Congressman Michael N. Castle: Delaware and "Federalism"

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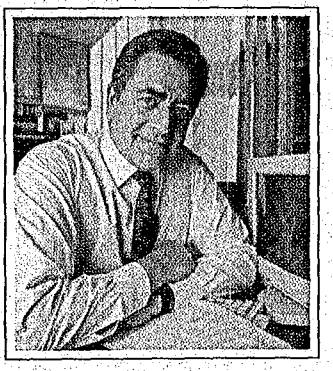

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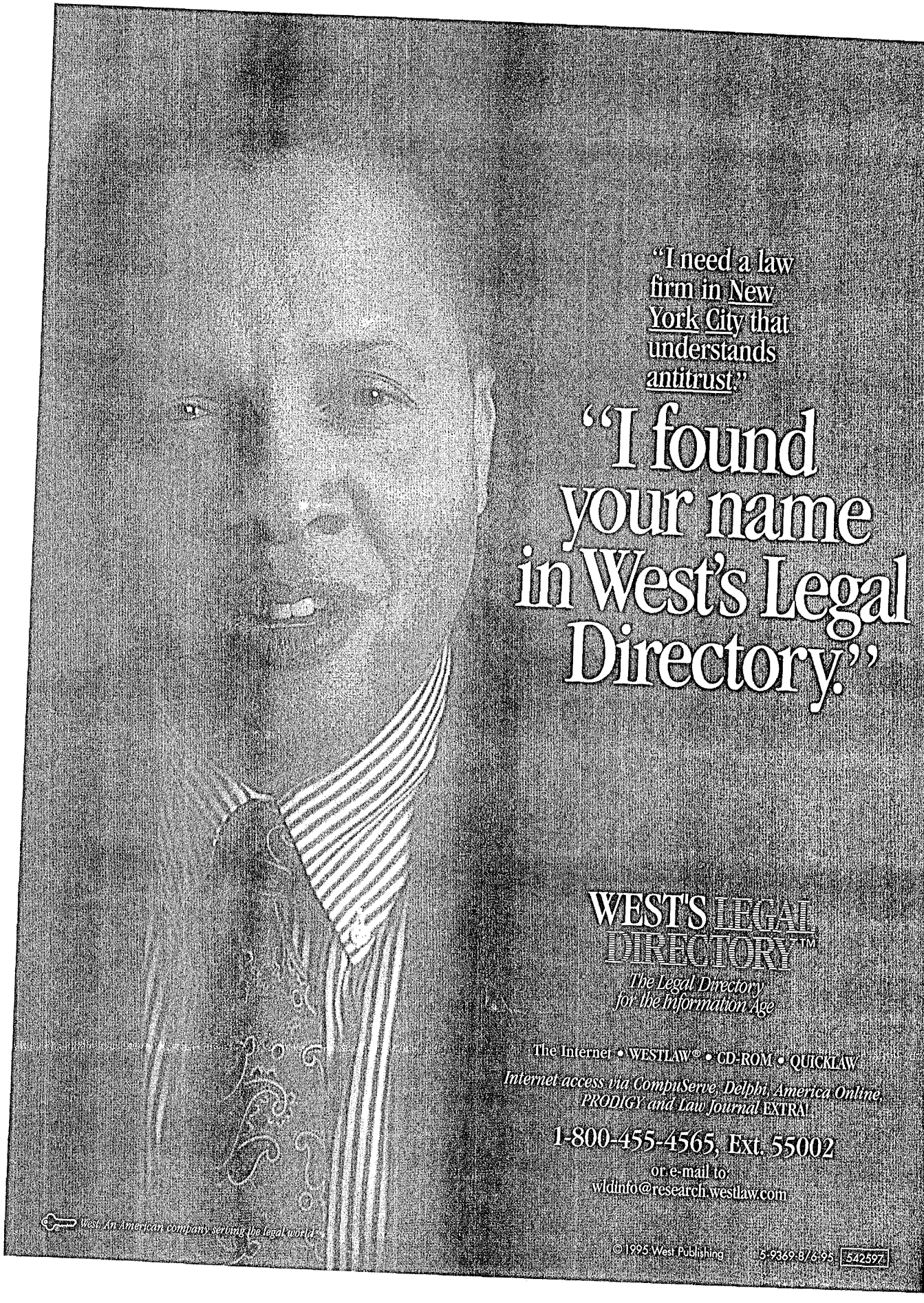

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Contributors

Thomas R. Carper, Governor of Delaware, became the State's seventy-first Chief Executive on January 19, 1993, after serving five terms as Delaware's Congressman and six years as State Treasurer.

Representative Michael N. Castle became Delaware's Congressman on January 5, 1993. He also served two terms as Governor of Delaware and one term as its Lieutenant Governor. Before that, he served as a State Senator and was a practicing attorney in Wilmington.

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EDITOR'S NOTES

SPLINTERS FROM THE CHAIR

by Vernon R. Proctor

In this issue, we offer a smorgasbord of articles about significant public policy issues affecting the State of Delaware. The theme of the issue may be inferred from its title: what are some of the key legislative and political issues facing our State, and how does Delaware's response make the First State unique?

I must digress for a moment on the meaning of "unique." I share with my predecessor, Bill Wiggin, an aversion to the use of any modifier in conjunction with the word. Think about it: either something is unique, or it is not. Expressions like "most unique," "very unique" and "rather unique" make no etymological sense and reflect a sloppy, MTV-like approach to the English language. I believe that the concatenation of developments discussed in this issue — court reform, interstate banking, school choice, the "new federalism" and others — makes Delaware unique. What other small or large state has faced so much wrenching change in such a brief period of time?

This issue of *Delaware Lawyer* offers a blue-chip list of contributors, each of whom has great expertise, if not fame, in his selected field. Pete du Pont has been speaking about educational reform for years. Dave Swayze was an architect of the Financial Center Development Act and has provocative things to say about the repeal of that landmark legislation. Rod Ward and Frank Biondi have been deeply involved in the Herculean task of reforming and modernizing Delaware's courts since that effort began. Ned Carpenter's status as a giant of our Bar renders him singularly able to present persuasively the historical and prospective cases for a new Justice Center.

Delaware Lawyer is also extremely fortunate to present the views of three of Delaware's leading public figures. Governor Carper's upbeat introductory piece provides a comprehensive overview of the economic opportunities available to our State in 1995. Congressman Castle advocates a rational application of the "new federalism" in the context of Delaware's ability to cope with the anticipated devolution of Federal power. Finally, Chief Justice Veasey's articulate report on our court system constitutes a cogent argument in favor of full legislative funding for the Delaware judiciary.

Two or three issues ago, when my term as Chairman of the Board of Editors began, I promised you that *Delaware Lawyer* would be a civilized forum for the exchange of competing views. This issue fulfills that promise: every article is actually or potentially controversial, but none is abusive of the contrary position. Coincidentally, on the very day that I delivered the Castle article to our printer, E. J. Dionne published an op-ed piece in *The Washington Post* that succinctly made the case against allowing a "spinoff" of federal powers to the states. The actual correctness of our authors' respective positions is not the point: providing a basis for rational debate in the legal community, however, *is*.

Once again, we were pleased with the overwhelmingly positive response to our solicitations of articles. The quality of the submissions was uniformly high, and the substantive importance of the issues addressed cannot be gainsaid. Please feel free to call me or my fellow editors if you wish to contribute to *Delaware Lawyer*. The "fiction issue" (June, 1996) is just around the corner, and there is no shortage of public policy matters about which to write for later issues.

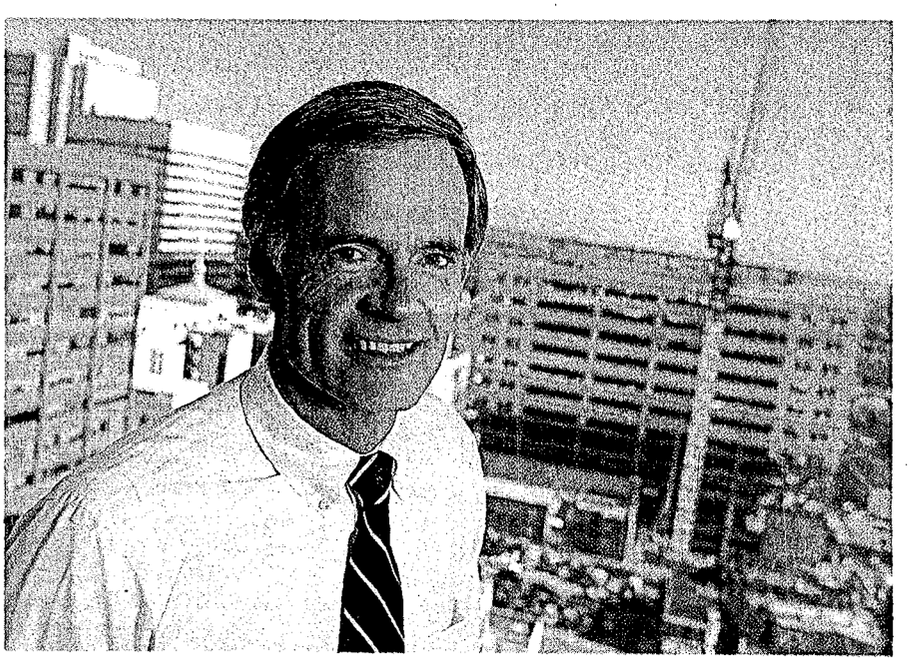
Vernon R. Proctor

Tiny Delaware as Corporate and Legal Powerhouse

Governor Thomas R. Carper

Since Delaware became the first state of a fledging Union in 1787, we have worked hard to sustain our "front-runner" status. More than 200 years after taking our first formative steps as a state, we are on solid footing to compete in a global economy into the 21st century and beyond. From recruiting jobs from outside our borders, to supporting homegrown businesses that seek to expand, to cutting red tape, to helping some of the world's largest companies to incorporate here, to preparing a work force that will help Delaware companies thrive in an increasingly competitive environment, our philosophy is a simple one: create a climate in which business can grow and prosper — with minimal government interference.

Our efforts are clearly paying dividends. In addition to more than 700,000 people and roughly one quarter billion chickens, over 250,000 U.S. and international businesses call Delaware home. As the corporate home for more than half the Fortune 500 and nearly half the corporations listed on the New York Stock Exchange, Delaware has streamlined the process of incorporating into a model of state-of-the-art efficiency. As the nation's second-smallest state, we can promptly respond to ever-changing business conditions, offering the most attractive home for corporations in the country today.



Photograph by Luigi Ciuffetelli

Our small size allows us to convene key players quickly and effectively in response to challenges and opportunities alike. When our economic development team learned that a major international company might be interested in moving its North American headquarters to Delaware, we assembled on three days' notice an unprecedented team of prominent corporate leaders, as well as federal, state, county, and local leaders, to help bolster the company's interest. Several other large manufacturing firms have recently decided to make Delaware their home, bringing with them more than 1,000 jobs with good benefits. As much as anything, those corporate leaders report being impressed with the prompt, personal attention they receive from Delaware's representatives.

If personal service and teamwork are the hallmarks of our recruitment and retention efforts, a vital cornerstone of our stable business environment is the Court of Chancery, the most well-respected court of its kind in the United States. Devoted to equity issues, the Court decides corporation law cases and has written much of the modern decisional law on corporate governance. Because the members of the Court are well versed in corporate matters, Delaware is known

for efficiently settling disputes regarding stockholders' rights, board authority, and mergers and acquisitions.

In addition to our ability to persuade some of the world's largest corporations to incorporate here, Delaware began to forge a solid international banking presence as early as 1981 with passage of the Financial Center Development Act. This legislation took the unprecedented step of inviting out-of-state and foreign banks to set up credit card operations in Delaware by eliminating usury limits, exempting foreign income from state taxes, and instituting a specific tax system for bank holding companies. Nearly 40 out-of-state banks with over $54 billion in assets have responded by relocating here. As a result, Delaware's financial services sector provides more than 25,000 jobs for Delawareans and contributes close to $100 million in bank franchise fees to the State's coffers.

Incorporation rates and banking activities aren't the only statistics that illustrate our stand-out status. Frequently hovering as much as two percent below the national average, our unemployment rate is the lowest in the East. Delaware's economy is increasingly diverse, having emerged from the 1980s recession and corporate downsizing in better shape than our Northeast counterparts. With agriculture and those 250 million resident chickens representing the oldest segment of our economy, Delaware has branched out from a farm economy in the 1800s to one that is the envy of other states for its diversity and overall strength. In addition to agriculture, Delaware's economy and employment base rely primarily on tourism, retail trade, financial services, and manufacturing. Our comprehensive economic development strategy supports those sectors and encourages further diversification, including the emergence of a natural "cottage industry" attributable to our prominence as an international corporate and banking center — legal services. Many of the most prominent and accomplished legal professionals in the country already work within our borders, and we would like to be able to build on that growing success.

Our Rainy Day Fund is full, our budgets are balanced, and we spent only 96 percent of available revenues last year, thereby reducing the State's overall indebtedness and providing some buffer against possible federal cuts over the next several years. For the first time in more than a decade, our bond rating with Moody's Investor Service was upgraded to AA1. This move gave us the highest rating the State has ever had and placed us among the top dozen states in the nation. Continued prudent financial management will ensure that Delaware maintains this steady course, and my Administration is fully committed to further improvements on a time-honored Delaware tradition of sound financial management.

The advantages of doing business in a small state are succinctly captured in the credo adopted by the Delaware Economic Development Office: "Delaware. Smaller. Quicker. Smarter for business." Teamwork is a critical part of our success here in the First State. In a state where nearly everyone has had the opportunity to shake hands or to chat with his or her highest elected officials, and where we are able to assemble the most prominent members of the State's business and governmental communities in a single room on less than three days' notice, we clearly have something special to offer. We look forward to preserving and enhancing our status as the premier banking and corporate center of the United States. ◆

FEATURE

David S. Swayze & Joseph A. Fillip, Jr.:[1]

SURFING THE INTERSTATE:

CAN DELAWARE'S FINANCIAL CENTER REVOLUTION SURVIVE INTERSTATE BANKING AND BRANCHING ?

Effective September 29, 1995, the Financial Center Development Act[2]("FCDA"), the 1981 law that underpinned one of the greatest economic revolutions in Delaware's history, was prospectively repealed.[3] As of now, no new bank may be formed under this venerable legislation. The law will continue to exist only for so long as at least one of the remaining banks created under it chooses to remain subject to one or more of its operational restrictions.[4]

The FCDA expired without a eulogy – indeed, without so much as a mention. Is its silent demise mute testimony to the end of the great Delaware banking revolution, or rather, is it an epiphany for Delaware with respect to the new era of interstate banking and branching?

History

Through its passage of a succession of innovative laws governing both bank entry into the state and the exercise of novel powers in a favorable regulatory and tax climate once here, Delaware became one of the most formidable banking centers in the United States. Over the past fifteen years, the banking industry spawned more than twenty-five thousand new jobs and an increase in annual bank franchise taxes from less than $4 million a year to almost $100 million a year.[5]

The principal legal development triggering this growth was the 1978 U.S. Supreme Court ruling that a national bank could charge its out-of-state credit card customers a rate of interest on unpaid balances permitted by the bank's home state, even though that rate was illegal under the laws of those states in which the bank's nonresident customers resided.[6] This decision, which established what came to be known as the "*Marquette* Doctrine," offered any state that was willing to repeal its existing usury laws an extraordinary opportunity to establish itself as a center for national bank credit card operations.

In 1981, Delaware seized this opportunity by enacting the FCDA. The FCDA repealed Delaware's usury laws and provided that banks providing credit were free to set interest rates through contracts with their customers. The FCDA essentially defines "interest" for purposes of state law as anything that a bank says it is, including late fees and over-limit charges.[7] Under the *Marquette* Doctrine, as now refined by subsequent appellate decisions, all of these charges can be exported from Delaware to other states as "interest."

Additionally, the FCDA offered another benefit having universal appeal to both national and state-chartered banks: it drastically lowered bank franchise tax rates. The FCDA did so through a novel regressive tax rate, under which banks enjoyed progressively lower blended tax rates as their net taxable income increased.[8]

In addition to these "carrots," the FCDA contained a number of "sticks" intended to encourage economic development in the State and to protect established Delaware retail banks. Banks acquired under the FCDA had to employ at least 100 people in Delaware, and had to maintain high levels of capital in the State. Such banks could only maintain a single retail office in Delaware, and were generally forbidden from competing for the customers of established Delaware banks.[9]

Despite these restrictions, the FCDA proved to be an unqualified success. There are a number of marketing reasons for this success, but the key legal/structural reason was the inability of bank holding companies to conduct interstate operations through a single banking entity. Under both federal and state law, a bank established under the FCDA could not establish multi-state branches, or operate as the mere branch or representative office of an out-of-state bank. Rather, such bank had a separate charter, asset base and management.[10] Delaware thus realized the full benefits of employment and tax revenues that inhere in the creation of a true financial services center.

This remained true when Delaware adopted a limited Interstate Banking Act in 1987.[11] Under this Act, certain out-of-state bank holding companies could acquire established Delaware banks,[12] but were not permitted to merge the acquired banks across state lines. Again, each acquired bank had to remain in place as a separate legal entity, with its own capital, officers, directors, employees and taxable situs in Delaware.

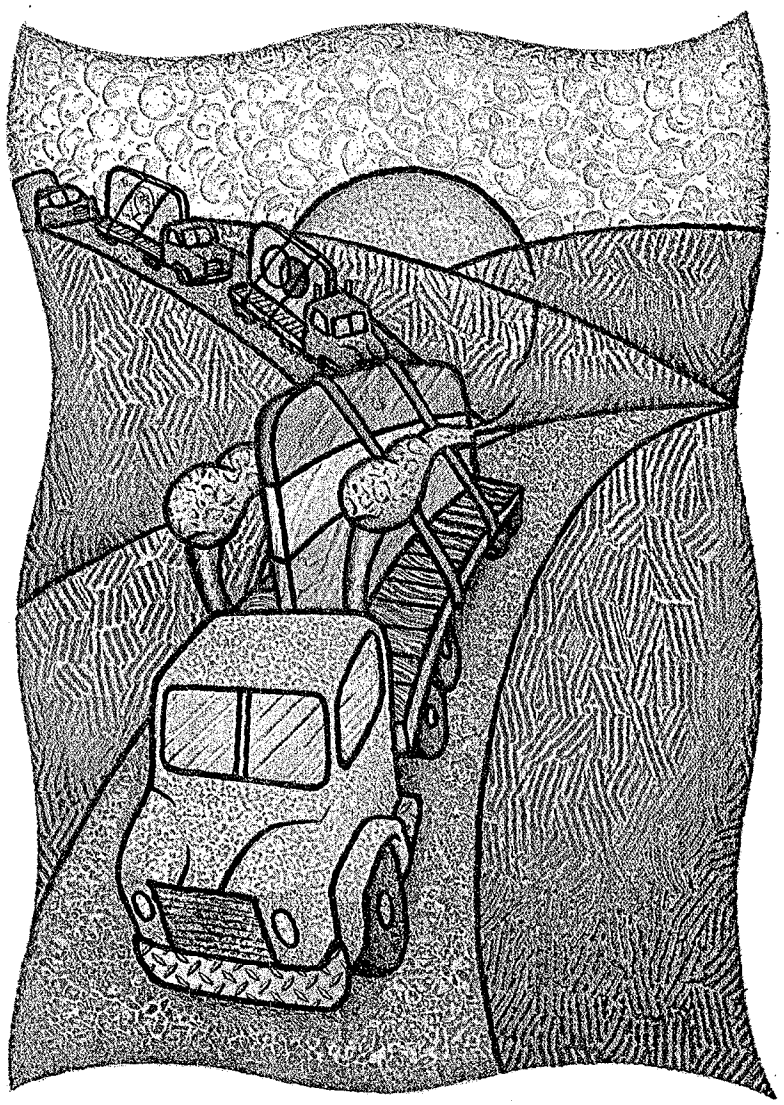
Federalization of Banking Law

In 1991, Congress passed the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"), a bill that capped

years of gradual federalization of banking law, and that hobbled state legislatures and bank regulators in their efforts to attract new banking businesses by further enhancing state bank charters.[13]

Delaware had engaged in such charter enhancement efforts for years prior to the adoption of FDICIA, again with much success. In 1987, Delaware gave its banks the power to sell and underwrite securities.[14] In 1990, Delaware banks gained the right to sell and underwrite insurance, over the strenuous objection of national and local insurance agent lobbies.[15]

FDICIA was no interstate banking bill, but it did give the insurance industry at least part of what it wanted. In a slap at Delaware, it prohibited non-grandfathered, FDIC-insured, state-chartered banks from underwriting insurance. There were only a few survivors.[16]



But FDICIA also went well beyond insurance activities by providing that the limit of powers granted by the states to FDIC-insured, state-chartered banks should be measured by those powers granted to national banks by Congress and the Comptroller of the Currency ("OCC").[17] If a state-chartered bank wishes to exercise certain powers not permitted for national banks, FDICIA provides that it has to petition the FDIC for permission to do so.[18]

The federalization trend is further evident in the increasing imbalance between national and state bank charters. A number of factors suggest that the national bank is now the charter of choice for a financial institution with interstate ambitions.

First, a national bank doing business in multiple states need only report to a single federal regulator (the OCC), whereas a state bank is subject to the jurisdiction of the regulator in each state where it does business, as well as the FDIC.

Second, where the powers or activities of a national bank are challenged as being contrary to state law, the national bank can at least argue that state law is preempted by the National Bank Act, and only the OCC is empowered to enforce the state law or regulation which a national bank has allegedly offended. State banks enjoy no similar preemption defense or regulatory shelter.

Third, since FDICIA generally prohibits state banks from exercising powers not permitted to national banks, the OCC, rather than state legislatures or bank regulators, has taken the lead in expanding the boundaries of permissible bank powers.

The federalization of banking law and the resulting legal advantages conferred on the national bank charter have disturbing implications for Delaware, since those trends indicate that there are now legal disincentives to the formation of *new* Delaware-chartered banks.[19]

The Interstate Banking and Branching Efficiency Act of 1994

Given the relative difficulties in attracting new banks to Delaware, it is not surprising that State leaders watched with some trepidation as Congress enacted federal interstate banking legislation in September 1994 (the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, or "IBBEA"),[20] providing that, effective June 1, 1997, banks located in different states may merge across state lines. Would this new law encourage banking leaders to reduce their operating costs through consolidation and to eliminate or minimize their operations in Delaware? How should Delaware respond to such risks legislatively without sending the chilling message to the banking community that, suddenly, "Delaware is closed"?

The early returns suggest no real cause for alarm: the proposed mergers out of existence of J.P. Morgan Delaware and the Delaware Trust Company were both anticipated, and the parent holding companies of both institutions continue to have a major operational and asset presence in Delaware. However, market-driven consolidations that could and would have occurred without the new federal law are another matter. In recent months, American Express Centurion Bank has announced that it is merging its limited-purpose Delaware bank into an industrial bank subsidiary in Utah, causing the loss of $8.3 million in tax revenue and of approximately 60 jobs. Additionally, Chemical Bank and Chase Manhattan Bank recently announced their merger and a resulting cutback in 12,000 jobs nationally. Delaware will presum-

Illustration by Sam Hill

ably bear its share of these lost jobs.

Again, both these mergers could have occurred without the passage of IBBEA and Delaware's complementary legislative response (both of which are discussed below). As it now appears, the real threat confronting Delaware – banks' fervor for maximizing asset size and minimizing labor costs – is one that neither the Delaware General Assembly nor the United States Congress could have forestalled. That said, what can and should Delaware do to stop the bleeding?

As a first step, Delaware's leaders must avoid an over-dramatization of the risks that both current market forces and interstate bank acquisition and branching pose. Our laws are sound and still cutting-edge with respect to state bank charter authority. Our labor costs, regulatory climate, and favorable bank tax rates remain as magnets for banks to come and grow in Delaware, rather than to abandon it. Our foundation, it is worth repeating, is solid.

But we have gotten ahead of ourselves. The next order of business is an examination of the new federal interstate banking and branching law, and of Delaware's statutory response.

New Federal Law

The IBBEA deals with three areas of interstate banking of principal interest to Delaware: interstate bank acquisitions; interstate bank mergers; and interstate bank branching. Regarding interstate bank acquisitions, the new federal law permits bank holding companies to acquire banks in any state, effective September 29, 1995. States have no authority to opt out of this law, but may require that their local banks have reached a minimum age (but not greater than five years) before they can be acquired by an out-of-state bank holding company.[21]

With respect to interstate bank mergers, the new federal law permits banks to merge across state lines effective June 1, 1997, with the offices of a bank that does not survive a merger being converted to interstate branches of the surviving bank. States may opt out of, or opt in to, this aspect of the law prior to its effective date. As with interstate acquisitions, states may require that their local banks have reached a minimum age (but not greater than five years) before they can participate in interstate mergers.[22]

Regarding interstate bank branching, the federal law leaves it up to the states, by permitting a bank located outside of a state to commence business in that state

by opening new branch offices only if the state enacts a law expressly permitting such branching by out-of-state banks.[23]

Delaware is Response

Delaware's response to the new federal law was developed after lengthy negotiations among representatives of state government and Delaware's banking community. The resulting bill, enacted on June 28, 1995, is a nuanced response to the competing goals of preserving Delaware's status as a "bank friendly" state, and protecting Delaware's established retail banks against predatory competition hastened by entry into the Delaware market "on the cheap."

The statute's treatment of interstate bank acquisitions is indicative. While no new full-service banks may be established in Delaware and acquired by out-of-state bank holding companies until September 29, 1997, any existing Delaware bank that is at least five years old may be acquired at any time. Additionally, the Delaware law permits new limited-purpose credit card banks to be established prior to this date.[24]

With respect to interstate bank mergers, the new Delaware law permits a bank in Delaware that is at least five years old to be merged out of existence into an out-of-state bank, and its branches to be converted into branches of the surviving out-of-state bank. On the other hand, if the Delaware bank is to survive the merger, the five-year aging requirement is dropped.[25]

On the subject of interstate branching, the new Delaware law flatly prohibits out-of-state banks from coming into Delaware by establishing new branches in the State.[26] In other words, the only way to get into the banking business in Delaware is by establishing a new bank or acquiring an existing bank in the State. Importantly, however, the Act authorizes the existing banks that were formed under and are subject to restrictions on branching under the FCDA to waive such restrictions upon a showing of convenience and need.[27]

To summarize, the new Delaware law encourages the continued formation of new credit card banks, and the expansion of interstate activities by previously restricted FCDA banks, but otherwise shelters Delaware's retail banks from competition from new bank entrants for two years. Since almost all of Delaware's existing banks (including uninsured building and loan associations, which may still be converted into banks) are at

least five years old, the new law permits them to be acquired by out-of-state bank holding companies, merged out of existence into out-of-state banks, and their branches converted to branches of their out-of-state merger partners.

A Proposed Agenda

Despite ominous market forces, the erosion of the dual banking system, and the onset of interstate banking and branching, the allure of a separate Delaware bank presence is far from dead. Consider: FDICIA limitations do not apply to powers exercised by a state-chartered bank in its capacity as agent, broker, custodian or trustee. As a first step, Delaware should comprehensively review the agency and custodial powers of national banks. Where the exercise of such powers by national banks is denied or severely restricted, Delaware should enhance or expand those powers among its own banks. The promulgation of an incidental powers regulation by the Bank Commissioner would send a clear message that there are still significant advantages to a Delaware bank charter in such areas.[28]

Second, Delaware should enact a "wild card" statute permitting Delaware banks to exercise all of the powers of national banks as and when such powers are conferred by Congress and the OCC. Such a statute will help to minimize any competitive disadvantage that Delaware-chartered banks may suffer in comparison to national banks.

Third, Delaware needs to promote the existing advantages that Delaware-chartered banks enjoy over national banks in the exercise of certain agency powers. Insurance agency powers are a case in point. Delaware banks are subject to fewer operational restrictions when selling insurance than are national banks.[29] Additionally, the OCC's recent expansion of national bank insurance powers has angered the insurance agent lobbies, and they have prodded Congressional consideration of new legislation that would freeze the OCC's ability to confer new insurance powers on banks. If such legislation is enacted, Delaware could find itself a center for banks wishing to establish or expand their insurance operations.

Fourth, the Delaware government, with the support of the banking community, must redouble its efforts to promote Delaware asset and employment growth among the premier bank holding companies that now have or are contemplating a Delaware bank presence. As this article goes to press, Governor Tom Carper has commenced a vigorous round of visits with targeted institutions whose commitment to their Delaware banks is either new (for example, First Union, which will indirectly acquire First Fidelity Bank, Delaware as the result of its acquisition of First Fidelity Bancorporation) or in flux (for example, Chemical, by reason of its merger with Chase Manhattan). At the same time, Congressman Mike Castle is pressing the adoption of legislation that will close the federal statutory loophole that encouraged American Express Centurion Bank to merge with its Utah industrial bank affiliate. Such distinguished leadership by two of our top elected officials, if sustained, may well determine whether the financial center we have built in Delaware flourishes or flounders.

Fifth, Delaware's arsenal contains other weapons that we should now bring to the fore. Foremost among them is the bundle of advantages that attend the use of Delaware-sitused trusts for both individuals and businesses. Additionally, Delaware continues to exempt in its entirety from the bank franchise tax all income attributable to international banking activities.[30] Further, banks with proprietary mutual funds and investment Edge Act or Agreement corporations can reap similar exemptions.[31]

Finally, whether or not a national bank charter remains a more attractive vehicle than a Delaware bank charter, Delaware can attract and retain both national and state-chartered banks through a continuing commitment to a favorable bank franchise tax structure. By doing so, Delaware will assure that the out-of-state holding companies that own Delaware-chartered or -located banks have the maximum incentive to preserve the separate charter and to maximize the asset bases of their Delaware banks. At present, Delaware's lowest bank franchise tax rate is 2.7% of net income in excess of $30 million. The State might consider providing a significant tax inducement for banks to locate or remain in Delaware by further lowering this tax rate on higher income levels – for example, 1.7% on net income in excess of $100 million. The burgeoning threat of double taxation posed by increasing interstate banking activity and growing tax aggressiveness among so-called "market" states means that the larger bank holding companies will look even more favorably on a state of domicile that provides a significant safe harbor from state and local tax.

Conclusion

Delaware has worked hard to establish itself as a banking center in this country, and has reaped the rewards of its efforts in the form of jobs and tax revenues. However, in the current environment, it will be a lot tougher for the State to retain its dominant position. Delaware now has to contend with many other states that are competing for a share of the financial services pie, some of whom, such as Virginia and Utah, are doing so by copying Delaware's banking laws *verbatim*. Additionally, the trend toward consolidation and cost savings in the banking industry, which will likely be accelerated by the new interstate banking legislation, means that there will be fewer banks in the future to generate taxes and employ qualified workers. Finally, Congress has gradually placed Delaware-chartered banks at a competitive disadvantage in comparison to national banks.

In these circumstances, there is, unfortunately, no "son (or daughter) of FCDA" waiting in the wings. Rather, there are separate pockets of lesser raw materials that Delaware must mold together and then aggressively market if it is to sustain its status as a major financial center. To continue to thrive as a financial services center, Delaware must enhance and promote the unique agency, brokerage, custodial and fiduciary powers available to Delaware-chartered institutions, particularly where those powers may not be available to national banks. Additionally, Delaware must provide every incentive available, tax and otherwise, to promote asset attraction and growth among the remaining bank subsidiaries of "money center" and regional bank holding companies. While interstate mergers mean the inevitable loss of banking jobs, such mergers also mean the significant consolidation of bank capital. Increased capital means increased earnings, and increased earnings mean increased franchise taxes for Delaware.

All yet may be well. FCDA? R.I.P..

✦ ✦ ✦

The authors gratefully acknowledge the assistance of Mary F. Caloway in the preparation of this article.

Constraints of space make it impossible to include the footnotes, but the numbers to them appear. They will be available upon request from the offices of the editor. ◆

FIRST FIDELITY BANK ANNOUNCES ITS NEW CORPORATE TRUST OFFICE IN WILMINGTON, DELAWARE.

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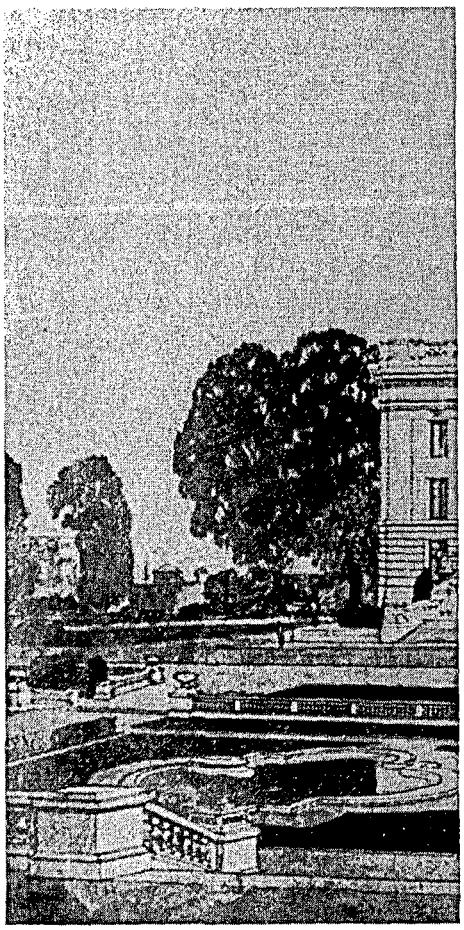
FEATURE

Edmund N. Carpenter, II[1]

END OF AN ERA:

THE GRAND OLD LADY OF RODNEY SQUARE



"The old order changeth, Yielding forth unto the new."
- Tennyson,
The Idylls of the King.

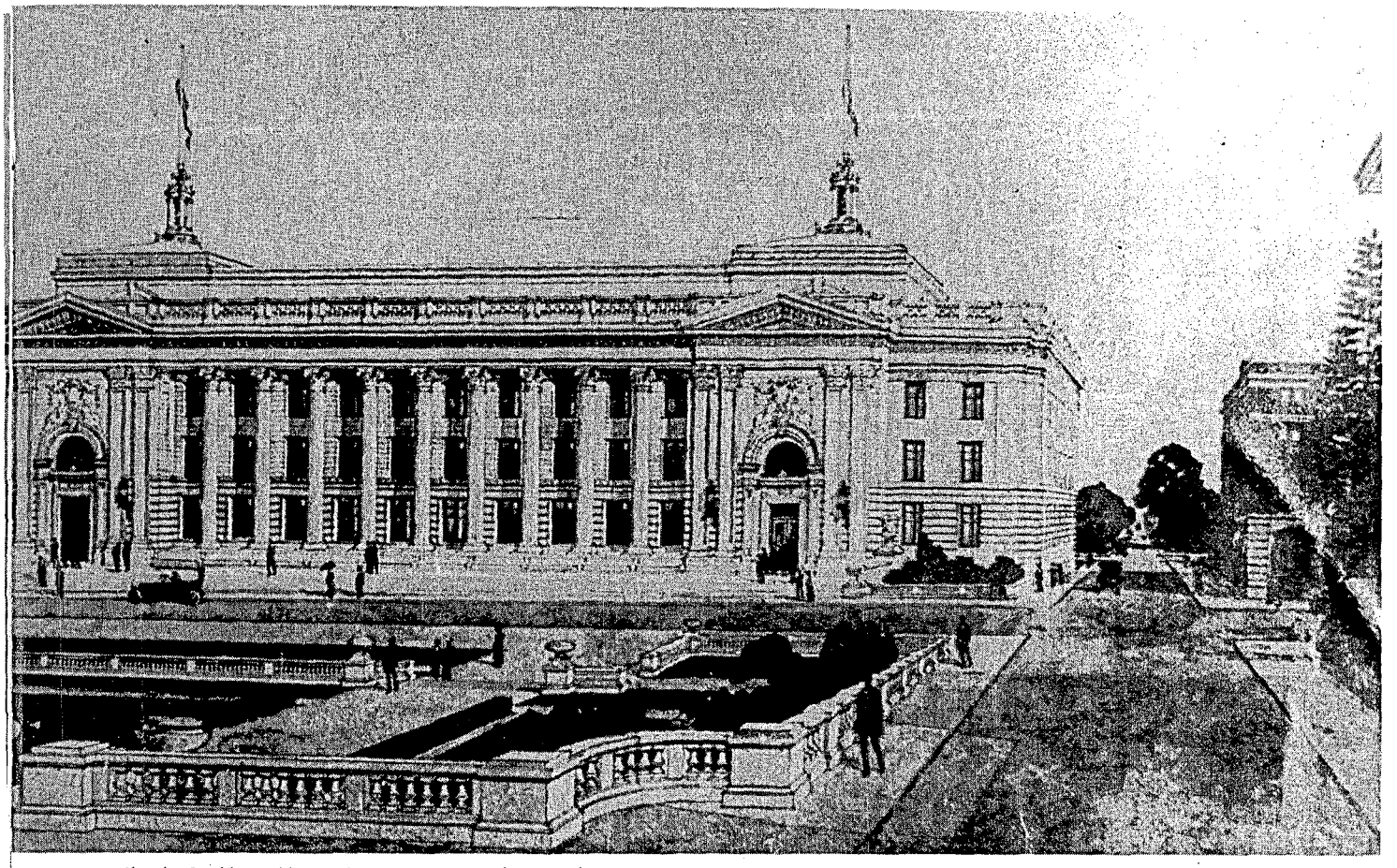
Scurrying across Rodney Square in their busy days, Delaware citizens rarely have time to look around them at the imposing and, yes, beautiful architecture that surrounds this central spot in our State: the imposing Du Pont Company office building, the oldest of the current buildings; the Daniel L. Herrmann Court House, facing it, constructed beginning in 1914 and dedicated in 1916; the Delaware Library building constructed soon afterwards; and the facade remnant of the U.S. Post Office, built in the early 1930s in the midst of the Great Depression and recently transformed into the Wilmington Trust Building. Nor do they have time to reflect that at the end of the 19th Century, Rodney Square itself was the city reservoir, converted at the beginning of this century into Court House Square, where an imposing old courthouse once stood. It was demolished after World War I to create the beautiful centerpiece we now have.

But let us focus today on the building that, after many past vicissitudes, is under consideration for a still further dramatic change, namely the Daniel L. Herrmann Court House. Its majestic classical facade rises on the east side of Rodney Square in the heart of Wilmington, and it has been recently renamed the Daniel L. Herrmann Court House in memory of our revered late Chief Justice of the Delaware Supreme Court. It is a landmark known to every Delawarean who has worked or lived in Wilmington, and to most Delawareans who work and live elsewhere in our tiny State. We would miss the monumental dignity that it imparts to the center of the first city of the First State, if for any reason it were removed. But it was constructed in the early part of this century for quite a different purpose and now, at the end of the century, we must seriously contemplate its future use.

HISTORY

Back in the early days of this century, when the little town of Wilmington in the second smallest state in the country was just beginning to emerge from its sleepy cocoon, the city fathers saw the necessity of constructing a facility to house both city and county government facilities, which had, at about the same time, outgrown the office space then available to them. Out of that contemplation arose the idea of a combined city/county building, one-half of which would be devoted to the offices and other accommodations for the mayor, the City Council, the city police force, and the Municipal Court, together with related facilities, and one-half of which would be devoted to New Castle County, its Levy Court (not really a court but a county administrative and legislative body), various county offices, some county courtrooms, and the typical county row offices, including a Prothonotary (the Clerk of the Court), a Clerk of the Peace (clerk for the criminal courts), a Register of Wills, a sheriff, and so on.

In the closing years of the 19th century, most of the business center in Wilmington was located in the blocks of Market Street between Front Street and Fifth Street.[2] When, soon afterwards, E. I. Du Pont de Nemours & Company, the largest and most



Sketch of Public Building, Wilmington, Delaware (circa 1920).

prestigious business in the Wilmington area, moved to its current location between Tenth and Eleventh Streets on Market Street, it led the way to a movement of the center of the city's business district to that new area, although Rodney Square as we know it was really not completed until the 1930s. Work on the City/County Building began in 1914.[3] The building, in the popular Greco-Roman style, was completed in 1917.[4]

The newspapers of 1912 and 1913 are full of the debate over the construction of a city/county building. John J. Raskob, an official of the DuPont Company; Robert H. Richards, formerly Attorney General of Delaware; David Snellenburg, one of the city's leading merchants; and State Senator David J. Reinhardt, together with other leading citizens, organized a campaign of speeches and other presentations to civic groups and government organizations to win approval of what was to be a major project not only for the City of Wilmington, but for the entire state.[5]

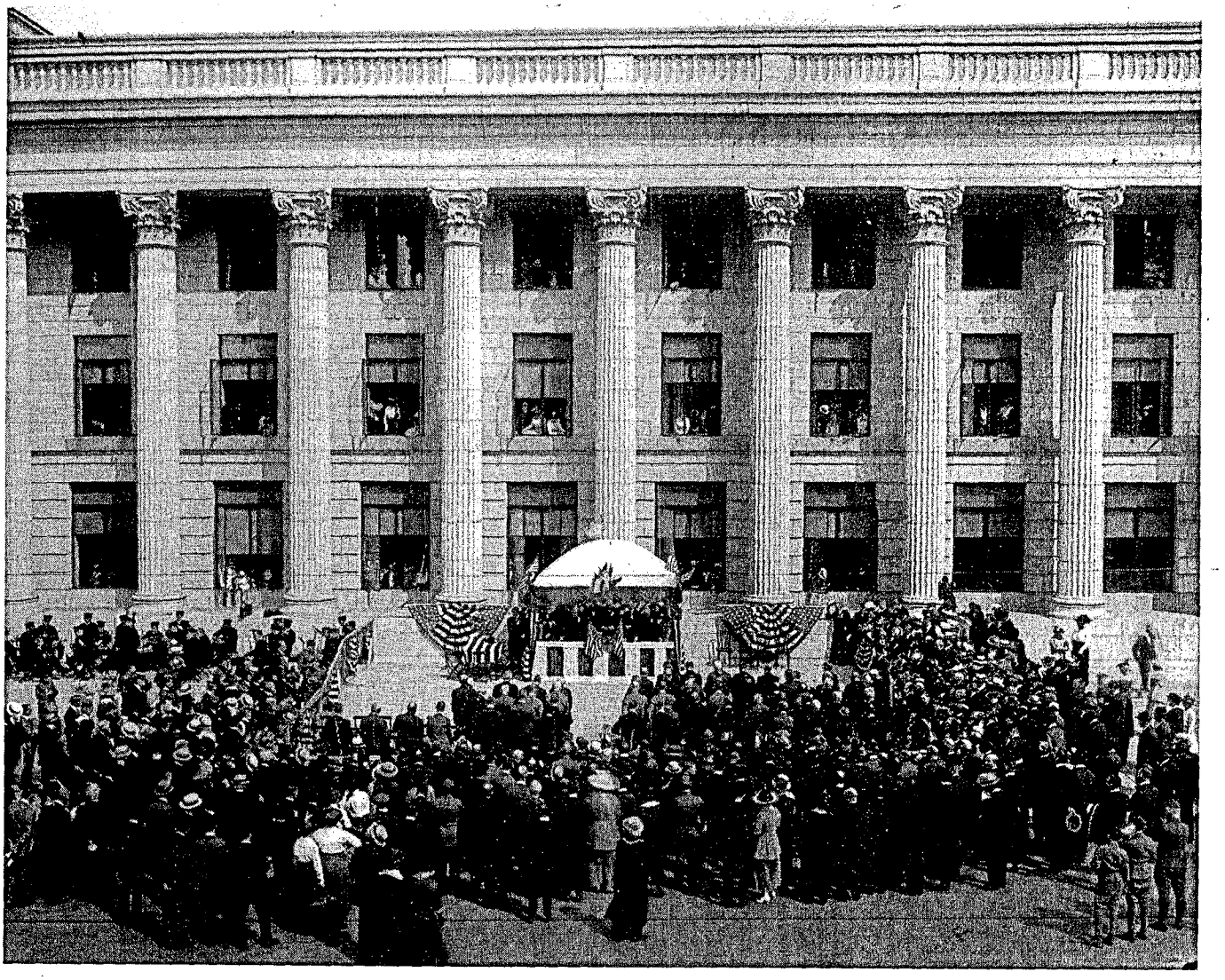
By the end of 1912, virtually all of the newspapers in New Castle County and several of those in Kent and Sussex Counties strongly supported the new City/County Building project.[6] The idea of developing the square where the old Courthouse stood began around 1915, when construction of the City/County Building was under way.[7]

By February 1913, John J. Raskob, who led the movement, had obtained the approval of the City Council and was asking the Levy Court to provide similar approval on behalf of the County. Work started in the field with the beginning of excavation in June of 1914 under the supervision of a commission authorized by the Delaware General Assembly and consisting of Harlan G. Scott, L. Scott Townsend, James I. Ford, Daniel Corbit and John J. Raskob.[8]

Since then, this magnificent building has served the city, county, and state in many important ways, undergoing painful and dramatic metamorphoses over the years. While the commission that devised and constructed the building did an excellent job, which subsequent generations have never ceased to admire, nevertheless it did not contemplate, and indeed could not have contemplated, the many changes that have occurred.

As the years marched on, both the city government and the county government outgrew that facility. Despite its sturdy construction, including thick walls, efforts were made to modify it for its changing uses. City offices eventually moved out and county facilities, and then state facilities (when the state assumed control and responsibility for most of our courts), gradually took over. A Family Court was added, and then it outgrew its facilities and moved to its own building down the street. The Court of Oyer and Terminer and the Court of General Sessions, the two principal criminal courts, were merged into the Superior Court, and that court grew and grew to meet the rising demand for civil and criminal trials and related proceedings. Change after change was more or less successfully — frequently less — attempted to adapt the handsome but now aging and unwieldy facility to the burgeoning demands new conditions placed upon it. Efforts were made to put communication wires through the thick walls. Expensive repairs, renovations, and renewal of the roof were required to moderate

Photograph Courtesy of The Historical Society of Delaware



Opening ceremony, Public Building, 1916.

the constant leaks and decay. (One of the judges is reported to have said the roof has more leaks than the CIA.) Bizarre arrangements of offices, judges' chambers, and courtrooms were required to squeeze into the antique structure designed for an entirely different purpose.

TODAY'S PROBLEMS

Now, at last, it is obvious that this grand old lady cannot accommodate modern needs. Court facilities already have inadequate space. Some judges and their chambers are now located completely outside the building, no longer readily and efficiently available to the courtrooms in which those judges operate. Probation and parole offices are several blocks away, resulting in the loss of about one defendant each day who does not follow directions from the courtroom to his probation officer. In addition, the needs of an efficient, modern, computerized world simply cannot be accommodated in this beautiful but aged building.

Further, and of particular importance in the world in which we find ourselves today, the courthouse is not secure and cannot effectively and efficiently be made secure. Repeated expensive attempts to do so have resulted in the current situation where long lines of attorneys, witnesses, and others stand in the rain waiting to get into the courthouse in the morning through an improvised and inefficient security gate. The unfortunate location of heavily used offices at the opposite end of the building from the security entrance means that persons admitted over the weekend or at night for work in the building have access to all of the building as they wander down to their places of business, resulting in unnecessary and potentially dangerous exposure.

And, as the state grows and litigation swells, there is a threat of inadequate numbers of courtrooms, raising the likelihood that trials will be postponed because no courtroom is available. Statistics show that only about 9% of the civil actions filed are actually tried, but the cases hang on and on until trials are actually scheduled. The capacity to schedule a trial promptly as soon as a case is ready means that litigants, attorneys, and judges can move forward swiftly and efficiently to whittle down a backlog that is already of enormous and threatening proportions.

Further, if there are insufficient courtrooms to handle peak demand in the morning, too many people are waiting, wasting precious time, and forming a terrible impression of the Delaware justice system as they mill around in a confusing and uncomfortable environment.

Without sufficient courtrooms, it is not possible to arrange the advance scheduling of proceedings in specific locations so that citizens, whether litigants, lawyers, or others, will know where they

are to go when they arrive. Existing courtrooms are not designed to accommodate the new proceedings relating to the Drug Court and other case management programs. Offices are distributed throughout the courthouse without regard to work flow, impairing productivity. Defendants in custody are using the same corridors as jurors, judges and other court personnel, raising dangerous security problems. Hours are wasted each day by Attorney General and Public Defender personnel shuffling back and forth from their offices in the Carvel Building. Although the Victims' Bill of Rights mandates separate waiting areas adjacent to the courtrooms for victims and their families, these rooms do not exist.

Inefficiency in the jerry-built arrangement of current offices within the courthouse adds to expense and delays. The office with the highest public traffic (after the Municipal Court) is the Prothonotary's Office (Office of the Court Clerk), but it is located at the opposite end of the building from the public entrance. The busiest after-hours location is the Law Library, but it, too, is located at the opposite end of the building from the main entrance. Once past the single after-hours security agent on duty, a visitor has unfettered access to all areas of the building.

To get into the courthouse, wheelchair-bound citizens must endure the humiliating experience of being hoisted on a mechanical lift. Jurors en route from the jury assembly area of the courtrooms must use the public corridors, stairways and elevators, although modern procedures urge protected access for them. The recently constructed jury assembly area was forced into available space that is inadequate and obstructed by large columns, canceling previous plans to conduct some judicial proceedings there when all other courtrooms are occupied.

At the present time, virtually every meeting room in the courthouse has been converted into office or storage space. Attorneys routinely consult their clients in the hallways because there is no available office for them to use. Despite many expensive efforts over the years, the heating, air conditioning and ventilation systems never achieve a comfortable balance. On the coldest days of the winter, one will find windows open, and on the hottest summer days one will find space heaters operating to compensate.

To strangers visiting the courthouse, including out-of-state attorneys and their prominent clients, the arrangement is confusing, frustrating, and undignified. Court staff spend a lot of time redirecting people to their destination. Important nationwide litigation, a vital factor in continuing and bolstering the reputation of this State as the premier domicile of national and multi-national corporations, large and small, is conducted in somewhat shabby and inadequate facilities, imperiling the 20% of our budget that comes from the corporate franchise tax and the other important state income from this area.

Ahead lie even further problems. There is no room for future growth, although recent studies estimate substantial enlargement in staffs will be required in the Superior Court — probably well in excess of 100 by the year 2000 — and doubtless in the other courts as well. There is no longer any room for constructing additional courtrooms or for enlarging existing courtrooms. Important auxiliary services, including a central mailroom, a copier/printing room, a freight elevator and loading dock, storage for supplies, storage for evidence and exhibits, and a central file room simply cannot be accommodated. Parking is inadequate.

Indeed, on February 6, 1995, the Grand Jury formally complained about their working conditions:

"We are cooped up in a small room with no window. We are not even provided with a bare minimum of coffee. And the straw that broke the proverbial camel's back was in our last session, when during one of our many delays we were told that we couldn't sit outside the Grand Jury room because we might come in contact with some of the people we were indicting."

Delaware is becoming yet another example of the old political adage that, in resource priorities, the courts are neglected stepchildren. We need once again to recognize the important role our justice system plays in our private lives, solving domestic, personal, and commercial disputes, and in our public lives, disposing of criminal and other anti-social behavior. When the social or personal fabric is torn, a trial is an important part of the healing process.

SOLUTIONS

"We shape our buildings,
and afterwards our buildings shape us."
- Winston Churchill[9]

The Courts 2000 Committee, established for the purpose of reviewing the future of our courts in the next century and headed by the brilliant leadership of O. Francis Biondi and Rodman Ward, concluded in its final report that a new justice center was required, and urged that the Chief Justice establish a committee to press forward on this high priority need. The Delaware Justice Center Committee has been established,[10] has reaffirmed the finding of the Courts 2000 Committee, and is in the process of developing new plans, based on responses to an advertisement published in April 1995 by the Delaware Department of Administrative Services requesting Letters of Interest from all parties desiring to be considered for participation in this project.

Alternative building sites in the area between Fourth and Sixth Streets and in the area between Eighth and Ninth Streets have been considered, and detailed plans for construction on each of these areas are already developed and being reviewed. Further, there may be a chance that the beautiful facade of the old courthouse may be preserved if a tower could be erected behind it to house the sorely-needed new facilities, an arrangement analogous to the successful adaptation of the facade of the old Wilmington Post Office to the new Wilmington Trust Company tower and proposed by the builder of that project. Other sites are also being reviewed.

Meanwhile, however, the City of Wilmington is already enjoying an unprecedented real estate boom, and potential sites for the new courthouse facility are rapidly disappearing. Many involved in this search had hoped that what was then a gaping hole at Eleventh and King Streets, a prime location, could be acquired for this purpose, but delays and procrastination held up the process until that prize site was acquired by MBNA, a local, rapidly expanding credit card operation that has now nearly completed its own facility there and has become one of the leading residents of Wilmington, and of Delaware.

Other sites are also rapidly disappearing as each week's news announces further construction. This is, of course, good for the City of Wilmington and the State of Delaware. But it creates a special urgency for rapid movement on behalf of our State to acquire adequate land for its own facility.

What is needed, of course, is a dignified, solid building, expressive both internally and externally of the important functions of our justice system that are taking place there. Courts do not have armies to enforce their decisions and

must rely instead on the acceptance of those decisions by an informed body of citizens, even though many of those citizens will inevitably feel disappointed or aggrieved by the action of the court. Our courthouse must withstand the major changes that authorities agree will come in at least four areas in future years.[11]

First, it is clear that major technological improvements will materialize over the course of the next few years, including real-time audio-visual electronics allowing all participants access to in-court automated legal research; instant recording and replay of trial testimony; simultaneous translation of other languages into English; and remote conferencing, eliminating the need for many in-court appearances. There will be improvements in the way in which information is gathered, stored, retrieved, communicated, and presented.

Second, we must recognize the growing demand by law firms, media, and the public for increased electronic access to the courts, including the filing of court documents, scheduling of events, and so on.

Third, it is foreseen that courts will be reorganized so that the focus will shift to small work teams, responsible for a body of cases and coordination of all the elements needed to resolve a case from beginning to end.

Finally, it is expected that the courthouse of the future will integrate complementary dispute resolution programs into regular court operations, including mediation, arbitration, and others.

Already Delaware courts are moving up on some of these areas, and all that will be needed is an efficient courthouse making available the facilities that will be required. When our new Delaware Justice Center has been constructed and is in operation, we will be ready at last for the 21st-century needs of our justice system.

And in closing, let me urge *you*, the next time you are scurrying through Rodney Square, to pause a moment and look around, remembering the words of the poet:

"We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time."
- T. S. Eliot, Little Gidding.

Constraints of space make it impossible to include the footnotes, but the numbers to them appear. They will be available upon request from the offices of the editor. ◆

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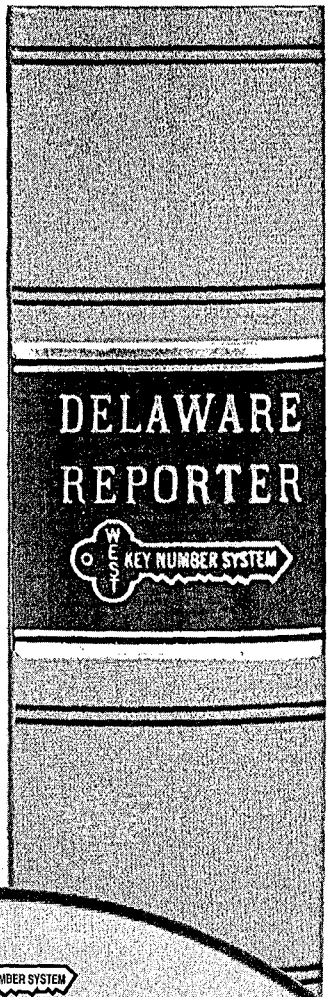

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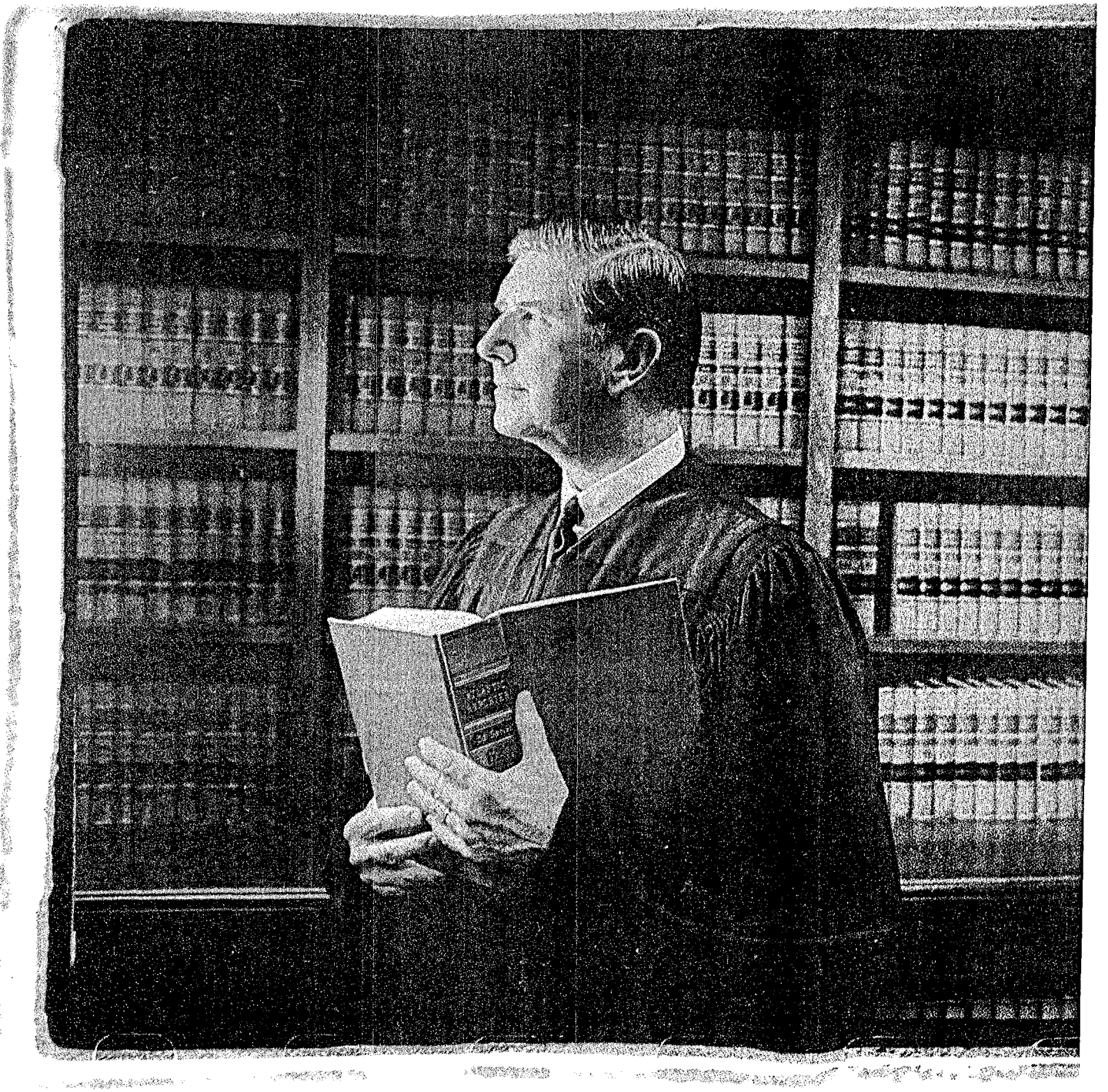
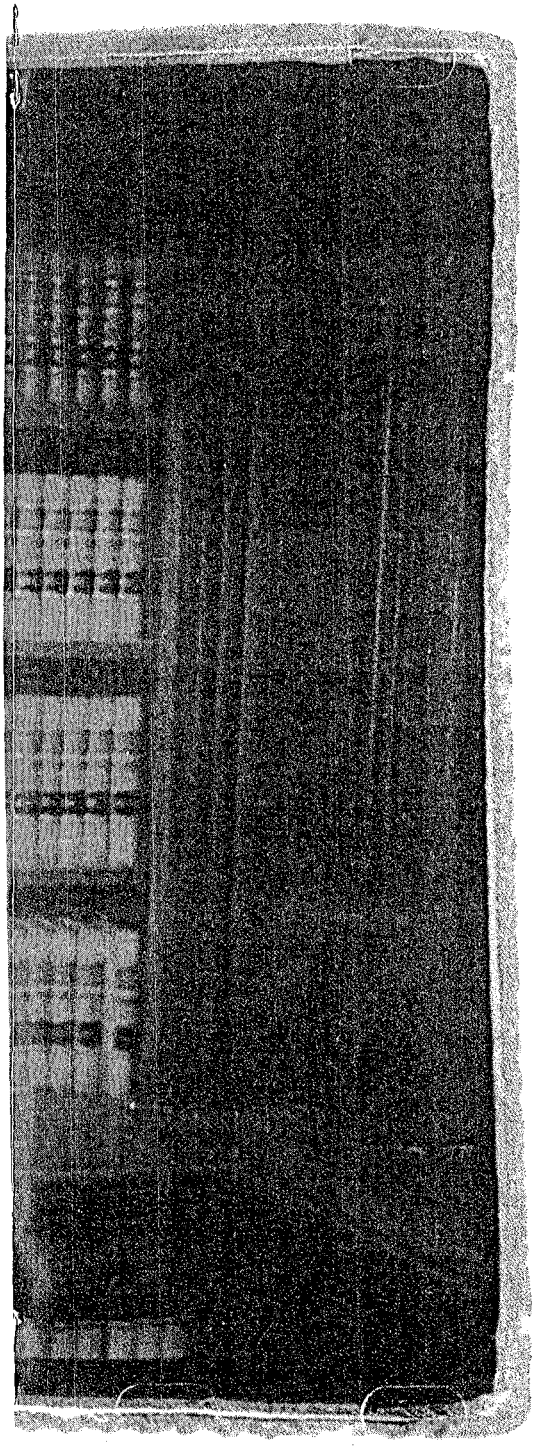


Photograph by Pat Crowe



E. Norman Veasey
Chief Justice of Delaware

"I HAVE THE BEST JOB IN AMERICA"

Having completed about 30% of my term, which began in April of 1992 and will end in April of 2004, I have decided that the best job in America (putting aside the modest pay and long hours, of course) is being Delaware's Chief Justice. In the last paragraph of this article, I hope to sum up some of the reasons why I believe this.

There are certain things about Delaware's judiciary that are easy to understand. For example, most knowledgeable people in Delaware and around the country know of Delaware's reputation for excellence in the corporation law. That reputation is driven primarily by the national respect for our Court of Chancery and Supreme Court, as well as the historic and current initiatives of the General Assembly and the Governor in providing modern statutes and outstanding service to Delaware corporations.

Somewhat less known are relatively recent initiatives such as the Financial Center Development Act of the early 1980s, leading to a strong nationwide banking establishment in Delaware, and the legislative creation of new business entities (various forms of partnerships, limited liability companies, business trusts and the like). The outstanding judicial management over the past several years by the Superior Court of huge and complex international insurance coverage cases and the availability of summary proceedings for commercial disputes in that Court are further examples of Delaware's national prominence. Indeed, *all* of Delaware's courts contribute to the good work of the judicial branch: the Family Court, the Court of Common Pleas, the Municipal Court and the Justice of the Peace Courts are part of the mosaic of Delaware's judicial competence.

Let us not be smug about our achievements, however. At times, we are tempted to take for granted our national preeminence. As business and court management become increasingly complex and other states seek fiercely to compete with us, we have to realize that we need to "earn our wings every day" to justify that national respect and the respect and trust of our citizens. All our courts, including the Supreme Court, the

Court of Chancery, and the Superior Court, need improvement in their internal processes. The great work of the Commission on Delaware Courts 2000 and the partial implementation of its report are very positive. That implementation needs to be completed. In addition, the judicial branch is undergoing a comprehensive self-study as part of an ongoing strategic planning process. That study will not only be a candid evaluation of where we are, but should lead to appropriate goals, performance standards and new, cutting-edge initiatives.

Most importantly, our judicial system must be fair and efficient and it must be *seen* as fair and efficient. To that end, we have made significant progress in facing up to issues of diversity, gender fairness, racial fairness and ethnic fairness with broad-based task force studies and recommendations for implementation. We need to follow through faithfully and diligently with those efforts.

As a member of the board of directors of the National Conference of Chief Justices, I have the opportunity regularly to see how Delaware fits in with emerging national trends. I have the privilege of working with the heads of all state judiciaries in learning (or teaching) the "state-of-the-art" in judicial management, substantive legal problems, cooperating with the federal judiciary, and dealing with Congress and the Clinton Administration. Although state courts handle over 96% of all litigation in the United States, our dealings at the federal level often involve nettlesome policy issues of federalism in the areas of ethics, law enforcement, domestic abuse, unauthorized practice of law, federal funding and the like. Delaware has an important national voice that is attributable to the respect for our judiciary, the collegiality among our state officials, and the efforts of Delaware's effective and communicative United States Senators and Representatives.

Along with other representatives of the Delaware judicial, legislative and executive branches of government, I attended the National Interbranch Conference on Funding the State Courts held in Minneapolis, from September 29 to October 1, 1995. This conference focused on cooperation within each state among the legislative, executive and judicial branches to deal with issues of funding and with vexing policy questions such as crime, domestic violence, and the impact of mandatory minimum sentences. Without putting words into the mouths of my fellow Delaware delegates, I think it is fair to say that we concluded that Delaware was in better shape than many states in important areas of interbranch cooperation. Yet, it is clear to me that we have many opportunities and much work ahead.

Delaware's size as the "small wonder" gives us an enormous advantage, particularly when coupled with the intelligence, approachability, cooperation and integrity of our public office holders. All three branches of government in Delaware are keenly aware of the reputation of the judicial branch of government and of the enormous contribution that the judicial branch makes to Delaware's economy and to the well-being of our citizens. Delaware's judicial branch must, however, continuously explain and justify its processes to the other two branches and to the citizenry. We are making that effort. But, we need the help of the organized Bar, and we need for the other two branches of government to examine, advise, hear and support us.

Delaware's size as the "small wonder" gives us an enormous advantage, particularly when coupled with the intelligence, approachability, cooperation and integrity of our public office holders.

In the end, we must collectively dispel some myths. Some of these myths include the perceptions that: (1) the judicial branch always has its hand out to the General Assembly for more money to pay judges and to provide for the convenience of judges; (2) judges don't work hard enough and are slow in moving cases and making decisions; and (3) judges are simply lawyers in robes, and lawyers are not perceived well by the citizenry. There are other myths, of course, but this is a sufficiently harsh sampling for purposes of this article. Let's talk about these myths:

MYTH NO. 1. Comforts for Judges.

We go to the General Assembly every year and ask for lots of money. We are often seen as having an unrealistic "wish list." We may not be seen by the legislative branch as an important political constituency, so our funding requests may seem less important than schools and prisons, for example. The fact is (and we need to have this understood) that our budget requests are *not* for the convenience of judges and lawyers. In the end, our budget requests represent "*people* needs," not "judges' needs." When we ask the Joint Finance Committee to provide funds for technology, security, a new Justice Center, court-appointed attorneys, commissioners, law clerks, and the like, we are expressing a need for tools to serve *people*—the litigants and their families who come in and out of our courts every day. For example: technology improvements make our court system more efficient in order to serve people with more swiftness and more certainty; security and especially the new Justice Center are urgently needed to make our courts a safer and more user-friendly place for litigants as well as those of us who work in the courthouses; commissioners, law clerks, and adequate representation for defendants (as well as the prosecution) are needed to move along the cases and to reach prompt and correct decisions. Striving for deliberate but swift justice is an important part of addressing the crime problem and concerns about the civil justice system.

MYTH NO. 2. Judges' Work Ethic.

Most Delaware judges work very long hours. Not all of that is in court with robes on: much work is done in chambers. Beyond that, however, it is perhaps not always understood that we work at home at night and over the weekends on a regular basis. Although the pace of our case management may be better than that of most states, at times we may be slower in moving and deciding cases than litigants would prefer. We are continuing to place special emphasis on the improvement of the pace and quality of processing cases.

MYTH NO. 3. Judges are Simply Lawyers in Robes.

Lawyers are held in disrepute around the country because the Bar has not done enough to inform the other branches of government and the citizenry of the good things lawyers and judges do for *people*. Many non-lawyers *correctly* perceive that some lawyers are greedy and care very little for their clients. They perceive *incorrectly* that the judiciary doesn't care and is not doing anything about bad lawyers. This perceived greed and lack of caring are then extrapolated to the entire profession and the judiciary. This is not a fair extrapolation, but it is understandable

because we have allowed the judicial system and the regulation of lawyers by the judiciary to be somewhat mysterious or misunderstood. To be sure, we have too many lawyers and we have too many getting in trouble. But the Delaware Supreme Court and the organized bar are dealing with the problem. Professionalism is improving. Good lawyers are acting as mentors for other lawyers. In our Bar, we have many outstanding role models who are public-spirited exemplars in the great tradition of the Delaware Bar. Communication, mentoring and role models are also an integral part of the Bar's strong diversity initiative. The disciplinary system works, but it can be improved. In the end, the judicial branch and lawyers need to reach out to the other two branches of government and the citizenry to instill a better understanding of who we are and what we do. Moreover, we need their input. In the end, we need to exorcise the myths.

This fall, we have undertaken a new program to invite members of the legislative and executive branches of government to visit our various courts to take an up-close view of what we do and how we do it, and to seek suggestions from those public officials for improvement of the total quality and swiftness of judicial decisionmaking.

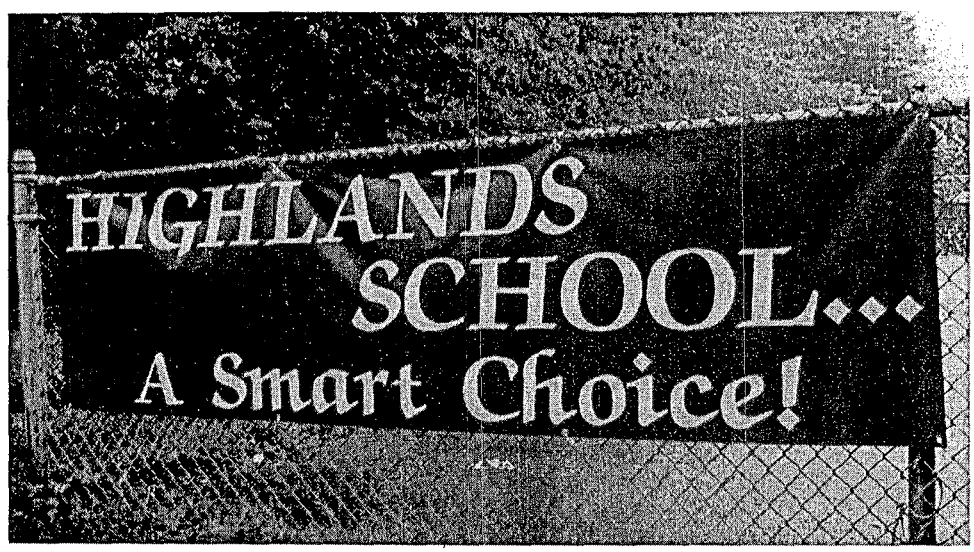
✦ ✦ ✦

This brings me full circle to the reasons why I believe I have the best job in America. Delaware has a fine national reputation. It is well earned and well deserved. We must continue to work at it. It is an honor and a pleasure to be the head of a court system that has a national lustre intellectually; is seen as a national leader among judicial systems; serves our citizens well; and is largely responsible for a very significant contribution to the Delaware economy. It is also a court system that is not afraid to look at itself in the mirror and improve. We have a collegial bench and a civil and professional Bar that compare very favorably to the benches and bars of other states. We have excellent relations with the other two branches of state government, and we have a powerful and cooperative Congressional delegation. Delaware works! Delaware's Chief Justice sometimes has to do some damage control, but the job is not about damage control. It is about *building* — working together within a three-branch system of an outstanding State to *achieve* excellence and to meet the emerging challenges of the 21st century. ◆

FEATURE

Pete du Pont

DELAWARE'S SMART CHOICE



What is wrong with this picture?

Absolutely nothing. In fact, it is an astounding photograph: a Delaware public school is promoting itself to parents and students as "a smart choice." Although it's a simple sign, just four or five feet wide, it may be symbolic of seismic changes occurring in Delaware's education system — changes that could affect, and benefit, every family in the state.

"Choice" and "public school" are a word pairing previously unthinkable in Delaware. Twenty years ago, school choice was a reactionary idea put forward by a few academic conservatives such as Milton Friedman. Ten years ago, despite a successful and popular public school choice experiment briefly tried in the Greenwood school system, choice was dismissed as impractical, undermining of public schools, and even frightening. Three years ago, in *Delaware Lawyer*, Wilmington attorney David A. Drexler argued that there are "too many parents who are ill equipped to make the intelligent choices, even for their own children." Professional educators were supposedly better equipped to choose for them.

Yet, in June, a public school choice bill passed the General Assembly with only nine negative votes, and with Governor Carper's signature, became law. So did a "charter school" law that allows organizations or groups of citizens to create and manage schools that operate outside the laws and regulations governing public schools. The tide of educational thinking seems to have turned.

While Delaware media coverage of education matters has been dominated by the August court ruling lifting the 1978 desegregation order affecting Northern New Castle County, the choice and charter legislation may well turn out to be more significant in terms of progress in Delaware's schools and opportunities for Delaware's children.

The charter legislation allows any group, except for religious groups or already existing private schools, to petition the State Board of Education or local school boards to start a new charter school. Alternatively, if a majority of parents and a majority of teachers agree, an existing public school can also attempt to become a charter school. The key to the legislation is that, while charter schools would still be held accountable for giving students the education they need to meet Delaware's graduation requirements, the method and techniques used to accomplish these requirements would be left completely up to the administrators and teachers at each charter school.

Illustration by Will Terry

Other than rules on the health and safety of the students, the charter school would be free of the rules issued by Delaware's education bureaucracy. In short, the decisions about how to teach the students at a charter school would be made at the school.

While the charter legislation empowers teachers and the community to create new schools, the choice legislation empowers parents, who will now be able to decide which public school they want their children to attend and then petition that school for admittance. Admittance would not be guaranteed, but certainly the parents of Delaware would have a great deal more choice than they have now. Delaware's better public schools would obviously attract more students (and the state funds that move from school to school with those students), pressuring other schools to improve their schools and programs to keep up.

So we may see new schools springing up, perhaps specializing in basics, or math, or the arts, and we may see parents sitting around kitchen tables discussing which of the half-dozen elementary schools within a few miles of their home they want their children to attend next September. Then we might see more than just the Highlands School advertising that it is the smart choice: we might see public schools improving their curriculum to attract students, charter schools paying increased salaries to get better teachers — from within or without the school system — and whole new concepts of schools and teaching.

If we see these things, Delaware may begin to remedy its most serious public policy failings: the inability of the state to deliver sound education, and a school system that "graduates" children tragically under-prepared to grasp life's opportunities. Delaware continues to spend more per pupil than 42 states and more on teacher salaries than 38 states. Yet, its students outperform the students of only 23 states, and that performance is far lower than it should be.

In September of this year, the Department of Public Instruction released the results of the 1995 Interim Assessment Test. The IAT, started in 1993, tells us how well Delaware public school students in the 3rd, 5th, 8th and 10th grades are doing. Our students are doing very badly, indeed. Somewhere between 2% and 24% of our students meet the various achievement standards. In the math portion of the test, 30% of our 5th and 10th graders fall into the category of "considerably below standard" and 55% fall into the category of "approach standard." So, semantics aside, 85% of Delaware's 5th and 10th graders do not achieve what is expected. The results of the IAT were so disappointing that Delaware's education bureaucracy has decided to stop testing. Ceasing to measure current progress virtually guarantees that no future progress will be made.

Will the "smart choice" sign at Highlands School be symbolic of another failed new educational approach, or does it represent the first sign of Delaware's educational rebirth?

Even more frightening, Delaware has actually lost ground compared to the rest of the country during this decade. In 1985, Delaware's verbal SAT scores bettered the national average by thirteen points, while our state's Math scores were one point below the average. Since then, the students of Delaware have lost 12 points versus the rest of our country in the verbal test and 13 points in the math test. Delaware's students are also losing the competition with students in our neighboring states. The performance trends for New Jersey, Pennsylvania, and Maryland have all bettered Delaware.

Over two decades, Delaware has tried every reform but choice. After *A Nation At Risk* warned us in 1983 of the "rising tide of mediocrity" that was engulfing our nation's schools, Delaware's education and political leaders came together to map a plan for reform. The experts said to decrease class size, so we did. The experts said to increase teacher salaries, so we did. The experts said to begin teaching children earlier, so they would have a longer academic career, and we did that, too. The experts said to spend more money, so we raised per-pupil spending (in inflation-adjusted dollars) 25% in 15 years. Yet, the promised improvements have never arrived.

The choice and charter statutes may deliver the improvements that the education bureaucracy has been unable to accomplish. But much depends upon how they are interpreted by the Department of Public Instruction and implemented by Delaware's 19 school districts.

The laws themselves codify open enrollment and the opportunity to start a charter school. The choice law states, for example, that "this chapter be construed broadly to maximize parental choice in obtaining access to educational opportunities for their children." Jeanne Allen, the President of The Center for Education Reform in Washington, ranks Delaware's charter law "the third strongest law in the land."

Since choice and charter schools are no longer new ideas, and are, in fact, being tried and evaluated across the country, Delaware has some models to study. In New York, East Harlem District No. 4 is legendary for the significant student improvement that occurred when teachers and parents were empowered to design and choose the education approach they wanted. Public school choice has long been under way in Minnesota and North Carolina.

In Milwaukee, Wisconsin, an increasing number of low-income children are in the fifth year of a private school choice program, and test scores are rising, although so far only slightly. More importantly, student satisfaction has improved, as have parental satisfaction and involvement and, not surprisingly, student attendance and discipline. These all contribute to a learning-friendly environment that should increase test scores even more in the future.

This past summer, Representative Stephanie Ulbrich (R-Newark South), a member of the House Education Committee, led a group of Delaware educators and legislators in visits to half a dozen public school choice programs in other states. After the Harlem visit, State Superintendent Pat Forgione was heard to exclaim, "If they can do *that* in Harlem, imagine what we can do here!"

Already in Delaware, the Red Clay School District has established charter schools and experimented with open

enrollment. It has made Wilmington High School a center for schools of choice. Students are able to attend the Academy of Finance (sponsored by the local banking industry), the Cab Calloway School for the Performing Arts, or the Phoenix Academy.

Starting with the 1994-95 school year, Red Clay permitted each student to choose among its four high schools, and while the impact of this decision was limited somewhat by a court ruling related to the desegregation order, over 1,100 students were granted admittance to the school of their choice in the first year of the program. Interestingly, for the first time since 1978, the size of the entering ninth grade class in Red Clay increased from the prior year, and it has done so again for the 1995-96 school year. The evidence in Delaware seems to indicate that confidence in public schools rises immediately (even before the academic results are in) once people are permitted to choose their schools.

But, the devil is in the details, and there is every opportunity for the Department of Public Instruction, any of the local school boards, or school administrators to make sure that choice and charter schools are never a reality.

Section 405 of the choice statute (70 Del. Laws, c. 180 (July 10, 1995)) gives the district to which a child wishes to go the power to disapprove applications for reasons "reasonably related to the nature of the program or school for which the application is submitted" and to use whatever criteria it wishes to limit application approval. In other words, there appears to be room for the "receiving district" to establish policies that would, for all practical purposes, exclude it from the school choice program.

Similarly, the charter school statute (70 Del. Laws, c. 179 (July 10, 1995)) may in fact be a "Potemkin village." Approval of the charter depends — if it is an existing public school that wishes to become a charter school — upon an affirmative vote of a majority of the school's teachers, as well as of the parents of school-age children in the District. That may well be an impossible hurdle to clear, and it gives teachers veto power over the wishes of parents.

Worse, charter applications must be approved (Section 511(c)) by either the school district board — likely to be hostile to the whole idea of a school free of its control — or the State Board of Education, which has historically been a foe of choice concepts. Either entity may limit the number of applications it will consider or the number of charters it will grant, and local school boards are permitted to grant none at all. In a sobering example of status-quo thinking that could hobble real reform, Christina School Board member Cynthia Oates recently criticized choice and charter legislation by saying "the potential for harm to children is too great," sentiments not likely confined to the Christina Board. In fact, the Colonial School Board voted in September to decline to accept any charter school applications for a period of one year. Continuing oversight by the approving authority gives ample opportunity for the bureaucracy to chill the application process or to harass a charter school to extinction.

Finally, there is the opportunity, with which northern Delawareans are familiar in the desegregation case, to litigate various issues — from funding formulas, to busing routes, to racial balance in classrooms — so that the entire choice and charter concept could be indefinitely delayed.

So far, there is no evidence that obstructionism will occur. But one has to wonder how large a role the education establishment sees for choice and charter. The Delaware Education Improvement Commission recently completed its review of Delaware's education system. The DEIC's report was 30 pages long, plus appendices, reflecting a year-long effort involving scores of people interested in education, yet the concepts of choice and charter merited just one brief paragraph each.

So, the jury is still out. Choice and charter legislation, by empowering parents and teachers, may show us the way out of Delaware's educational morass. Delaware's more affluent families have always had choice, frequently sending their children to private school. (In fact, Delaware sends a larger proportion of its children to private school than any other state in the country.) Now, for the first time, less affluent working and low-income families may have the same opportunity.

But the question remains whether Delaware's education establishment will work to implement or to smother these reforms. Will the "smart choice" sign at Highlands School be symbolic of another failed new educational approach, or does it represent the first sign of Delaware's educational rebirth?

We shall see. ◆

FEATURE

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Rodman Ward, Jr.
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THE COMMISION ON DELAWARE COURTS 2000:

A Work In Progress

The Commission on Delaware Courts 2000 (Courts Commission 2000 or Commission) was created on July 17, 1993, when Governor Thomas Carper signed Senate Joint Resolution No. 14. The scope of the Commission's charge was unprecedented. For the first time, a single Commission examined all of the elements of the judicial system, including the needs of the citizens of Delaware, the structure and jurisdiction of the courts, the space and security needs of the courts, judicial compensation, the use of advanced technology and other court resources. The Commission issued an interim report on February 22, 1994 and a final report on May 16, 1994. The recommendations and conclusions of the Courts Commission 2000 report have been reported elsewhere and will not be reviewed herein.[2]

Another unprecedented feature of the Courts Commission 2000 is that, unlike other court studies, the Courts Commission 2000 was, and is, charged with the implementation of its recommendations. Thus, after issuing its final report in May 1994, the Commission undertook to have introduced and enacted 13 pieces of legislation implementing many of the Commission's recommendations, including the first leg of a constitutional amendment granting the Court of Common Pleas and the Family Court constitutional status. In addition, the Courts Commission 2000 was instrumental in obtaining funding for additional personnel for the court system.

Joint Resolution No. 9 of the 138th General Assembly extended the Courts Commission 2000's life through the duration of the 138th General Assembly, mandating the Commission to continue the process of implementing its recommendations. Members of the Courts Commission 2000 were active during the first session of the 138th General Assembly in lobbying on behalf of legislation implementing the Commission's recommendations.

This article will review the changes accomplished to date and will set forth the recommendations that the Commission will address in the second session of the 138th General Assembly.

JUSTICE OF THE PEACE COURTS

Two recommendations of the Courts Commission 2000 have dramatically changed civil practice in the Justice of the Peace Courts. Before the implementation of the Commission's recommendations, the Court's civil jurisdiction was limited to cases with $5,000 or less in dispute. Every civil matter was heard by a Justice of the Peace regardless of whether a defense was offered. This resulted in a considerable waste of judicial resources in cases where the defendant did not appear at the scheduled hearing, triggering the entry of a default judgment by the Justice of the Peace and inconveniencing the complainant by requiring an unnecessary appearance.

The jurisdictional limit for civil actions in the Justice of the Peace Courts was raised to $15,000 effective January 15, 1995.[3] In conjunction with the higher limit on civil cases, responsive pleadings are now required in all civil cases.[4] In addition, the Court Clerk is now empowered to enter default judgments where a duly summoned defendant fails to file a response to the complaint.[5] The provision to permit entry of a default by the Clerk of the Court has eliminated unnecessary appearances and has increased the efficiency of the Court's calendaring of civil cases. Together, the jurisdictional increase and the request for responsive pleadings should positively affect the civil caseload of the Court of Common Pleas.

The Governor and the General Assembly have heeded the Commission's call for a full complement of Justices of the Peace. At the time of the interim report, there were five vacant Justice of the Peace positions. Those positions have been filled. The five additional Justices of the Peace, combined with the changes in civil procedure, have allowed this Court to continue to handle the caseload without undue delay.

Illustration by Paul Stoddard

The legislature has also responded to the Commission's finding that the Justice of the Peace Courts need additional security. The State's budget for Fiscal Year 1995 included three new security officers/bailiffs for the Justice of the Peace Courts.

COURT OF COMMON PLEAS

The Court of Common Pleas is a statewide court with courtrooms in each county. The Court features law-trained judges administering a non-jury civil jurisdiction and jurisdiction over misdemeanors and traffic offenses. The Court also holds preliminary hearings on felony cases.

The jurisdiction of the Court of Common Pleas has been significantly altered by implementation of the recommendations of the Courts Commission 2000. The most visible change is the availability of trial by jury for criminal cases in the Court of Common Pleas in New Castle County.[6] Before January 15, 1995, any criminal case pending in the Court of Common Pleas in New Castle County in which the defendant did not waive the right to a jury trial was transferred to the Superior Court regardless of whether the offense was a felony, misdemeanor or traffic violation. In addition, the Superior Court tried any appeal from the Justice of the Peace Courts involving a violation of an ordinance, code or regulation of local government, or a Title 11 offense. Those cases often languished in the Superior Court while weightier felonies and civil matters proceeded.

As a result of the implementation of the Commission's recommendations, offenses committed after January 15, 1995 are being tried by jury (if not waived) in the Court of Common Pleas. Similarly, effective August 1, 1995, appeals from the Justice of the Peace Courts for criminal convictions are vested in the Court of Common Pleas.[7] A *de novo* trial is available on an appeal where imprisonment exceeds one month or a fine exceeds $100. As a result, cases that were the least important in the Superior Court are now being treated as the more important cases in the Court of Common Pleas. This change has aided the swift administration of justice in both courts.

The Superior Court and the Court of Common Pleas have worked together in a cooperative effort to overcome the logistical difficulties of providing jury trials in the Court of Common Pleas. On Thursday afternoons, the Court of Common Pleas draws jurors from the Superior Court juror pool. On average, 10 to 15 cases are scheduled for jury trial in the Court of Common Pleas, resulting in three jury trials to be held the following day.[8] The trials are conducted in courtrooms that are used by the Superior Court during the balance of the week.

The Court of Common Pleas and the Superior Court have similarly cooperated to institute arbitration for the Court of Common Pleas' new civil jurisdiction. The Courts Commission 2000's recommendation to raise the Court of Common Pleas' jurisdictional limit in civil cases to $50,000 became effective on January 15,1995.[9] Arbitration is mandated for all civil matters valued between $15,000 and $50,000.[10] The arbitration unit in the Superior Court handles the paperwork associated with the selection of an arbitrator and the mechanics of the arbitration process. Given the relatively short time since the increase in this jurisdiction, the Court of Common Pleas has not yet been affected by this change.

Finally, a variety of civil appeals from matters heard in the Justice of the Peace Courts have been transferred to the Court of Common Pleas.[11] Previously, such appeals had been taken to the Superior Court. Included in this new jurisdiction are appeals from motor vehicle violations originally heard in the Justice of the Peace Courts.

Another significant change to the Court of Common Pleas is the addition of a Commissioner in New Castle County.[12] The Commissioner has undertaken a number of responsibilities related to the handling of the Court of Common Pleas caseload to allow the judges to spend more time trying cases. In Sussex County, the Superior Court and the Court of Common Pleas share a Commissioner. In addition to providing for a Court Commissioner, the Courts Commission 2000 assisted in obtaining two new clerks and a bailiff for the Court of Common Pleas commencing in Fiscal Year 1995.

The Court of Common Pleas' ability to cope with its new jurisdiction has been enhanced through the cooperation between the Court of Common Pleas and the Wilmington Municipal Court. The Wilmington Municipal Court has cooperated to provide the Court of Common Pleas with additional courtroom space for the Court of Common Pleas. The need for courtroom resources continues to be a critical concern of the Court of Common Pleas in administering its new jurisdiction.

FAMILY COURT

The Family Court is the court of original jurisdiction over family and child matters. Its civil jurisdiction includes all matters related to divorce and annulment, including property division, support, alimony, and related enforcement proceedings. Matters related to parentage, custody, visitation, abuse and neglect, guardianship and termination of parental rights are also within the Court's original jurisdiction. Its criminal jurisdiction includes all delinquency matters as well as certain non-felony crimes committed by adults.

The Family Court's jurisdiction has been amended in two respects as a result of the Courts Commission 2000. First, Title 10 of the Delaware Code has been amended to correct a jurisdictional anomaly that resulted in the courts not having jurisdiction to expunge certain adult criminal records in the Family Court. The Family Court now has the power to expunge such records on the same basis that other courts expunge records.[13]

Second, the Courts Commission 2000's recommendation to consolidate all adoption records within the Family Court was adopted by the 137th General Assembly. Before this change, adoption records predating 1971 were archived in the Superior Court and records from and after 1971 were archived in the Family Court. The pre-1971 Superior Court records were a vestige of its pre-Family Court jurisdiction. As a result, confusion existed as to how and where to obtain adoption records. Records related to adoptions are now within the purview of the Family Court, thereby eliminating confusion and any divergent practices to obtain the records.[14]

SUPERIOR COURT

The Superior Court is the court of general jurisdiction in all non-equity matters. Its jurisdiction includes all civil matters in which a jury trial is requested, appeals from administrative determinations, exclusive felony jurisdiction and jurisdiction over misdemeanors concurrent with the Court of Common Pleas and the Justice of the Peace Courts.

The 1994 legislative changes to the jurisdiction of the Superior Court are best characterized as "addition by subtraction." The addition of Common Pleas jury trials in New Castle County significantly affects the Superior Court. The Superior Court in New Castle County had been the only Court in that county where a jury trial was available for

any defendant, regardless of the severity of the offense. The advent of jury trials in the New Castle County Court of Common Pleas has eliminated the transfer of criminal cases from the Court of Common Pleas in New Castle County. In addition, the availability of a jury trial in each county permitted transfer of the appeals from the Justice of the Peace Courts — appeals formerly heard in the Superior Court. This change in jurisdiction allows the Superior Court to concentrate on more serious criminal and civil matters without the distraction of the lesser offenses which, in the past, had languished on the Superior Court docket.

Effective January 15, 1996, the Superior Court will have concurrent jurisdiction over the settlement of disabled persons' tort claims.[15] Disabled persons are defined as persons under the age of 18 or people who, because of mental or physical incapacity, are unable properly to manage or care for themselves or their property or both.[16] The Superior Court has developed substantial knowledge and experience regarding tort claims. As a result, the Commission recommended and the legislature enacted a provision placing jurisdiction over approval of such settlements in the Superior Court. Guardianships will continue to be administered by the Court of Chancery. It is expected that the Superior Court will establish rules similar to those currently in place in the Chancery Court for court approval of such settlements.

The Commission sponsored legislation to implement and administer a new methodology for jury selection that will affect every Delaware citizen who is called for jury duty by the Superior Court. In the past, citizens selected for jury duty would, depending on the county, be obligated to be available for selection for up to one month, resulting in their having to go to court six to eight times a month. Under the new program, each citizen's obligations have been substantially curtailed.

In New Castle County, the Court has implemented the "One Day, One Jury Program." Under this program, jurors are summoned to the Superior Court to be available for selection to a jury panel for one day. If selected, the person serves on a jury. If not selected, the person is dismissed and will not be called for jury duty again for two years. In Kent and Sussex Counties, where the available pool of jurors is smaller, the length of service has been reduced from one month to two weeks. Jurors are paid for every day

of jury service after the first day. In addition to working with the Court and the legislature to revise the jury selection process,[17] the Commission participated in the budget process to secure funding for the five jury clerks and the computer software necessary to implement the change.

Another example of "addition by subtraction" is the adoption of the Commission's recommendation that the felony threshold for many offenses be increased to $1,000.[18] As a result, only the more serious mischief and theft cases are heard in the Superior Court. The cases that do not meet the threshold are now heard in the Court of Common Pleas, where they are among the more serious in the Court's criminal jurisdiction.

The Commission supported legislation initiated by the Courts to create the office of Commissioner in the Superior Court.[19] At present, the Superior Court has three Court Commissioners, one residing in each county. The Commissioners conduct *capias* returns and arraignments, and they take pleas and impose sentences for misdemeanors. On the civil side, the Commissioners conduct status and scheduling conferences.

The Superior Court is in the process of completing implementation of the Commission's recommendation that civil cases be individually assigned.[20] The individual assignment of cases in the Superior Court has been studied for decades. The Commission carefully reviewed past recommendations and suggested a hybrid approach to individual assignment of certain civil cases to a judge of the Superior Court. The Court studied the proposal, utilized a State Justice Institute Grant to examine individual assignments in courts in other jurisdictions, and decided to assign individually every civil case. The Court began to implement the program this past summer, with all civil cases to be individually assigned by January 1, 1996. As of November 1, 1995, all civil cases will be assigned to a particular judge upon filing of the case. The Commission expects this to enhance greatly the management of cases.

COURT OF CHANCERY

The Chancery Court's original jurisdiction includes matters of equity, corporate law, estates and fiduciary relationships. The Courts Commission 2000 found that the Court of Chancery has operated efficiently to serve the Delaware community's needs. The only legislative change is effective January 15, 1996: the Court of Chancery will then have con-

current jurisdiction with the Superior Court over the approval of settlements of tort claims by disabled people.[21] As noted above, this jurisdictional change takes advantage of the Superior Court's knowledge regarding tort claims.

SUPREME COURT

The main impact of changes in the Supreme Court has not been jurisdictional. Rather, the Courts Commission 2000 assisted the Court in obtaining additional resources for the Court to continue its appellate mission. In the Fiscal Year 1995 budget, the Courts Commission 2000 secured four additional positions for the Supreme Court including a staff attorney, a senior secretary, a law clerk and a judicial secretary.

OTHER INITIATIVES

The effect of the Courts Commission 2000 has not been limited to issues of court jurisdiction and proceedings. As discussed elsewhere in this edition of *Delaware Lawyer*, Chief Justice E. Norman Veasey, pursuant to the Commission's recommendation, established a blue-ribbon committee charged to secure funding, select a site, and plan the development and construction of a new justice center on a cost-effective basis.

The Chief Justice acted on another Commission recommendation by creating, through an Administrative Directive, the Delaware Technical Coordinating Committee.[22] The Committee, chaired by Justice Carolyn Berger, includes representatives of all courts, the Administrative Office of the Courts, the Attorney General's office, the Public Defender's office, and counsel in private practice.

The Administrative Office of the Courts (AOC) has followed up on the concerns identified by the Courts Commission 2000 by engaging in a cooperative effort with the Department of Administrative Services to improve court security. The two offices have worked together to use Minor Capital Improvement Funds to improve security measures in the Family Court and the Superior Court. The AOC has also followed up on the Courts Commission 2000's comments regarding the use of interpreters in the courts. The AOC expects to issue state-wide court interpreter guidelines in the near future.

THE AGENDA FOR 1996

The Courts Commission 2000's agenda for the second session of the 138th General Assembly, commencing

in January 1995, includes two initiatives currently pending in the General Assembly.

In the closing hours of the 137th General Assembly, the first leg of the constitutional amendment to grant the Family Court and the Court of Common Pleas constitutional status was passed.[23] In the first session of the 138th General Assembly, the House of Representatives passed the second leg of the constitutional amendment without dissent.[24] The second leg is pending in the Senate Judiciary Committee.

Granting constitutional status to the Family Court and the Court of Common Pleas will greatly enhance the overall operations of the Delaware court system. Constitutional status will afford the Chief Justice greater flexibility in using judicial resources to improve the quality of Delaware courts. One present example of the utility of flexibility is the creation of the commercial court within the jurisdiction of the Superior Court. An express feature of that court is availability of the Chancellor or a Vice Chancellor to hear a matter. Passage of the constitutional amendment will put more resources at the Chief Justice's disposal. For instance, were a problem to occur in the Superior Court, the Chief Justice, at the request of the President Judge, could assign a judge from a constitutionally mandated Court of Common Pleas to the Superior Court to assist the Court. At present, a Court of Common Pleas judge could not be so designated because of the lack of constitutional status. Constitutional status will give the Chief Justice the flexibility to use appropriately the state's judicial resources.

The Family Court is a court of special jurisdiction. Its criminal jurisdiction, including delinquency, generally parallels that of the Superior Court, omitting only the most serious offenses (e.g. murder, rape, vehicular homicide). The Family Court's civil jurisdiction embraces the full panoply of family issues identified above. The scope and complexities of domestic relations cases rival those of estate and commercial matters brought in the Chancery Court. Family Court litigation may include issues that parallel those raised in Chancery Court guardianship matters.

The Family Court is the judicial front line for preservation of the family and family values, with primary responsibility for assisting children at risk and combatting domestic violence. Issues relating to children and domestic violence are among the State's highest priorities. The caseload trends, combined with the

demographic trends, indicate that the Family Court's caseload regarding children at risk and domestic violence is expected to increase at a higher rate than any other court's jurisdiction through and beyond the year 2000. The Court responsible for those important issues should be a constitutional court.

Granting constitutional status to the Family Court and to the Court of Common Pleas will end the vexing problem regarding the holdover status of judges. Article IV, Section 3 of the Delaware Constitution allows an incumbent judge to hold over for a maximum of 60 days.[25] At present, judges in the Court of Common Pleas and in the Family Court may remain in office until a replacement is appointed by the Governor and approved by the Senate. Thus, such judges have been able to hold over for years without being reappointed, depriving Delaware citizens of accountability in the appointment process. The pending constitutional amendment would make the 60-day holdover limitation applicable to judges of both the Family Court and the Court of Common Pleas.[26]

The Family Court and the Court of Common Pleas are the two courts in which Delawareans are most likely to encounter a law-trained judge. The judges of these courts should enjoy compensation and prestige comparable to those of Delaware's other trial courts. Giving the Court of Common Pleas and the Family Court constitutional status will properly enhance the perception of each court within the judiciary and by members of the Bar and the general public.

In the closing days of the first session of the 138th General Assembly, a bill was introduced to implement the Courts Commission 2000's recommendation to merge the Wilmington Municipal Court into the State court system.[27] The Municipal Court has criminal jurisdiction over traffic misdemeanors and municipal ordinances occurring in the City of Wilmington, concurrent with the Court of Common Pleas and the Justice of the Peace Courts. The Court also conducts preliminary hearings for felonies and drug-related misdemeanors alleged to have occurred within the City of Wilmington. The bill passed the House of Representatives without dissent and now awaits disposition by the Senate Judiciary Committee. Merger of those courts will aid in the administration of justice by eliminating geographical distinctions that have created problems for citizens and the police. A merger would

also standardize appellate review, eliminate the part time Municipal Court judge, and provide additional judges and resources for the Court of Common Pleas. The pending legislation provides for the merger of the courts and the creation of a new Justice of the Peace Court in the City of Wilmington.

Several other recommendations of the Courts Commission 2000 may be acted upon in the upcoming legislative session. Legislation eliminating the jurisdiction of the Alderman Courts and transferring that jurisdiction to the Justice of the Peace system, including the establishment of a new Justice of the Peace Court serving the towns and municipalities of eastern Sussex County, will be presented. This recommendation will create a single, entry level court system in Delaware that enhances the fairness and consistency with which justice is administered in this State. Over the past two years, the Commission has worked with the municipalities of eastern Sussex County to find methods to minimize the time that police must be absent from the jurisdiction in order to appear in court. The use of videophone connections to the Justice of the Peace Court will significantly assist in keeping police in their jurisdiction, instead of traveling for many non trial court appearances.

A recommendation that might be brought before the legislature in the second session of the 138th General Assembly is that the Public Defender's office be phased into a full time position. At present, the Public Defender and Deputy Public Defenders may have a private practice in addition to the duties of a Public Defender. The Commission has recommended that, upon the appointment of the next Public Defender, the Public Defender and Chief Deputy Public Defender will be required to serve as full time employees of the State. In addition, upon enactment, new Assistant Public Defenders will be hired on a full time basis. Current Public Defenders may continue to maintain private practices in conjunction with their service as Public Defenders.

The Courts Commission 2000 continues to assist the courts' implementation of other recommendations of the Commission. As we proceed, we are mindful of Chief Justice Herrmann's admonition that court reform is not for the faint hearted or the short winded.

Constraints of space make it impossible to include the footnotes, but the numbers to them appear. They will be available upon request from the offices of the editor. ◆

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care for all Delaware children up to age 18. To enact such a proposal and use Medicaid dollars, Delaware needed a federal waiver from the Medicaid program. Consequently, we had to fill out forms, "jump through hoops" and seek permission from the federal government — all of which took many months. This is but one example of the many "stop signs" Delaware received from the federal government before it was able to enact reforms. Luckily, the atmosphere is changing and a new perspective is shaping public policy.

One cannot discuss the topic of federalism without first mentioning the concept of block grants — a term first developed in 1966. While there is no legal definition of the term, the Congressional Research Service explains block grants as a "characterization of a federal, state or local relationship in which there is considerable discretion in grant administration within a broadly defined program area." Block grants typically entail less red tape and fewer administrative requirements, and apply to broad rather than narrow categories. I believe that block grants are a more efficient and effective mechanism for achieving a national goal because they usually encourage long-term planning and eliminate funding uncertainty that often accompanies competitive federal categorical programs.

As Congress prepares to cede control of matters to the states through block grants, our state officials are busy formulating plans to meet to the overwhelming expectations and responsibilities engendered by the federal government's transfer of authority. Governors must have mixed emotions about this devolution of power from the federal government. On the one hand, they are probably relieved that Washington has finally acknowledged that the states might have good ideas of their own. On the other hand, they are likely concerned about the adequacy of the states' resources and the concomitant federal commitment to fund these important new programs. I can understand the governors' uneasiness, given such a monumental change in governing. But I also must say that federalism supplies the answers that many governors and the National Governors Association have been waiting to hear for years. The federal government is willing to allow the states to recapture responsibility. In return, it expects the states to manage these new responsibilities with fewer dollars because there are far fewer federally-imposed administrative costs and regulations. One of the most prominent examples of this is the recent Congressional action to end the federal entitlement for most welfare benefits and to provide states with block grants to implement job training programs, child care services, administration of cash benefits, and food stamps. Congress has voted to remove people from dependency and to help them become self-sufficient. While all the details of this complex issue have yet to be worked out in conference by the House and the Senate, I am pleased that the President has signaled that he will sign the Senate bill.

As another example, Congress is considering ending the entitlement status of Medicaid health benefits and "block-granting" funds for the joint federal/state health care program for poor, disabled and aged individuals. Medicaid is the fastest growing program of the Federal government, increasing by 10.7 percent annually. The program is extremely important and necessary, but we simply must enact reforms and slow its exorbitant cost growth. If we do not, the states will confront a heavy increase in spending — $688 billion of their own money — for this program, which already consumes an average of 20 percent of their budgets. Delaware currently spends about $161 million each year on Medicaid, which is ten percent of its budget for fiscal year 1996. In 1985, when I was governor, Delaware spent about four percent of its budget on Medicaid. Neither the states nor the federal government can sustain this growth rate.

Through slower growth rates and block grants, states will be able to implement innovative Medicaid reforms that might provide more services to more people. The crux of this issue, however, is the funding formula, which dictates how much money each state receives from the federal government. While this has not yet been formalized, I am working to ensure that Delaware is not unfairly affected by a dramatic change in the formula.

A further application of federalism that has gained broad, bipartisan support in the House is in the area of job training. Currently, there are over 150 separate, duplicative and fragmented job training, education and employment assistance programs. These programs now include multiple plan requirements, endless reporting mandates, and inconsistent definitions of eligibility. Individuals who attempt to obtain services through these programs face a bureaucratic maze of eligibility determinants and application requirements. The House recently passed legislation called the Consolidated and Reformed Education, Employment and Rehabilitation Systems (CAREERS) Act that consolidates these multifarious programs into block grants to the states. This legislation replaces confusion with simplicity by giving states and localities the ability to streamline job-training services to meet better the needs of participants. The CAREERS Act ensures that states and local governments are held accountable for program results through performance measures developed in partnership with governors. This bill, which I strongly supported and cosponsored, recognizes that states are different and that the needs of individuals are different. Under it, each state is allowed to develop its own structure for a statewide training and development system.

While I support efforts to give the states freedom through block grants to implement their own programs, I think it is neither wise nor responsible simply to "write the states a check" without including any broader goals or standards. Federal laws, rules and regulations are intended to achieve important goals and objectives that are held to be in the national interest. They are also intended to be checks against the three enemies of responsible government: waste, fraud, and abuse. While I support such standards, I believe they should be minimal, emphasizing broad policy goals rather than program micromanagement, and should contain accountability provisions to ensure that funds are spent responsibly to achieve intended results.

Federalism helps not only the states, which benefit from more flexibility, and program recipients, who benefit from programs designed by those who best understand their needs: it also assists the federal government by reducing program costs. Existing federal programs are enormously expensive to administer and manage. By consolidating such programs and freeing states to implement them, substantial savings can be generated. Yet Congress must not reduce funding too drastically because, at some point, all the state creativity in the world will not enable states to succeed if they lack the resources to implement their

innovative ideas.

So how is federalism faring in Washington? One of the biggest victories on the "federalism front" was passage of the Unfunded Mandates Law, which deters the federal government from imposing expensive new requirements on state or local governments without providing the required funding. This important new law will enable state and local resources to meet state and local priorities rather than federal mandates. With the power shift to the states through block grants, large amounts of money will pass over to state control as well, allowing the states to spend as they see fit within broad policy guidelines. This epochal change in governing will allow states to allocate resources among the priorities they choose, rather than requiring them to accept meekly the prescriptions of politicians and regulators in Washington. Red tape will be slashed, experimentation will be encouraged, and fifty state "laboratories" will likely generate more policy innovations on their own than if they had to request federal permission for each proposal. While I am pleased at this change in perspective, I share and understand well the principal relevant fear of the governors: that the federal government might spread its available resources too thinly. I am working to ensure that we provide sufficient policy latitude and enough federal funds to enable the "new federalism" to succeed.

In the final analysis, I expect that states will welcome the increased responsibility and program flexibility entailed by the "new federalism." However, the states must also prepare for the certainty of less federal funding. The need for such preparation is particularly acute because this Congress is determined to balance the budget by 2002. I will continue to work to ensure that the federal government retains the necessary involvement and interest in policy problems and that states, including Delaware, have the wherewithal to address those problems in their own creative ways — particularly in deciding how federal funding formulas will affect programs such as Medicaid. I think Delaware is completely prepared to handle the new challenges and responsibilities that it will face. Once it has adjusted to those dramatic changes, the First State will be better able to manage and provide job training, health care, employment, child care and many other services to Delawareans. ◆

OPINION

The New Federalism and Delaware

by Congressman Michael N. Castle

Whatever becomes of the current Republican majority in the next general election, this Congress will rank historically as one of the most revolutionary legislative bodies of the past two hundred years. It has already passed more significant legislation than has any Congress in recent memory — legislation that fundamentally changes the way business is done in Washington.

One of the most important consequences of the 1994 elections has been the new consideration that Congress is giving to an old principle — federalism. As I define the term, federalism means allowing states to retain as much authority as possible without undue interference from the federal government. The states are being given the responsibility for policy matters that traditionally have been administered by Washington. Welfare, Medicaid and job training are just a few of the programs for which the states will receive primary administrative responsibility. A return to federalism offers hope that states will succeed where the federal government has failed to achieve intended results. This shift is a direct response to the voters' expressed wishes to shrink the size and scope of the federal government and evidences a philosophy that the states are inherently more efficient than the federal government. Simply put, the states are closer to the people they serve and therefore know best how to meet the particular needs of their communities.

States want to be "laboratories of change" to devise creative, effective solutions to many of today's problems. However, the states have continually been frustrated by federal rules and regulations. For example, when I was Governor of Delaware, the federal government was an obstacle to our desire to create a public-private partnership for universal health

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