Roger Williams University Law Review

Volume 6 | Issue 2 Article 1

Spring 2001

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Tributes

Tribute to Chief Justice Joseph R. Weisberger

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On February 24, when Chief Justice Joseph R. Weisberger puts on his hat, buttons his overcoat, turns out the lights and walks out of his chambers on the seventh floor in the Licht Judicial Complex, a notable chapter in the judicial history of Rhode Island will have been written.

When Joe became an associate justice of the superior court in February of 1956, I had been a member of the Rhode Island Bar for just over two years. As a young lawyer, and later during my twenty years as a trial attorney, I had the opportunity to try a number of cases before him. Each one was a learning experience. He was a brilliant trial justice, a compassionate and understanding jurist and a great teacher. He generously shared his vast knowledge of the law with the attorneys who were fortunate enough to try cases in his courtroom. In his role as a trial justice, any attorney who came into his courtroom quickly appreciated his facile mind, wise counsel and his unwavering respect for the law. He earned his reputation as a scholar and great trial justice. To debate a point of law with him during trial was a rich experience. I personally recall one instance when, in attempting to convince him of the perfect logic in my client's position, my opponent began to pierce that perfect logic. Joe thoughtfully interjected a question or two to rescue me from my dilemma and potential embarrassment in front of my client. Such a characteristic was not one that he exhibited only with me; he rescued many a trial counsel from the

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same dilemma. It was always a pleasant experience to appear before him and try cases.

When I was appointed to the superior court in May 1974, along with the late Justice Thomas Needham, Joe was the presiding justice. From our first day on that court, he made us feel as if we had been there for many years. He was always available to lend a willing ear and give sage advice to all who served with him on his court. He was more than just the presiding justice; he was a loyal friend and ready mentor that everyone appreciated and respected. In March of 1978, he was elevated to the supreme court where, because of the widespread publication of his legal opinions, his great legal ability and talent became legendary. His supreme court opinions always reflected his abounding love for the law and justice and exemplified his uncanny knack for clarity by explaining in understandable terms even the most complex of legal theory and principle.

Fortunately for the State of Rhode Island and, in particular, for its judicial system, Joe did not elect to retire when first eligible. In the late 1980s and early 1990s, he was serving when the hitherto good reputation of our supreme court was wracked with scandal and was reeling from wide public criticism. Following the resignation of the second of two chief justices, Joe, on August 26, 1993, became "Acting Chief Justice" and inherited all of the court's problems, both public and internal. In doing so, he turned aside, at great personal monetary loss, a generous offer and opportunity to become a part of the United States First Circuit Court of Appeals, in Boston. His public prestige, coupled with his courage and administrative ability, made him the logical choice to "save the court" and, true to his background as a former Navy Lieutenant Commander, he stuck with the troubled ship and its crew. Armed and endowed with enormous legal ability, wisdom and human understanding, he not only accepted that challenge but was more than equal to it. Because of his leadership, he was able to guide the supreme court through troubled waters and restore it to its position as one of the most respected in this nation. Today, the people of Rhode Island are all beneficiaries of Joe's greatness and his unselfish devotion to the law and to the Rhode Island Supreme Court. In March 1995, a grateful general assembly elected him to become chief justice of the supreme court that he so truly cherishes. He

was most deserving of that position and served it well until his retirement.

Joe Weisberger will certainly be missed by all of his colleagues who remain on "his" court. He wore his robe with quiet dignity. Speaking personally, I will miss his intellectual and judicial leadership. I also will remember him for his gift of enhancing the enunciation of great philosophies and great legal principles in the many opinions that he authored as a member of this court.

When Joe Weisberger was sworn in as an associate justice of this court in 1978, his good and loyal friend, the esteemed and now retired Justice Florence K. Murray, had occasion to read a letter of congratulations that she had received from the American Bar Association. It read in part:

> Few trial judges are better known in the United States than Joseph Weisberger. He is admired as a superb teacher. His devotion and unselfish dedication to the National College of the Judiciary is one of the important factors which has made it an outstanding educational institution. He has often appeared at educational seminars for the bench and bar of the entire United States, sometimes at much personal sacrifice, and to the benefit of thousands who serve in the pursuit of justice.
>
> The honor now being bestowed upon Justice Weisberger is further recognition of his many sterling qualities. His friends will mark his ascendancy to the Supreme Court as another evidence that the judiciary in your State is ranked with the finest in the nation. He will assure that this great and honorable tradition is maintained.[1]

Thank you, Joe. You have indeed maintained that great and honorable tradition. I wish you well. You richly deserve the pleasure of spending happy days and years with your wonderful wife, Sylvia, and with J. Robert, Judith and Paula and all of your grandchildren. May God bless you with many years of good health in which to do so.

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1. 119 R.I. Rep. xxiii (1978).

Chief Justice Weisberger: The Judicial Legacy

Robert G. Flanders, Jr.*

The greatest tribute that I can pay to Chief Justice Joseph R. Weisberger is to acknowledge publicly the iconographic example that he has set for those of us who have had the privilege of working with him as his colleagues during one or more periods of his long judicial tenure. His integrity, dedication, civility, judgment, eloquence, assiduity, gravitas, wisdom, professorial skills, voice and strength of character are just a sprinkling of the positive attributes that vault to mind when one considers the inestimable measure of his lasting achievements as a jurist. Ultimately, however, the enormity of his true contribution to Rhode Island's legal system beggars all description.

When I was sworn in as a Rhode Island Supreme Court justice in 1996, I stated then that I felt extremely fortunate to be joining the court at a time when Chief Justice Weisberger was at the helm. The almost five years I have served with him on the court have confirmed this belief. But my personal luck has been dwarfed by the good fortune that all Rhode Islanders have experienced in having him function with distinction in this crucial post, especially after two successive chief justices of the court had resigned in disgrace. Chief Justice Weisberger's decision in 1993 to continue serving as a Rhode Island Supreme Court justice, when he could have retired on a full pension and accepted a lucrative federal judicial appointment, would alone have secured his place in the pantheon of Rhode Island's outstanding public servants. Yet he has contributed so much more.

In this brief essay, I would like to relate some of my very personal impressions of his judicial philosophy and practices. Many of these tenets are apparent in the countless opinions he has au-

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thored for the court, or in his separate concurring or dissenting opinions. Others, perhaps, would only be detectable to those who have worked closely with him over a number of years and who have listened to him express his judicial beliefs in the course of deciding the many cases that have come before the court.

Chief Justice Weisberger is a natural teacher. He is also a man of strong opinions. Inevitably, over the course of discussing and deciding the cases before the supreme court, he has shared many of these opinions with his colleagues. Although I have not always agreed with him, I believe these opinions not only have shaped the man and his judicial career, but also they have formed a large part of his legacy to the court and to Rhode Island jurisprudence. Accordingly, I would like to share some of them here, at least as I have perceived them.

One caveat before I begin. These are my own impressions. It is entirely possible that I may have misinterpreted or misconstrued at least some portion of what I have heard and observed over the years that I have served with him. Nonetheless, these are my perceptions and conclusions concerning several of his actuating principles. Again, I recount them here not because I necessarily agree or disagree with these precepts. In fact, on some notable occasions, I have publicly agreed or disagreed with one or more of them. But I set them down here because I think, on the whole, they give a fair picture of at least a portion of his core judicial philosophy, one that has found its way into scores of judicial opinions over his many years of service on the bench.

I. A Strong Belief in the Efficacy of the Adversarial System

Chief Justice Weisberger has always believed in the ultimate efficacy of the adversarial system, and has been fond of expressing and affirming this belief whenever the occasion has demanded it. For example, if a motion for attorney fees was unopposed, his immediate disposition would be to grant it,[1] reasoning that if the other side had decided not to object to such a motion, presumptively it should be granted. Similarly, when reviewing motions for ineffective assistance of counsel or those involving some other chal-

1. An exception to this rule would be if the motion pertained to public funds. In that case, the presumption would not apply.

lenge to an attorney's legal performance, it was his natural inclination to view such attacks with skepticism. He believed that lawyers usually did their level best to serve as effective advocates for their clients. He was not one to second-guess the strategic and other decisions that lawyers inevitably make in the course of representing their clients. He also believed that the adversarial system was one of the lasting contributions that Anglo-Saxon and American jurisprudence have made to the development of law. He conceived of it, I believe, as a relatively efficient and time-tested engine for truth seeking and conflict resolution. Consequently, he would not hesitate to remind his colleagues, when the occasion called for it, of his abiding faith in the ultimate efficacy of the adversarial system.

II. Decide Only What is Before the Court

Although he might countenance deviations from this principle now and then, he was usually a staunch advocate of having the court resolve only those issues that were then before it, instead of reaching out to decide questions that were not presented for decision. Many cases inevitably raise a host of collateral issues and concerns that may impact upon future cases in whatever area of the law the court has under consideration. Nevertheless, the parties or the procedural posture of the case will raise only a finite number of issues on appeal for the court to decide. Whenever the court may have been tempted to go off on a tangent and decide issues that were perhaps interesting but not directly before it, Chief Justice Weisberger would remind us that we should be deciding only those issues that were presently before the court. The other issues, however interesting, the court should save for another day and another case. This, of course, was sound advice and, with some notable exceptions, the court generally has tried to adhere to this principle.

III. Avoid Remanding the Case Back to the Trial Court When It Would Only Give that Court Another Chance to Get it Wrong

Based on his experience with alternative approaches, Chief Justice Weisberger believed that whenever the Rhode Island Supreme Court found error in a trial court's decision, it should resolve as much of the particular case before it as it could, rather

than send it back to the trial court and give the erring trial justice another chance to get it wrong. This had less to do with any inherent distrust of how the trial court might resolve the problem than it did with concerns about efficiency and decisiveness. The Chief Justice relished cutting what he called "Gordian Knots." In this context, he meant that the court should endeavor to wrap up the issues before it as best as it could, rather than bounce the case back to the trial court in the hope that a trial justice might hit upon the right solution or carry out what might turn out to be an uncertain mandate. He was of the opinion that, whenever possible, the supreme court should take the bull by the horns and corral whatever problems may have caused the case to stray from its proper course. As a result, he generally did not favor remands to a trial court to give it another chance to rule on questions that the supreme court itself could resolve. This approach had the collateral benefit of saving time, money and forestalling future litigation. But sometimes the desire to avoid a remand would buck up against the precept that the court should decide only what is presently before it and allow the trial court to take a first crack at the issues in question. When that happened, the desire to avoid unnecessary remands occasionally may have trumped the principle that the court should decide only what was before it after first allowing the trial court to address the issue.

IV. Lack of Subject Matter Jurisdiction

Chief Justice Weisberger believed that many references to a court's supposed lack of jurisdiction (meaning subject matter jurisdiction) were misconceived and that this terminology should be limited to the truly rare instance when a court lacks the power to adjudicate a particular kind of dispute. He would point out the difference between a litigant's failure to properly invoke a court's subject matter jurisdiction and the court's lack of subject matter jurisdiction itself. In most cases, it was the former rather than the latter that most aptly described the situation. Thus, Chief Justice Weisberger usually was alert to the indiscriminate and inappropriate reference to a court's asserted lack of jurisdiction in describing a particular legal problem.

V. United States Supreme Court Precedents

For many years, Chief Justice Weisberger has lectured to other judges concerning the latest United States Supreme Court decisions, particularly, but certainly not exclusively, in the area of criminal law and procedure. Although he did not hesitate to criticize these decisions when they were at odds with prior precedents or with a common sense interpretation of the constitutional safeguards at issue, he also was loath to deviate from these decisions when deciding whether Rhode Island state law provided a higher or more protective threshold for individual rights. His general approach was to follow United States Supreme Court precedents rather than to establish or to recognize higher or more protective standards as a matter of interpreting the provisions of state statutory or state constitutional law.

VI. Post-Argument Conferences of the Justices

Chief Justice Weisberger was a great champion of the notion that the court should not lightly revisit how a case should be decided once a tentative decision was reached at the court's initial post-hearing conference following oral argument of the case. At these conferences the justices of the court would attempt to reach a tentative decision on how the case ought to be resolved. Although the court would sometimes revisit these decisions, particularly after viewing a draft majority and/or dissenting opinion, Chief Justice Weisberger was unlikely to change his initial view of a case. Whether this was due to his vast experience, the soundness of his initial impressions or a general unwillingness to revisit the court's initial decision-making, Chief Justice Weisberger did not believe in allowing a wide scope for reargument or for reconsideration of the tentative decisions that had been reached. This approach was consistent with his firm views against allowing reargument petitions generally and against rethinking the wisdom of prior court decisions. He believed strongly in the need for closure and for the court to be decisive and relatively expeditious in its decision-making, rather than opening its decisions to collateral and subsequent attack. He feared that the court would become bogged down if it opened itself generally to reargument petitions and to revisiting its prior decisions. Consequently, he usually cast a jaundiced eye at attempts to do so.

In any event, it is here, in the court's post-argument conferences, that I will miss him the most. Whether you agreed with him or not, he typically expressed a point of view that was well-reasoned, practical and that drew upon his years of experience and comprehensive knowledge of the law. Thus, his retirement not only dims a bright light at the head of our conference table, but it leaves us without a steady beacon of illumination, one that shone throughout our deliberations and that helped to guide us as we wended our way, through all the shoals and shallows, to each legal port of last resort.

VII. Cross-Examination

Chief Justice Weisberger was a proponent for allowing attorneys reasonable scope for cross-examination of witnesses, particularly to expose a witness's bias. Thus, he tended to disapprove of a trial justice's premature attempt to limit or restrict such examinations. This, I believe, was a corollary of his strong faith in the adversarial system.

VIII. Admission or Exclusion of Evidence

As a trial judge, Chief Justice Weisberger would often remark that he was generally a "leteriner" rather than a "keeperouter." Hence, he viewed with skepticism a trial justice's decision to keep evidence from a jury—unless, of course, such rulings were grounded on some solid evidentiary foundation. However, there were certain exceptions to this outlook. Among them:

(a) "Bolstering" situations. Bolstering occurs when one witness is allowed to vouch for the credibility or truth-telling capacity of another. Chief Justice Weisberger usually was receptive to arguments that a witness had improperly bolstered the testimony of another.

(b) Uncharged sexual misconduct evidence. Chief Justice Weisberger believed that uncharged sexual misconduct that occurred outside the household of the victim should not be admitted into evidence.[2] Thus, he was a great supporter of the *Maginot* line established by the *Quattrocchi* case that attempted to limit the ad-

2. *See* State v. Hopkins, 698 A.2d 183, 189 (R.I. 1997) (Weisberger, C.J., dissenting).

missible scope of uncharged sexual misconduct evidence to the household of the victim.[3]

IX. Judicial Humor and Literary Allusions in Published Decisions

Chief Justice Weisberger adhered to the view that, in published decisions of the court, judicial humor was an oxymoron. He believed that an attempt at judicial humor tended to detract from the dignity of the court's legal work and that its appearance might needlessly offend one or more of the parties to the case. He feared that readers of the opinion might misinterpret the attempt at humor as an insensitivity or a flippancy on the court's part that the gravity of the legal stakes did not warrant. Accordingly, he succeeded periodically in excising perceived attempts at judicial humor from draft opinions. Attempted literary allusions were also an occasional casualty of his blue pencil. Here too, he tended to view such references as excrescences that were not only distracting but potentially damaging to the court because they might be perceived as needlessly barbed daggers thrust into the carcass of the losing party's case. Nevertheless, a careful reader of the court's opinions still can detect, now and then, trace amounts of humor and isolated literary references that somehow managed either to elude or to evade these emendations.

X. Public Trust and Confidence in the Judiciary

Chief Justice Weisberger frequently has expressed a strong belief in doing whatever was possible to foster increased public trust and confidence in the judiciary. He has often stated that democracy, in general, and the legal system, in particular, were very fragile and largely dependent on earning and maintaining the public's trust and confidence. Furthermore, he has periodically expressed the view that this public trust and confidence could be easily lost or forfeited if the court was not careful to preserve and improve the legal system continuously, and to do so in a way that enhances the public's appreciation and understanding for the value of such a system. Although some members of the public, various public watchdog groups and others occasionally have ques-

3. *See* State v. Quattrocchi, 681 A.2d 879, 886 (R.I. 1996) (relying upon State v. Pignolet, 465 A.2d 176 (R.I. 1983)).

tioned whether his conduct as chief justice always has measured up to these lofty ideals (by criticizing, for example, his handling of the traffic court scandal or his retirement-eve appointment of the wife of the omni-powerful Speaker of the Rhode Island House of Representatives to a lifetime $100,000 judicial post), on the whole, his commitment to achieving these goals was unshaken and he took many positive steps toward realizing this objective. These included the formation of various committees to improve public trust and confidence in the courts (e.g., the User-Friendly Courts Committee, the Future of the Courts Committee, the Committee on Women and Minorities in the Courts, etc.) and the organization of various bench/bar seminars designed to improve relations with the media and the public.

XI. Parliamentary Supremacy

Based largely upon his understanding of Rhode Island's unique history, his admiration for the British system of government, and, in my judgment, his former status as a state legislative leader, Chief Justice Weisberger subscribed to the notion that Rhode Island's form of government constituted what he called a "quintessential" example of a "parliamentary supremacy." By that, he meant that the legislature was not only *de facto,* but also *de jure,* the dominant branch of Rhode Island's state government, especially as regards the executive branch and the governor in particular. This belief and its ramifications for particular attempts to limit the general assembly's actions or powers have been articulated in some detail in the opinions he authored and/or joined in the Lottery and Ethics Commission cases.[4] Suffice it to say that, as a former legislative leader, student of Rhode Island history and Rhode Island's longest serving jurist, Chief Justice Weisberger cut the general assembly and its leaders a very wide swath to carry out their legislative functions, and he was not inclined to interpret the Rhode Island Constitution as effectively limiting in any significant way the state legislature's pre-constitutional power to execute the very same laws that it enacts. For better or for worse, whether consistent with the distribution of powers in our state constitution or not, Chief Justice Weisberger's vision of Rhode Island's govern-

4. *See* Almond v. Rhode Island Lottery Commission, 756 A.2d 186 (R.I. 2000); *In re* Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999).

ment as one of "parliamentary supremacy" forms a central pillar of his judicial legacy.

XII. Official Immunity

Chief Justice Weisberger also was a great believer in the propriety and need for official immunity from civil damage and injunctive actions. He was a particular champion of absolute judicial immunity. But he also believed that other public officials deserved and needed a cushion of official immunity to insulate them from damage actions and other attempts to attack their decision-making.

XIII. Government Procurement

Chief Justice Weisberger strongly supported a "laissez faire" judicial approach to government procurement. Absent fraud or egregious legal violations, he believed that courts should stay out of attempts to involve them in second guessing government decision-making in the process of awarding public construction projects and in other such public-procurement situations. He did not believe in government by injunction. Rather, he believed that the court should let the other branches and agencies of government decide for themselves how to pick bidders for construction projects.

Conclusion

The above précis is by no means exhaustive, but it contains a representative sample of Chief Justice Weisberger's approach to judicial decision-making and to the appellate judicial process. Let me conclude by stating again that I consider myself extraordinarily privileged to have worked with him as a colleague during my first five years on the bench. I fervently hope, in his retirement, that he will remain, as ever, a resource that the court, the bar, the academy and the public will be able to draw upon for many years to come.

Chief Justice Joseph R. Weisberger

Maureen McKenna Goldberg*

As a law student in 1977, the first courtroom I entered in Providence County Superior Court as a summer intern for the Rhode Island Office of the Public Defender, was that of then Presiding Justice Joseph R. Weisberger. He was about to charge a jury in a criminal case, an event I was told that I should not miss. I found my way to courtroom twelve and saw my first judge in action. It was a memorable experience; he entered the courtroom with great dignity, and while standing at a podium, proceeded to address the jury. In a booming voice, he explained to the jurors their function as the finders of fact in the case they were ready to deliberate. He explained the law in clear and understandable language. I was impressed. At that point Justice Weisberger had been on the bench for twenty-one years and would be elevated to the supreme court the following March. Twenty years later, I joined him on a court that has been forever distinguished and molded by the force of his intellect; a court that, through his selfless devotion to duty, he rescued with its reputation intact. Chief Justice Weisberger has given forty-five years of service to the people of the State of Rhode Island and, in my opinion, he is a hero.

I had just celebrated my fifth birthday when on February 17, 1956, at the age of thirty-five, Joseph R. Weisberger undertook the oath of office as an associate justice of the superior court. Justice Weisberger was preparing for a lifetime of judicial service and I was looking forward to kindergarten. Thus, during most of my life, Chief Justice Weisberger has served the people of the State of Rhode Island with dignity, integrity and compassion. He is a jurist of national stature with a renowned reputation for scholarship and collegiality. For the past forty-five years, during which the citizens of Rhode Island have elected ten presidents, nine governors and ten attorneys general, Joseph R. Weisberger has toiled in the

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courtrooms of this state as an associate justice and presiding justice of the superior court and as an associate justice and chief justice of the supreme court. He has earned the respect and affection of the bench and bar of the state that he has served so well. After such exemplary service, it is fitting that we recognize not only his professional accomplishments, but pay tribute to the tremendous contributions he has made to the bench and the bar of Rhode Island and the nation.

Over the years, in a series of opinions authored by the Chief Justice or in which he was joined with the majority, Chief Justice Weisberger has been the guardian of our constitutional safeguards. He has paid faithful allegiance to the jurisprudence surrounding the Bill of Rights as enunciated by the United States Supreme Court. He has done so in the face of public clamor against offenders escaping punishment based on perceived technicalities and has consistently counseled his colleagues to be ever vigilant for the protection of the basic constitutional freedoms we are charged with upholding. He is the quintessential example of an appellate judge who recognizes that his role is to render opinions in accordance with the law and the Constitutions of this state and of the United States, whether or not those opinions are pleasing to the public. All of us who reside in the state founded by Roger Williams, on the principles of freedom and tolerance for the beliefs of others, are the beneficiaries of his long tenure on the court.

During his judicial career, the Rhode Island Supreme Court has decided some of the most important cases of our time. In 1979, in *State v. Cline*,[1] the court struck down the state's mandatory death penalty because it failed to allow for the consideration of the background and record of the accused, including factors that might militate against capital punishment in violation of the criteria set forth by the United State Supreme Court in *Bell v. Ohio*;[2] *Lockett v. Ohio*;[3] *Roberts v. Louisiana*[4] and *Woodson v. North Carolina*.[5] Justice Weisberger subsequently authored the opinion that affirmed Cline's conviction for the chilling and notorious felony murder of an itinerant fish peddler who was selling fish from his truck

1. 397 A.2d 1309 (R.I. 1979).
2. 438 U.S. 637 (1978).
3. 438 U.S. 586 (1978).
4. 431 U.S. 633 (1977).
5. 428 U.S. 280 (1976).

in the Chad Brown Housing Projects in the city of Providence.[6] A significant issue in Cline's appeal was his claim that counsel had been appointed to represent him prior to the time of his interrogation and therefore he could not make a knowing and voluntary waiver of counsel unless counsel was present for consultation. The evidence disclosed that counsel was not appointed for Cline, rather an attorney was notified by a district court judge that an arrest was expected over the weekend and the attorney was asked to be available to represent anyone who may be in need of counsel. The supreme court rejected Cline's claim that he was deprived of counsel and held that no attorney-client relationship existed at the time that Cline gave his confession and that no relationship of trust and confidence could exist between persons who have never met and who in all probability were unaware of each other's existence prior to Cline's arrest.[7]

In perhaps his most recognized opinion, again on Sixth Amendment grounds, Justice Weisberger authored the majority opinion in *State v. Burbine*,[8] a case ultimately decided by the United States Supreme Court.[9] In 1977, Brian Burbine was represented by the late Richard Casparian, an assistant public defender. On June 29, 1977, Burbine failed to appear for a late afternoon appointment with counsel because he was in the custody of the Cranston police having been arrested in connection with a charge of breaking and entering, a fact about which Mr. Casparian was unaware. Later that evening, Burbine's sister was able to contact a member of the public defender's office to notify Casparian about her brother's arrest. The attorney who answered the phone attempted to notify Casparian; failing that, she contacted another attorney who in turn spoke with a Cranston detective. However by that time, detectives from the Providence police department had arrived at Cranston police headquarters and were interviewing Burbine relative to the murder of a woman in Providence the preceding March. According to the testimony elicited at the suppression hearing, the assistant public defender was informed that Burbine was in custody, but was not told that Providence detectives were on the scene. This attorney indicated that Burbine was

6. *See* State v. Cline, 405 A.2d 1192 (R.I. 1979).
7. *See id.* at 1199.
8. 451 A.2d 22 (R.I. 1982).
9. *See* Burbine v. Moran, 475 U.S. 412 (1986).

represented by Mr. Casparian who was unavailable, but she would act as his legal counsel in the event that the police intended to place him in a lineup or undertake any interrogation. The attorney was informed that the police would not be questioning Burbine or undertaking a lineup and that they were through with him for the night. Several hours later, having been informed of his Miranda rights, Burbine signed a waiver-of-rights form and gave a signed confession to a brutal homicide. The denial of his motion to suppress this confession was upheld by a divided court. Justice Weisberger, in an eloquent opinion, traced the evolution of the jurisprudence surrounding a suspect's so-called Miranda rights, beginning with *Mallory v. United States*,[10] *McNabb v. United States*[11] and *Brown v. Mississippi*[12] to the seminal case of *Miranda v. Arizona*,[13] that he described as "'a brilliant flash of lightning illuminating the interrogational landscape in all directions, but followed by the thunderclap of criticism concerning its effects upon law enforcement.'"[14] However, this beautiful metaphor was of no assistance to Brian Burbine because Justice Weisberger found that nothing in the Miranda opinion or in succeeding cases suggested that the right to counsel may be asserted by anyone other than the accused. "The strength of Miranda lies in its simplicity."[15] Consequently, "the principles of Miranda place 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."[16]

The United States District Court for the District of Rhode Island denied Burbine's petition for federal habeas corpus relief.[17] However, this decision was reversed on appeal by the United States Court of Appeals for the First Circuit[18] based on a finding that the police conduct in failing to inform Burbine about the attorney's call to the station had fatally tainted his waiver of his Fifth Amendment privilege. The United States Supreme Court granted

10. 354 U.S. 449 (1957).
11. 318 U.S. 332 (1943).
12. 297 U.S. 278 (1936).
13. 384 U.S. 436 (1966).
14. *Burbine*, 451 A.2d at 26 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
15. *Id.* at 28.
16. *Id.*
17. *See* Burbine v. Moran, 589 F. Supp. 1245 (1984).
18. *See* Burbine v. Moran, 753 F.2d 178 (1985).

certiorari and, in an opinion authored by Justice Sandra Day O'Connor, the decision of the First Circuit was vacated.[19] As Justice Weisberger had accurately predicted, the Court declined to extend Miranda's reach to require a reversal in situations where the police are less than forthright with an attorney or if they fail to inform a suspect of an attorney's unilateral attempt to contact him.[20] This opinion remains the law today in this state and in the federal courts.

In the realm of the Fourth, Fifth and Sixth Amendments, the Chief Justice has been prolific; having authored numerous opinions that have defined the breadth of rights accorded to defendants who appear before the courts of Rhode Island. In 1980, he authored a decision that vacated a criminal conviction on the ground that the trial justice precluded the defendant from conferring with counsel over the weekend because the state was engaged in cross-examination of the defendant at that time.[21] He also authored an opinion which stated that the refusal of the trial justice to permit defense counsel to cross-examine the complaining witness relative to his intent to commence a civil action against his assailants amounted to a denial of defendant's Sixth Amendment right to confrontation.[22] Two years later, Justice Weisberger, again on Sixth Amendment grounds, vacated a manslaughter conviction because the trial justice refused to allow cross-examination of defendant's wife relative to her arrest status at the time she gave police a statement that incriminated her husband.[23] Also included in the list of significant constitutional cases is the seminal case that sets forth the requirements necessary to establish the reliability and admissibility of an out-of-court identification of the defendant in a criminal case.[24] He also authored *State v. Alexander*,[25] an opinion that upheld the suppression of a significant amount of marijuana seized as a result of a warrantless search of a motel room rented by the defendant. In *Alexander*, Justice Weisberger rejected the state's contention that probable cause to believe that the room

19. *See* Burbine v. Moran, 475 U.S. 412 (1986).
20. *See id.* at 424.
21. *See* Mastracchio v. Houle, 416 A.2d 116 (R.I. 1980).
22. *See* State v. DeBarros, 441 A.2d 549 (R.I. 1982).
23. *See* State v. Freeman, 473 A.2d 1149 (R.I. 1984).
24. *See* State v. Pailon, 590 A.2d 858 (R.I. 1991).
25. 433 A.2d 965 (R.I. 1981).

might contain contraband was an appropriate justification for a warrantless search, holding that:

> [n]othing is more firmly established as a constitutional principle than the special protection afforded to dwelling places by the Fourth Amendment to the Constitution of the United States. Merely because officers may have probable cause to believe that a dwelling house contains contraband does not give officers permission to avoid the warrant requirement.[26]

The Chief Justice has also authored opinions on standing to challenge a violation of a co-defendant's Fifth Amendment rights[27] and standing to challenge a warrantless search and seizure of an automobile not owned by the defendant but in his possession and control.[28] He joined the majority in a three-to-two opinion that parted company with a majority of other states and struck down drunk driving roadblocks as violative of article 1 section 6 of the Rhode Island Constitution.[29] He was a member of the court that initially prohibited, pursuant to article 1 section 6 of the Rhode Island Constitution,[30] and then sanctioned,[31] warrantless automobile searches that are based upon probable cause. He authored an opinion that upheld the admissibility of a confession of an arson suspect that was obtained during a non-custodial interview of the defendant,[32] noting that the Miranda's prophylactic requirements are only triggered "when the dual elements of interrogation and custody are both present . . . ."[33] Recently, he joined the majority in an opinion that declared that the police have no authority to force a suspect to undergo a blood, breath or urine test in a drunk driving case, even where there has been a fatality; nor is there any authority that permits the courts of this state to issue search warrants for the forcible seizure of a suspect's bodily fluids.[34] In a striking concurrence in that case, the Chief Justice urged the members of the general assembly to begin to examine the state's drunk driving statutes and address the deficiencies in the current

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26. *Id.* at 967.
27. *See* State v. Ducharme, 601 A.2d 937 (R.I. 1991).
28. *See* State v. Pena Lora, 746 A.2d 113 (R.I. 2000).
29. *See* Pimental v. Dep't of Transp., 561 A.2d 1348 (R.I. 1989).
30. *See* State v. Benoit, 417 A.2d 895 (R.I. 1980).
31. *See* State v. Werner, 615 A.2d 1010 (R.I. 1992).
32. *See* State v. Caruolo, 524 A.2d 575 (R.I. 1987).
33. *Id.* at 580.
34. *See* State v. DiStefano, 764 A.2d 1156 (R.I. 2000).

statutory scheme.[35] Whether popular or unpopular, whether politically correct or incorrect, his decisions have been forthright and courageous. He is an example for all who aspire to the bench.

As a faithful student of the decisions of the United State Supreme Court, Chief Justice Weisberger has prepared annual synopses of opinions that impact both the bench and bar. These summaries, along with his stirring lectures, have been presented at the annual meetings of the Rhode Island Bar Association, usually to a packed auditorium. He is one of the state's foremost experts on the Bill of Rights and the jurisprudence surrounding the Fourth, Fifth and Sixth Amendments to the United States Constitution.

Chief Justice Weisberger is not only a student of the law, he is a teacher as well. Perhaps his greatest contribution to the judiciary of this nation has been his loyal service as a faculty member at the National Judicial College in Reno, Nevada. Since 1966, the Chief Justice has taught constitutional law to countless judges from every state and territory in the United States. As one of his former students (I was assigned to the first seat in the first row), I can personally attest to the enthusiasm and vigor that he exhibited in describing the situations that his infamous and fictitious Officer Muldoon encountered with suspects, citizens and the courts, all in the context of the Fourth and Fifth Amendments. His wonderful oratory skills have left a lasting impression on generations of trial judges throughout this country. At the conclusion of his lecture series, well into the second week of the school, he was given a standing ovation by my fellow classmates. I was informed that this recognition is fairly routine when the Chief Justice is on the faculty. Fittingly, his portrait hangs outside the lecture hall at the National Judicial College.

As my first chief justice enters his well-earned retirement and the next phase of his professional life, I join the many citizens, lawyers and judges of this state who wish him a long and happy tenure as a senior justice of this court. I will miss him.

35. *See id.* at 1170-74 (Weisberger, C.J., concurring).

Joseph R. Weisberger—Some Memories

Robert B. Kent*

In late 1961, Presiding Justice Louis W. Cappelli of the Superior Court of Rhode Island announced that the justices of the court had unanimously determined to undertake an effort to modernize the civil procedure system of the state, then based upon separate common law and equity practice. Associate Justice Joseph R. Weisberger was a member of that court. In April of 1962, I was asked to serve as reporter to the project, to work with the court and its advisory committee to draft rules patterned generally upon the Federal Rules of Civil Procedure. When the justices of the court promulgated the rules, effective in 1966, Justice Weisberger was a signer of that order.

Our working relationship became closer in 1972 when he became the presiding justice of the superior court. The arrival of comparative negligence in Rhode Island led to a reexamination of Rule 49, which dealt with special and general verdicts, the rules theretofore predicated on the doctrine of contributory negligence. The Presiding Justice worked closely, as he always has, with a bench-bar committee to craft a recommendation to amend the rule. Again, the job of drafting the rule and its explanatory note fell to me. By that time, the rule-making power of the superior court had been made subject to the approval of the supreme court. Presiding Justice Weisberger and I took the rule to the seventh floor, where we were asked for an additional explanatory memorandum. We produced it and obtained approval.

Soon thereafter, my own work in Rhode Island centered on the family court and a legislative commission on criminal law and procedure. In 1978, I was delighted by an invitation to appear at the

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legislative hearing on the election of Joseph R. Weisberger as an associate justice of the supreme court.

In 1980 came a move from Boston University to Cornell. It was not until 1992 that, shortly before he became acting chief justice, Justice Weisberger was instrumental in bringing me back for another look at the Rhode Island Superior Court Rules of Civil Procedure, which had been amended little since adoption in 1966, while the Federal Rules model had been transformed substantially by a series of amendments. The opportunity to work with a new generation of Rhode Island's judges and lawyers is one for which I shall always be grateful. Aside from one judge, the cast of characters was entirely different from those whom I had known in the sixties. The one exception: Joseph R. Weisberger. By the time the rules were ready for approval, the court was headed by its first chief justice appointed and confirmed under the new constitutional procedure.

I believe it is no secret that, when he was asked to undertake the formidable task facing him as acting chief justice in 1993, he had already contemplated retirement from the court and a career change. His willingness to remain in a time of trouble and to take on more, not fewer, responsibilities is totally in character. For seven-and-one-half years he has led the court with distinction, to its everlasting benefit and that of the State of Rhode Island.

Twice in recent years he has brought me back into contact with the judicial system. First came the supreme court's consideration of the amendment of Rules 404 and 405 of the Rhode Island Rules of Evidence, dealing with the admission of evidence of similar crimes in sexual assault and child molestation cases. In late 1997 the Chief Justice asked me to assist with this venture into an area where I had virtually no experience. We worked through a series of drafts. A public hearing evidenced considerable opposition, and the court created a committee of judges and lawyers to study the matter further and to report to the court, a committee chaired by Justice Maureen McKenna Goldberg. Working with that group was a challenge and a pleasure, and for me, an educational experience. The committee's report and the draft of amendments again met with opposition, particularly from the justices of the superior court. The supreme court decided to go no further with a rule change, leaving the subject for further judicial elaboration on a case-by-case basis, often a wise decision.

My final venture with the Weisberger court has not ended. The wide-ranging examination of the future of the courts, spearheaded by the Chief Justice, has focused considerably upon their structure. Although much has been advocated regarding court unification, I think it fair to say that there are times when change must come incrementally. I witnessed another facet of the Chief Justice's character, an ability to accept graciously committee conclusions with which he may not have agreed.

Justice Weisberger's contributions to the nation's judicial system are a matter of record. His essays in the Rhode Island Bar Journal cover a wide range of subjects; to mention a few: Bail in Criminal Cases; Courts and Canon 35 (cameras in court); World Peace Through Law. His involvement in the welcoming and orientation of young Rhode Island lawyers has been constant.

Finally, I come to legal education and to his support of Roger Williams University. Years ago he responded to my invitation to judge a moot court competition at Cornell. Later he was animated in our conversation about the founding of Rhode Island's first law school. He was active on its advisory committee. When the School of Law at Roger Williams University became a reality, he instantly rendered support in many ways, support that has continued to this day.

Lest admiration descend into sycophancy, I must report that we did not always agree (read: separation of powers). But his graciousness and good humor always shone through.

Recently I ran into a statement about his career that the judge composed a few years ago:

> My professional life for the last 42 years has been occupied with judicial duties. I have been blessed with the opportunity to meet ever-changing challenges and to attempt to solve a myriad of problems. These opportunities have been rewarding and absorbing. I consider judicial work to be a great privilege.

By his character, his intellect, his personality, his unfailing civility, Joseph R. Weisberger exercised that privilege to the betterment of society. Those of us who have had the opportunity to work with him have also been privileged, and we have benefited along the way.

Chief Justice Joseph R. Weisberger: A Reflection on the Jurist, the Intellectual, the Man

Victoria Lederberg*

> [T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.[1]

Alexander Hamilton would surely have recognized Joseph R. Weisberger as one of those rare persons who embodied the requisite integrity and had achieved the requisite knowledge to qualify as a judge's judge. At the time he relinquished his position as chief justice of the Rhode Island Supreme Court on February 24, 2001, he had been a jurist for forty-five years, longer than anyone in the history of Rhode Island. But the most notable feature of his tenure as a judge is not its length—as unique as that is—but the intensity, dedication, zest, breadth and quality of his service on the superior and supreme courts of our state. Two of my colleagues discuss the jurisprudential impact of his judicial opinions and writings, and another colleague recounts his experience as an attorney, fellow jurist and colleague of this unique individual.[2] This reflection sketches some of my observations of this remarkable justice's impact on the judiciary and on our community.

Being a judge is a way of life more than it is a profession or occupation, and for Chief Justice Weisberger, it has been a life that he has loved and that has permeated his existence. For in the law, he was totally fulfilled. On his fiftieth anniversary as a member of

* Senior Associate Justice, Rhode Island Supreme Court.

1. The Federalist No. 23 (Alexander Hamilton).

2. For a comprehensive profile of the Justice's life, see Patrick T. Conley, Esq., *Joseph R. Weisberger: A Life in Law*, R.I.B.J., Feb. 2001, at 5.

the Rhode Island Bar, he spoke of his love of the law and of the honor and privilege that he enjoyed as a member of the legal profession. As a judge, he quite naturally relished the opportunity to utilize his formidable skills as a teacher, mentor, scholar and author, consensus builder and leader, skills that have been shaped by earlier events in his life.

During his college years, Brown University's Sock and Buskin theater group was the favorite college extracurricular activity for Chief Justice Weisberger, whose rich, resonant voice and innate sense of drama and timing was honed in a variety of productions. Few, however, believe his comment that he spent more time in the theater than at his studies, given his *magna cum laude* undergraduate degree, his induction into Phi Beta Kappa and his awards for scholarship. He effortlessly enhanced the drama of the courtroom. His compelling voice, whether intoning the formalities of the court's procedures or challenging attorneys at oral argument, added dignity to our proceedings and fostered confidence in the ultimate resolution of cases that deeply affect people's lives.

It has been said that one never knows an issue as well as when one must teach it. Chief Justice Weisberger has taught Fourth and Fifth Amendment jurisprudence at the National Judicial College in Reno, Nevada for over thirty years and was regularly rated at the top of his teaching colleagues. His expertise in these areas has informed thousands of judges from all parts of the United States and visiting judicial officers from foreign countries. Because of the depth of his understanding of this area of the criminal law, his analyses of issues on appeal by defendants and the state are always compelling and difficult to refute. Consequently, he has had major influence on the criminal law of our state.

But the Chief's enthusiasm for teaching is not limited to educating judges. He routinely accepts with interest and dedication invitations to classrooms in local schools and colleges, as well as appearances on radio and television programs. The fact that he cares deeply about using all of these forums to promote public confidence in the judiciary speaks to his innate sense of duty and responsibility to the community and his faith in the importance of the rule of law in binding together the fabric of our nation of diverse and independent individuals.

Chief Justice Weisberger never hesitated to lead by being the first to comply with his own orders—clearly the mark of a good

leader and a precept he no doubt followed in his role as a Lieutenant Commander in the United States Navy during World War II. As chief justice, his share of the caseload of the supreme court was never less than that of his colleagues, and sometimes more, in addition to his administrative duties as head of the judicial branch of state government. In fact, he was a prodigious worker who reveled in all aspects of his role as chief justice. In particularly complex or novel cases, he produced his first drafts of opinions by arraying relevant case law, statutes and portions of the record before him on his large conference table and dictating the opinion to his secretary, at times in perfect, final form!

During his entire tenure, Chief Justice Weisberger worked many hours each day at the courthouse. But I learned, after commenting to him towards the end of my first year on the court that I found the commitment of time needed to fulfill the responsibilities of a supreme court justice to be surprisingly large, that he, too, spent hours each night and on weekends engaged in court work. His beloved wife Sylvia, whom he wed in 1951, has remarked that Joe Weisberger has never said, "Thank God it's Friday," but rather declared, "Thank God it's Monday," the time when he can return to where he wants to be—at court. His secretary has said that Chief Justice Weisberger feels the same about vacations—he would rather stay at the courthouse.

The Chief Justice's considerable knowledge of history is evidenced in his many writings. One example will suffice. In an excellent analysis of the United States Supreme Court's rulings in education, attorney advertising and obscenity,[3] Chief Justice Weisberger wrote a truly insightful commentary, replete with federal court cases on those issues, as well as ample illustrations from important relevant historical leaders and events. His discussion included references to George II, George III, William Pitt, Blackstone, Voltaire, Montesquieu, Diderot, Rousseau, Frederick the Great of Prussia, Maria Theresa of Austria, Catherine the Great of Russia, James Madison, Alexander Hamilton, Wars and Treatises and incisive analyses of the impact of leading significant Supreme Court cases on these issues.

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3. Joseph R. Weisberger, *The Bill of Rights and Benevolent Despotism: A Look at the Supreme Court's Role in Education, Regulation of Attorney Advertising and Obscenity*, 17 Suffolk U. L. Rev. 23 (1983).

One might not expect that a man of such great ability and character would also be patient and cordial to everyone, but he is, especially to his colleagues. Moreover, he is a man who has consistently participated in an amazing array of charitable and civic affairs, including religious organizations, bar associations and committees, hospitals and healthcare organizations and has enjoyed a distinguished political career and assisted countless other causes and events for which his help has been sought. At all times, he answered all his mail promptly, returns all phone calls and uniformly fulfills all his responsibilities with a sense of duty and caring. Despite his exceptional dedication to the law and to jurisprudence, he is equally a devoted husband, father and grandfather.

We who have had the privilege of working with him will celebrate his legacy and recount his irreplaceable skill in weaving into an analysis the precise Latin legal phrase that embodies the dispositive disposition of a case. His is a legacy that will always be a treasured part of the Rhode Island Supreme Court.

Tribute To Chief Justice Joseph R. Weisberger

Frank Q. Nebeker*

This is a tribute to Chief Justice Joseph R. Weisberger. Any similarity to the truth is purely deliberate and not coincidental.

Chief Justice Weisberger is a judge's judge, a teacher's teacher, a lawyer's lawyer, an historian's historian, a patriot and a most eloquent Churchillian speaker. He is also a man blessed with a great sense of humor and a wonderful, sing-along, baritone voice. These characteristics are taken for granted for those who know him, so what more can be said of him? There is much more and it is a humbling experience for me to elaborate on his wonderful qualities.

To know Joe in the ways described above, the reader ought first to know of his early manhood. The patriot in him first emerged in mid-1940 during his junior year at Brown University. It was not an auspicious beginning to start as a reserve apprentice seaman. He served aboard the U.S.S. Arkansas, a 1911 vintage battleship, which, like Joe, who was nine years younger, saw service through the war; but unlike Joe, she was sunk as a target ship during atomic testing at Bikini Atoll. Joe's explosive future lay ahead.

After graduating *magna cum laude* from Brown University in 1942, Joe saw Navy service throughout the war, ultimately in the Western Pacific. He attained the rank of Lieutenant Commander. His experience with seawater in the Navy, laying protective screening at ports against enemy torpedoes and submarines, undoubtedly enabled him to do an outstanding job (during his private practice days in 1950-1956) as counsel for the East Providence Sewer Commission.

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* Senior Judge, District of Columbia Court of Appeals; Chief Judge, United States Court of Appeals for Veterans Claims (retired).

Joe's 1949 graduation from Harvard Law School (member of Phi Beta Kappa) launched a legal career sparkling with unselfish public service, surely at a cost of far greater remuneration. Just a few years after that graduation he served as minority leader of the Rhode Island Senate. Seven years from that graduation, he assumed the bench as associate judge of the Rhode Island Superior Court and became its presiding judge in 1972. From there, he was elected by the state legislature for a lifetime term to the supreme court in 1978 and was acting chief justice for nineteen months before being elected by the legislature in 1995 as chief justice.

During his exemplary judicial service, Joe devoted much effort toward beginning, and continuing, a national undertaking to teach judges to be judges. The days of "trial and error" judging for new judges came quickly to a close.

It is hard to say whether Joe's educational efforts on behalf of the American judiciary have any topical focus. Of course, his boundless effort in annually producing a synopsis of United States Supreme Court decisions is one of his most recognized hallmarks. Stop to think for a moment: in any one year that Court produces hundreds of pages of factually and legally intricate decisions–some of esoteric federal concern, but many of vital concern to states. Joe's analysis of those decisions has been brilliantly thorough and yet easy to understand. In addition, the historian in Joe puts those decisions in context of the past to teach that "what's past is prologue."[1]

About the time the National Judicial College began its nationwide effort to help the American judiciary, it naturally sought out judges to teach judges. In 1966, ten years after assuming the Rhode Island trial bench, Joe began a thirty-three year cycle of teaching at the College. He often taught three separate courses in one summer. A review of the College curriculum for the last thirty-three years reveals that Joe's range of teaching included just about every topic that a trial judge needed to be current. He was first elected as a charter member of the faculty council and then a member from 1991 to 1995. Rigorous standards had been set for election to the faculty council–a governing body of delegated powers from the faculty, the board and the general by-laws.

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1. William Shakespeare, The Tempest act 2, sc. 1.

One cannot say Joe's teaching shone more brightly in one subject than in another. Regardless of his topic, there has been consensus among the judges in attendance that each was brought alive by his thorough and historical understanding of background, current issues and, above all, his mastery of oratory.

His capacity still untaxed, Joe then took on responsibilities with the Appellate Judges Conference, which he chaired in 1985-1986. He earlier led the National Conference of State Trial Judges. Following membership on the Council of the Judicial Administration Division, he served as a member of the House of Delegates of the ABA. He has been a member of the American Law Institute, a senior faculty member at the familiar New York University Appellate Seminars, and he has served on the Board of the National Center for State Courts. In 1986, he delivered the Robert H. Jackson Lecture, "An Independent State Judiciary: The Bulwark of Individual Liberty." These offices reflect his leadership ability; but an even greater attribute is, again, his scholarly and Socratic way of informing.

Soon after the beginning of the Appellate Judges Seminar Series, Joe became an outstanding faculty member. Again, all topics he taught came alive. Never did he receive less than the top rating from the participants' evaluations in the thirty or so seminars at which he spoke. That series has had the honor to present such "greats" as, for example, Professor Jesse Choper, Professor Erwin Chemerinsky, Dean Page Keaton, Dean Dan Meaedor, Professor Maurice Rosenberg, Burnie Witkin and Professor Calvin Woodward. Add to that partial list Joseph R. Weisberger, who can claim a very large share of the success in planning and delivery of that thirty-year old program.

One measure of the esteem in which he is held, in and beyond the legal profession, is the number of honorary degrees he has received–eleven. It comes as no surprise that Brown University has conferred two such degrees.

The awards conferred upon Joe bespeak his awesome accomplishments: The Erwin Griswold Award for Excellence in Teaching at the National Judicial College for twenty-three years (1989); that same year, the Herbert Harley Award by the American Judicature Society; the Goodrich Award for Service to Rhode Island Taxpayers by the Rhode Island Expenditure Council in 1995, the year he became Chief Justice.

Of all these honorary degrees, one warrants comment and possible analysis. The degree is dubbed "DBA," which probably denotes a doctorate in business administration. However, the plot thickens. During my fifteen or so years of close friendship with Joe (in which I take great pride), I have noticed his keen taste in the finer aspects of nourishment. And now we can know the full story. The conferring institution is the Johnson and Wales University–a renowned school of the culinary arts. Knowing Joe's epicurean tastes, I am sure the degree was awarded on the basis of his reputation for those finer things; his taste for them preceded that award by many years.

This tribute would not be complete without explaining in some detail one of Joe's most significant contributions to judicial independence in the last century. In 1983, the United States Supreme Court affirmed a holding of the United States Court of Appeals for the Fourth Circuit that a Virginia State magistrate could be enjoined, under 42 U.S.C. § 1988, from a practice of committing, in lieu of bail, persons charged with a fine-only offense.[2] In the fee aspect of the case, that Court held that judicial immunity was no bar to imposing payment of attorney's fees upon the magistrate under 42 U.S.C. § 1988.[3] In the ensuing years, many injunctive actions throughout the country resulted in § 1988 awards of attorney's fees. While permissively constitutional, such orders had a chilling effect on judicial independence. Indeed, many judges sought shelter from personal liability through insurance.

Armed with solid support from the state judges, Joe carried on a thoughtful and high-toned effort, in writing and through testimony, to persuade Congress to amend § 1988 to remedy this erosion of judicial independence through lack of judicial immunity. His effort took a number of years, but in 1996 it proved successful. Today, § 1988 reads in pertinent part that attorney's fees may in certain actions be allowed the prevailing party:

> [E]xcept that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.[4]

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2. *See* Pulliam v. Allen, 466 U.S. 522 (1984).
3. *See id.* at 523.
4. 42 U.S.C. § 1988 (1994) (Supp. IV 1998).

Completeness of this tribute also demands grateful acknowledgment that Joe has not been alone in his many outstanding accomplishments. Through his hundreds of thousands of miles of travel and many months away from home, through his forty-five years on the bench, his wife of forty-nine years has stood with him, nursed him when he needed care and always encouraged him. On behalf of a nation that doesn't know how much it owes both of you, I say thank you Sylvia.

A Tribute to Chief Justice Weisberger

Anthony J. Santoro*

I am very honored to participate in this well-deserved tribute to Chief Justice Joseph R. Weisberger. There are many reasons to celebrate the life and career of Chief Justice Weisberger. For half a century he has demonstrated distinguished and selfless devotion to public service, to the rule of law and to the administration of justice.

Rhode Island has given birth to many citizens who have served the public, but few have served in as exemplary a manner as has Chief Justice Weisberger. He served his country with distinction as a Naval officer in World War II. He then served his state as a senator in the Rhode Island legislature until drawn to the bench where he served for two decades as a judge of the superior court. In 1978 he was called to service as an associate justice of the Rhode Island Supreme Court, a position for which he was eminently well qualified by reason of experience, intelligence, learning and temperament.

As an associate justice he earned national repute and respect, sharing his legal acumen with the American Law Institute, the American Bar Association, the National Judicial College and other organizations of lawyers and judges as well as with numerous citizen's groups. Without more, Chief Justice Weisberger would be admitted to the pantheon of truly distinguished Americans. However, by an odd and tragic confluence of events, Chief Justice Weisberger proved himself to be truly selfless, truly dedicated to the welfare of the public he already had served so well.

No stranger to controversy surrounding its public servants, Rhode Island was rocked with a series of judicial scandals extremely damaging to the legal profession generally and to the administration of justice in Rhode Island specifically. Two of these

* Chancellor, Roger Williams University; President and Professor of Law, Ralph R. Papitto School of Law.

scandals reached the very pinnacle of the judicial hierarchy, compelling the resignation of two chief justices. With the second resignation, an immediate consensus arose—only one man had the stature and reputation for integrity and ability to restore dignity and vitality to the judicial system in Rhode Island. That man was Joseph R. Weisberger. However, he had earlier announced his resignation from the supreme court to assume an important position with the federal judiciary. At considerable sacrifice in terms of both income and opportunity, Justice Weisberger responded to the call and accepted the position of acting chief justice and later that of chief justice of Rhode Island. He was committed to restoring respect for a battered judiciary and to serving the needs of Rhode Island.

What Chief Justice Weisberger has been able to achieve since those dark days of 1993 has been remarkable. Today the judiciary has been restored to the lofty position that it merits. For his efforts in this regard, Chief Justice Weisberger is owed the unqualified thanks of all Rhode Islanders.

That said, it must also be noted that those of us intimately involved with this law school—students, staff and faculty—have another, more personal reason to give tribute to Chief Justice Weisberger. It is said, to paraphrase an old saying, that a bad idea is an orphan and that a good idea has many parents. So it was with the idea to start this law school. Many important people gathered together to give birth to this law school and rightly may be considered a parent of the law school, but few played as pivotal a role as Chief Justice Weisberger. At the request of the Chairman of the Board of Trustees, Ralph R. Papitto, Justice Weisberger assumed the chairmanship of the Law School Study Committee in 1989. In May 1991, Justice Weisberger, reporting for the committee, stated its findings, noting that it started its work based upon certain assumptions including the following:

> The establishment of a high quality law school in the State of Rhode Island with an outstanding faculty and a well-qualified student body would be a significant addition to the intellectual, cultural, and legal quality of our state. Such a law school would contribute not only to the education of potential candidates for the bar, but would also be of great importance and significance in the establishment of mechanisms for continuing legal education of both new and experienced members of the bar. The faculty would provide resources for research

> not only relating to Rhode Island law but relating to those aspects of constitutional law which impact the State of Rhode Island as well as all other governmental entities throughout the United States. Thus it was believed by a majority of the committee that the legal culture of Rhode Island would be stimulated and enhanced by the creation of a critical mass of significant intellectual resources.[1]

The Study also noted that:

> the decision to establish a law school was to a great extent an irreversible moral commitment. When students are admitted to study in a new law school, they have a right to expect that the sponsoring agency will proceed toward full accreditation as soon as the American Bar Association will permit.[2]

On the basis of those assumptions the committee investigated the feasibility of establishing a law school. The committee concluded that "its initial assumptions on the benefits to be derived from a law school in the State of Rhode Island were valid."[3] It also recommended that a further, more detailed feasibility study was warranted. The Board of Trustees agreed, voting to pursue the issue of a law school for Rhode Island further.

It was at this point that Dean James P. White, Consultant on Legal Education to the American Bar Association, and I met with Chairman Weisberger, Chairman Papitto and other members of the committee and Board of Trustees. Very impressed with the work of the committee and the commitment of the Board of Trustees, we agreed to help with the effort to establish Rhode Island's first law school.

The rest of the story is now well known. The second study indicated that a law school was needed and that it could fulfill the role that Chief Justice Weisberger believed would enhance the legal culture of Rhode Island. The Board of Trustees agreed, committing several million dollars to the effort. In 1993, a brand new law school opened its doors to students and is now, eight years later, fulfilling the mission originally envisioned for it.

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1. Report from Justice R. Weisberger, Chairman, Preliminary Feasibility Study to Establish a Law School at Roger Williams College, Bristol, Rhode Island, to the Law School Study Committee 1 (May 13, 1991) (on file with Roger Williams University Law Review).

2. *Id.*

3. *Id.* at 4.

While it may have been possible to establish a law school without the efforts of Chief Justice Weisberger, it is unlikely that it would have been launched as quickly and as successfully. Chief Justice Weisberger brought to the project leadership, prestige, wisdom, vision and the ability to articulate the need. Without his involvement it is quite likely that the project would have languished. For that reason, students, faculty, staff and, to the extent that the law school continues to fulfill the mission envisioned by Chief Justice Weisberger, the organized Bar and the public are again indebted to a man who has proved himself to be a truly distinguished public servant.

Joseph R. Weisberger: Casting A Long Shadow

Bruce M. Selya*

The third branch of government tends to be the most anonymous of the three. Yet some judges, by the sheer dint of their accomplishments, acquire a high level of visibility.

Of course, fame usually must be taken with a grain of salt: common experience teaches that reputation often is an uncertain barometer of merit. But that phenomenon is much less likely to occur in the cloistered corridors of the judiciary. After all, when a governor makes a decision or a legislator votes for a bill, speculation as to his underlying motives frequently runs rampant–but when a judge decides a case, he authors an opinion and lays bare for the world to see the force or weakness of his ratiocination, the depth or shallowness of his insights and the extent to which he has conquered or failed to conquer the intricacies of a particular case and a particular area of the law.

In times gone by, many–I dare say most–renowned jurists forged their reputations in the state courts. Consider the litany that springs to mind when asked to enumerate, say, the outstanding judges of the era from the mid-1800s to the mid-1900s. Unquestionably, the first name on most lists would be Oliver Wendell Holmes. Justice Holmes earned a towering reputation during two decades of service as a justice of the Massachusetts Supreme Judicial Court from 1882 to 1902. His subsequent service as a Justice of the United States Supreme Court built on the foundation he had laid so ably in Massachusetts.

Nor is Justice Holmes an isolated example. Benjamin N. Cardozo, too, came to public prominence as a state court judge (in his case, through eighteen years of exemplary service as a judge of the

* Judge, United States Court of Appeals for the First Circuit; Chair, Rhode Island State-Federal Judicial Council; Adjunct Professor of Law, Boston College Law School; Adjunct Professor of Law, Boston University School of Law.

New York Court of Appeals). While Cardozo did spend six years as a Justice of the United State Supreme Court, his most influential, most enduring opinions were handed down during his state court tenure. Few judges, federal or state, have made a greater impact on the development of the law than did Cardozo in his most heralded opinion, *MacPherson v. Buick Motor Co.*[1] Like Holmes, Cardozo was able to mold the development of American law from his perch on a state court bench.

So too Judge Roger J. Traynor, a mainstay on the California Supreme Court for thirty years (including six as chief justice). He moved the law in a fashion similar to Holmes and Cardozo, playing a leading role in the development of concepts–familiar today but recondite at the time–such as strict liability and intentional infliction of emotional distress.

That the mantle of greatness was draped over the shoulders of state court judges for the last half of the nineteenth century and the first half of the twentieth century may have been due to the fact that there were many more state judges than federal judges. But I daresay that simple arithmetic was not the proximate cause of this reputational imbalance. In my view, that pattern developed chiefly because those matters most relevant to people's lives were much more likely to come before state tribunals.

By the mid-point of the twentieth century, the arithmetic remained substantially the same; state judges still vastly outnumbered their federal counterparts. Yet, the tectonic plates had shifted. As society became ever more complex, the proliferation of federal statutes, the rise of the administrative state, the increasing dominance of the national government, the civil rights movement, the intensified use of the federal Constitution as the primary tool for protecting individuals against abuses of official power and a plethora of other factors combined to make federal court decisions more relevant to more people, and thus to focus greater attention on the federal judiciary. Not surprisingly, then, the names of the judges that first come to mind when one is asked to list the outstanding jurists of the latter half of the twentieth century tend to be those whose roots are exclusively in the federal system. These jurists include not only a number of Justices of the United States Supreme Court–leaving to one side justices who are still serving,

1. 111 N.E. 1050 (N.Y. 1916).

the names Jackson, Harlan, Brennan, and Powell spring readily to mind–but also persons such as Judge John Minor Wisdom, who served with distinction on the Fifth Circuit Court of Appeals for forty-two years (and who is rightfully credited with having performed pathbreaking work in respect to civil rights); Judge Henry J. Friendly, who graced the bench of the United States Court of Appeals for the Second Circuit for twenty-seven years and who is widely regarded as the most learned judge of his time; Judge Frank M. Coffin, who continues to serve on the First Circuit Court of Appeals some thirty-five years after his appointment and whose book *The Ways of a Judge*[2] continues to be required reading for anyone who aspires to the bench; and Judge Richard A. Posner, perhaps the most influential legal thinker in America today, who authored the seminal work underpinning the law and economics movement and who since has enhanced his already colossal stature by distinguished service for two decades as a member of the United States Court of Appeals for the Seventh Circuit.

However pronounced this shift may be, the pendulum has not swung all the way. Any fair-minded effort to assemble a pantheon of notable contemporary jurists necessarily will include a number of state court judges. Chief Justice Joseph R. Weisberger is one of them. He is a man who, from the bench of a relatively obscure state court–Rhode Island, much as we love it, is not New York or California, or even Massachusetts–has cast a long and storied shadow.

Chief Justice Weisberger has authored over eight hundred decisions while serving on Rhode Island's highest court for more than two decades. At this point, his opinions constitute nothing short of a body of law. Collectively, they attest to his mastery of abstract legal principles, his knack for refining those principles into workable legal structures and his skill in interweaving an encyclopedic knowledge of the law with a profound insight into the human condition and the dynamics of interpersonal relations.

The temptation, at this point, is to undertake an exegetic canvass of those Weisberger opinions that have enduring importance in a rapidly changing world. I leave that task to others. For my part, it suffices to say that virtually every Weisberger opin-

2. Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980).

ion–from his meticulous exposition of the historical development of the doctrine of custodial interrogation in *State v. Burbine*,[3] to his deft handling of the First Amendment in *Capuano v. The Outlet Co.*,[4] to his thoughtful analysis of the limitations on a court's inherent powers in *State v. DiPrete*[5]–exhibits care and craftsmanship. Moreover, his opinions demonstrate a penchant for reasoned analysis–analysis that considers both abstract legal principles and their effect in real life terms. Finally, reading a Weisberger opinion leaves one assured that the author has thought it through, taken nothing for granted, researched every precedent and gotten to the heart of the matter.

Joseph Weisberger was in grammar school when the Honorable Cuthbert W. Pound wrote that "[w]e rate the judge who is only a lawyer higher than the judge who is only a philosopher."[6] That is true as far as it goes–but it does not go far enough. In the last analysis, we reserve the highest encomium for the judge who is both a consummate lawyer and a gifted philosopher. Rhode Island has been fortunate to have such a man as a member of its highest court for the past twenty-three years. As he departs, with our gratitude and our acclaim, he should do so confident that he leaves a legacy that will enrich all students of the law–indeed, all Americans–for many years to come.

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3. 451 A.2d 22 (R.I. 1982).
4. 579 A.2d 469 (R.I. 1990).
5. 710 A.2d 1266 (R.I. 1998).
6. Cuthbert W. Pound, *Defective Law–Its Cause and Remedy*, 1 N.Y.S. Bar Bull. 279, 285-86 (1929).

Rhode Island Chief Justice Joseph R. Weisberger

Donald F. Shea*

The recent retirement of Rhode Island Supreme Court Chief Justice Joseph Robert Weisberger presents an opportunity for him to begin what we hope are many years of well-earned leisure. It also allows his friends and colleagues to reflect upon what is undeniably the longest—and certainly among the most distinguished—judicial careers in both the State of Rhode Island and the nation and to celebrate this outstanding man's extraordinary achievements.

JOSEPH WEISBERGER - HIS EDUCATION AND CAREER

The themes that became central to Chief Justice Weisberger's legal career were apparent early in his life. From his earliest days he has shown his love for and his dedication to education, excellence and serving the citizens of his home state.

Joseph Weisberger was born and educated in the state in which he would become a leader. A product of the public schools in Providence and Cranston, he entered Brown University in the fall of 1938. While a student at Brown, he developed a record of excellence and accomplishment, demonstrating his understanding of the importance of education. He was elected to Phi Beta Kappa and the National Honor Society and became both a James Manning Scholar[1] and a Francis Wayland Scholar.[2] His experiences at Brown presaged other aspects of his future life and career as well.

Yet, despite the obvious importance to him of his education, he interrupted his college education in 1941 to serve in the United

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1. This scholarship was named after the founder and first president of Brown University who served from 1764-1791.

2. Similarly, this scholarship was named after the fourth president of Brown University who served from 1827-1855.

States Navy from 1941 to 1946. This service again foreshadowed Justice Weisberger's future life, indicating his commitment to serving his fellow Rhode Islanders through government service. His service in the military included a two-year tour of duty in the Pacific Theatre followed by service in the Japanese Occupation Force after World War II ended.

He ultimately returned to Brown and graduated *magna cum laude* with a degree in history.[3] He then left the State of Rhode Island—although briefly—to attend Harvard Law School, graduating with a *juris doctor* degree in 1949. He returned to his home state upon graduation and engaged in the private practice of law in Providence from 1949 until 1956.[4]

Justice Weisberger began judicial service to the state of Rhode Island in 1956. Beginning on February 17, 1956, and continuing until February 24, 2001, Justice Weisberger served as a judge for the State of Rhode Island. This forty-five year tenure constitutes the longest judicial career in Rhode Island history and remarkable service to Rhode Island and the nation. His career spanned the terms of ten Rhode Island governors.[5]

Justice Weisberger's judicial service began with sixteen years as an associate justice on the Rhode Island Superior Court and was followed by five years as that court's presiding justice. From 1978 until his recent retirement, he served on the Rhode Island Supreme Court,[6] including fifteen years as an associate justice and just short of eight years as its chief justice.[7]

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3. Although Justice Weisberger actually completed his studies at Brown in 1947, he is considered a member of the Class of 1942, the class with whom he would have graduated but for the interruption in his education due to his military service.

4. Joseph Weisberger was a member of the Rhode Island Senate, representing the City of East Providence, from 1953 to 1956, serving as that chamber's Minority Leader from 1955 to 1956.

5. Appointed by Governor Dennis J. Roberts in 1956, he served through the tenures of Governors Del Sesto, Notte, Chafee, Licht, Noel, Garrahy, DiPrete, Sundlun and Almond.

6. This writer had the privilege and honor of serving with Justice Weisberger both on the superior court (from 1972) and on the supreme court (from 1981 until the writer retired in 1995).

7. After announcing his retirement and accepting a position offered to him by the U.S. Court of Appeals for the First Circuit in 1993, Justice Weisberger answered the call of the bench and bar and agreed to submit his name for consideration as the Chief Justice of the Rhode Island Supreme Court. This decision to remain on the Rhode Island bench and assume the position of Chief Justice was a

Although longevity is certainly a characteristic to note upon Justice Weisberger's retirement, it is not the defining attribute of his career. More significantly, during his years of service on the superior and supreme courts, he has set the standard of what a trial judge and an appellate judge should be. He is a judge's judge—an outstanding, insightful jurist, a dedicated and exceptional teacher of the bench and bar and a fierce advocate for the judicial system. As a result, the effects of his accomplishments during his distinguished tenure have been and will be felt for decades to come both in Rhode Island and throughout the United States.

JOSEPH WEISBERGER - THE JURIST

Others will chronicle the significant and noteworthy contributions Justice Weisberger made to the body of substantive law in his forty-five years on the bench. Such a review of his substantive decisions, although important, will tell only part of the story of Justice Weisberger's contributions as a jurist. We must also consider how his activities in addressing two of his concerns exemplify his accomplishments and contributions as a jurist: how the public interacts with the court system and the standards of professionalism the legal system sets for itself.

With regard to public interaction with the courts, Justice Weisberger would often cite the fall of the Roman Empire as an example, noting that public faith in the legal system is a requirement if that system is to survive. He believes education is the key to restoring public confidence in the legal system, and he put that belief into practice.

In 1994, Chief Justice Weisberger created a User-Friendly Committee of the Rhode Island Supreme Court. He appointed judges, lawyers, court personnel and members of the public to the committee. The committee has explored ways of sensitizing all court personnel to the fears, discomforts and uncertainties of our citizens who must use public services and buildings and otherwise helping members of the public who come into courthouses for information or assistance.

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personal sacrifice for Justice Weisberger, but it was of great importance in restoring public confidence in the integrity of the Rhode Island courts. Under Chief Justice Weisberger's leadership, the reputation of the Rhode Island Supreme Court has been without a blemish.

An important goal, and accomplishment, of this committee is to educate citizens about the judicial system and about how to have access to that system. As the Chief Justice has said, "[i]n a democracy, knowledge of how our government works is one of the most important elements we must have in order to preserve our government."[8] His establishment of the User-Friendly Committee will have a lasting effect by putting in place an established mechanism to assure continued public education and access to the workings of the judicial branch of government in Rhode Island.

He has an abiding love of the legal profession, as demonstrated by his statements to the incoming students at Rhode Island's only law school–the Roger Williams University Ralph R. Papitto School of Law[9]–that he still "feels as proud and excited as [he] did fifty years ago" when he entered the legal profession. To ensure that this pride and excitement lasted for him and other members of the profession forever–by raising standards of professionalism practiced throughout the bench and bar–the Chief Justice created the Committee on Professionalism and Civility in 1995, the year after he established the User-Friendly Committee.

He appointed highly respected attorneys, judges and lay persons to the Committee on Professionalism and Civility. Its responsibility is to foster an atmosphere of civility and professionalism among attorneys, judges, litigants and witnesses.

The committee adopted the "Standards for Professional Conduct Within the Rhode Island Judicial System" which deals with such topics as a lawyer's obligations to his or her clients, to opposing counsel, to the court, to the public and to our system of justice. The standards also address a judge's obligations to lawyers, parties, witnesses and each other.

These standards inform all interested parties of the level of conduct the court expects from them and others. Reports from the bench and bar indicate that, although the standards do not have the force and effect of law, they have served as a reference tool for attorneys and judges and have served to improve the level of pro-

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8. Seth Kerschner, *Weisberger '42 to Retire from State Supreme Court*, Brown Daily Herald, Sept. 14, 2000, at 1.

9. Chief Justice Weisberger was instrumental in the establishment in 1992 of Rhode Island's first, and only, law school, as chair of the feasibility study which recommended the establishment of the law school, and he has continued to support the law school.

fessionalism of lawyers and judges throughout the state. The standards, which are now published in the Rhode Island Court Rules, will continue to serve the judicial system well beyond Chief Justice Weisberger's tenure on the bench.

JOSEPH WEISBERGER - THE EDUCATOR

Chief Justice Weisberger believes that "you're condemning yourself to a life of a perpetual student" when you enter the legal profession.[10] It is a "course of study that never stops."[11] To assist others in this continuing education process, Justice Weisberger has been a leader in judicial education throughout the country.

Justice Weisberger is so well-known nationally as a result of his work as an educator that most Rhode Island judges have shared the experience of attending a seminar or conference in another state and hearing as the first question from a judge who learns you are from Rhode Island: "Do you know Joe Weisberger?" Invariably, the questioner is one of his former students.

Justice Weisberger has been a regular faculty member at the National Judicial College in Reno, Nevada. The National Judicial College serves as the primary education site for state judges throughout the United States. Justice Weisberger has had the honor of teaching at the National Judicial College every year for thirty-four years. This writer estimates, based on average class size, that over those years Justice Weisberger lectured to between 3,500 and 4,000 state court judges.

Whatever the number of students who have had the privilege of being taught by Justice Weisberger at the college, it is apparent he has been one of the most popular lecturers there. It became a tradition for his students to recognize his excellence by giving him a standing ovation after his final lecture each year. Retired Justice Florence K. Murray, an associate of Justice Weisberger for forty years, who had served as chairperson of the Board of Trustees of the National Judicial College, stated of Justice Weisberger that "he has literally given his life as well as his talents to the professional part of the judiciary."

His primary subjects at the National Judicial College have been Fourth and Fifth Amendment issues, principally search and

10. *See Kerschner*, *supra* note 8.
11. *See id.*

seizure, double jeopardy and custodial interrogation. His peers would affirm that the Chief Justice is one of the country's leading judges in expertise on United States Supreme Court criminal decisions. Each year he abstracts and critiques what he determines to be the "impact" decisions of the previous term of the United States Supreme Court. These abstracts are bound and published by West Publishing annually. They are made available to jurists in connection with his lectures at the appellate justice seminars and have found their way onto benches and into chambers around the country. The published abstracts have also become a very sought after item for attorneys and judges attending the American Bar Association and Rhode Island Bar Association annual meetings.

Beyond his work at the National Judicial College, Justice Weisberger has lectured at conferences and seminars in all fifty states. He has also lectured in Canada, Great Britain, Germany, Malta and Cyprus on the Bill of Rights of the United States Constitution. Further, Chief Justice Weisberger has served as an educator through the leadership roles he has taken in professional organizations. He served as "National Chairperson of the Conference of State Trial Judges" in 1977 and 1978. After he became acting chief justice and was later confirmed as chief justice, he was active in the Conference of Chief Justices and in the Appellate Judges Conference of the American Bar Association. He served as the Appellate Judges Conference's National Chairperson in 1985 and 1986.

Chief Justice Weisberger's role as an educator has been recognized many times, most notably in the thirteen honorary degrees various educational institutions have bestowed upon him. His contributions have earned him the high esteem of judges throughout this country, both state and federal.

JOSEPH WEISBERGER - THE ADVOCATE

During the many years in which this writer has had a professional relationship with Chief Justice Weisberger, the writer has never seen such a fierce and effective reaction from him as his response to the United States Supreme Court's 1984 decision in *Pulliam v. Allen*.[12] Soon after that decision Justice Weisberger embarked on what would become a twelve-year crusade that ended

12. 466 U.S. 522 (1984).

successfully in 1996 when President Clinton signed a law that, in essence, overturned the result in *Pulliam*.

In *Pulliam*, the United States Supreme Court, in a five-to-four opinion, set aside 400 years of consistent judicial decisions concerning judicial immunity.[13] The question in *Pulliam* was the scope of judicial immunity from a civil suit seeking injunctive and declaratory relief under federal civil rights laws.[14]

The plaintiffs in that case had brought a federal civil rights suit against a Virginia magistrate challenging the magistrate's practice of incarcerating persons awaiting trial for nonincarcerable offenses.[15] The federal district court found that the practice violated due process and equal protection and issued an injunction.[16] The district court also found that the plaintiffs were entitled to costs and attorney's fees pursuant to 42 U.S.C. § 1988.[17] The magistrate appealed the order that she pay $7,038 in attorney's fees, arguing that, as a judicial officer, she was absolutely immune from an award of attorney's fees.[18]

In the United States Supreme Court, Justice Blackmun, writing for the majority, concluded that judicial immunity is no bar to prospective injunctive relief, such as the order the district court had issued in that case.[19] The majority opinion further concluded that judicial immunity did not bar the award of attorney's fees against the magistrate under 42 U.S.C. § 1988.[20]

Justice Powell, in his vigorous dissent from the majority opinion, stated the majority decision "eviscerate[d] the doctrine of judicial immunity that the common law so long has accepted as absolute."[21] The dissent cited an unbroken line of decisions repeatedly reaffirming judicial immunity.

In the aftermath of the Supreme Court's opinion, lawsuits against state court judges alleging violation of 42 U.S.C. § 1983 ("the Civil Rights Act of 1971") proliferated around the country. Judges throughout the country–and the American Bar Associa-

13. *See id.* at 541-44.
14. *See id.* at 525.
15. *See id.*
16. *See id.* at 526.
17. *See id.* at 527.
18. *See Pulliam*, 466 U.S. at 527.
19. *See id.* at 541.
20. *See id.* at 544.
21. *Id.* (Powell, J., dissenting).

tion–became concerned about the effects of the *Pulliam* decision upon independent judicial decision-making. The importance of that independence was recognized even by the majority in *Pulliam*:

> It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.[22]

In 1985, while he was Chairperson-Elect of the ABA Appellate Judges Conference, Justice Weisberger began his quest to restore the rule of judicial immunity in this country. He, with the help of the federal and state judges, was able to guide through the House of Delegates of the American Bar Association a resolution that called for the restoration of judicial immunity.

While that work was being done, Justice Weisberger drafted an article entitled *The Twilight of Judicial Independence*—Pulliam v. Allen, which was published in the *Suffolk University Law Review* in the fall of 1985.[23] That article became the legal basis for arguments presented to the ABA House of Delegates and, later, to members of Congress, including the Committee on Judiciary of the United States Senate.

As a result of Justice Weisberger's efforts, legislation in the form of Senate Bill 1887 was introduced in the United States Senate. That bill included an amendment to 42 U.S.C. § 1988 prohibiting the award of costs or attorney's fees against judicial officers for acts or omissions taken in the officer's judicial capacity unless the action was clearly in excess of the officer's jurisdiction. While that legislation was pending, Justice Weisberger, as well as other ABA members and representatives of the Conference of Chief Justices and American Judges Association, testified before the Senate Judiciary Committee. Justice Weisberger's crusade to restore judicial immunity ended successfully in 1996 when President Clinton signed Senate Bill 1887 into law.

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22. *Id.* at 532 (citing Bradley v. Fisher, 13 Wall. 335, 350 (1872) (quoting Scott v. Stansfield, 3 L.R. Ex. 220, 223 (1868))).

23. Joseph R. Weisberger, *The Twilight of Judicial Independence*—Pulliam v. Allen, 19 Suffolk U. L. Rev. 537 (1985).

Justice Weisberger gives great credit for the ultimate passage of the legislation to Senators Heflin and Thurmond, as well as chief justices from several states who supported the amendment. However, all of those people and many more give full credit for the success to Justice Weisberger, who initiated the crusade, waged it relentlessly and deserves commendation for its successful conclusion.

Justice Weisberger's zealous and effective advocacy on this issue was an important service to the judges of America by restoring their ability to make independent and unbiased decisions without looking over their shoulders for fear of being sued by disappointed litigants.

CONCLUSION

In conclusion, this writer is honored and privileged to have had the opportunity to serve with such a distinguished jurist, educator and advocate as Chief Justice Joseph R. Weisberger. This man is a great intellect, a dedicated public servant of high ethical principles and an exceptionally fine person. We are all fortunate to have had a man with this remarkable combination of talents serving the State of Rhode Island and the entire country for so many years. Chief Justice Weisberger leaves an indelible mark on Rhode Island's legal history. His positive legacy will benefit us for generations to come.