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Chief Justice Joseph R. Weisberger's Page of History

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Article

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I. INTRODUCTION

Over the course of his forty-five years as a jurist, Chief Justice Weisberger has heard scores, if not hundreds, of cases involving the function of government and the respective powers of its three branches in the State of Rhode Island. In those cases, the Chief Justice, by necessity, analyzed a variety of statutes, regulations and proposed legislation to evaluate the constitutionality of those documents in accordance with state and federal law. As is evidenced by many of those opinions, the Chief Justice most heavily relied on history as his guidepost in rendering a decision.

"A page of history is worth a volume of logic"[1] is the principle often quoted by Justice Weisberger at the outset of his analysis in several of the cases discussed herein. It is this thought-provoking and considered approach taken by Justice Oliver Wendell Holmes

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1. Kass v. Ret. Bd. of the Employees Ret. Sys. of the State of R.I., 567 A.2d 358, 360 (R.I. 1989) (citing N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). *See, e.g., In re* Advisory Opinion to the Governor (Appointment to Fill Vacancy on Office of Lieutenant Governor), 688 A.2d 288, 291 (R.I. 1997); *In re* Advisory Opinion to the Governor (R.I. Ethics Comm'n-Separation of Powers), 732 A.2d 55, 62 (R.I. 1999).

in 1921 that Justice Weisberger has carried throughout his tenure on the bench. The cases that will be reviewed focus on the functioning of the executive, legislative and judicial branches of government in Rhode Island and the development of their powers, beginning with the granting of a Charter from King Charles II in 1663, which "delegated virtually unlimited power to govern to the General Assembly"[2] through the present day. While the powers of the three branches have evolved over the last three centuries, according to Justice Weisberger, a fundamental benchmark has remained unchanged–"Rhode Island's history is that of a quintessential system of parliamentary supremacy."[3]

The clear imbalance of power between the legislative, executive and judicial branches of government and the manner in which the Rhode Island Supreme Court, with Chief Justice Weisberger at the helm over much of the past decade, has interpreted the issues before it in light of the historical foundations of power in this state will be one focus of this article, as well as Justice Weisberger's use of history to balance the competing interests of parties affected by the work of the Judiciary.

II. THE LEGISLATIVE AND EXECUTIVE BRANCHES

Of the hundreds of cases that have come before the Rhode Island Supreme Court over the last several decades of Justice Weisberger's service on the court, four will be discussed in analyzing the respective powers of the legislative and executive branches. These cases are *Kass v. Retirement Board of the Employees' Retirement System of the State of Rhode Island,*[4] *In re Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns),*[5] *In re Advisory Opinion to the Governor (Appointment to Fill Vacancy in Office of Lieutenant Governor)*[6] *and In re Advisory Opinion to the Governor (Rhode Island Ethics Commission-Separation of Powers).*[7] Particular attention will be paid to the historical analysis employed by the court in resolving these cases,

2. *In re* Advisory Opinion to the Governor (R.I. Ethics Comm'n- Separation of Powers), 732 A.2d 55, 63 (R.I. 1999).
3. *Id.* at 64.
4. 567 A.2d 358 (R.I. 1989).
5. 576 A.2d 1371 (R.I. 1990).
6. 688 A.2d 288 (R.I. 1997).
7. 732 A.2d 55 (R.I. 1999).

the most significant of which is the *Separation of Powers Advisory Opinion*, a matter that provoked enormous public and private debate.[8]

In the earliest decision under consideration, Stephen Kass, filing as a citizen and taxpayer, challenged the provisions of the Rhode Island General Laws that established the Employees' Retirement System for the State of Rhode Island and provided for participation in that system by members of the Rhode Island General Assembly.[9] At the time of the suit, members of the General Assembly had been continuously participating in the retirement system for over forty years.[10] Kass sought to preclude disbursement of retirement benefits to legislators by the Retirement Board under the theory that Article VI, section 3, of the Rhode Island Constitution *exclusively* provided for all compensation legislators may receive for their work on behalf of their constituents. Any additional sums in excess of that amount, argued Kass, were unconstitutional[11] in light of Article VI, section 3, of the Rhode Island Constitution which provides, in pertinent part, "(t)he senators and representatives shall severally receive the sum of five dollars. . . for every day of actual attendance, and eight cents per mile for traveling expenses."[12]

The trial justice granted summary judgment in favor of the defendant Retirement Board, holding that members of the General Assembly may participate in the state retirement system regardless of other allowances for legislative stipends and travel expenses for which they are constitutionally provided.[13] The matter then came before the supreme court by way of plaintiff's appeal.

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8. *See* M. Charles Baskt, *Separation of Powers–I'd Like to Know How Much Longer We'll Have to Wait*, Prov. J. Bull., June 30, 1999, at A-13; Christopher Rowland, *An Opinion Steeped in Rhode Island History*, Prov. J. Bull., June 30, 1999, at A-1, A-12; Tom Mooney, *For the Time Being, It Remains the General Assembly that Rules Rhode Island, Not the Governor*, Prov. J. Bull., June 30, 1999, at A-1, A-13.

9. *See Kass*, 567 A.2d at 359-60. Kass contended that the provisions of R.I. Gen. Laws. sections 36-8-1(2), 36-10-1, 36-10-2, 36-10-7, 36-10-9.1 and 36-10-10.1 were unconstitutional insofar as those provisions allowed state legislators to receive retirement pensions.

10. *See Kass*, 567 A.2d at 359. By 1947 the (pension) legislation was modified and the restriction barring members of the General Assembly from participating in the state retirement system was removed. *See* R.I. Pub. Laws 1947, ch. 1971, § 5, now codified as R.I. Gen. Laws § 36-10-9.1 (1956) (1984 Reenactment).

11. *See id.* at 359-360.

12. *Id.* at 361 (quoting R.I. Const. art. VI, § 3).

13. *See id.* at 358.

The critical issue for consideration by the court was whether or not the General Assembly had the power, albeit forty years earlier, to enact legislation providing for its members' participation in the retirement system.[14] Justice Weisberger's opinion for the court provides a direct affirmative answer to that question.[15]

Weisberger's analysis in *Kass* began by citing the basic proposition that, as history has revealed, "the power of the General Assembly. . . has been plenary and unlimited, save as this authority may have been limited by the Constitutions of the United States and the State of Rhode Island."[16] Moreover, distinguishing our state system from that of the federal government, the court noted that actions of the Rhode Island Legislature are checked only by specific textual limitations contained within the state constitution.[17] There being no such limitation contained within Article VI, section 3, or in any other provision of the constitution for that matter, that prohibited the General Assembly from granting to its membership the right to participate in the retirement system, the court upheld the enactment.

Justice Weisberger noted further that while the original framers may have never contemplated retirement benefits in 1863, the participants in the 1986 constitutional convention were well aware of the granting of such benefits, and while having the opportunity to amend, chose not to incorporate any prohibition on legislative retirement benefits in the ratified document. The decision in *Kass* demonstrates our supreme court's interpretation of the Rhode Island Constitution and the nearly limitless authority of the General Assembly to act. As will be demonstrated *infra*, Justice Weisberger's opinion in *Kass* laid the foundation for the opinions to follow on matters involving the scope and extent of power amongst the three coordinate branches of government.

Only six months after reaching a decision in *Kass*, the supreme court was again faced with a matter involving the authority of a branch of state government to act, this time however, the question presented dealt with the authority of the Executive to im-

14. *See id.* at 360, 363.

15. *See Kass*, 567 A.2d at 358, 363.

16. *Id.* at 360 (citing *In re* Advisory Opinion to the House of Reps., 485 A.2d at 553 (1984); Opinion to the Governor, 221 A.2d 799, 801 (1966); Payne & Butler v. Providence Gas Co., 77 A. 145, 153 (1910)).

17. *See id.* at 360-61.

pound funds appropriated by the Legislature to aid cities and towns. In an advisory opinion issued at the request of the House of Representatives, the court responded to the question of whether the Chief Executive could unilaterally reduce, impound or withhold monies appropriated by the General Assembly to cities and towns notwithstanding the express provisions of 1989 Rhode Island Public Laws, ch.126, Rhode Island General Laws, section 45-13-1, Rhode Island General Laws sections 35-3-2 and 35-3-7 through 35-3-12 as well as Articles VI and IX of the Rhode Island Constitution.[18]

In 1990, then-Governor Edward D. DiPrete,[19] in an effort to balance the state budget, impounded ten million dollars being administered by the Department of Administration but appropriated by the General Assembly to the cities and towns of the State of Rhode Island.[20] To that end, the Governor invoked the provisions of Rhode Island General Laws section 35-3-16 which provided that the Governor may "reduce or suspend appropriations for any or all departments or subdivisions" in order to achieve a balanced budget in a given fiscal year.[21]

Opponents of the Governor's actions argued that section 35-3-16 did not authorize the unilateral impound of funds duly appropriated by the Legislature to cities and towns, that the Department of Administration was not relieved from its duty to administer funds as directed by the General Assembly, that the Governor's actions constituted a breach of his duty to faithfully ex-

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18. *See In re* Advisory Opinion to the House of Reps. (Impoundment of State Aid to Cities and Towns), 576 A.2d 1371 (R.I. 1990).

19. Edward D. DiPrete served as Governor of Rhode Island from 1985 to 1991. After leaving office he was prosecuted by the State on a variety of public corruption charges that furnished the basis for the discussion *infra* at 521-532.

20. *See Impoundment of State Aid*, 576 A.2d at 1372.

21. *Id.* At the same time section 35-3-16 of the Rhode Island General Laws provided:

> At any time during the fiscal year, upon notification by the budget officer that it is indicated that actual revenue receipts or resources will not equal the original estimates upon which appropriations were based or that it is indicated that spending will exceed appropriations, the governor, for the purpose of maintaining a balanced budget, shall have the power to reduce or suspend appropriations for any or all departments or subdivisions thereof, excepting the General Assembly, legislative agencies and legislative committees and commissions.

R.I. Gen. Laws § 35-3-16 (1956) (repealed 1997).

ecute the laws of the state as well as constituting an unlawful usurpation of legislative power.[22]

In responding to the request by the House of Representatives, the first issue addressed in the majority opinion was whether or not the court had jurisdiction to respond to such a request. The prior practice of the court in responding to requests made by either body of the Legislature required that the inquiry concern the constitutionality of pending legislation.[23] Clearly, this request did not meet that standard in light of the fact that the question propounded asked the court to opine on the propriety of the actions of the Governor and not on a matter of constitutional law. The majority, however, elected to respond to the request made by the House of Representatives, finding that while the request did not meet the prerequisites previously established by the court, the deficiency would be overlooked in light of the significant "constitutional and public importance" of the matter at issue.[24]

Having concluded that a response was warranted, the majority then addressed the merits of the case and determined that the Governor was without the legal authority to impound appropriations made by the legislature to cities and towns.[25] The court determined, contrary to the Governor's position, that the monies at issue were never appropriations made to a "department"[26] or "subdivision" of state government within the meaning of section 35-3-16, but were funds due to the cities and towns that were simply being administered by a state agency, and that therefore the Governor was without the authority to impound the aid.[27]

The most striking portion of the opinion for purposes of this article came not from the majority, but from the dissents by both

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22. *See id.* at 1372-73.

23. *See In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1318-19 (R.I. 1986).

24. *Impoundment of State Aid*, 576 A.2d at 1372.

25. *See id.* at 1374.

26. Section 35-1-4 of the Rhode Island General Laws entitled "Agencies subject to fiscal supervision" provides:

> The term 'department and agency,' as used in this title, shall be deemed to include and be interpreted to mean any department, division, board, Commission, Commissioner, committee, agent, officer, person or institution for whom an appropriation is made, or who is authorized to expend or to collect money for the state.

R.I. Gen. Laws § 35-1-4 (1956) (1988 Reenactment).

27. *See Impoundment of State Aid*, 576 A.2d at 1374.

Justice Weisberger and Justice Shea. Reaffirming his belief that long-standing precedent should control and should not be disregarded, Justice Weisberger dissented at the outset, on the grounds that the court was not constitutionally authorized to issue an opinion on the matter, and that therefore, the merits should not have been reached.[28] Citing a line of cases in which written advisory opinions were given to either body of the General Assembly, Justice Weisberger noted that in each of those cases, the question proffered by the House or Senate involved the constitutionality of pending litigation.[29] This case, according to Justice Weisberger, having come to the court by way of a request from the House, but concerning a duty of the Chief Executive, did not meet the constitutional requirements for granting a written advisory opinion.[30] Moreover, he noted that it was particularly inappropriate in this case to issue a written decision in light of the fact that it involved a question of the Executive's duty to perform, and yet the Executive had not asked for an opinion.[31]

As for the merits, while noting his objection to issuing an opinion in the case, Justice Weisberger concurred with the dissent of Justice Shea, wherein Justice Shea opined that the Governor had the authority under section 35-3-16 to impound the funds in order to achieve a balanced budget.[32] In reaching this conclusion, Justice Shea employed the plain-meaning rule and held that the plain meaning of the statute allows for said action by the Governor and nothing contained within the text thereof limits the authority of the Governor to do so or delineates exceptions of any kind.[33] As was the case in *Kass*, Chief Justice Weisberger in explaining the

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28. *See id.* at 1376.

29. *See id.* (citing, *e.g.*, *In re* Advisory Opinion (Chief Justice), 507 A.2d 1316 (R.I. 1986)).

30. *See id.*

31. *See id.* at 1376.

> Any reply from this court to an advisory request made by the House of Representatives in respect to a duty to be performed by the Governor is particularly inappropriate in light of the undisputed fact that the Governor does not seek our advice on this question. Indeed, the Governor has filed a brief clearly indicating that he feels that at this time our answer to such a question propounded by the House of Representatives would be a violation of our precedents. With this position I wholeheartedly agree.

Id.

32. *See Impoundment of State Aid*, 576 A.2d at 1375.

33. *See id.*

basis for his decision in *Aid to Cities and Towns*, once again relied on historical case precedent as the foundation for his dissent.

In the matter of *In re Advisory Opinion to the Governor (Appointment to Fill Vacancy In Office of Lieutenant Governor)*,[34] the issue of the respective powers of the legislative and executive branches of government came before the supreme court some seven years following the *Aid to Cities and Towns* opinion. This case arose after then Lieutenant Governor Robert Weygand assumed office as a member of the United States House of Representatives, thereby vacating his position in state government.[35] The request from the Governor for a written opinion posed the question of whether or not the Chief Executive had the authority pursuant to Article IX, section 5, of the Rhode Island Constitution to fill the vacancy in the office of Lieutenant Governor for the remainder of Weygand's term.[36]

Briefs were filed by both houses of the General Assembly contending that the Governor was without constitutional authority to fill the vacancy since the state constitution, they argued, provided for a transfer of all duties of the Lieutenant Governor in that party's absence or inability to perform.[37] This particular position within state government was distinguishable, argued both the House and Senate, from those unspecified government positions covered by Article IX, section 5, which provides that the Governor may "fill vacancies in office not otherwise provided for. . . until the same shall be filled by the General Assembly, or by the people."[38]

Writing for the majority, Justice Weisberger's analysis in this case began with an acknowledgment of *Kass* and the importance of history in determining the extent of state and federal constitutional limitations.[39] Recognizing the "plenary and unlimited"

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34. 688 A.2d 288 (R.I. 1997).

35. *See id.* at 289.

36. Unlike the Aid to Cities and Towns case, the members of the court concurred on the propriety of the request from the Governor for this opinion because it involved a constitutional duty awaiting performance by the Governor, a well-founded basis upon which advisory opinions are granted. *See id.* at 290.

37. *See* R.I. Const. art. IX, § 3 (providing for a replacement for the lieutenant governor if he or she is unable to preside over the senate); R.I. Const. art. IX, § 10 (providing that the Speaker of the House of Representatives shall fill a vacancy in the office of Governor in the event of a vacancy in both that office and the office of Lieutenant Governor).

38. *Appointment to Fill Vacancy*, 688 A.2d at 290.

39. *See id.* at 291.

power of the General Assembly, the court opined that in light of this power, the General Assembly could have enacted legislation usurping the authority of the Governor to fill vacancies in the office of lieutenant, but no such prohibition being in existence, the authority of the Governor to fill the same was clear under Article IX, section 5, of the Rhode Island Constitution.[40]

This provision of the Rhode Island Constitution provides the Governor with the power to "fill vacancies in office not otherwise provided for by this Constitution or by law, until the same shall be filled by the General Assembly, or by the people."[41] Unlike Article IV, section 4, which provides for the filling of vacancies in the specified offices of the Secretary of State, Attorney General or the General Treasurer by Grand Committee of the General Assembly,[42] there is a marked absence of a similar provision pertaining to the Lieutenant Governor. In light of the absence of a Lieutenant Governor-specific provision, the court held the Article IX unspecified vacancy-filling power of the Governor clearly authorized his actions.[43]

While the specific outcome of this case recognized the power of the Executive to act in the face of an objection by the Legislature, the opinion again reiterated the unlimited authority of the General Assembly to act.[44] The court stated that "little doubt" existed that had the General Assembly, given its plenary power, chosen to override the authority of the Chief Executive in this instance, it could have simply enacted a statute providing for the filling of a vacancy in the office of Lieutenant Governor, and that such a statute would have provided a constitutionally permissible action by the legislature.[45] Unquestionably, in Justice Weisberger's view, the historical power of the Rhode Island General Assembly to act appears nearly limitless, whereas the power of the Chief Executive emerges as strictly prescribed.

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40. *See id.*

41. R.I. Const. art. IX, § 5.

42. See R.I. Const. art. IV, § 4. "In case of a vacancy in the office of the secretary of state, attorney-general, or general treasurer from any cause, the General Assembly in grand committee shall elect some person to fill the same." *Id.*

43. *See Appointment to Fill Vacancy*, 688 A.2d at 291-92.

44. *See id.* at 291.

45. *See id.*

While the *Appointment to Fill Vacancy* matter created quite a stir at the State House,[46] of all the cases being considered herein, no other created more controversy than did the opinion in *In re Advisory Opinion to the Governor (Rhode Island Ethics Commission-Separation of Powers)*.[47] This case produced a tremendous amount of debate as a result of the significant issues addressed and the substantial impact the opinion would have on the political structure in the State of Rhode Island.[48]

By amendment to the Rhode Island Constitution in 1986, the voters of the state approved the creation of an independent, non-partisan Ethics Commission.[49] Article III, sections 7 and 8 (as it became known), defined "ethical conduct"[50] and provided for the creation of the Ethics Commission,[51] which was to be established by the General Assembly. Once formed, the Commission was mandated to adopt a code of ethics, which was to include among other things, provisions on conflict of interest, confidential information and use of position.[52]

On October 10, 1995, the Ethics Commission issued a proposed ethics code for public comment, which included regulation 5.13A (later renumbered regulation 5014).[53] Regulation 5014 prohibited members of the General Assembly from serving as mem-

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46. Justice Lederberg, herself a former state representative, lodged a vigorous dissent in the *Appointment to Fill Vacancy* case. *See id.* at 292-95.

47. 732 A.2d 55 (R.I. 1999).

48. *See supra* note 8.

49. *See Rhode Island Ethics Commission*, 732 A.2d at 57.

50. Article III, section 7 of the Rhode Island Constitution entitled "Ethical Conduct" provides:

> The people of the State of Rhode Island believe that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage. Such persons shall hold their positions during good behavior.

R.I. Const. art. III, § 7.

51. Article III, section 8 of the Rhode Island Constitution entitled "Ethics Commission-Code of ethics" provides in pertinent part:

> The General Assembly shall establish an independent non-partisan Ethics Commission which shall adopt a code of ethics including, but not limited to, provisions on conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure.

R.I. Const. art. III, § 8.

52. *See Rhode Island Ethics Commission*, 732 A.2d at 58.

53. Regulation 5014 entitled "Prohibited Activities-Members of the General Assembly-Restrictions on activities relating to Public Boards" provided:

bers of any public board and from participating in the appointment of any other person on a public board, except through advice and consent as provided by law.[54] A "public board" was defined as "all public bodies within the executive branch of state government," but specifically excluded those entities that functioned solely in an advisory capacity or exercised solely legislative functions.[55] After a series of public hearings, the Commission adopted the proposed code in May 1997, with an effective date of July 1, 1999.[56]

Prior to the effective date of the regulation, the Governor sought an advisory opinion from the supreme court as to the constitutionality of the regulation and specifically inquiring whether or not the principle of separation of powers would be violated by its enactment.[57] The questions posed by the Governor were:

> 1) Does Article III, section 8 of the Rhode Island Constitution, which empowers the Rhode Island Ethics Commission to 'adopt a code of ethics, including, but not limited to provisions on conflicts of interest, . . . [and] use of position' provide the Ethics Commission with the power to adopt Regulation 36-14-5014?
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> 2) Is the principle of separation of powers contained in the Rhode Island Constitution properly interpreted in the same fashion as it has been interpreted in the United States Constitution with respect to appointments, such that neither legislators, nor their appointees, may serve on any public body within the executive branch of state government, or state executive, public and quasi-public boards, authorities, corporations, Commissions, councils or agencies except those which:

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(1) No member of the General Assembly shall serve as a member of a Public board. No member of the General Assembly shall participate in the appointment, except through advice and consent as provided by law, of any other person to serve as a member of a Public Board. (2) For purposes of this regulation, 'Public Board' means all public bodies within the executive branch of state government, and all state executive, public and quasi-public boards, authorities, corporations, Commissions, councils or agencies; provided, however, that the foregoing definition shall not apply to any such entity which (i) functions solely in an advisory capacity, or (ii) exercises solely legislative functions.

Id.

54. *See id.* at 59.
55. *See id.* at 57.
56. *See id.* at 58.
57. *See id.* at 57.

> (i) function solely in an advisory capacity; or (ii) exercise solely legislative functions?
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> 3) Does the Rhode Island separation of powers principle contained in the Rhode Island Constitution impose any limits whatsoever on legislative appointments to a public board or body (as defined above)? In particular, does the Constitution prohibit legislators and/or their appointees from constituting a majority of the membership of a public board or body? Does the Constitution prohibit appointment of sitting legislators to a public board or body?[58]

As was common in all his advisory opinion matters, Justice Weisberger began his analysis by considering the propriety of the request from the Governor for the advisory opinion.[59] The Chief Justice, writing for the four justice majority (Justice Flanders dissenting), concluded that advisory opinions are to be issued only when the questions propounded "concern the constitutionality of existing statutes which require implementation by the Chief Executive" and while the request suffered from a serious procedural deficiency, namely the question came before it by way of a request from the Governor before the effective date of Regulation 5014 had yet to come to pass, the court would nevertheless issue an opinion.[60] Noting that while "the long established precedent of this Court" would ordinarily require it to refrain from responding to the Governor's request and direct the Chief Executive to the superior court for adjudication, the Chief Justice wrote that a response was appropriate due to the "significant constitutional issue of great public interest sufficient to transcend these infirmities."[61]

Having reasoned that the issuance of an opinion was proper, Chief Justice Weisberger then categorically denied the Commission any authority to enact regulations that would impede in any way the appointive power of the General Assembly.[62] The foundation for this ruling, as will be discussed *infra*, was the "centuries-

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58. *Id.*

59. *See Rhode Island Ethics Commission*, 732 A.2d at 59.

60. *Id.* (citing *In re* Advisory from the Governor, 633 A.2d 664, 666 (R.I. 1993)).

61. *Id. But see In re* Advisory to the Governor (Appointment to Fill Vacancy on Office of Lieutenant Governor), 688 A.2d 288 (R.I. 1997) (Weisberger, C.J., dissenting) (where the Chief Judge refused to make a similar exception).

62. *See id.* at 66-73.

old historic and constitutional origins of the General Assembly's recognized authority to make appointments."[63]

In considering the facts, Justice Weisberger recognized that the relevant provisions of Article III "merely served to transfer to the Commission a limited portion of what had always been a legislative prerogative, namely, the enactment of substantive ethics regulations" and interpreted that authority to provide the Commission with the constitutionally delegated power to adopt a code of ethics.[64] However, while such authority may have been given to the Commission with regard to ethics regulations, the court specifically found that the General Assembly continued to reserve its power to enact substantive ethics regulations, limited only to the extent that such enactments were to be consistent with the code of ethics adopted by the Commission.

Upon laying this foundation for the empowerment of the Commission by the legislature under Article III, Chief Justice Weisberger then considered the question of whether the Ethics Commission exceeded the power given to it in the constitution by adopting Regulation 5014. The Chief Justice responded that it had.[65] The enactment of a regulation that removed from the General Assembly the power to appoint members to public boards, a power the Legislature had enjoyed for centuries, the court held, was clearly an unconstitutional usurpation of power to the extent that it unconstitutionally modified our form of government by imposing a restriction on the General Assembly's power to appoint and relocating that power in the executive branch. In reaching this decision, the Chief Justice reflected on the historical foundations for the General Assembly's authority to make appointments, which he deemed compelling.

Utilizing his skills as an astute legal historian, Chief Justice Weisberger reflected as far back in time as of the granting of the Charter of King Charles II on July 8, 1663, for historical support of the General Assembly's appointive powers.[66] The Chief Justice embarked on a lengthy discussion of the development of that power, considering the several constitutional conventions as well as the intent of the people at the time of the revolution, and con-

63. *Id.* at 63.
64. *Rhode Island Ethics Commission*, 732 A.2d at 60.
65. *See id.* at 71, 72.
66. *See id.* at 63.

cluded that the power of the General Assembly with regard to the appointive power had not been diminished throughout the centuries and cannot be diminished by the actions of the Ethics Commission in this instance.[67]

The Chief Justice reasoned that the actions of the Ethics Commission were flawed in enacting Regulation 5014, as the regulation proposed a prophylactic ban on appointments by the General Assembly which clearly altered government structure as it had until then been known, rather than regulating individual conduct, the only conduct the Commission was empowered to effect.[68] Justice Weisberger further explained that even more recent history supports this conclusion by citing the fact that the delegates to the constitutional convention of 1986 tabled a proposal to curb the appointive power of the General Assembly and indeed ratified Article VI, section 10, which specifically reaffirmed the General Assembly's unfettered right and power to "continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution."[69]

Moreover, if Regulation 5014 was authorized by our state constitution, noted the Chief Justice, it would invalidate scores of boards and public bodies, including the Ethics Commission itself, and "would have a sweeping effect and would create a wall of separation high and impenetrable between the appointment power of the Executive and the power of the Legislature."[70] Justice Weisberger went on to question:

> [c]ould such a wall be justified by our case law and constitutional history, especially given that the 1986 State Constitution delegated to the Commission only specific, limited ethics authority, taken from the otherwise vast panoply of rights and powers that for centuries has been vouchsafed in the General Assembly? Indeed, article XI, section 10, of the 1986 Constitution specifically reaffirms the General Assembly's unfettered right and power to 'continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution.'[71]

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67. *See id.* at 63-65.

68. *See id.* at 70, 71.

69. *Rhode Island Ethics Commission*, 732 A.2d at 71 (quoting R.I. Const. art. XI, § 10).

70. *Id.* at 62.

71. *Id.* (citing *Kass*, 567 A.2d at 361).

Clearly, the decision in *Separation of Powers* unquestionably supported and reaffirmed Rhode Island's long-standing history of parliamentary supremacy, and Justice Weisberger was not reluctant to so state.

III. THE COURT SYSTEM

Justice Weisberger's opinions also disclose a fundamentally pragmatic approach to how the court system should properly function. Drawing on his well-developed sense of history, Weisberger's decisions seek to balance the interests of all affected by the work of the judiciary. He is ever cognizant of just how high are the stakes for those whose circumstances bring them into contact with the courts. Justice Weisberger conceptualizes a legal process with uniform and predictable application of socially constructive legal rules by prosecutors and other government officials in the first instance, by attorneys in their representation of clients, by trial justices as they supervise courtroom proceedings and ultimately by appellate justices in the discharge of their responsibility to review the work of the lower courts. Although these themes suffuse all of Justice Weisberger's writings, an examination of a handful of his opinions handed down in criminal appeals over the past twenty years will serve to enlighten these points. It is, after all, in the arena of criminal justice that the interests of the individual conflict most directly with those of the public at large, requiring the closest scrutiny by the courts.

Perhaps nowhere is Justice Weisberger's acute sense of legal history as clearly demonstrated as in *State v. Burbine*.[72] In that 1982 decision the court held that no one other than the defendant himself could assert the Fifth Amendment right to remain silent[73] in the face of custodial interrogation by law enforcement officers.[74] Significantly, the United States Supreme Court affirmed this position in 1986 in *Moran v. Burbine*.[75]

Brian Burbine was suspected of being involved in the murder of a young woman in Providence, Rhode Island, in March 1977.[76]

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72. 451 A.2d 22 (R.I. 1982).

73. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

74. *See Burbine*, 451 A.2d at 28.

75. 475 U.S. 412 (1986).

76. *See Burbine*, 451 A.2d at 23.

Nearly four months later he was arrested with two other men in nearby Cranston, Rhode Island, on a charge of breaking and entering.[77] After Burbine's companions made statements that implicated him in the earlier murder, a Cranston police detective telephoned certain Providence detectives about Burbine around 6 p.m.[78] Providence detectives thereupon drove to Cranston police headquarters, arriving at approximately 7 p.m.[79] The Providence officers spoke with the Cranston detective and then extensively questioned Burbine's companions.[80]

In the meanwhile, at approximately 8:15 p.m., at the behest of Burbine's sister, an assistant public defender telephoned the Cranston police station and spoke with an unidentified person in the detective division.[81] The assistant public defender confirmed that Burbine was being held at the station and stated that, although she was not the public defender who had previously represented Burbine, she would act as his legal counsel in the event that the police intended to place him in a lineup or question him.[82] The unidentified person told the assistant public defender that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night.[83] While that statement might have been accurate with respect to the intent of the Cranston police department, it turned out not to reflect the subsequent actions of the Providence detectives. The assistant public defender was not informed in the telephone conversation that the Providence police were at the Cranston station or that Burbine was a suspect in the murder.[84] Burbine was not told of the assistant public defender's call or her willingness to come to the station and assist him.[85] The Providence police then explained the *Miranda* rights to Burbine and he signed waiver-of-rights forms before giving two separately signed written confessions to the murder that night and a third written confession the next

77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.* at 23.
81. *See id.*
82. *Burbine*, 451 A.2d at 23-24.
83. *See id.* at 24.
84. *See id.* at 23-24.
85. *See id.* at 24.

morning.[86] Eventually the defense moved to suppress the confessions.[87]

At the pre-trial hearing on the motion to suppress, the trial judge found that Burbine had been thoroughly advised of his right to remain silent, of his right to retained or appointed counsel and that anything he said would be used against him.[88] The trial justice further found that Burbine was not coerced, threatened nor promised any benefit in return for his statements.[89] The trial justice concluded that Burbine signed waiver-of-rights forms on three separate occasions and that when he did so, he knowingly, intelligently and voluntarily waived both his privilege against self-incrimination and his right to counsel.[90]

On appeal following his conviction of murder, the defendant contended that all three confessions should have been suppressed on the grounds that they were obtained in violation of his right to counsel and his privilege against self-incrimination.[91] The gravamen of the defendant's appeal was that even though Burbine had neither requested a lawyer nor refused to give voluntary statements, his right to counsel should have attached when the assistant public defender telephoned the police station to inquire about him or, in the alternative, that his statements should not be considered voluntary because he was not told by the police that there was a public defender willing to come to the police station if he was going to be questioned.

In order to analyze Burbine's argument, Justice Weisberger presented a concise and powerful historical review of the United States Supreme Court's self-incrimination jurisprudence in the twentieth century.[92] He began by noting that "[d]uring the first five decades of the twentieth century, the Supreme Court of the United States groped toward a means of striking a balance between the societal need for police interrogation and the protection

86. *See id.*
87. *See id.*
88. *Burbine*, 451 A.2d at 24.
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.* at 24-30.

of the accused from undue coercive pressures."[93] Those early years saw the high Court approach federal self-incrimination practice as merely an example of the supervisory power of the courts over the administration of federal criminal justice.[94] The requirement of presenting a federal criminal defendant to a federal magistrate without unnecessary delay and the practice of having the magistrate inform a defendant at arraignment of his right to remain silent and to have legal counsel were neither constitutionally mandated nor applicable to the states.[95]

Justice Weisberger's historical treatment of self-incrimination jurisprudence noted a series of United States Supreme Court cases in which state convictions were in some instances overturned on due-process grounds for the use of coercive force or means that offended the Court's sense of fair-play.[96] "Indeed, at that time the Court's review of state cases involving allegedly involuntary confessions was based upon a due-process 'shock the conscience' test."[97] Under this approach, involuntary confessions were inadmissible, not because it was unlikely that they were true, but because the methods used offended an underlying principle of enforcement of the criminal law that the authorities might not by coercion prove a charge out of the accused's own mouth.[98]

By the mid-1960's, Justice Weisberger pointed out a marked change in the approach of the United States Supreme Court, then

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93. *Id.* at 24. Weisberger's attention to balancing interests continues throughout this opinion and many others, mostly notably nearly twenty years later in State v. DiPrete, 710 A.2d 1266 (R.I. 1998).

94. *Burbine*, 451 A.2d at 25.

95. *See id.* at 25.

96. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961) (noting confession was obtained after a chief of police threatened to take the defendant's arthritic wife into custody); Spano v. New York, 360 U.S. 315 (1959) (noting confession was obtained by a childhood friend of the defendant who had become a policeman and who falsely told the defendant that his job would depend upon getting a statement from the defendant); Brown v. Mississippi, 297 U.S. 278 (1936) (overturning because torture and brutality used to produce confession). More recently, the United States Supreme Court has been willing to tolerate a certain degree of police misrepresentation to induce a confession. *See, e.g.*, Colorado v. Spring, 479 U.S. 564 (1987) (allowing police deceit about who was the real focus of the investigation); Oregon v. Mathiason, 429 U.S. 492 (1977) (upholding action of police who falsely stated that suspect's fingerprints had been found at the crime scene); Frazier v. Cupp, 394 U.S. 731 (1969) (upholding police action when police falsely stated that co-defendant had confessed implicating suspect under interrogation).

97. *Burbine*, 451 A.2d at 25.

98. *See id.*

under the leadership of Chief Justice Warren. In 1964, in *Malloy v. Hogan*,[99] the Court determined to incorporate the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment due-process clause, making the privilege applicable to state court proceedings.[100] In Weisberger's view, "this holding did not herald any remodification of the interrogation process, since conventional wisdom at the time did not apply the privilege against self-incrimination to the police interrogation process, because the police had no legal power to compel testimony."[101] Weisberger's historical review notes that 1964 also was the year of *Escobedo v. Illinois,* in which the Supreme Court recognized a constitutionally mandated Sixth Amendment right to counsel in state criminal prosecutions.[102] Weisberger characterized the consequence of *Escobedo* as "a feeble effort to control the voluntariness of confessions," largely because of the subsequent varying and conflicting pre-*Miranda* interpretations in the various states.[103]

Then came *Miranda*, the United States Supreme Court decision that, in Justice Weisberger's words, produced a "straightforward movement of the privilege against self-incrimination from the courtroom into the police station."[104] Justice Weisberger's description of the impact of the 1966 *Miranda*[105] decision symbolizes his historical acuity and his reverence for the power and majesty of the law:

> Upon this somewhat murky judicial environment, the Court's opinion in *Miranda v. Arizona*, came as a brilliant flash of

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99. 378 U.S. 1 (1964).

100. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

101. *Burbine*, 451 A.2d at 26 (citing Yale Kamser, *A Dissent from the Miranda Dissents: Some Comments on the 'New' Fifth Amendment and the Old 'Voluntariness' Test, in* Police Interrogation and Confessions 48-55 (1980)).

102. *See* Escobedo v. Illinois, 378 U.S. 478 (1964). The facts in *Escobedo* involve a criminal defendant who received no admonitions concerning either his right to remain silent or to the assistance of counsel and who was kept apart from his attorney during interrogation as a result of series of blatant police deceptions. In *Burbine*, dissenting Chief Justice Bevilacqua even though he disagreed with the outcome of Weisberger's majority opinion noted: "[t]he trial justice found as a fact that Allegra Munson [the assistant public defender] did telephone the Cranston police station and that someone responded. He also found that there was no conspiracy or collusion by the Cranston police department to secrete Burbine from his attorney." *Burbine*, 451 A.2d at 34 (Bevilacqua, C.J., dissenting).

103. *Id.* at 26.

104. *Id.*

105. Miranda v. Arizona, 384 U.S. 436 (1966).

> lightning illuminating the interrogational landscape in all directions, but followed by the thunderclap of criticism concerning its effects upon law enforcement. In itself, the *Miranda* decision was relatively simple and its mandate not unduly difficult in application. Essentially stripped of historical analysis and carefully developed rationale, the Supreme Court imposed a set of rules upon every police officer in the land who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom had been inhibited in a significant way. The rule required that the following admonitions be given to the suspect: (1) that he has a right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) that he has the right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. The Court went on to say:
> "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."[106]

Having laid out the basic teaching of *Miranda* and its progeny, Justice Weisberger then set out the Rhode Island Court's inquiry into whether Mr. Burbine's rights were violated by the actions of the Providence and Cranston police in questioning him and obtaining his confessions without informing him of the telephone call from an attorney he did not know.[107] Burbine was in custody and he was being interrogated.[108] He had been given his constitutionally mandated admonitions on more than one occasion.[109] If he had invoked his right to counsel or to remain silent, then *Miranda* would have required the police to cease questioning, but Burbine did not personally assert either right before confessing.[110] For the defendant to succeed in his appeal to the Rhode Island Supreme Court he would have had to establish that his confessions were not

106. *Burbine*, 451 A.2d at 26 (quoting *Miranda*, 384 U.S. at 479) (citations omitted).

107. *See id.* at 29-31.

108. *See id.* at 23.

109. *See id.* at 23-24.

110. *See id.* at 27.

knowingly, intelligently and voluntarily given.[111] In order to attempt to do this, Burbine's counsel argued that Rhode Island should follow a line of New York cases that prohibited the use of inculpatory statements taken by police from a suspect following the receipt by police officials of a telephone call from a lawyer communicating that he represents the suspect.[112] Weisberger, however, rejected those cases and noted that:

> [n]othing in the *Miranda* opinion or in succeeding cases has indicated that the right to counsel may be asserted by anyone other than the accused. [T]he principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys.[113]

In so doing, Weisberger demonstrated his belief that the *Miranda* decision struck the correct balancing of interests between society's need for reasonable law enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination.[114] To modify the *Miranda* rights as urged by Burbine so that family members or lawyers could invoke a criminal suspect's right to counsel or to remain silent would, in Weisberger's view, "upset the balance between the societal interests and those of the accused."[115] This neither he nor the United States Supreme Court was inclined to do.

The need to balance the interests of society against those of one accused of serious criminal wrongdoing is also a significant theme in Justice Weisberger's more recent opinion in the celebrated public corruption case of *State v. DiPrete*.[116] This opinion clearly demonstrates Weisberger's essentially pragmatic approach to resolving complex and controversial cases. Edward D. DiPrete served as the Governor of the State of Rhode Island from 1985 un-

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111. *See Burbine*, 451 A.2d at 26-27.

112. The New York "Donovan-Arthur-Hobson" rule is quoted in *Burbine* as follows: "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel." *Id.* at 28.

113. *Id.* at 28.

114. *See id.* at 29.

115. *Id.* at 30.

116. 710 A.2d 1266 (1998).

til 1991.[117] After DiPrete left office, a state grand jury returned a twenty-four count indictment against the former governor and his adult son, Dennis L. DiPrete, charging them with multiple acts of bribery and extortion.[118] The indictment also named as unindicted coconspirators certain other individuals who had engaged in a series of allegedly illegal dealings with DiPrete while he was governor and who subsequently were cooperating with the Attorney General of Rhode Island.[119] The failure of the prosecution to fully or timely disclose the private arrangements that had been made by the State with these unsavory individuals is what led to the *DiPrete* opinion.[120]

A brief chronology of the events leading up to the superior court's dismissal of most counts of the indictment for prosecutorial misconduct in discovery may be helpful in understanding why the Weisberger-led supreme court majority reversed the trial justice. The grand jury handed down the multi-count indictment in March 1994.[121] Following the indictment, the parties entered into a stipulation in June 1994, pursuant to which counsel for the State agreed to provide defendants with the grand jury testimony of prospective trial witnesses related to the subject matter of the indictment.[122] The Attorney General's office also agreed to provide defendants with all relevant written or recorded statements of expected witnesses, summaries of unrecorded witness statements and, with the exception of privileged work product, all documents related to the subject matter of the indictment within the possession of the Department of the Attorney General or the Rhode Island State Police.[123] During the next year the State produced approximately 600 boxes containing thousands of pages of documents that were generally relevant to the issues raised by the indictment.[124] Included in those materials were certain immunity

117. State of Rhode Island and Providence Plantations, Rhode Island On-Line Public Information Kiosk, Rhode Island Governors 1863 to Present, *at* http://www.states.ri.us/library/governors.htm.

118. *See DiPrete*, 710 A.2d at 1267 n.1.

119. *See id.* at 1267.

120. *See id.* at 1267-70.

121. *See id.* at 1267 n.1.

122. *See id.*

123. *See DiPrete*, 710 A.2d at 1267.

124. *See id.*

petitions and letters of nonprosecution covering the unindicted coconspirators.[125]

In July 1995, the defendants filed a series of motions including one for the production of exculpatory evidence (so-called *Brady*[126] material).[127] In late-August 1995, the trial justice with the tacit consent of the State entered an order requiring, with respect to the unindicted coconspirators, the production of:

> a full and complete statement of all promises, rewards, and/or inducements made in order to secure their cooperation in the investigation; a full and complete statement of the State's knowledge of any and all criminal conduct of the unindicted coconspirators, including not only criminal convictions or pending criminal charges but also information on any known criminal conduct, whether or not that conduct had been the subject of a criminal charge; and any other information relating to a coconspirator's credibility as a witness such as prior inconsistent statements, admissions of poor memory, or evidence of bias on the part of the witness.[128]

At the same time, the trial justice further ordered the State to produce "all notes of interviews with prospective witnesses taken by any agent of the State in the course of the investigation,"[129] although with respect to this last category of information the notes were to be produced first for the trial justice for an in-camera review to determine the necessity of redaction to protect an on-going investigation or to preserve an applicable privilege.[130] None of those orders were appealed and therefore became the "law of the case."[131]

In November 1995, the defendants pressed another motion for production of exculpatory evidence under the *Brady* doctrine to which counsel for the State responded that all exculpatory evi-

125. *See id.*
126. Brady v. Maryland, 373 U.S. 83 (1963).
127. *See DiPrete*, 710 A.2d at 1267.
128. *Id.*
129. *See id.* at 1268.
130. *See id.*
131. Most frequently raised in the context of jury instructions to which no exceptions were lodged during trial, the "law of the case" doctrine precludes an appellant from arguing in opposition to the law as stated in the charge which then becomes "the law of the case." *See, e.g.*, Carratauro v. Lawrence, 268 A.2d 277 (R.I. 1970). However, other rulings of the trial court, if not objected to, also can be regarded as the law of the case. *See, e.g.*, DeLeo v. Anthony A. Nunes, Inc., 546 A.2d 1344, 1345-46 (R.I. 1988); Binney v. R.I. Hosp. Trust, 143 A.2d 324 (R.I. 1958).

dence had already been produced as part of the earlier production.[132] Then, in July 1996, after certain unrelated pre-trial proceedings, in the course of a conference call between counsel for both sides and the court, reference was made to certain materials that had not previously been disclosed by the State because of a claim of privilege.[133] This revelation led the trial justice to verbally order the State to produce all such materials for an in-camera review by the court.[134] In response to this order counsel for the State, as an alternative to producing documents for in-camera review, offered to allow defense counsel to review all materials in the State's possession.[135] The State's offer was accepted and led to the production of another thirty boxes of materials containing approximately 68,000 pages of documents that had been withheld by the State from earlier production.[136] Included within that production were eighty-nine exhibits that the defense identified as of an exculpatory nature revealing information about criminal conduct of the unindicted coconspirators and efforts of the State to assist those individuals in covering up or defusing the impact of that conduct.[137] Shortly thereafter the State filed a supplemental response with additional information of a potentially exculpatory nature about witnesses or unindicted coconspirators who had been granted immunity or a letter of nonprosecution.[138]

Predictably, the defense was perturbed at the State's delay and disingenuous earlier production and moved for sanctions, claiming that material in the latest productions had been ordered by the court to be produced one year earlier, that their clients had been substantively prejudiced by prosecutorial misconduct in the delay in discovery, and that the defense had been forced to reveal critical parts of its trial strategy in identifying particular items of exculpatory evidence that might have otherwise been used to impeach State witnesses in cross-examination.[139] The State in response contended that all of this information was available in other forms within the massive amount of discovery provided in

132. *DiPrete*, 710 A.2d at 1268.
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.*
137. *See id.*
138. *See DiPrete*, 710 A.2d at 1268.
139. *See id.* at 1268-69.

the original 600 boxes of material timely furnished pursuant to the parties' stipulation and the earlier orders of the court.[140]

> The trial justice rejected the State's contentions and found, after the conclusion of a thirty-two day evidentiary hearing, that counsel for the State had not fully complied with the orders of the court, Rule 16 of the Superior Court Rules of Criminal Procedure, the stipulation of the parties, and the *Brady* principles. He found that this withholding of information caused defendants to suffer substantive prejudice that warranted a remedy beyond a mere continuance.[141]

Ultimately, the lower court held that there had been a pattern of deliberate misconduct resulting in repeated violations of Rule 16, the *Brady* principles, the parties' stipulation and the court's orders.[142] As a result, the trial justice dismissed twenty-two counts of the twenty-four count indictment against the former governor and his son.[143]

In analyzing whether to affirm or reverse the trial justice, Justice Weisberger, speaking for the majority, identified three principal issues to resolve regarding the State's failure to timely or honestly comply with its discovery obligations.[144] The first issue, whether the State's pre-trial conduct in *DiPrete* violated the *Brady* rule requiring it to disclose evidence favorable to the defense;[145] second, whether a trial justice of the Rhode Island Superior Court could dismiss an indictment under the exercise of an inherent supervisory power to govern proceedings before the court and lastly, whether and under what circumstances the State's violation of the discovery rules in Rule 16 of the Rhode Island Superior Court Rules of Criminal Procedure might justify dismissal of an indictment.[146]

In discussing the *Brady* issue, Justice Weisberger was once again in his legal historian mode, laying out a concise treatment of the history and consequences of the United States Supreme Court's 1963 seminal decision on the duty of the prosecution to dis-

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140. *See id.* at 1269.
141. *See id.* at 1269.
142. *See id.* at 1270.
143. *See id.*
144. *See DiPrete*, 710 A.2d at 1270.
145. *See id.*
146. *See id.*

close exculpatory evidence to the defense.[147] Like so many other fundamental landmarks of modern criminal procedure, the *Brady* decision handed down by the Warren Court constitutionalized the State's obligation to disclose evidence favorable to the defense through the Fifth Amendment due process guarantee made applicable to the states by the Fourteenth Amendment.[148] Fleshed out over the next thirty plus years, the *Brady* rule has come to mean that the government has the duty to disclose exculpatory evidence, even in the absence of a defense request, if the withheld evidence taken as a whole results in a reasonable probability that a different result might have been obtained had it been disclosed.[149] This obligation would exist regardless of the good faith or bad faith of the prosecution and even if the police had failed to disclose the exculpatory information to the prosecutor.[150]

The normal context in which *Brady* matters arise is in post-trial appeals and Weisberger points out numerous instances in both federal and Rhode Island cases where sentences have been vacated, convictions reversed or new trials ordered for failure to disclose evidence favorable to the defense.[151] Weisberger reminds the reader that the first enunciation of the *Brady* principles in Rhode Island was in 1975 in *In re Ouimette*.[152] That decision suggested that where the prosecution unintentionally withholds evidence favorable to the defense, then the defendant must prove prejudicial effect to succeed on appeal (e.g., defense "must show that there is a significant chance that the use and development of the withheld evidence by skilled counsel at trial would have produced a reasonable doubt in the minds of enough jurors to avoid the conviction").[153] Later, in *State v. Wyche*[154] the Rhode Island Supreme Court eliminated the defense burden of establishing the prejudicial effect of the State's deliberate failure to disclose excul-

147. *See id.* at 1270-71.

148. *See Brady*, 373 U.S. at 87.

149. *See DiPrete*, 710 A.2d at 1270-71.

150. *See id.* at 1271.

151. *See generally DiPrete*, 710 A.2d at 1270-71 (discussing United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972)).

152. *See id.* (citing *In re* Ouimette, 342 A.2d 250 (R.I. 1975)).

153. *Id.* at 254-55.

154. 518 A.2d 907 (R.I. 1986).

patory evidence in order to secure a new trial following a conviction; deliberate withholding was enough for post-trial relief.[155]

After recounting the development of the *Brady* principles, Weisberger then summarily dismissed their application to the DiPrete facts:

> All the foregoing cases indicate beyond doubt that the *Brady* principles have no relevance to pretrial discovery. Under *Brady* the denial of due process is ripe for consideration only in the event that an accused has been convicted of an offense in circumstances in which the nondisclosure of exculpatory or impeaching evidence was deliberate or, when viewed in the context of the totality of the State's proof in the case, would have a material effect upon the outcome or would create a significant chance that such exculpatory or impeaching evidence in the hands of skilled counsel would have created a reasonable doubt in the minds of jurors. In sum the *Brady* doctrine creates a post-trial remedy and not a pretrial remedy and is therefore not relevant to the issues raised by this appeal.[156]

The appeal did, however, squarely raise the question of the trial justice's power to dismiss a duly returned grand jury indictment under the inherent supervisory power of a court to "take such actions as may be necessary to vindicate their authority, even though such actions may not be specifically authorized by constitution or rule."[157] Justice Weisberger, while clearly acknowledging the inherent power of superior court justices to govern the proceedings before them by appropriate sanctions, including contempt, approached the resolution of this issue as he did many others throughout his career, with reliance on a balancing test. Weisberger recognized that the trial justice was justifiably displeased at the prosecution's delaying and deceptive tactics in discovery.[158] Affirming the trial justice's dismissal order would certainly discourage that type of prosecutorial misconduct in the future. Weighing against dismissal was the significant public interest in the case and the severity of the public corruption charges lodged against the former chief executive officer of the state for venal conduct alleged to have occurred during his term in office. For Justice

155. *See id.* at 910.
156. *DiPrete*, 710 A.2d at 1271.
157. *Id.* at 1275.
158. *See id.* at 1274.

Weisberger, whose entire career had been in service of the public,[159] that balance easily tipped in favor of the public interest when he stated:

> We must bear in mind that when a grand jury returns an indictment, the people of the State of Rhode Island are entitled to have the issues of fact and the issues of guilt or innocence tried on the merits. The punishment of an errant prosecutor by dismissal of the charges is in effect a punishment imposed upon the people of this state. Only in the most extraordinary circumstances should the people of Rhode Island be deprived of their right to a trial of these charges.[160]

Although the inherent supervisory authority of a trial justice might not require any specific constitutional provision or rule, the third issue in the case did directly rely on the interpretation of a rule of court. Rule 16(a) of the Rhode Island Superior Court Rules of Criminal Procedure provides a mechanism by which a defendant in a criminal matter in the superior court may secure production of a comprehensive array of items, information, documents or photographs within the possession, custody, control or knowledge of the state.[161] Not surprisingly, a defendant who seeks any discovery under Rule 16(a) is obligated in turn to furnish a range of items or information to the state.[162] Thus, "[t]rial by ambush is no longer available to either side."[163] In order to encourage both the defense and prosecution to comply with their respective discovery obligations, Rule 16(i) empowers the trial justice to take remedial action aimed at enforcing the rule.[164] Rule 16(i) provides as follows:

> Failure to Comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to provide

159. For a comprehensive biography of the Chief Justice that recounts his heroic naval service to the country during World War II, his political career as East Providence town moderator and as a state senator, his appointment to the Superior Court bench in 1956, his elevation to the Supreme Court in 1978, and his eventual selection first as "acting" Chief Justice in 1993 and then as Chief Justice in 1995 until his retirement in February 2001, see Patrick T. Conley, *Joseph R. Weisberger: A Life in Law*, 49 R.I.B.J. 5 (Feb. 2001).

160. *DiPrete*, 710 A.2d at 1276.

161. *See* R.I. R. Crim. P. 16(a).

162. *See* R.I. R. Crim. P. 16(b).

163. *DiPrete*, 710 A.2d at 1274.

164. *See* R.I. R. Crim. P. 16(i).

> the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, or it may enter such other order as it deems appropriate.[165]

In *DiPrete*, Justice Weisberger had to address whether the Department of the Attorney General's discovery violations warranted pre-trial dismissal of serious felony charges in the grand jury indictment. Typically, trial justices utilize Rule 16(i)'s explicit pretrial remedies such as enforcement order, continuance or evidence preclusion to ensure that the trial proceeds fairly. Historically, the Rhode Island Supreme Court has, on a number of occasions, affirmed a trial justice's reliance on Rule 16(i) to justify the powerful post-trial remedy of vacating or reversing a conviction and ordering a new trial.[166] However, in those cases the failure to provide discovery had continued through the trial, effectively resulting in a denial of discovery. In determining whether to impose a Rule 16(i) sanction and which one, the superior court had been instructed by the supreme court in *State v. Coelho* to consider the following factors: "(1) the reason for nondisclosure, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors."[167]

In only one unusual prior case, *State v. Quintal*,[168] had the Rhode Island Supreme Court upheld a trial justice's pre-trial dismissal of an indictment for the State's failure to obey the trial justice's order to comply with discovery.[169] Although the trial justice in *DiPrete* had relied heavily upon *Quintal*, Justice Weisberger easily distinguished that case away from the circumstances in *DiPrete*. In *Quintal*, after extended failure on the part of the prosecution to comply with its Rule 16 discovery obligations, the superior court trial justice had entered a conditional sixty-day order that specified that if the State failed to comply with the court's command, the case would be dismissed with prejudice.[170] Of significance to Weisberger's later analysis of *Quintal*, the State

165. *Id.*
166. *See, e.g.*, State v. Darcy, 442 A.2d 900, 903 (R.I. 1982); State v. Verlaque, 465 A.2d 207, 213-14 (R.I. 1983); State v. Coelho, 454 A.2d 241, 246 (R.I. 1982).
167. State v. Coelho, 454 A.2d 241, 245 (R.I. 1982).
168. 479 A.2d 117 (R.I. 1984).
169. *See id.* at 120.
170. *See id.* at 118.

agreed to the entry of this conditional order of dismissal, which was, by its own term, self-executing.[171] When the State persisted in failing to produce the required discovery materials, the court granted the defendant's motion to dismiss.[172] That order was upheld by the supreme court, which stated that "[a]bsent enforcement of such self-executing orders, 'the sanctions would have no meaning, and parties would be allowed to ignore the discovery rules and orders issued pursuant to them.'"[173] Therefore, in *Quintal,* prior to dismissal the State never provided the discovery materials, whereas the majority in *DiPrete* accepted that the State had furnished all of the requested exculpatory and impeachment material by the end of the thirty-two day hearing on defendant's motion for sanctions.[174] Applying the *Coelho* factors, Weisberger was unable to find that the DiPretes had suffered prejudice sufficient to support pre-trial dismissal under the authority of Rule 16.[175]

Justice Weisberger then addressed the trial justice's authority or discretion under Rule 16 to impose the "ultimate sanction of dismissal" of specific counts or the entire indictment.[176] After citing other sanctions that the trial justice might have imposed under Rule 16 (such as precluding evidence that had not been disclosed at all before trial or imposing counsel fees on the State for the cost the defense's extraordinary efforts to secure full discovery), the majority in *DiPrete* held that the trial justice did not have the authority under Rule 16 to dismiss twenty-two counts of the indictment.[177]

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171. *See id.*

172. *See id.*

173. *DiPrete*, 710 A.2d at 1273 (quoting *Quintal*, 479 A.2d at 120 (quoting *DiPrete*, 468 A.2d at 265)).

174. Dissenting Justice Bourcier was not convinced that the state had furnished all of the requested exculpatory and impeachment material when he noted:

> What I believe the learned trial justice found most disturbing and damaging of all, however, was the very real possibility that even as of the date of his decision, the defendants may not then have yet received all of the exculpatory materials that had been requested and to which they were entitled.

Id. at 1286.

175. *See id.* at 1273.

176. *Id.* at 1276.

177. *See id.*

Speaking for the majority,[178] Justice Weisberger provided the following explanation for this conclusion:

> We are not testing this order under an abuse-of-discretion standard. We hold to the contrary that there was an insufficient basis upon which the trial justice could enter an order of dismissal. Therefore, his discretion in this context was not called into action. We are of the opinion that only in extraordinary circumstances such as were present in *State v. Quintal* would a trial justice have the authority to dismiss an indictment for delayed discovery. Those circumstances were not present in this case.[179]

Justice Weisberger's conclusion that a trial justice lacks authority under Rule 16 to impose the ultimate sanction of dismissal in all but the most unusual or egregious circumstances was certainly controversial. Justices Lederberg and Bourcier both disagreed with him pointing out in their separate opinions in *DiPrete* that the Supreme Court had traditionally reviewed a trial justice's imposition of Rule 16(i) sanctions for discovery violations under an abuse-of-discretion standard.[180] Although Justice Weisberger framed the standard of review in *DiPrete* as this novel "lack of authority" rule, it is also clear that he acknowledged the possibility that unique circumstances could demand that a trial justice exercise some discretion to dismiss an indictment when he stated towards the end of the opinion:

> We recognize that the trial justice in the case at bar reached a conscientious determination that the remedy of dismissal was authorized by our opinion in *Quintal*. Our limiting of the holding in that case to its particular facts will serve as a guide to trial justices in reserving the extreme and ultimate sanction of dismissal only to situations in which there has

178. Joining with the Chief Justice in the majority opinion were retired Justices Florence Murray and Donald Shea. Justices Robert Flanders and Maureen McKenna Goldberg had recused themselves from hearing or participating in the *DiPrete* case. Justice Victoria Lederberg concurred in the outcome of remanding the case back to the Superior Court for a trial on the merits, but dissented with respect to the authority and discretion of a trial justice in enforcing compliance with Rule 16. Justice John Bourcier dissented as to both the outcome and the role of the trial justice in fashioning sanctions under Rule 16 for prosecutorial discovery misconduct.

179. *DiPrete*, 710 A.2d at 1274.

180. *See id.* at 1277-78, 1289-96.

> been flagrant prosecutorial misconduct accompanied by severe and incurable prejudice.[181]

The notion that a trial justice could "reserve" the sanction of dismissal at all, although seemingly inconsistent with Weisberger's pronouncement that "in the circumstances of this case . . . the trial justice did not have the authority to dismiss,"[182] is nonetheless warranted by the actual text and purpose of Rule 16(i) which gives the trial court the power to "enter such other order as it deems appropriate" when a party has failed to comply with its Rule 16 discovery obligations.[183]

Only three months after the *DiPrete* opinion was handed down, the Rhode Island Supreme Court in *State v. Musumeci*[184] once again had the opportunity to address a trial justice's authority or discretion to dismiss criminal charges for failure of the prosecution to make discovery as required by Rule 16. In that case, the prosecution negligently failed to produce an undercover operative's logbook prior to a drug charges trial, surprising the defense and justifying the initial trial justice's declaring of a mistrial.[185] Ten months later, a second trial justice assigned to preside over the retrial convened an evidentiary hearing to determine the circumstances underlying the prosecution's non-production of the logbook.[186] Although the defendant made no showing of additional prejudice that could not have been cured by the mistrial and continuance, the second trial justice granted defendant's motion to dismiss the criminal information on the grounds that the State's grossly negligent nondisclosure of the logbook had prevented defense counsel from interviewing potential witnesses named therein while events were still fresh in their memories. The second trial justice also indicated that the dismissal sanction would serve as a

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181. *Id.* at 1276.

182. *Id.* at 1274.

183. R.I. R. Crim. P. 16(i).

184. 717 A.2d 56 (R.I. 1998).

185. *See id.* at 61. Although the logbook contained notations that tended to inculpate the defendant rather than to exculpate him, the trial justice nonetheless viewed the surprise to defendant as prejudicial. This is an excellent example of the trial court using its discretionary authority under Rule 16(i) to enter "such other order as it deems appropriate" when dealing with a failure by the state to make required pre-trial discovery. R.I. R. Crim. P. 16(i).

186. *See id.* at 59-60.

deterrent to any future instances of negligent nondisclosure of discoverable evidence by the prosecution.[187]

If the State's intentional failure to disclose discoverable exculpatory evidence in *DiPrete* did not support dismissal of the indictment, it is obvious that the supreme court was not going to affirm dismissal of a criminal information for merely negligent nondisclosure in *Musumeci*, and it did not. The majority opinion authored by Justice Flanders[188] reviewed the applicable precedents including *Coelho*, *Quintal* and *DiPrete*, and determined that the trial justice's dismissal of the charges constituted an abuse-of-discretion because there had been no showing of irremediable and material prejudice after the granting of the mistrial and continuance.[189] Justice Flanders also recognized that deterrence of prosecutorial misconduct, while laudable, must be balanced against the policy considerations identified by Justice Weisberger in *DiPrete*, favoring resolution of criminal charges on their merits.[190] The majority opinion instructs that dismissal of criminal charges under the authority of Rule 16(i) would only be warranted as a last resort when the defendant has been substantially prejudiced and it has been shown that "no other available discretionary measures can possibly neutralize the harmful effect [of the prosecution's discovery violations]."[191]

In reaching this conclusion, the majority and the dissenting Justice McKenna Goldberg reverted back to the pre-*DiPrete* abuse-

187. *See id.* at 60.

188. Justice Flanders was joined in his opinion by Justices Bourcier and Lederberg. Justice Weisberger concurred in the result, but dissented as to the standard to be used in reviewing the trial justice's determination as is discussed *infra*. Justice McKenna Goldberg concurred in the applicable standard of review (abuse-of-discretion), but dissented as to the outcome since she agreed with the trial justice as to the necessity to deter future discovery abuses by the state.

189. *See Musumeci*, 717 A.2d at 62-64.

190. *See id.* at 63.

> [T]he burden of any dismissal sanction ultimately falls squarely on the people of this state and not solely upon the Attorney General's office. And although we agree with the second trial justice's observation that defendant is entitled to a 'trial by jury, not trial by ambush,' we are also of the opinion that as a general rule, and subject to constitutional safeguards, a criminal defendant should not 'go free because the constable [or the prosecution] has blundered.'

Id. (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

191. *See id.* at 63 (quoting State v. Darcy, 442 A.2d 900, 902 (R.I. 1982)).

of-discretion standard in reviewing the trial justice's determination under Rule 16(i), with Justice Flanders stating:

> Because the trial justice is in the best position to determine the harm resulting from a discovery-rules violation and can best assess the possibility of mitigating that harm, his or her ruling on what sanction should be imposed on that score will not be overturned absent a clear abuse of discretion. However, the trial court's discretion is not without limits and is reviewable by this Court for an alleged abuse thereof.[192]

Justice McKenna Goldberg's dissent concurred as to the abuse-of-discretion standard, noting: "We have consistently stated, as the majority acknowledges, that while subsection (i) of Rule 16 provides a list of specific sanctions to employ in the event of noncompliance, the trial justice is clearly free within the bounds of sound discretion to impose any sanction he or she deems appropriate in light of the attendant circumstances."[193]

Justice Flanders was clearly aware that the resurrection of the abuse-of-discretion standard so close on the heels of Justice Weisberger's articulation of the "no authority" standard in *DiPrete* may be troublesome, if to no one else, then at least to Justice Weisberger. Therefore, Flanders went to some pains to collegially frame their differences as principally semantic:

> We also note that our disagreement with the *DiPrete* majority's dicta concerning whether a Superior Court trial justice has the discretion to dismiss an indictment in certain circumstances may be more semantic than substantive. Except for the dissent, all of the justices of this Court concur that in certain egregious circumstances – namely, flagrant prosecutorial discovery noncompliance coupled with substantial resultant prejudice to the defendant that cannot be remedied by alternative measures – Rule 16(i) permits a trial justice to dismiss a criminal indictment both before and after the underlying criminal trial has begun. Conversely, we also agree that a trial justice commits reversible error by dismissing an indictment for the prosecution's discovery violations in the absence of such egregious circumstances.[194]

In his separate opinion Justice Weisberger started out by summarily agreeing with the majority that the second trial justice in

192. *Id.* at 60 (citations omitted).
193. *Id.* at 72.
194. *Musumeci*, 717 A.2d at 65.

Musumeci acted improperly in dismissing an information in the circumstances of this case.[195] He continued by noting, in parallel with both Flanders and McKenna Goldberg, that the dismissal of a criminal indictment or information for a discovery violation is a drastic step: "Both the majority and the dissent in this case would recognize that dismissal of an indictment or an information should take place only as a last resort to save a defendant from incurable prejudice brought about by egregious prosecutorial misconduct."[196] But Justice Weisberger went on to set forth a carefully drawn dissent in which he urged his colleagues to consider the impact of the resurrection of the abuse-of-discretion standard on two fundamental judicial concepts, namely, uniformity and predictability.[197]

Weisberger forcefully stated his concerns about uniformity in discretionary enforcement of such a drastic remedy as dismissal:

> It would be unconscionable as in the present case for one justice of the Superior Court to deny a motion to dismiss a criminal case and another justice of the same court allowed to grant it unhampered save for deferential review based upon abuse of discretion. It is the function of this Court to set and maintain standards, not to foster the potential chaos of inconsistent determinations subject only to correction if an abuse of discretion may be found to have existed.[198]

Respect for the fundamental judicial concept of uniformity is inconsistent with the discretion Justice Weisberger defines as "the right to be wrong without being reversed."[199] Acknowledging that trial justices must have certain discretionary authority to govern their courtrooms, Justice Weisberger, himself a former superior court trial justice, reminded his colleagues that there are two broad categories of discretion:

> The first category of discretion accords to judges freedom of choice unhampered by legal rules. For example, a decision to recess court or to grant a continuance in a case would not normally be reviewable by an appellate court. The second class of judicial discretion involves freedom of choice, but the choices are limited, bounded by law, and reviewable.[200]

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195. *See id.* at 67.
196. *Id.* at 69.
197. *See id.*
198. *Id.* at 69.
199. *Musumeci*, 717 A.2d at 69.
200. *Id.* (quoting Albertson v. Leca, 447 A.2d 383, 387 (R.I. 1982)).

Continuing to advocate for his *DiPrete* no-authority standard, Weisberger's dissent in *Musumeci* argues, "that this freedom of choice is inappropriate in the context of dismissal of an indictment."[201]

Equally troubling to Justice Weisberger about the majority's abrupt return to the abuse-of-discretion standard was the seeming disrespect for the venerable legal doctrine of *stare decisis*. Weisberger believes that all members of the supreme court should be "bound by its prior decisions regardless of whether they were members of the Court who participated or even dissented in respect to prior opinions."[202] In an attempt to convince his colleagues of the predictability-producing value of *stare decisis*, Justice Weisberger returned to the comfortable-for-him role of legal historian. His historical treatment paid particular recognition to the decisions and writings of United States Supreme Court Justices John Marshall Harlan and Lewis F. Powell, Jr., both of whom extolled the virtues and necessity of *stare decisis* to the sound administration of justice and the judicial system.[203] Justice Weisberger reverentially described their service on the high Court as thus contributing to the stability and predictability that this doctrine provides, and he quoted Justice Powell, as follows:

> Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions.[204]

Clearly, Weisberger is more concerned about the fundamental and constitutionally prescribed role of the Rhode Island Supreme Court and its perception by the public and the other branches of state government. He closed his admonition to his colleagues with this insightful observation: "A tribunal that shifts its position every few

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201. *Id.* at 69.

202. *Id.* at 68.

203. *See id.* at 68-69.

204. *Musumeci*, 717 A.2d at 68-69 (quoting from Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, J. Sup. Ct. Hist. 13, 16 (1991)).

months may satisfy the individual predilections of its members, but in the long run will diminish its credibility."[205]

IV. CONCLUSION

This article began by noting Chief Justice Weisberger's tendency to rely on history (whether constitutional, legal or political) in attempting to pragmatically balance the competing interests presented to the Rhode Island Supreme Court for adjudication or advisory opinion. Some of these disputes or questions have addressed the fundamental structure of government in this state. In those instances, the competing forces have included the General Assembly and a taxpayer disputing whether the state constitution permitted the Legislature to enact a law providing pension benefits for its members (*Kass*), the House of Representatives and the Governor contesting the authority of the Governor to impound funds appropriated by the Legislature in order to balance the state budget (*Impoundment of State Aid*), the Governor and the Legislature wrangling over which branch had the appointive authority to fill a vacancy created in the office of Lieutenant Governor (*Appointment to Fill Vacancy*) and the Governor and the General Assembly contentiously clashing over whether a constitutionally created executive Commission could promulgate regulations that usurped the traditional authority of the Legislature to appoint members of executive branch boards and Commissions (*Rhode Island Ethics Commission*). Weisberger's answers to these questions generally have drawn upon more than three centuries of colonial and state history which have recognized the nearly limitless authority of the Legislature to act and which have strictly circumscribed the powers of the executive branch in Rhode Island. Unlike the federal government and most other states, Rhode Island's long-standing history is that of parliamentary supremacy. Even when he acknowledged some authority on the part of the Governor, as Weisberger did in *Appointment to Fill Vacancy* and in his dissent in *Impoundment of State Aid*, that executive authority either was based upon legislative grant or was subject to limitation should the Legislature choose to do so.

In resolving the competing interests of the state and criminal defendants, Weisberger has also called upon history to help strike

205. *Id.* at 68.

an appropriate balance. In the cases examined, where the court was asked to determine whether anyone other than the defendant himself could invoke the constitutionally protected rights to counsel and to remain silent (*Burbine*) or where the court was asked to dismiss serious criminal charges because of prosecutorial failure to comply with its discovery obligations (*DiPrete* and *Musumeci*), for Justice Weisberger that balance has tipped in favor of the interest of the people of Rhode Island in having those serious charges resolved on the merits or in seeing to it that law enforcement personnel can effectively investigate crime while respecting the personal right of a suspect to invoke for himself his constitutional rights. Weisberger has also used history to urge his colleagues on the state supreme court to respect the principles of uniformity and predictability that are incorporated into the doctrine of *stare decisis*. As he steps down from the Rhode Island Supreme Court, Chief Justice Joseph R. Weisberger can rest assured that his lifetime of service to his native state, including forty-five years as a member of the Judiciary, will fill an illustrious page of history.