

An Addendum in Light of Recent Developments

*Bruce Ledewitz**

The author's contribution to this issue of the *Duquesne Law Review* was almost finished when *In re Bruno* was decided on October 1, 2014¹ and was entirely finished when the resignation of Justice Seamus McCaffery was announced on October 27, 2014, after a very public controversy and suspension by a 4–1 vote on October 20, 2014.² But I want to address those two matters briefly since they will be a part of the legacy of Chief Justice Castille. They may even overshadow the rest of it.

Bruno appears to be the denouement of an issue that arose almost immediately upon adoption of the 1993 constitutional amendment reformulating judicial discipline (Amendment)—how much authority the Pennsylvania Supreme Court retained over judicial discipline. The issue arose when, in the fall of 1993, shortly after the Amendment's adoption, Justice Rolf Larsen was indicted on criminal charges. The rest of the Justices thereupon relieved Justice Larsen of his judicial duties, effectively suspending him.³

The reason that this issue should not have arisen is that in context and structure it is clear that the effect of the Amendment, fairly read, was to deprive the Pennsylvania Supreme Court of any role in judicial discipline. The context was that the Amendment was adopted after years of infighting among the Justices and the very public censure of Justice Larsen by two other Justices—the rest of the court not participating—that had led to the empanelling of an investigatory grand jury to look into all the charges and counter-charges among the Justices.⁴ The Amendment was the legislature's and the public's response to these embarrassing events.

* Professor of Law, Duquesne University School of Law. Professor Ledewitz contributed another article to this issue of the *Duquesne Law Review*, discussing Chief Justice Castille's contributions to state constitutional law. Bruce Ledewitz, *Beyond Edmunds: The State Constitutional Legacy of Chief Justice Ronald D. Castille*, 53 DUQ. L. REV. 371 (2015).

1. *In re Bruno*, 101 A.3d 635 (Pa. 2014).

2. *In re McCaffery*, No. 14–430, 2014 Pa. LEXIS 2762 (Pa. Oct. 20, 2014), *vacated*, *In re McCaffery*, No. 14–430, 2014 Pa. LEXIS 2807 (Pa. Oct. 27, 2014) (holding the case vacated as moot on account of Justice McCaffery's retirement).

3. *In re Larsen*, 812 A.2d 640, 644 (Pa. Spec. Trib. 2002).

4. *Id.*

The structure of the Amendment gave the Court of Judicial Discipline discretion to issue an interim suspension, which was made expressly unreviewable in any other court,⁵ sole discretion over the choice of sanctions, which could be reviewed on appeal only for legality rather than appropriateness,⁶ and the substitution of a Special Tribunal rather than the Pennsylvania Supreme Court for appeal of a disciplinary decision involving a Justice.⁷ To an unbiased eye, the effort to insulate judicial discipline from the Pennsylvania Supreme Court is clear beyond doubt.

In the years that followed the suspension of Justice Larsen, and in particular in the suspension of Justice Joan Orié Melvin by the Court in 2012,⁸ also upon the filing of criminal charges against her, it was not clear how much authority the Supreme Court claimed to retain in judicial discipline. These suspensions of Justices were entered immediately upon the opening of criminal cases and could have been viewed as modest exercises of the “general supervisory and administrative authority” over the judiciary that the court is granted in article V, section 10(a).⁹ In other words, these suspensions could have been viewed as temporary actions to give time to the Judicial Conduct Board and the Court of Judicial Discipline to decide what to do.

But that interpretation was undermined by Chief Justice Castille’s opinion in *Bruno*.¹⁰ In form, the suspension in *Bruno* was like those of Justices Larsen and Orié Melvin, merely a temporary expedient issued by the Pennsylvania Supreme Court upon the initiation of criminal proceedings against a judge. However, in the case of Judge of the Magisterial Court, Mark Bruno, a dispute arose between the original suspension by the Supreme Court, which was without pay,¹¹ and the temporary suspension later issued by the Court of Judicial Discipline, which was not only with pay, but also ordered that any withheld compensation be repaid to him.¹² The Administrative Office of the Pennsylvania Courts did not recommence paying Judge Bruno his salary in accordance with the order of the Court of Judicial Discipline and did not order payment until ordered to do so by the Pennsylvania Supreme Court pursuant to

5. PA. CONST. art. V, § 18(d)(2).

6. PA. CONST. art. V, § 18(c)(2).

7. *Id.*

8. *In re Melvin*, 57 A.3d 226 (Pa. Ct. Jud. Disc. 2012) (order suspending Justice Melvin).

9. PA. CONST. art. V., § 10(a).

10. *In re Bruno*, 101 A.3d 635 (Pa. 2014).

11. *In re Bruno*, No. 13–84 (Pa. Feb. 1, 2013) (order suspending Judge Bruno).

12. *In re Bruno*, 69 A.3d. 780 (Pa. Ct. Jud. Disc. 2013).

the court's consideration of its authority to suspend and the authority of the Court of Judicial Discipline to, as the court's opinion put it, "overturn this Court's prior order."¹³

Judge Bruno was eventually acquitted on all criminal charges and returned to the bench.¹⁴ But the issue of the respective authority of the Pennsylvania Supreme Court and the Court of Judicial Discipline remained to be determined. Chief Justice Castille concluded for the majority that the Supreme Court, pursuant to its "authority at King's Bench" possesses the power to order interim suspensions, including suspensions without pay, and that the Court of Judicial Discipline possesses its own authority to issue interim suspensions, but that if such orders conflict, as they did in this case, "the order of the Supreme Court is 'supreme' and controlling."¹⁵

It is easy to see that this assertion of the King's Bench power, which the Chief Justice held the 1993 Judicial Discipline Amendment did not displace,¹⁶ is in conflict with the terms of article V, section 18. Section 18(d)(2) renders interim orders of suspension, with or without pay, unreviewable.¹⁷ But, in effect, the judgment of the Court of Judicial Discipline that a suspension without pay was not warranted was reviewed by the Pennsylvania Supreme Court, in the sense that its order countermanded that of the Court of Judicial Discipline and Judge Bruno's salary continued to be withheld.

Nevertheless, the *Bruno* case presented only a relatively narrow legal issue: which order of suspension in the case controlled? The implications of the opinion were far broader, however. By referring to the supervisory authority of the Pennsylvania Supreme Court pursuant to the King's Bench power and the authority of the Court of Judicial Discipline as "distinct" and by raising in a footnote the possibility that the Supreme Court might even possess the authority to remove a sitting judge,¹⁸ the majority opinion seemed to be suggesting that the Supreme Court might be able to function as a complete alternative to the Court of Judicial Discipline. That impression was strengthened by the suggestion in another footnote

13. *In re Bruno*, 101 A.3d 635, 642 (Pa. 2014).

14. *Id.* at 643.

15. *Id.* at 641.

16. *Id.* at 675–76.

17. See PA. CONST. art. V, § 18(d)(2) ("An interim order under this paragraph shall not be considered a final order from which an appeal may be taken").

18. *In re Bruno*, No. 13–84, 101 A.3d 635, 680 n.24 ("There is no constitutional provision that places restrictions on the Supreme Court similar to those on the General Assembly respecting the ability to restrict a judicial officer's exercise of his or her office by removal, suspension, or otherwise").

that the Supreme Court might be able to take a case from the purview of the Court of Judicial Discipline under its “extraordinary jurisdiction.”¹⁹

The stage was thus set, intentionally or not,²⁰ for the drama over the suspension of Justice McCaffery. Prior to that episode, when the court entered an order of interim suspension of a judge, the court then left the matter of the ultimate sanction to the judicial discipline machinery of the Judicial Conduct Board and the Court of Judicial Discipline, either by implication, as in the suspensions of Justices Larsen and Orié Melvin, or expressly, as in the suspension of Judge H. Patrick McFalls.²¹ Even in *Bruno*, the contradictory orders of suspension involved only interim suspension rather than an ultimate sanction for judicial wrongdoing.

But the order of suspension of Justice McCaffery was quite different. First of all, the *per curiam* order referenced the “Court’s King’s Bench power,”²² which prior orders of suspension had not, and which was reminiscent of the “distinct” authority over the judicial sanctions that *Bruno* had asserted.²³ In a special concurring opinion, Chief Justice Castille made the reference to *Bruno* express.²⁴

Second, while the order did refer the matter to the Judicial Conduct Board, it treated the Judicial Conduct Board not as an independent investigative body, but as an inferior body subject to the Pennsylvania Supreme Court’s authority, much as the footnote in *Bruno* had anticipated under the court’s extraordinary jurisdiction.²⁵ In other words, the Supreme Court stood ready to decide for

19. *Id.* at 697 n.30 (“The question of whether the Supreme Court may exercise another facet of King’s Bench jurisdiction—extraordinary jurisdiction—to take cognizance of a matter pending before the CJD is not before us. We note that, in a case in which the Court exercises extraordinary jurisdiction over a pending matter, the exercise of the Court’s jurisdiction would preempt proceedings before the CJD . . .”).

20. Attorney General Kathleen Kane released certain sexually explicit emails to the media on September 25, 2014, which is the originating issue that led to the suspension of Justice McCaffery a few weeks later. It is not clear whether the *Bruno* opinion was, or even could have been, written with an eye toward the issue of discipline of a sitting Justice that became an actually pressing issue just a few weeks later. It is worth noting that Justice Todd’s concurrence in *Bruno*, 101 A.3d 635, 701 (Pa. 2014) (Todd, J., concurring), specifically exempted authority over a Justice from any other exercise of the King’s Bench power of supervision and that she subsequently registered the only dissent from the order suspending Justice McCaffery. *In re McCaffery*, No. 14–430, 2014 Pa. LEXIS 2762 at *13–14 (Pa. Oct. 20, 2014) (Todd, J., dissenting).

21. *In re McFalls*, 795 A.2d 367 (Pa. 2002).

22. *In re McCaffery*, 2014 Pa. LEXIS 2762 at *1.

23. *In re Bruno*, 101 A.3d at 685.

24. *In re McCaffery*, 2014 Pa. LEXIS 2762 at *4–5 (Castille, C.J., concurring).

25. The Board was given thirty days to determine whether probable cause existed to file formal misconduct charges against Justice McCaffery and, if not, to file a report in the Supreme Court indicating its reasons. *Id.* at *3.

itself what ought to be done in the case of Justice McCaffery's misconduct.²⁶

The results in *Bruno* and in the Justice McCaffery suspension were not just questionable in their own right as a reasonable interpretation of the Pennsylvania Constitution; the public charges that surrounded the suspension gave further support to the reasons that the people had attempted in 1993 to remove the Supreme Court from issues of judicial discipline, particularly when the matter involves a sitting Supreme Court Justice. When the court suspends a fellow Justice, a mere majority essentially acts against a democratically elected office holder. There is a reason why a two-thirds vote is usually required to expel a member of a democratically elected body.²⁷

In addition, if the entire matter had been turned over to the Judicial Conduct Board and the Court of Judicial Discipline, either after an interim suspension or instead of one, there would have been no need for the Supreme Court to specify all of the charges pending against Justice McCaffery, including the allegation of threats by Justice McCaffery against Justice Michael Eakin.²⁸ None of these allegations had been proven and their listing as if true was unfair to Justice McCaffery.

Finally, if the role of the Supreme Court in judicial discipline were eliminated or at least greatly reduced, the people of Pennsylvania could rest assured that matters of judicial discipline were being handled impartially. Justice McCaffery publically charged that the allegations against him were part of a "vindictive pattern of attacks" by Chief Justice Castille.²⁹ On his part, Chief Justice Castille admitted in his concurrence to the order of suspension that "I have been attempting to remove Justice McCaffery from the Court."³⁰

In an article praising the legacy of the Chief Justice on the occasion of his retirement, I would have preferred to pass these matters by. But that would have been impossible. The same admirable

26. The Chief Justice even suggested that the Judicial Conduct Board should only handle "prosaic complaints about judicial misconduct" and that more serious matters should be handled by the Court itself. *Id.* at *4–5 (Castille, C.J., concurring).

27. See generally *Powell v. McCormack*, 395 U.S. 486, 507–512 (1969).

28. See *In re McCaffery*, 2014 Pa. LEXIS 2762 at *1–3.

29. Kate Giammarise, *Pennsylvania Justice Eakin dragged into lewd email scandal; accuses McCaffery of blackmail*, PITTSBURGH POST-GAZETTE (Oct. 18, 2014), <http://www.post-gazette.com/news/state/2014/10/17/Another-Pennsylvania-justice-embroiled-in-porn-email-scandal/stories/201410170187>.

30. *In re McCaffery*, 2014 Pa. LEXIS 2762 at *8 (Castille, C.J., concurring).

traits of careful judicial craftsmanship, extreme care for the reputation of the courts, and an insistence on judicial independence that resulted in positive results above, led to the debacle of the McCaffery suspension and resignation that defined the end of the Chief Justice's term on the court. I hope that the latter will not supplant the former. I hope that the Chief Justice will be remembered for his strong leadership and record of accomplishment. But in every such account, the judicial overreaching in the Bruno and McCaffery matters will have to be noted as well.