"But the poor," Lorris continues, "have the cars cast off by the rich: the 1968 Chryslers that get eight gas stations per mile. And they've inherited the delapidated

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Charles Waller

Briefcases

8/11/79

Henrick Drescher

Proposed Carter Nominee Under Fire

By Harvey Silverglate

A wave of criticism has temporarily sidetracked the Carter administration's commitment to nominate a controversial federal district judge from New Jersey, Frederick B. Lacey, to fill the second highest position in the Department of Justice, the deputy attorney general. If the president finally does nominate Lacey, he will expose himself to an embarrassing confirmation hearing before Senator Edward Kennedy's Judiciary Committee that will further damage his chances for reelection in 1980.

Weeks ago, Carter and his advisers virtually had decided to name Lacey to replace Benjamin Civiletti, who had been slated (and now has been nominated), to succeed Attorney General Griffin B. Bell. Formal announcement of Lacey's nomination was held up, however, when outside sources began calling the department's attention to some incidents in Lacey's background that cast serious doubt on his qualifications for a job that requires decision making in areas affecting the most basic rights of individual citizens.

It turns out that Lacey's widely perceived reputation as a tough and competent former New Jersey federal attorney and current federal district judge, does not tell the whole story. In the law, appearances are often quite different from realities, and a number of people who know Lacey well hold a quite different view of his qualities and qualifica-

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attack. You might say that the only one whose health was affected by that reactor near Harrisburg. No, that would be wrong.

Edward Teller as he appeared in last week's Wall Street Journal *ad*

It was not the reactor. It was Jane Fonda. Reactors are not dangerous."

Teller goes on to defend not only nuclear power but his own role in developing the hydrogen bomb, since "both are needed for the survival of a free society." A few paragraphs down he defends his bomb work again: "I was once asked how I would like for my grandson, Eric, to think of me and my life's work after I am gone. Eric is nine years old. He is a terrible guy — he beats me at the game of 'Go.' I am enormously fond of him, but I have not given much thought to what he will someday think of my life's work. I have given a great deal of thought to whether he will be alive in the next century, and whether he will be living in freedom or in slavery. If he is living under communism, he will know I was a failure."

In a question-and-answer section, Teller emotionally denies that a reactor can explode like an atom bomb, something no antinuker has suggested for years. He

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tions to be either in the Department of Justice or, for that matter, on the bench.

Lacey was involved in a controversial criminal case involving an attempt to bribe the mayor of Fort Lee, New Jersey. Several defendants in that case were convicted in a jury trial with Lacey presiding, and he sentenced each to what was generally considered to be a stiff sentence: five years in prison and $10,000 fine. (As a point of comparison, one might note that here in Massachusetts United States District Judge Walter Jay Skinner imposed one-year prison sentences upon State Senators Joseph DiCarlo and Ronald MacKenzie upon their conviction in the MBM payoff case.)

Sometime after the Fort Lee bribe defendants were sentenced, and while their appeals were pending (they had been released on baif pending appeal), their appellate lawyers discovered certain suspicious facts that made it appear not only that the prosecutor had likely failed to turn over to the defendants certain exculpatory information that the prosecutor knew about prior to trial, but also that during the trial the prosecutor had met and discussed the case with Lacey without the defendants' lawyers being present. Such *ex parte* discussions between the judge and lawyers for one side are highly unethical and irregular, although many defense lawyers suspect that it is an uncomfortably common practice for judges and prosecutors in some places.

The defendants filed motions to set aside the verdicts and the sentences; their allegations that the prosecutor had had *ex parte* meetings with the judge introduced an unusually acrimonious tone to the legal proceedings that ensued.

The defendants claimed that they had made a sufficient demonstration, with the evidence they already had at hand, to justify the court's convening a full-scale evidentiary hearing, at which the defendants' lawyers would be able to issue subpoenas and call witnesses to further bolster their contentions. High on the list of potential witnesses on the issue of *ex parte* communications were the United States attorney (Jonathan Goldstein, who had been Lacey's protégé when Lacey had himself been the United States attorney), and Judge Lacey himself.

Needless to say, Judge Lacey did not relish the prospect of taking the stand as a witness. Despite the filing of voluminous affidavits and legal briefs by the defendants' legal team, led by Harvard Law School Professor Alan Dershowitz, Judge Lacey denied the motion for an evidentiary hearing.

During the course of his long, complex written opinion justifying his denial, and during the course of the oral arguments leading up to that denial, Judge Lacey neither flatly denied (nor admitted) having *ex parte* meetings with the prosecutor. At the same time as he denied the motion for a hearing, he denied another blockbuster request filed by the defendants: that he disqualify himself from conducting further proceedings in the case.

The defendants sought an immediate appeal to the United States Court of Appeals for the Third Judicial Circuit, which sits in Philadelphia. First of all, they appealed from Lacey's order that the defendants begin serving their prison sentences immediately. Eventually, the Court of Appeals reversed this order, and allowed the defendants to remain free pending decision on the appeal. When the appeal was completed, the Court of Appeals also reversed Lacey's refusal to hold an evidentiary hearing. The court said that such a hearing had to be held for three of the four defendants, although it refused to force Lacey to disqualify himself from being the judge to hold the hearing. At this point, the defendants filed a petition with the US Supreme Court, asking that Lacey be disqualified from further participation in the case.

Then a startling thing happened: Lacey announced that he was removing himself from the case voluntarily in order, he said, to expedite the litigation. However, as Lacey knew, his disqualification had the opposite effect, since a new judge had to familiarize himself with the thousands of pages of transcript and legal papers. Lacey's move meant that the Supreme Court did not have to decide on disqualification. In late 1977, the case was then transferred to Judge H. Curtis Meanor, a respected, experienced jurist.

Part way through the evidentiary hearing that Meanor promptly had convened, the prosecution relented and agreed to a deal: the defendants would withdraw their motion to vacate the conviction on the condition that Meanor be allowed to vacate the original sentence and resentence them. Judge Meanor resentenced them to three-year prison terms plus the $10,000 fines, although he ordered the defendants actually to serve only six months of the sentence. (This so-called split sentence is authorized by law and is common in white-collar criminal cases.)

At this point, Lacey blew his top and proceeded to do things that were highly irregular and improper for a judge. First, he arranged for a hearing to be convened in the case of the one defendant who the Court of Appeals said was not entitled to an evidentiary hearing. Lacey conducted the hearing himself, notwithstanding the statute and rule that prohibit a judge disqualified in a case from participating in any further proceedings in the case.

Then, Lacey used this opportunity to issue an unusual, blistering written opinion, attacking Judge Meanor, suggesting that he was soft on corruption cases. Lacey also claimed that Meanor did not have the legal authority to resentence the defendants to lower prison terms.

Lacey issued his opinion in an open court session and ordered his clerk to distribute copies of it to members of the press, who

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conveniently had appeared in the courtroom at that moment. The whole episode took on the air of a judicial press conference, although it may never be known just who summoned the reporters. What is clear is that Lacey expected the press to show up, and he was ready for them. For this breach, the respected *New Jersey Law Journal* castigated him in a well-reasoned editorial.

Apparently, Lacey did not stop there. Lawyers close to the case claim that once the defendants entered prison to serve the sentences imposed by Judge Meanor, Lacey made *ex parte* contacts with officials of the United States Bureau of Prisons, urging the bureau to cause the defendants to serve his five-year sentences on the theory that the shorter sentences imposed by Judge Meanor were unlawful. (Proper procedure would dictate that if Judge Meanor's sentences were indeed unlawful, a higher court's opinion on the subject would have to be sought in a formal appeal brought by the prosecutor, and no such appeal was lodged in this case.)

All the while, the defendants started up serving the sentences imposed by Judge Meanor, but the incident caused shock waves among New Jersey's lawyers and judges. Stories started to leak out that Lacey had threatened Meanor by warning Meanor that, if reduced sentences were imposed, Lacey would hold precisely the kind of hearing that he did in fact later convene, to criticize Meanor publicly. Stories also began to appear that Lacey had a practice of holding *ex parte* meetings with the prosecutor in still other celebrated cases.

Reportedly, once the facts of the Fort Lee bribery cases were brought to the attention of the White House and members of the Department of Justice, the plans to announce Lacey's nomination as deputy attorney general were postponed. Gradually, reports of Lacey's alleged misconduct in other cases came to Washington's attention.

The odd thing is that high administration officials were prepared to nominate Lacey for the second highest post in the most sensitive department of the executive branch of the government without doing a sufficient investigation to learn about his background, his erratic behavior in the Fort Lee bribery cases, and the claims, neither adequately investigated nor disproven to date, that he has engaged in a pattern of unethical conduct while on the bench. In contrast to some of the relatively minor financial blemishes that defeat some nominees for high public office, Lacey's proven and alleged actions demonstrate flaws that go to the heart of his fitness for any high office in the system of justice.

It is less likely now that the president will name Lacey to the post. If he does, however, the confirmation hearings that would follow would likely prove extremely embarrassing to both Lacey and to the president. Lacey would have to answer the questions about Fort Lee and other cases that he has avoided thus far. Confirmation would be far from assured.

Interestingly, if administration officials had only bothered to inquire of some of their own people, they may have learned something about Lacey that they did not, apparently, know when they decided to push him for nomination. One prominent government attorney who spoke to me off the record discussing the proposed Lacey nomination commented that he was surprised "that they picked a fascist like Lacey" for the post.

The Court Returns the Hot Potato

The state's highest court, the Supreme Judicial Court (SJC), was recently asked by the legislature whether a proposed drug law, mandating a minimum twenty-five-year prison sentence without the possibility of parole, was constitutional. As was noted here (see Briefcases, *RP*, 7/14), the legislature had some doubt as to the constitutionality of such a long sentence, as well as of the definition of the cut-off line for imposing the sentence: those defendants caught with illegal drugs with a "street value" of $25,000 or more.

I noted then that the SJC, which might not look favorably on legislation that removes all sentencing flexibility from the trial judge, could scuttle the bill either by declaring it unconstitutional or by failing to render an advisory opinion before the legislative session ended. This would have suited the legislature, which wanted the court, not itself, to take any blame for the defeat of this ill-advised proposal.

As it turned out, the SJC might have had the last laugh. On July 6, five justices (a majority of the seven-member court) issued an opinion declaring that the twenty-five-year mandatory minimum term did not, in and of itself, violate the provisions of the state and federal constitutions barring cruel or unusual punishments and that the $25,000 "street value" cut-off was not impermissibly vague. However, in several different ways the court suggested that the bill was of dubious merit, legal and otherwise.

First, the court stated that it wanted it understood that it was not commenting "as to the wisdom of the proposed legislation or whether it would tend to derogate from the even-handed administration of justice." Next, the SJC majority warned that its declaration of constitutionality was based only upon a "facial examination" of the bill, meaning that the court was not saying that the law would be constitutional regardless of the situation in which it was sought to be applied. The court also made it clear that it had considered only the legislature's fear that the twenty-five year sentence might run afoul of the cruel or unusual punishment clause, leaving open the possibility that it might be found unconstitutional in some future attack under other relevant constitutional provisions that the court went on to cite.

As if this weren't enough, the SJC went on to warn that it was not then passing on whether in certain cases the statute might be inapplicable because of the difficulty a defendant might encounter in trying to find expert testimony to refute the prosecutions' claim that the drugs in question were worth $25,000 or more "on the street." The court added that "it may even be possible that . . . some of the drugs . . . are not susceptible to readily computable 'street values.' " In other words, it may well be that the bill, if enacted into law, would be useless as a prosecutorial weapon.

To make the validity of the bill even more questionable, two dissenting members of the court, Justices Paul Liacos and Ruth Abrams, took a more direct approach and said that the proposed penalties were indeed cruel or unusual punishments and hence unconstitutional. Thus, in any future case challenging the law if it is enacted and applied to some hapless defendant, that defendant already has two members of the court on his or her side, with the other five members expressing serious doubts as to whether the statute is workable and whether it can be applied in a large variety of cases.

The well-hedged SJC opinion may not have been the most courageous thing for the court to do, but it does seem a fitting response to the legislature's attempt to slough off its own responsibility to throw ill-conceived legislation like this in the trash can. ■

Short Takes

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repeats the discredited Rasmussen Report line that one's chance of being injured in a nuclear accident is "about the same as being hit by a falling meteor." He urges the reprocessing of plutonium from spent fuel and the transition to a plutonium economy, since reprocessing is admittedly the only way "to make nuclear energy abundant and lasting."

To the question "Will the expansion of nuclear power by other countries enable them to make nuclear weapons?" Teller answers, "Unfortunately, yes. This is already happening." His solution is as follows: "What we must do is find better solutions to international problems . . . and to strengthen cooperation and confidence among nations."

As to the possibility of terrorists making atom bombs with all that plutonium in circulation, Teller says, "The answer is not to get rid of the reactors — let's get rid of the terrorists."

The problem with that approach, of course, is that when someone becomes a terrorist, it is already too late. His group has already exploded a thermonuclear atom bomb and is threatening to blow up twenty American cities over a one-year period unless given a trillion dollars, the state of Arizona, and a promise to ship all blacks back to Africa, or something equally outrageous. What Teller means is, "Let's get rid of all *potential* terrorists." This could only be done by keeping track of every move by, and every opinion held by, 220 million citizens.

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Thirty-Four Years and Counting . . .

Nuclear bombs are already in the hands of terrorists, however. The terrorists are the Joint Chiefs of Staff and the Soviet Politburo, and they use the nuclear "balance of terror" — which is almost an official term among them — to vie for political leverage around the world.

For people who believe no one should have atom bombs, the Mobilization for Survival is holding a series of vigils and rallies this week commemorating the thirty-fourth anniversary of the bombing of Hiroshima and Nagasaki. Vigils will be held August 6 through 9 at such sites as Draper Labs in Cambridge, maker of high-accuracy, first-strike missile guidance systems; Stone & Webster, the nuclear-power-plant builder; the Park Street military recruiting station; and inner-city neighborhoods that bear the brunt of the impoverishment of the economy brought on by massive defense spending. The events conclude Thursday, August 9, with a rally at the Arlington Street Church at 7:30 p.m. (For information call 354-0008.)