

## Judicial Profile

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PHILIP R. SCHATZ

# Hon. Dennis Jacobs Chief Judge, U.S. Court of Appeals for the Second Circuit

TO DENNIS JACOBS, chief judge of the U.S. Court of Appeals for the Second Circuit, a lawyer's obligation to his or her client is paramount. The greatest honor of the chief judge's long career as teacher, lawyer, and judge is the honor of having clients. "One thing that really irritates me is when lawyers apologize for representing their clients. Once a lawyer takes a representation, he has a duty to

represent the client zealously." His hero in this regard is Chrétien Guillaume de Lamoignon de Malesherbes (1721–1794), a liberal French minister of state who campaigned for the civil rights of religious minorities and prisoners and who, during his long career, repeatedly fought against the excesses of the monarchy. During the French Revolution, at great personal risk, Malesherbes voluntarily came out of a well-earned retirement in 1792 to represent Louis XVI in his trial before the French Convention, because when he was king, Louis had been Malesherbes' client. Louis' conviction was, of course, preordained. Two years later, during the Reign of Terror, Malesherbes himself was executed, along with his daughter and grandchildren. "Now, that's a lawyer," says Chief Judge Jacobs.

Chief Judge Jacobs backed into the legal profession from his initial career choice to teach college-level English—a career in which he was quite well advanced. He had earned a master's degree from New York University, focusing primarily on Victorian novels and the prose stylists of the 16th and 17th centuries, and was teaching introductory English literature courses at Queens College. He was only a dissertation away from his Ph.D., but his only job offer was from a state college outside Philadelphia that was expanding its liberal arts program. Not thrilled with leaving his beloved New York, Judge Jacobs decided to take the LSAT and see how he did.

He turned out to have an affinity for law. After graduating New York University's Law School in 1971, he joined the august New York City firm of Simpson, Thacher & Bartlett in 1973. He became a partner in 1980, eventually specializing in insurance and re-insurance cases. He loved being an advocate. "I like lawyers, and I like talking to lawyers. And I



liked my adversaries," he says. "When you butt heads with people, you really get to know them."

Becoming a judge never entered his mind. "I was quite happy practicing law," he says. "I loved my job. I loved my firm." In the 1980s, as an apparent offshoot of his involvement in the nascent Federalist Society, he was repeatedly invited to Washington, D.C., for interviews, but nothing ever came of them. It was only when he declined an invitation for another round of interviews that he was tapped for a position on the bench. He joined the Second Circuit Court of Appeals in 1992.

He was named chief judge of that court in 2006. "Technically, the position goes to the most senior active judge under 65 when the preceding chief steps down," he laughs, "but when my colleagues are around, I say I got the position on merit." His term as chief judge will expire on September 30, 2013, continued good health permitting. As chief judge, he has presided over a long-overdue updating of the local rules and a correlative modernization of the court's administrative procedures. One of Chief Judge Jacobs' ambitions is to normalize the treatment of en banc petitions so that they conform more closely to the practices in other circuits. The Second Circuit has a long tradition of eschewing en banc review.

Chief Judge Jacobs considers oral argument important. Although the recent administrative changes took some cases out of the pool, the vast majority of Second Circuit cases is still argued. The judges of the Second Circuit do not discuss the cases beforehand, so oral argument is the first time that the judges on the panel receive any indication of how the other panelists view the merits of the case. The panel votes on the case immediately following oral argument. Lawyers before the Second Circuit can count on a hot bench with a deep knowledge of the record. Lawyers who appear before the court should have a firm grip on appellate jurisdiction, and, if confronted by an unsympathetic judge, counsel should be prepared to let go of a losing argument and focus on the other reasons they should prevail.

Chief Judge Jacobs does not view the job of judging as oracular. He believes the primary purpose of a written opinion is to communicate the decision in the particular case clearly. "Judicial opinions are business. Not politics. Not agitprop." His ideal imagined audience for a judicial opinion is the lawyer for the losing side. That is the person who needs to know the reason for the decision; the winner doesn't much care about the reason. The chief judge also disclaims any overarching theory of judging. "It's all I can do to decide the cases one at a time," he says. Because cases are randomly assigned to panels, no individual judge can exert much individual control over the development of the law, and that's as it should be, he says. Although dissent is sometimes warranted, Chief Judge Jacobs would rather participate in the development of the majority opinion.

Chief Judge Jacobs is a lifelong New Yorker. He was born and raised on the Upper West Side; his home, grade school, and father's store were all within a couple of blocks of the 96th Street train station on Broadway. Although the chief judge has traveled around the world with his wife of 35 years, a former French instructor at Columbia College, he has never been out of New York City for more than a few months at a time, and he couldn't imagine living anywhere else. He has an abiding interest in New York City's history, incubated by a summer college job in midtown Manhattan. "I couldn't get a job in English as an undergraduate student, so I took a job as a Jet messenger. I had to learn the geography of the city, the names of the streets, and the bus and train schedules. I got to know the city intimately, in ways most people don't. Some people may look down on that job. I thought it was brimming with glamour and interest."

As an outgrowth of his continued fascination with New York's history, Chief Judge Jacobs is drafting an oral presentation on the remarkable 1854 court case of *Jennings v. Third Ave. Railroad*. In that case, the plaintiff, Elizabeth Jennings Graham, was kicked off a "whites only" streetcar (at Park Row and Pearl Street, the current location of the Daniel P. Moynihan

U.S. Courthouse housing the Second Circuit) as she rushed to her job as organist for the First Colored Congregational Church in Lower Manhattan. With the aid of future President Chester A. Arthur, then a 24-year-old junior partner in a Manhattan law firm, she sued the streetcar company and was awarded damages. The day after the verdict, the streetcar company ordered its cars desegregated.

As a result of his extensive liberal arts education, Judge Jacobs reads broadly. He also reads critically, and, as a result, he is something of an iconoclast. He lectures occasionally on seemingly obvious, but generally unremarked, mutual back-scratching between the organized bench and bar, frequently under the guise of "judicial independence." "The support of judicial power by the bar may be a pillar of law," he notes with some bemusement, "but it can also operate as group loyalty, the protection of turf, or a reciprocal commitment to the ascendancy of judges and lawyers." Lawyers and judges sometimes "lack humility in approaching great matters," he says, wrongly considering themselves "omni-competent" across the widest variety of disciplines and to the exclusion of other professionals—such as doctors, engineers, police, educators, clergy, and military—whose expertise and insights deserve to be part of the organic growth of the law. (The pervasive, if unconscious, anti-military bias of the bicoastal legal elites is another topic of concern to the chief judge). His older brother, an ophthalmologist, is always willing to help educate Chief Judge Jacobs on the limitations of the legal profession.

Chief Judge Jacobs loves poetry and music. A lifetime of reading poetry—particularly such favorites as Tennyson, Auden (the only poet who has made his way into one of Judge Jacobs' decisions), Pope, and Swinburne—provides "a fund of lines and phrases that come to mind like snatches of music, sometimes sinuous, sometimes just insidious." These lines are joined by snatches of actual music from Judge Jacobs' extensive collection of symphonic and chamber music.

All in all, Judge Jacobs considers himself blessed. According to the chief judge, he has a terrific job in a terrific court in the greatest city in the world. He has never stopped learning and hopes he never does. "I think of myself as a graduate student with a terrific fellowship (and a modest stipend) that lasts for life."

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