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## THE CHANCELLOR'S BOOT

*Stephen B. Burbank\**

It is a privilege to comment on a paper by Judge Weinstein, of whom one can say, after Justice Jackson: "He is not non-final because he is inferior, but he is inferior only because he is non-final."<sup>1</sup> At least comparing the Judge's opinion on Rule 11 sanctions in *Eastway Construction Corp. v. City of New York*<sup>2</sup> with the opinions of his "superiors"<sup>3</sup> leaves that abiding impression. A comparison of those opinions also recalls another tribute to Walter Wheeler Cook,<sup>4</sup> whose deconstruction of Joseph Beale's vested rights theory, in the words of Brainerd Currie, "discredited . . . [it] as thoroughly as the intellect of one man can ever discredit the intellectual product of another."<sup>5</sup> One hears much these days about the independence of the federal judiciary; one hears less about the independence of individual federal judges. I suspect that Judge Weinstein's years in academe contributed more than deep learning to his career as a judge.

For one in my position to spend all his time distributing bouquets would be as surprising as a book reviewer spending *any* of his time talking about the book.<sup>6</sup> Lest I surprise the

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\* Professor of Law, University of Pennsylvania. A.B. 1968, J.D. 1973, Harvard University. The author presented these comments on Judge Weinstein's paper, together with comments on a paper by Dean Paul Carrington, Duke Law School, at the meeting of the Section of Civil Procedure, American Association of Law Schools, on January 9, 1988.

<sup>1</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>2</sup> 637 F. Supp. 558 (E.D.N.Y. 1986) (demonstrating on remand why sanctions inappropriate).

<sup>3</sup> *Eastway Const. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (reversing denial of sanctions and requiring sanction of attorney's fees); *Eastway Const. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987) (increasing sanction of \$1,000 imposed by Judge Weinstein on client to \$10,000 on client and attorney without explanation why the former constituted an abuse of discretion).

<sup>4</sup> Dean Carrington's paper, *see supra* note \*, was entitled "An Appreciation of Walter Wheeler Cook, *Erie*, and the Rules Enabling Act."

<sup>5</sup> B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 6 (1963).

<sup>6</sup>

Book reviews are of two types: those in which the reviewer has read the book, and those (the vast majority) in which he has not. When the book has been read this is shown by pointing out a few printers' errors, but this is the only difference between the two, and, normally, a perfectly satisfactory review

reader, I will offer a few observations about Judge Weinstein's paper that are intended to suggest different perspectives, perspectives that may inform our thinking about the procedure of the future.

In his paper Judge Weinstein demonstrates both the powerful vision of justice that has marked his career as a judge and the practical vision of politics that has marked his career as a scholar. The paper raises, at least for me, the question whether the Judge has succeeded in reconciling those visions and, more important, whether they can and should be reconciled as we contemplate procedure for the twenty-first century.

Judge Weinstein indicates that, in his courtroom, "the federal rules are of little significance."<sup>7</sup> He also chronicles various respects in which the system of open access that came to be associated with the Federal Rules of Civil Procedure has in recent years been modified, formally and informally, attributing a decline in "society's egalitarian consciousness"<sup>8</sup> to "massive demographic, economic and sociological factors rather than the details of the Federal Rules."<sup>9</sup> But, having earlier observed that "[j]udicial reform, though almost invisible, can have powerful secondary effects on society,"<sup>10</sup> he takes heart in the notion that "the inertia inherent in any procedural system, and the institutional structures which have an interest in maintaining the status quo, ensure that swift radical changes in procedure are unlikely."<sup>11</sup> Finally, Judge Weinstein finds in the Federal Rules and *Erie* "useful windows into the personality of our legal system," which he defines as "compassion for people who claim to have been wronged, . . . reliance on the good sense of judges, . . . faith in the usefulness of lawyers, and, ultimately, . . . optimistic confidence that the people will use their political institutions for what is right and decent."<sup>12</sup>

What we have here, I suggest, is a combination of personal

can be produced after a brief perusal of the Author's Preface, which is designed for just this purpose.

Anonymous, *How to Become a Jurist*, 7 J. Soc'y Pub. L. Tchrs. 129, 133 (1963).

<sup>7</sup> Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1, 28 (1988).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Id.* at 29-30.

politics and wishful thinking. To the extent that the Federal Rules are merely charters for discretionary decision-making,<sup>13</sup> it is no surprise that they are of little significance in Judge Weinstein's courtroom — or in the courtroom of federal judges who do not share his politics. What reason have we to hope that, as judges of Jack Weinstein's sympathies are replaced by those whose interests lie elsewhere, "the personality of our legal system" he describes will not seem as remote as the history of the Rules Enabling Act? If indeed the courthouse door has been closed as a result of "demographic, economic and sociological factors"<sup>14</sup> — the economic part of that equation at least requires refinement — are not more far-reaching modifications in attitudes towards litigation and towards individual rights assured?

A historical view hardly supports Judge Weinstein's description of "the personality of our legal system," but history does illuminate the tensions that are evident in his paper. How remarkable that individuals of such radically different politics as William Howard Taft and Charles Clark should have supported the bill that became the Rules Enabling Act. Grant that Clark would have been as unhappy as Judge Weinstein with recent developments, would Taft? I venture that Taft would have been pleased, both because those developments are consistent with what I understand of his politics<sup>15</sup> and because they have come about through exercises of power by judges, at times in the teeth of contrary legislation. In the field of procedure, Taft was largely responsible for ensuring that two personalities became one, as equity gobbled up common law.<sup>16</sup> We should neither be surprised that, in this field, there are now almost as many personalities as there are federal judges, nor that what some chancellors have given, others are taking away.<sup>17</sup>

If only because we are seeing fewer and fewer judges like Jack Weinstein, perhaps we should take more seriously the duty

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<sup>13</sup> See, e.g., Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1473-76 (1987).

<sup>14</sup> Weinstein, *supra* note 7, at 28.

<sup>15</sup> See, e.g., Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 952-56 (1987); Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425, 427 (1986).

<sup>16</sup> See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1069-76 (1982); Subrin, *supra* note 15, at 956-61.

<sup>17</sup> Burbank, *supra* note 13, at 1470.

he acknowledges of applying the law to the facts. In order to do that, we will need to be able to ascertain what the law is, and it will be necessary to curb judges' power to deny or subvert substance in the guise of procedure. It may also be necessary to regain a measure of confidence in the Congress. After all, as Judge Weinstein admits,<sup>18</sup> the rulemakers botched Rule 4 before Congress completed the job, and it was congressional pressure that sealed the fate of proposals to amend Rule 68.<sup>19</sup> More generally, it is judges who have been closing the courthouse door, not Congress. That they have been doing it under a system of equity rules may make the suggestion that we consider putting more law in a merged system<sup>20</sup> seem not "stingier,"<sup>21</sup> as Judge Weinstein describes it, but more liberal, at least in the sense of valuing rights. Senator Walsh had good reason to be worried.

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<sup>18</sup> See Weinstein, *supra* note 7, at 29.

<sup>19</sup> See Burbank, *supra* note 15, at 439-40.

<sup>20</sup> See Subrin, *supra* note 15, at 982-1002; Burbank, *supra* note 13, *passim*.

<sup>21</sup> Weinstein, *supra* note 7, at 3.