



Report of the Task Force on Judicial Independence

May 2015

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Foreword

For any orderly and peaceful society to survive, its people must have faith in a fair judicial resolution process. When disputes arise, whether of a civil, criminal or family nature, which lead to the issuance of a judgment that must be obeyed, the people must know and have confidence that the person who issued such a judgment is fair, impartial, independent and not motivated by personal concerns or interests.

Judicial independence in New Jersey means that judges and justices must be able to decide controversies and disputes, no matter their nature, only in accord with the evidence and applicable law, without any fear whatever of political, professional, economic or other retaliation.¹

In 2013, the New Jersey State Bar Association created a Task Force on Judicial Independence to examine judicial independence in New Jersey. The Task Force has fourteen members: it includes retired members of the judiciary,

¹ At the hearings conducted by the Task Force, the public was presented with a "Definition of Judicial Independence" which would shape the work of the Task Force and about which the public was invited to comment. A much more detailed discussion of the topic is included in the Appendix.

practicing attorneys, legal scholars and members of the public. The impetus for the formation of the Task Force was two-fold: recognition of the critical role an independent judiciary plays in the protection of the rights of all of the people of our State and a perception that such independence was then under attack and threatened. Quoting from then Bar President Ralph J. Lamparello's letter of appointment to the members of the Task Force...

There is no issue that matters more to the legal profession and the public than preserving the co-equal status of the New Jersey judiciary. Since the adoption of New Jersey's constitution in 1947, our courts have been one of the nation's finest examples of what it means to have a strong and independent Judiciary to protect the rights of our citizens.

...[t]he mission of the Task Force is a two-fold effort to examine current threats to the independence of our courts, to consider whether there are any procedures or steps that could prevent future threats from undermining the independence of the judiciary, and to educate and inform members of the

public with respect to their vital interest in assuring the existence of a "strong, competent, easily functioning, but always independent Judiciary."

The Task Force conducted a series of public hearings across the State, dedicated both to examining perceived threats to and suggestions for the protection of judicial independence in New Jersey. In holding these hearings, the Task Force specifically disavowed any purpose to criticize actions that had occurred in the past; rather, these hearings were aimed at seeking ideas as to how to protect and ensure the continued independence of our judiciary. The Task Force heard from a number of witnesses, with a wide variety of backgrounds— attorneys with large firms, members of small firms and solo practitioners, retired judges and justices, educators, members of organizations devoted to the betterment of the justice system, and members of the public.² The Task Force studied the transcripts of these hearings and also reviewed the methods and procedures used in other states with respect to their judiciaries in an

² A list of the hearing dates and sites is contained in the Appendix.

effort to learn whether New Jersey should adopt any of those methods and procedures to assure that our judiciary can continue to fulfill its vital role in protecting all of our people. With that background, the members of the Task Force engaged in wide-ranging, in-depth debates on a broad spectrum of issues. From that study and those debates, some general agreements emerged. This Report sets forth the issues the Task Force considered, the conclusions it reached with respect to those issues, and an explanation for those conclusions. The members of the Task Force appreciate having had the opportunity to study these issues, the support provided by the New Jersey State Bar Association to its efforts, and the complete independence from the Bar Association it has enjoyed during the course of its work.

Introduction

To understand and appreciate the conclusions the Task Force has reached, it is necessary to understand not only New Jersey's present approaches to ensuring an independent judiciary, but also the historical context that led to the adoption of these approaches and methodologies.

Our state's governing document, the Constitution of 1947, divides the powers and responsibilities of government among three distinct branches, the executive, the legislative, and the judicial. The legislative branch is further divided into two separate bodies, the Assembly and the Senate.

The head of the executive branch is the governor and the Constitution places solely within his or her discretion the nomination of members of the judicial branch. The only constitutional limit upon this gubernatorial power is that a nominee must have been admitted to the practice of law in New Jersey for no less than ten years to be eligible to become a judge or justice. N.J. Const. art. VI, § vi, ¶. 2. The Constitution places no time frame within which the governor

must act to nominate an individual to fill an open judicial slot. If a governor wishes to delay filling an open judicial slot, or, in contrast, wishes to fill a judicial slot immediately upon the vacancy occurring, he or she is free to do so, no matter the reason for whichever route the governor may select. The only time restriction placed upon the governor's appointment power is the requirement that he or she must notify the Legislature seven days in advance of an actual nomination of the intent to make that nomination N.J. Const. art. VI, § vi, ¶ 1.

Some states, in an evident attempt to prevent long-term judicial vacancies, do set deadlines for gubernatorial action. Nevada's constitution provides that in the event a vacancy occurs in a judicial office during its regular term, a judicial nominating commission shall forward to the governor a list of candidates to fill that slot. If the governor fails to act within thirty days of receiving those names, he or she may make no further appointments until filling that judicial vacancy. Nev. Const. art VI, § 20, ¶ 8. Utah's constitution, on the other hand, provides that if a governor fails to make an

appointment within thirty days of receiving a list of eligible candidates from a judicial nominating commission, the appointment shall be made by the Chief Justice of Utah's Supreme Court within twenty days. Utah Const. art. VIII, § 8, ¶ 1.

New Jersey's gubernatorial appointment power with respect to members of the judiciary is not absolute, however. The Senate is charged with the constitutional responsibility to give its advice and consent with respect to a proposed nomination. N.J. Const. art. VI, § vi, ¶ 1. The underlying purpose of the requirement that the governor give public notice of his or her intent to nominate an individual to serve on the bench seven days in advance of the actual nomination is to permit the Senate to better fulfill its constitutional role to give its advice and consent with respect to a governor's judicial selection. As with the gubernatorial power to nominate, however, there are no timelines that circumscribe

the Senate exercising the power to advise and consent to a particular nomination.³

Hawaii, by contrast, provides that if the Senate fails to act within thirty days of receiving a judicial nomination from the governor, the nomination is deemed approved. Haw. Const. art. VI, § 3. Utah, on the other hand, provides that if the Senate fails to act within sixty days of receiving a nomination, the nomination process ends and must commence anew. Utah Const. art. VIII, § 8, ¶ 3.

Methods of Judicial Selection and Length of Judicial Terms

There is a wide variety of approaches across the country to the method of judicial selection and the length of judicial terms of office. Several states have adopted the federal model, *i.e.*, judicial appointment for life, or appointment until attaining a mandatory retirement age.

Some states completely eschew the gubernatorial appointment model and rely exclusively upon an electoral

³ Art. V, § 1, ¶ 13 of the New Jersey constitution permits the governor to fill a vacant slot while the Legislature is in recess. If the individual so named is not confirmed by the Senate during the next legislative session, the appointment will expire.

model. Judges in those states are selected by popular election and, once elected, must return at prescribed intervals to seek approval from the citizens in order to retain their positions.

Some states have adopted judicial nominating commissions in connection with the appointment of judges and justices. There is no uniformity with respect to the use of such judicial nominating commissions among these states. Some states, such as Idaho, attempt to circumscribe a governor's appointment power by directing that he or she must make the appointment from a pool of candidates forwarded by a non-partisan commission. Delaware, in contrast, permits the governor, if dissatisfied with the names presented by the judicial nominating commission, to request a supplemental list; the governor's ultimate selection must come from one of those two lists. While Georgia selects its judges through non-partisan elections, it uses a judicial nominating commission in the eventuality a mid-term vacancy occurs. While the governor is not required by law to limit his or her selection to the names submitted by the

nominating commission, all governors since Jimmy Carter have agreed to such a restriction.

Some states provide for initial gubernatorial appointment, combined with the use of retention elections. California uses this approach for its Supreme Court and appellate court. There is no uniformity among the states as to the point at which retention elections are held; it ranges from a high of twelve years to a low of four years. In addition, some states utilize a judicial selection commission both at the time of initial appointment and reappointment and direct further that reappointment is conditioned upon the concurrence of that commission, while others use a judicial selection commission only if a mid-term vacancy occurs.

Judicial Selection in New Jersey

New Jersey has declined to follow the federal model of lifetime appointments. New Jersey has also rejected the limitations on the gubernatorial appointment power reflected by the use of retention elections and nominating

commissions. Rather, the governor of New Jersey nominates individuals to serve as members of the New Jersey judiciary for initial seven-year terms. If, at the end of that initial seven year term, the governor nominates that individual to continue, and the Senate concurs, with no break in service, the judge or justice has tenure in that position and serves until attaining the mandatory retirement age of seventy.⁴

The drafters of New Jersey's 1947 Constitution consciously set out to create a strong executive; indeed, New Jersey's governorship under our 1947 Constitution has been described as "one of the strongest of all the states."⁵ Limiting the governor's judicial selection power to a pool of candidates selected by others, or making that power subject to popular approval through retention elections would have been inherently inconsistent with that philosophy.

A major consideration that undergirded the adoption of our 1947 Constitution was a desire to create an independent

⁴ There is currently a proposed amendment to our constitution pending that would raise the mandatory judicial retirement age to seventy-five. In addition, *State v Buckner*, currently pending before the New Jersey Supreme Court, challenges as unconstitutional the practice of recalling to active judicial service retired judges who are beyond the age of 70.

⁵ "The Governors of New Jersey," Birkner, Linky and Mickulas, 2014, p. xv.

judiciary, free of the unfortunate political influences that hung over the judiciary in the first half of the twentieth century. The framers of the 1947 Constitution set out to design a system that, to the greatest extent possible, would be free of partisan political influence or that of special interests.⁶

The Task Force debated whether to recommend, in light of the passage of years, that certain modifications be made to our method of judicial selection, specifically, whether to recommend adoption of a nominating commission. Although such an approach may have worked in some of the states that have adopted it, success has not been uniform. The Task Force ultimately concluded that such a recommendation was not warranted at this time.

The Task Force noted that an agreement has existed for many years between the governor's office and the New Jersey State Bar Association, that the governor would not

⁶ In those years, New Jersey was dominated by political bosses, none more powerful than Frank Hague, mayor of Jersey City. "Since the judges of New Jersey, from the Supreme Court down, were chosen by the political organization, and dependent on it for their offices, it was relatively easy for the political machine to have a judge read into the law factors needed to help men friendly to the organization. This was a well-known factor for years." (Rapport, George, *The Statesman and the Boss*) In some cases, for example, judges appointed at Hague's behest stymied inquiries into allegations of electoral fraud. *Clee v. Moore*, 119 N.J.L. 215 (Sup. Ct. 1937); *In re Clee*, 119 N.J.L. 319 (Sup. Ct. 1938); *Ferguson v. Brogan*, 112 N.J.L. 471 (Sup Ct. 1934).

nominate for judicial office an individual deemed unqualified by the Bar Association.⁷ This agreement was originally proposed and implemented while Richard J. Hughes was governor and it is generally referred to as the “Hughes Compact.” Each governor since Governor Hughes has signed the Compact.⁸ The vetting of a potential judicial nominee by professional peers can serve to ensure the appointment of qualified candidates. The members of the Bar Association charged with the duty to review potential judicial nominees bear a heavy responsibility to ensure that they fulfill their roles in a scrupulously non-partisan manner and with complete confidentiality so as not to injure the reputations of individuals who may be under consideration, but ultimately not selected, for whatever reason.

The Task Force is aware that, in addition to the Compact, governors for many years have sought the confidential views of highly-regarded members of the bar and the public when considering potential judicial candidates, again to ensure that only qualified individuals

⁷ There is an informal analog for appointments to the federal bench; presidents generally (but not always) do not nominate candidates deemed not qualified by the American Bar Association.

⁸ The full text of the Compact may be found in the Appendix.

are nominated. The combination of the Compact and the confidential informal review of potential judicial candidates permits a review of potential nominees by a wide pool of diverse individuals, with a broad spectrum of views and, in many ways, serves some of the same values as would a judicial nominating commission.

New Jersey has consistently eschewed the other form of limitation on the gubernatorial appointment power, judicial elections, whether in connection with an initial judicial appointment or the reappointment of judges or justices through the use of retention elections. While New Jersey's complete rejection of an elected judiciary is a distinctly minority view among the fifty states, the Task Force wholeheartedly recommends strong opposition to any attempt ever to insert electoral contests in any form into the judicial appointment/reappointment process. A judiciary subject to the whims of electoral politics faces an ever present risk of losing its judicial independence. Members of our judiciary must be free to decide the issues and controversies that come before them solely in terms of the

evidence and applicable law, and certainly without any fear of the consequences of rendering a legally sound, but unpopular, decision, or one opposed by well-financed special interests.

With its two-step approach to the appointment and reappointment of judges and justices, New Jersey's Constitution recognizes the benefits that can inhere in not providing an initial lifetime judicial appointment. Although the selection of individuals to serve as judges and justices in New Jersey is a careful and deliberative process, with extensive investigation into a candidate's background and experience, there are occasions, fortunately quite rare, in which an individual, for whatever reason, turns out to be unsuited to the bench. Our Constitution, with its initial seven-year term, provides a mechanism to deal with that eventuality, rare as it may be. An individual unsuited to the bench is simply not reappointed.

A review of the deliberations of the constitutional convention that drafted the 1947 Constitution indicates that the selection of this seven-year term was driven, in part, by

the thought that creating a judicial term in office that was greater in length than a governor's elected four-year term made it possible that two different governors would have the opportunity to pass upon an individual's fitness for judicial office.

The Task Force debated at length whether circumstances had changed to such an extent that a change in the seven year paradigm would further the goal of judicial independence. The Task Force, recognizing the fundamentally different roles of the Superior Court and the Supreme Court, divided its deliberations into two parts and first turned to the former.

Superior Court

The Task Force considered the testimony of several retired assignment judges that while it may not always take seven years to determine whether an individual is suited to the judicial role, there are certain instances in which an individual may struggle in his or her first several years and

yet grow into the position and turn out to be an entirely capable judge. That is particularly so in light of the policy that calls for rotating newly-appointed judges among several divisions: an individual may initially have difficulty in a division which deals with a body of law with which the judge has had little or no previous experience and yet shine after the opportunity to become more familiar with that area or the opportunity to serve in a division in which the judge is handling a body of law with which he or she is more familiar. The Task Force thus decided not to recommend a change in the length of an initial judicial term for a Superior Court judge.

The Task Force also studied the past history of gubernatorial reappointments to the Superior Court and compared that history to recent practices. Such a comparison made evident that the reappointment of Superior Court judges in New Jersey, upon completion of the initial seven-year term, while undoubtedly a nerve-wracking process for the particular judge, has generally proceeded without significant difficulties or controversies. Upon

examination, anecdotal critical references to recent changes in the handling of judicial reappointments to the Superior Court proved unsupported.⁹

The Task Force concluded that any slight benefit that might flow from shortening the length of an initial judicial term could not begin to approach the risk such a change could pose to newly-appointed judges, who might unfairly be deprived of the opportunity to demonstrate the full extent of their abilities.

The Task Force applied the same analysis and reached the same conclusion with respect to the possibility of lengthening an initial judicial term. There was no testimony that fairness to new appointees called for providing them with a longer initial term to demonstrate fitness for a judicial role.

In sum, the Task Force thus recommends that, with respect to the Superior Court, New Jersey's present system of appointment and reappointment remain in place.

⁹ A recurring anecdotal concern heard by the Task Force was that if a competent, diligent justice, who had served with integrity, could be denied reappointment without apparent good reason, then untenured judges and justices would feel insecure; and that highly qualified potential future jurists would be discouraged from either seeking or accepting appointment for a potentially limited seven year term.

Supreme Court

After reaching that conclusion with respect to the Superior Court, the Task Force took up the question of appointment and reappointment of Supreme Court justices. The Task Force considered whether, in light of the fundamentally different roles of judges on the Superior Court, and justices on the Supreme Court, a difference in the method of appointment and reappointment might be warranted. The Task Force rejected the concept of a lifetime appointment to the Supreme Court for the same fundamental reasons that it rejected it for the Superior Court.

New Jersey, fortunately, has been well-served by justices possessing the ability, temperament, integrity, and the diligence the position demands. Our Supreme Court is regularly ranked as one of the leading courts in the nation.¹⁰ The Task Force is aware, however, as with all human ventures, there can be no guarantee that such will always be the case. As part of its discussion and deliberations, the Task

¹⁰ “Decidedly Co-Equal: The New Jersey Supreme Court”, <http://camlaw.rutgers.edu/statecon/publications/occpap1.pdf>

Force considered whether New Jersey and the Court would be better served by a proposed single, fourteen-year term for justices on the Supreme Court, a proposal which would require a constitutional amendment. This topic was discussed at length, with various paradigms put forth with respect to the methods by which it could possibly be implemented and what the impact of such a system would be upon the Court's historical terms of service.

Some noted that under our present system, there is no certainty as to when a vacancy may occur on the Supreme Court and thus, when one does appear, a governor may feel heightened pressure in selecting a nominee. They observed that appointments to a single, fourteen-year term, if implemented so as to provide staggered appointments, with one seat becoming vacant every two years, could lessen the pressure with respect to any one particular appointment, for a governor would know he or she would have the ability to make another appointment in two years. They observed that providing such an assurance of continued, uninterrupted service could provide another layer of

insulation against the possibility that fear of political ramifications might impact judicial decision-making. After reviewing the history of service on the New Jersey Supreme Court, they concluded that such a single fourteen-year term would not result in a significant deviation from the average time that justices had served under the current system.

Others were concerned with the possibility that such a system, with a member stepping down and a new member joining every two years, could prove disruptive and undermine the cohesion of the Court. Moreover, such a term limit might well discourage highly qualified individuals from accepting nomination. They noted that even if the historical data demonstrated that the great majority of justices since adoption of the 1947 Constitution had served less than fourteen years, some of those who were responsible for some of the Court's landmark decisions had, in fact, served longer than fourteen years. In their view, these factors created a potential detriment that was not outweighed by what they viewed as an uncertain benefit. Further, as noted earlier in this Report, New Jersey has no mandatory

timelines governing the nomination and confirmation of judges and justices. In the view of some, while such an approach might lessen the potential for political standoffs between the executive and legislative branches, it could not completely forestall them. If such standoffs were to occur, they could prove even more disruptive if such a model were adopted. Ultimately, a majority of the Task Force declined to put forth and support such a recommendation. The Task Force is not convinced that there is a better alternative for the Supreme Court than the template adopted in 1947: an initial term, with tenure conferred upon reappointment to a second term, with no break in service.

Presumption of Reappointment

As part of its discussions with respect to the Superior Court and Supreme Court, the Task Force debated whether, at the time of reappointment, there should exist a presumption that the individual whose initial term has expired will be reappointed if that individual has served with integrity, competence, diligence, and appropriate temperament. The Task Force is aware that such a

presumption is in place in other states, *e.g.*, Connecticut, and that some have sought an amendment to our Constitution to insert such a presumption. Indeed, the New Jersey State Bar Association, the body that formed this Task Force, has endorsed such a proposed amendment.¹¹

After extended discussion and debate, the Task Force determined not to endorse such a constitutional amendment, despite agreement with the substantive standard for reappointment it supports. Several factors led to this decision. Recommendations for enactment of such an amendment have left unresolved the issue whether a governor's decision not to reappoint a particular individual would create a justiciable issue¹², that is, could a court decide a dispute over reappointment. As was noted at the outset of this Report, the Task Force heard from a variety of witnesses at its public hearings. A number of those witnesses spoke favorably about the creation of such a presumption of reappointment. They were queried with respect to whether, if such a presumption were created, it

¹¹ The proposed amendment is informally referred to as the "Stein amendment."

¹² A "justiciable issue" is one capable of being ultimately decided by law or by the action of a court.

would create a justiciable issue in the event of non-reappointment. Most opined that indeed a justiciable issue would result. The Task Force viewed that possibility as highly undesirable. What forum would hear the issue? Would that forum be the final body? Who would bear the burden of proof in such an instance? ¹³

Even apart from such procedural questions, the Task Force concluded that the existence of a presumption could have the effect of forever marking an individual who did not receive a reappointment, making it difficult for that individual to resume a professional legal career. That in turn could tempt the individual faced with the possibility of not being reappointed to seek out interest groups to lobby for his or her reappointment. Such a turn of events would hardly further the cause of justice or the cause of judicial independence.

The Task Force also noted that its examination of the data for the reappointment of Superior Court judges failed to demonstrate that a problem existed in connection with their

¹³ Several provisions of the 1947 New Jersey Constitution address this question directly. *See* N.J. Const. art.I, § 2(b); N.J. Const. art. VIII, §. 2, ¶ 5(b).

reappointment. And while the Task Force was, of course, aware that more recently controversies had arisen in connection with certain recent Supreme Court reappointments, it was not convinced that enactment of such a presumption, as a constitutional mandate, was an effective method of forestalling such controversies.

Senatorial Courtesy

As part of its discussion and analysis of the process of judicial appointments and reappointments in New Jersey, the Task Force considered whether it should take up and make recommendations with respect to the practice of senatorial courtesy. Senatorial courtesy is an unwritten practice that is recognized by members of the New Jersey Senate when that body is called upon to give its advice and consent to a gubernatorial nomination.¹⁴ If the governor nominates an individual from a senator's district who is, for whatever reason, not acceptable to that senator, that nomination will not be put to a vote; it will simply languish. Other senators will afford their dissenting colleague the "courtesy" of recognizing his or her objections, without regard to their particular merit; hence, the term "senatorial courtesy."

The practice of senatorial courtesy has long been the subject of criticism. More than thirty years ago, the New Jersey State Bar Association passed a resolution calling for a

¹⁴ The practice of senatorial courtesy is not unique to New Jersey. The Task Force did not explore the use of senatorial courtesy in other jurisdictions, considering that beyond its mandate.

constitutional amendment requiring that the Senate vote on all judicial nominations within a defined period of time. Because it is a rule of practice that is observed by the Senate, albeit an unwritten one, its use has been held not to raise a justiciable question. *DeVesa v. Dorsey*, 134 N.J. 429 (1993).

In its original iteration in the Senate, senatorial courtesy was recognized both with respect to original nominations to a judicial seat and renominations. The Senate has, on its own initiative, modified its rule of practice and directed that a senator can only exercise courtesy with respect to an initial judicial appointment, and may not seek to exercise senatorial courtesy when the governor renominates a sitting judge or justice for a tenured term.¹⁵

The practice of senatorial courtesy has permitted instances to occur in which judicial seats have remained vacant for long periods of time. The work load of the court system does not decrease because there are not an adequate number of judges or justices; rather, those who are sitting are required to shoulder an ever-heavier burden, and

¹⁵ The Senate has also acted to preclude a Senator from exercising courtesy if its use is based on a conflict of interest with the nominee.

litigants forced to endure delays. Some nominees, moreover, have found themselves in a state of limbo, uncertain of what their professional future will be. Highly talented individuals can be deterred from seeking a judicial seat by the possibility that their nomination may not move forward for reasons that are wholly unrelated to them or their qualifications for office.

The Task Force ultimately concluded, however, that in light of the Senate's modification of its own rule precluding the use of senatorial courtesy in connection with a judicial renomination, the use of senatorial courtesy could not fairly be characterized as threatening judicial independence. A senator now may not hold up the reappointment of a judge or justice from within his or her district because the senator is unhappy with decisions that judge or justice may have made. Just as senatorial courtesy is non-justiciable, *DeVesa, supra*, it is beyond the mandate of this Task Force to make any recommendations with respect to it, and the Task Force thus declines to do so.

Administrative, workers' compensation and municipal court judges

During the course of its hearings, the Task Force heard from several witnesses who urged this Task Force to broaden its scope beyond judges of the Superior Court and justices of the Supreme Court and examine as well conditions that may impinge upon the independence of administrative law judges, workers' compensation judges and municipal court judges. Witnesses spoke of pressures that such individuals may face as they attempt to fulfill their adjudicative responsibilities. They do not have the benefit of terms as long as seven years, and they are not eligible for tenure.

Although administrative law judges and workers' compensation judges undoubtedly perform significant adjudicative functions, they are not members of the judicial branch of government. Rather, they are members of the executive branch. Accordingly, the Task Force concluded that it would exceed its mandate from the New Jersey State Bar Association if it were to examine whether any changes

should be made with respect to these two groups. The Task Force does deem it appropriate, however, to note the concerns expressed by several witnesses, with respect to the apparent practice of not submitting for reappointment the names of individuals currently sitting in such positions, leaving them in an extended hold-over period without removing them from office. Such a practice carries with it the potential to undermine the independence of such individuals as they seek to perform their adjudicative responsibilities.¹⁶

Municipal court judges, on the other hand, are members of the judicial branch. They are appointed for three-year terms; at the end of that three year period, they may continue to serve in a holdover capacity, without the protection of formal reappointment, or, if there has been a change in the identity of municipal officials, or the municipal officials are unhappy with the judge's performance, the judge may be denied reappointment and replaced.

Municipal courts are charged with the responsibility to judge traffic offenses, disorderly persons and petty

¹⁶ The procedures governing the appointment to these positions are set forth in *N.J.S.A. 52:14 F-4* and *N.J.S.A. 34:15-49*.

disorderly persons offenses, and violations of municipal ordinances. They also handle instances of alleged domestic violence and certain housing matters. All of these matters may lead to the imposition of fines along with other associated penalties. The manner in which such issues are disposed of can and often does have a significant impact upon a municipality's budget and financial strength.¹⁷

A comprehensive study of the inter-relationship that may exist between a municipal court's financial performance and the length of a municipal court judge's service requires extensive time and resources. The Task Force is aware that fulfilling its mandate has taken longer than its members, the Bar Association, and the public originally anticipated. If the Task Force were to engage in such further study, this Report would be further delayed. The Task Force therefore urges the Bar Association to appoint a similar group, charged with that singular focus. The question is critically important; the municipal court is the court with which most citizens come

¹⁷ Such pressures are by no means unique to New Jersey. Indeed, the Attorney General for the United States has recently issued a report with respect to Ferguson, Missouri that comments upon the pernicious effect such a linkage can create. *Investigation of the Ferguson Police Department, United States Department of Justice, Civil Rights Division, March 4, 2015.*

in contact. Its integrity, both actual and perceived, is critical to the public's acceptance of its determinations, which must be made without regard to whether findings of guilt, and the imposition of fines, could serve to assure continuation of a judge's position.

Salary and Pension Issues

Essential to the existence of an independent judiciary, comprised of individuals dedicated to the pursuit of excellence, is the assurance that its members will be fairly and adequately compensated. Although our three branches of government are considered co-equal, with no one branch being more important than the other two, there are significant limitations upon the powers of each. The judicial branch, by way of example, lacks the ability to ensure on its own that judges and justices receive adequate compensation; in that regard, it is dependent upon the concurrence of the executive and the legislative branches. It is thus subject to the possibility that correct but unpopular decisions may result in the other branches seeking to withhold otherwise necessary and appropriate increases in

compensation to express their displeasure.¹⁸ The simple fact that such a situation could arise is a threat to judicial independence for, unlike a great number of state employees, judges and justices are not organized into bargaining units and they are constrained from speaking out publicly in favor of, or in opposition to, budget proposals that affect their compensation.

The great majority of state employees receive two forms of raises—cost of living adjustments, familiarly referred to as COLAs, and step-increases, based either upon length of service or promotion. New Jersey judges and justices receive neither. The Task Force notes that in contrast, federal judges, who are dependent on Congress for salary increases, do receive COLAs.¹⁹

Because there is no mechanism in place to assure that the salaries of judges and justices receive periodic review and consideration, they can go for many years without

¹⁸ The Task Force acknowledges, for the sake of completeness, that theoretically the political branches could seek to reward the judiciary by granting an increase in compensation following a decision they favored. The Task Force is not aware of such an instance having occurred and does not view it as realistic in New Jersey's fiscal and economic situation.

¹⁹ The statutory history of COLAs for federal judges is set forth in *Beer v. United States*, 696 F.3d 1174 (Fed. Ct. 2012), *cert. denied*, 133 S.Ct. 1997 (2013)

receiving any adjustment in their compensation. One result is that when the other branches finally do take up the subject of judicial compensation, the amount necessary to overcome, at least in some measure, the years of neglect, seems to some of the public extraordinarily large. This reaction can deter the other two branches from acting, only aggravating the problem.

New Jersey has attempted to deal with this problem by creating a commission charged with the responsibility to review the salaries of certain public officials, including judges and justices, and make recommendations with respect to them. *N.J.S.A. 52:14-15.111 et seq.* The commission is to have seven members, two of whom are to be appointed by the governor. The President of the Senate, the minority leader of the Senate, the Speaker of the Assembly, the minority leader of the Assembly and the Chief Justice each get one appointment to fill out the roster. Because the statute does not provide a mechanism for relief if the political leaders fail to make their appointments, as most recently occurred in 2011, this commission has not

proved to be a viable method to deal with the question of judicial salaries. New Jersey's judges and justices have now gone for seven years without any increase in compensation.

Erosion in compensation has a direct effect both upon the quality and the independence of the judiciary. If judges and justices are not fairly and adequately compensated, it becomes difficult to convince talented individuals either to take a judicial position or to remain on the bench, particularly in light of the restrictions, both economic and personal, that accompany such an appointment. Some might respond that they perceive no shortage of individuals willing to become a judge or justice, but the goal must always be appointment of the best and the brightest, not those merely seeking the appointment.

In sum, the Task Force recommends that the statutory provisions governing the salaries of judges and justices be amended to provide that these salaries be adjusted annually to reflect the annual changes in the cost of living in New Jersey. It further recommends that the salary commission statute be amended to make its periodic meetings

mandatory and provide a default mechanism to deal with the possibility that the political leaders entrusted with the authority to name members of this commission fail to do so. The Task Force does not purport to direct what decisions a salary commission would reach but strongly believes that the commission should make periodic recommendations to the executive and legislative branches with respect to judicial salaries.

Closely tied to adequate salaries for judges and justices is providing a stable and adequate pension program for them. It is beyond the mandate of this Task Force to address all of the many issues that arose in light of the constitutional challenge that was mounted in *DePascale v. State of New Jersey*, 211 N.J. 40 (2012), to changes in the judicial pension program and the subsequent amendment to the New Jersey Constitution that was adopted. Several comments, however, are in order.

The Constitution in its present form, as a result of the 2012 amendment, would permit the legislature to increase the amount deducted from a judge's or justice's salary for

contributions for pension and health benefits without regard to the level of contributions by other state employees. Thus, if the political branches were unhappy with decisions of the judicial branch, they could decide to disproportionately increase the contributions judges and justices would be required to make. The Task Force recommends that the presence of this potential threat to the judiciary be removed. Any future increases in judicial contribution rates should not be punitive to the members of the judiciary when compared to the contribution rates paid by other state employees.

The Task Force is aware that New Jersey is contemplating changing its current program of defined benefit pension plans and health benefit plans for state employees.²⁰ The Task Force, of course, cannot comment upon such changes because no definite changes have been proposed for enactment. It notes, however, that any changes will have to be carefully drafted in order to preclude any potential threats to judicial independence arising in the future.

²⁰ Report of the New Jersey Pension and Health Benefit Study Commission, February 24, 2015.

Education and Judicial Independence

An educated citizenry is essential to the sound functioning of a responsive, fair government, and an appreciation of the importance of judicial independence in an ordered and peaceful society. Many of the witnesses who appeared before the Task Force urged the Task Force to address the issue of whether students in our schools learn certain fundamentals of citizenship; they spoke with conviction that if students are not provided with a sound “civics” foundation, they will lack the necessary tools to engage in the substantive analysis and critical thinking that is essential to the continued and future functioning of our democratic form of government.

The Task Force is aware that our schools today are called upon to meet many societal needs that in the past were handled by other institutions. This is occurring, moreover, in a context of a student population with a broad spectrum of backgrounds, needs and abilities, accompanied by reduced funding, and, in some instances, reduced public

support. These difficulties, however, real as they may be, cannot justify ignoring the problem.

The Task Force began to examine the issue, looking for instance, at various curricula, both in New Jersey schools and elsewhere, but determined that the scope of the issue was so broad that it required time, resources and expertise beyond that available to the Task Force.

The Task Force thus recommends to the Bar Association that it convene another group, devoted to the question of how to provide our citizens of all age groups with an understanding of the critical role played by our courts and our judges and justices in protecting the rights of all. The State Bar Association and local county bar associations have been in the forefront of efforts to bring such knowledge to our students; they arrange for speakers to visit the schools, as well as for students to visit local courthouses; they hold events such as moot court competitions with students serving as attorneys, judges, jurors, under the guidance of experienced attorneys. This experience will undoubtedly prove helpful in forming and assisting such a group.

The Task Force is of the view that it is not realistic to expect that our students will, even upon graduation from high school, have an adequate grasp of the fundamentals of civics and citizenship if their only classroom exposure to the subject is sporadic and is treated as tangential to other subjects. It therefore strongly urges the Association that its charge to this group include the development of specific age-appropriate, measurable standards of “civics” instruction that students would encounter at various points as they progress through their schooling.

The Task Force further urges the Association that such a group be directed to consider not only what should be covered in schools and classrooms but what community-based adult programs and organizations will best reach those who have completed their formal classroom instruction.

Recommendations

In sum, the Task Force presents the following recommendations to the New Jersey State Bar Association:

- The Task Force recommends that the New Jersey State Bar Association not advocate or endorse a modification to the method of judicial selection established in New Jersey's 1947 Constitution
- The Task Force recommends that the New Jersey State Bar Association continue to advocate that all governors sign and abide by the Hughes Compact
- The Task Force recommends that the New Jersey State Bar Association advocate that all governors, when considering judicial candidates, in addition to abiding by the Hughes Compact, utilize a vetting committee composed of highly-regarded members of the

Bar and the public to ensure that only qualified individuals are nominated

- The Task Force recommends that the New Jersey State Bar Association continue its strong opposition to any suggestions or attempts to inject judicial elections in any form into the process of appointing and reappointing members of the judiciary
- The Task Force recommends that the New Jersey State Bar Association reconsider its prior endorsement of the proposed constitutional amendment commonly referred to as the Stein amendment, regardless of the Task Force's agreement with the amendment's substantive standards for reappointment
- The Task Force recommends that the New Jersey State Bar Association continue to strongly advocate for the reappointment of judges and justices who have served their initial term of appointment with integrity,

competence, diligence and appropriate temperament.

- The Task Force recommends that the New Jersey State Bar Association be ever vigilant against any change to the Senate's current self-imposed prohibition on the use of senatorial courtesy with respect to the renomination of a sitting judge or justice
- The Task Force recommends that the New Jersey State Bar Association advocate for and endorse amendatory legislation that would direct a mandatory periodic meeting of the Salary Commission, and that would include a default provision to ensure that members are appointed to the Salary Commission so it may conduct its business
- The Task Force recommends that the New Jersey State Bar Association advocate for provisions that protect judicial independence in any future legislation that addresses

pension and health benefits for State employees

- The Task Force recommends that the New Jersey State Bar Association create a task force to consider issues of judicial independence that are unique to the municipal courts
- The Task Force recommends that the New Jersey State Bar Association create a task force to address the issue of educational initiatives to assure all residents of the State, whether in a school setting or otherwise, receive or have available to them a sound grounding in civics and the fundamentals of government.

Afterword

During the course of the public hearings, the Task Force heard a variety of views. Some who spoke forcefully urged that the Task Force come up with specific and sweeping recommendations to change the present methodology and procedures for the selection and nomination of judges and justices in New Jersey. These individuals may be disappointed that this Report did not adopt and does not make those recommendations. Regardless, all who read this Report should know that the Task Force reached its conclusions only after many long, thoughtful discussions; and that the Task Force was of the opinion it would be a grave disservice to all of the people of New Jersey if it were to put forth recommendations urging constitutional changes for the sake of the changes themselves, without being strongly convinced that any proposed change held out the promise of a stronger, better judiciary. In sum, after examining the procedures used in other states, the Task Force was unable to conclude that such procedures, or

various permutations thereof, were so obviously superior to New Jersey's that constitutional change was warranted.

Tensions between branches of government are inherent and ever present in our tri-partite system, as each branch strives to fulfill what it perceives to be its fundamental obligations to the public. At times, these tensions rise to the surface and boil over. They are not pleasant to be a party to or to witness, as they often cause much concern, comment, criticism and even harm. However, the resolution of these tensions usually takes place over time and by appropriate accommodations to the obligations of others, and is an essential, but sometimes contentious part of our democratic system of government. Ultimately, successful resolution, successful government, and yes, even judicial independence, rest, at bottom, on the integrity and good will of all participants and the people at large, no matter what judicial selection techniques are or may be constitutionally mandated.

The Task Force hopes this Report can serve, in some small way, to help the people of New Jersey understand and

appreciate the vital role an independent judiciary has in New Jersey in protecting the rights of all who reside here. The Task Force trusts this Report will serve as a spark for further discussion and consideration of the many critical issues that confront our State and its people.

Respectfully submitted

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Appendix Public Hearing Dates

The Task Force on Judicial Independence conducted public hearings on the following dates at the following sites.

April 1, 2014 – The New Jersey Law Center, New Brunswick, New Jersey.

May 15, 2014 – The Borgata, Atlantic City, New Jersey.

June 3, 2014 -- Seton Hall University School of Law, Newark, New Jersey.

June 17, 2014—Rutgers University School of Law, Camden, New Jersey.

The transcripts of the above-mentioned hearings are available for review at the New Jersey State Bar Association Law Center, New Brunswick, NJ.

Definition of Judicial Independence

The phrase “judicial independence” is sometimes used as a rhetorical device to suggest that judges, their decisions, or the judiciary as an institution, are not subject to criticism or to democratic accountability; others use the phrase to suggest that the concept represents nothing more than judges trying to advance their own economic self-interest. The Task Force emphatically rejects such a definition or understanding of the judicial independence it seeks to protect.

Free citizens have an inherent right to criticize governmental actions; members of the judiciary have no immunity from such criticism and the Task Force does not seek such immunity for them. Similarly, members of the judiciary are accountable for their actions and the Task Force does not seek to forestall such accountability. Members of the judiciary are accountable to the law itself, to higher courts reviewing their decisions, and to the legitimate authority of administrative agencies acting in accordance with powers that have been delegated to them. Further, courts are accountable for their decisions to the authority of the Legislature to overrule, by validly enacted laws, judicial decisions that interpret existing law and the common law. Finally, courts are, and must be, accountable for their constitutional decisions, for the people of this State have the

ultimate authority to amend our constitution or to adopt a new one.

The Task Force's understanding of the concept of judicial independence starts with the role of the judiciary in a representative democracy: to fairly resolve, in accordance with the law and the facts adduced in proceedings open to the public, disputes involving life, liberty, property or reputation of private or governmental parties. The absence of an independent judiciary creates the specter of such disputes being resolved by force or the exercise of political power.

The ultimate authority of the judiciary rests upon the confidence of our citizens that their controversies and disputes, no matter their nature, will be decided by a judge who will decide such matters in accordance with the law and the evidence, without fear of any political, professional or economic retaliation.

Inevitably, some of those controversies and disputes will pose novel questions, to which the answer is not immediately clear, and controversial issues, as to which people of good will can reasonably disagree. Such controversies and disputes must, nonetheless, be decided by the judges charged with the responsibility of doing so and the decisions ultimately reached can stir strong reactions, both by citizens and politicians. The Task Force members are as protective of the right to express such disagreement as they are of the judicial right to decide such matters

without fear of consequence. Such reactions and disagreements, however, should not deteriorate into personal attacks upon the integrity or intelligence of members of the judiciary or seek to retaliate against them for their decisions.

Hughes Compact

*Reaffirmation of the Judicial Compact Procedure
for Relationship Between the Governor and
the New Jersey State Bar Association*

WHEREAS, the Governor of the State of New Jersey and the New Jersey State Bar Association have, in past years, found substantial public benefit in devising, developing and implementing a process for the nonpartisan evaluation of candidates for judicial and prosecutorial office; and

WHEREAS, the Governor and the New Jersey State Bar Association recognize the value of reaffirming such a process to assure the continued nomination of highly qualified judges and prosecutors;

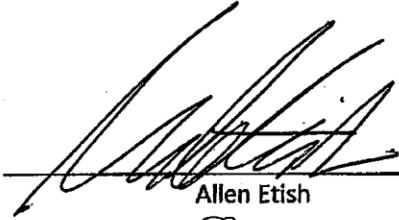
THEREFORE, It is on this 14th day of April, 2010, agreed that the relationship between the Governor and the New Jersey State Bar Association with respect to the process of evaluating such candidates is as follows:

1. Names of candidates being considered by the Governor as possible nominees for judicial appointment or reappointment to the Supreme Court and Superior Court, and for appointment or reappointment to the position of County Prosecutor will be referred to the New Jersey State Bar Association Judicial and Prosecutorial Appointments Committee ("State JPAC" or "Committee") for review and report to the Governor.
2. As it has in the past, the State JPAC shall be composed of no more than 26 members and shall include at least one representative from each county in New Jersey.
3. In furtherance of this referral and review process, the Governor will submit to the Committee a completed questionnaire for each candidate providing biographical material regarding the candidate's educational background, professional qualifications, experience and civic activities.
4. The State JPAC shall meet with proposed candidates under consideration for an original appointment. If the Committee deems it appropriate, candidates for reappointment will appear before the Committee.
5. The State JPAC will provide the Governor with a "Qualified" or "Not Qualified" determination for each candidate reviewed. When asked by the Governor, the State JPAC will also provide an explanation of its determination.
6. All members of the State JPAC involved in this procedure are required to adhere to the uniform policies and procedures as set forth in the New Jersey State Bar Association's Judicial and Prosecutorial Appointments Committee Manual, as adopted and amended, including strict confidentiality of all matters relating to this Committee. No member of the State JPAC shall speak to anyone outside of the Committee, with the exception as noted in Paragraph 7 of this Compact, regarding its deliberations or recommendation concerning a particular candidate. Strict confidentiality is particularly important in view of the fact that some candidates who come before the Committee may never be appointed. Any publicity about an individual under consideration who is not ultimately nominated could put this individual in an unfair position and could be harmful to his or her professional reputation.
7. The Chair of the State JPAC will communicate the Committee's determination of candidates considered to the Governor's office only. In the event the Governor appoints a nominee despite a "Not Qualified" determination by the State JPAC, the New Jersey State Bar Association may

appear and testify before the State Senate Judiciary Committee concerning its determination and the reasons therefore.

8. In order for the State Bar to have sufficient time to consider a candidate's qualifications and submit an accurate report to the Governor, a minimum of twenty (20) calendar days between the time a name is provided to the State JPAC and the date the report is made to the Governor is recommended.

Signed on this day:



Allen Etish

President

New Jersey State Bar Association



Chris Christie

Governor

State of New Jersey