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Testimony to the New Jersey State Bar Association Task Force on Judicial Independence

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Thank you to Justice Wefing and Judge Gallipoli, as well as the other members of this task force, for presiding over this critical discussion about how to preserve the independence of New Jersey's courts. The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute devoted to the twin ideals of democracy and equal justice, neither of which is possible without judicial independence. Among other things, we monitor assaults on fair and impartial courts across the nation, allowing us to educate the public on the growing politicization of judicial selection and to suggest reforms aimed towards alleviating political pressure on the courts.

Around the country, state courts are facing growing threats to judicial independence, including political retaliation in response to unpopular decisions and politicized processes for selecting judges. For example:

- A 2011 study by the National Center for State Courts found that there had been “more efforts to impeach or otherwise legislatively remove state judges from office [that year] than at any point in recent history.” In all but two instances, the sole basis for seeking removal was that the judges in question had issued opinions that displeased members of the legislature.² Just two months ago, the Oklahoma legislature initiated impeachment proceedings against five Oklahoma Supreme Court justices after the justices ordered an execution to be stayed.³
- State supreme court elections regularly feature attacks on sitting judges for unpopular decisions, as documented in a recent report co-authored by the Brennan Center.⁴ Last month, a North Carolina Supreme Court justice running for reelection was subject to hundreds of thousands of dollars of negative ads characterizing her as “taking the side of . . . convicted [child] molesters” because of an opinion she wrote in a criminal case.⁵

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² Bill Raftery, *2011 Year in Review: Record number of impeachment attempts against judges for their decisions*, GAVEL TO GAVEL (Dec. 27, 2011), <http://gaveltogavel.us/2011/12/27/2011-year-in-review-record-number-of-impeachment-attempts-against-judges-for-their-decisions/>.

³ Sean Murphy, *Oklahoma Court Reject Death-Row Inmates' Claims*, ASSOCIATED PRESS (Apr. 23, 2014), <http://bigstory.ap.org/article/apnewsbreak-oklahoma-court-could-face-impeachment>.

⁴ See ALICIA BANNON ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* 32 (Laura Kinney & Peter Hardin eds., 2013), available at <http://www.brennancenter.org/publication/new-politics-judicial-elections-2011-12>.

⁵ Erik Eckholm, *Outside Spending Enters Arena of Judicial Races*, N.Y. TIMES (May 5, 2014), http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html?_r=1.

- In 2012, Florida, Arizona, and Missouri each saw unsuccessful ballot measures that sought to increase the influence of the political branches on judicial selection. A year later, the Arizona legislature passed a law to weaken the independence of the state's judicial nominating commission. The measure was declared unconstitutional and overturned by the state Supreme Court.⁶

New Jersey has been no exception to this trend toward increased political pressure on the courts. In recent years, the governor has criticized court decisions and accused the state Supreme Court of “legislating from the bench.”⁷ In 2010, for the first time since the ratification of the New Jersey constitution in 1947, the governor declined to nominate a sitting Supreme Court justice for tenure, asserting that the justice had contributed to “out of control” activism on the court.⁸ In 2013, the governor again refused to nominate a sitting justice for tenure, asserting that she would not receive a fair hearing in the state senate.⁹ Delayed judicial appointments have likewise resulted in lengthy vacancies on the courts. Two seats on the Supreme Court have stood vacant for a number of years and, in the state's busiest court, the Essex County Superior Court, nearly a third of the seats on the bench remain unfilled.¹⁰

These recent experiences suggest two kinds of challenges to judicial independence in New Jersey. First, and most notably, New Jersey's reappointment process for Supreme Court justices and Superior Court judges creates a troubling opening for political pressure on the courts, raising the specter that judges' decisions may be guided by concerns about job security, rather than reasoned judgments about the law. Second, the partisan tug-of-war that has recently characterized judicial appointments in New Jersey has led to lengthy court vacancies and raised concerns about the politicization of the courts.

Improving the judicial selection system in New Jersey will require grappling with and reducing both of these challenges to a strong and independent state court system. The Brennan Center therefore makes the following two recommendations:

Eliminate judicial reappointments

Judicial independence rests on the security that a judge feels to decide a case based upon his or her interpretation of the law, without fear of retribution for deviating from public, legislative, or executive opinion. For this reason, it is imperative that the method for granting or revoking

⁶ *Dobson v. Arizona ex rel., Comm'n on Appellate Court Appointments*, 309 P.3d 1289 (Ariz. 2013), available at <http://law.justia.com/cases/arizona/supreme-court/2013/cv-13-0225.html>.

⁷ BILLY CORRIHER & ALEX BROWN, CHRIS CHRISTIE'S WAR ON JUDICIAL INDEPENDENCE 20 (Feb. 2014), available at <http://americanprogress.org/issues/civil-liberties/report/2014/02/04/82076/chris-christies-war-on-judicial-independence/>.

⁸ Editorial, *The Politicization of a Respected Court*, N.Y. TIMES (Dec. 15, 2010), http://www.nytimes.com/2010/12/16/opinion/16thurs3.html?_r=0.

⁹ Salvador Rizzo, *Supreme stunner: Christie declines to nominate Justice Hoens for lifetime tenure*, NJ.COM (Aug. 13, 2013),

http://www.nj.com/politics/index.ssf/2013/08/supreme_stunner_christie_declines_to_nominate_justice_hoens_for_lifetime_tenure.html.

¹⁰ Colleen O'Dea, *Explainer: How Do Our Judges Make It to the Bench in New Jersey?*, NJSPOTLIGHT (June 3, 2014), <http://www.njspotlight.com/stories/14/06/02/explainer-how-judges-make-it-to-the-bench-in-new-jersey/>.

judicial tenure insulate judges from these pressures. As recent history shows, however, the existing reappointment process puts New Jersey's judges at risk of job loss based solely on ideological disagreement with their decisions on the bench.

The State Bar Association has issued a resolution calling for an amendment to the state Constitution to hold that justices of the Supreme Court and judges of the Superior Court are to be reappointed by the governor with senate consent "unless they have demonstrated unfitness for such reappointment."¹¹ We commend this proposal and believe that it represents an important step towards safeguarding judicial independence in the state. However, we suggest that the proposed constitutional amendment could be further strengthened, and provide greater protection to the judiciary from political interference, by eliminating the reappointment process altogether.

The Bar Association's proposed amendment leaves the onus on the political branches to reappoint judges unless they are deemed unfit. By requiring affirmative action by the governor and Senate, the amendment opens the door to a constitutional crisis if the political branches refuse to act. It also invites potential gamesmanship as to whether a judge has met the standard of unfitness. Existing mechanisms, including the impeachment power,¹² the power to remove judges for incapacitation,¹³ and enforcement of the state's Code of Judicial Conduct,¹⁴ are adequate to ensure judicial fitness.

We therefore recommend strengthening the proposed constitutional amendment by eliminating the reappointment process and implementing a single term for judges. Practices in other states and the federal system could serve as potential models for implementing a single term for judges in New Jersey. Options include:

- (1) A system of lifetime tenure, akin to the federal system. This model is also used by the state of Rhode Island;¹⁵
- (2) A lifetime appointment with an age limit. For example, in both New Hampshire¹⁶ and Massachusetts,¹⁷ appointed judges serve a single term until a mandatory retirement age of 70. This option would be closest to New Jersey's existing system, which already provides for a retirement age of 70; or

¹¹ Press Release, New Jersey State Bar Association, NJSBA resolution urges constitutional amendment to protect judicial independence (Apr. 11, 2014), <http://www.njsba.com/about/news-archives/njsba-resolution-urges-constitutional-amendment-to-protect.html>.

¹² N.J. CONST. art. VII, § 3, *available at* <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>.

¹³ N.J. Const. art. VI, § 5.

¹⁴ N.J. CODE OF JUDICIAL CONDUCT (2014), *available at* http://www.judiciary.state.nj.us/rules/appendices/app1_jud.htm.

¹⁵ *State by State Summary of Judicial Selection*, USLEGAL, <http://courts.uslegal.com/selection-of-judges/state-by-state-summary-of-judicial-selection/> (last visited June 13, 2014).

¹⁶ *Methods of Judicial Selection: New Hampshire*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NH (last visited June 13, 2014).

¹⁷ *Methods of Judicial Selection: Massachusetts*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=MA (last visited June 13, 2014).

- (3) A lengthy fixed single term without reappointment. For example, the State Bar of Wisconsin's Judicial Task Force recently recommended the adoption of a 16-year fixed term for its supreme court justices.¹⁸

Adopting any of these systems would reduce the capacity of the political branches to place undue pressure on the courts, by eliminating their ability to deny tenure based on ideological disagreement with judicial decisions. We encourage the task force to consider this reform as a measure to promote the independence of New Jersey's judges and courts.

Establish an independent nominating commission to screen potential judicial nominees

New Jersey's system for judicial appointments has proven subject to partisan capture. In order to mitigate political influence in the appointments process and return attention to the qualifications and temperament of potential judges, we recommend the adoption of an independent nominating commission in New Jersey. The commission could locate, recruit, and investigate judicial applicants and present a slate of candidates to the governor to be considered for nomination. If New Jersey retains its reappointment process for judges, the commission could also determine fitness for reappointment.

Whether states elect or appoint their judges, nominating commissions are a popular and effective tool for evaluating judicial candidates. In fact, New Jersey is one of only 13 states¹⁹ that do not use a nominating commission to screen at least some of their judicial candidates.²⁰ Typically composed of a diverse selection of lawyers and non-lawyers appointed by a mix of public officials, attorneys, and private citizens, nominating commissions have a mandate to evaluate candidates based on their qualifications and temperament. By circumscribing the governor's discretion through a list of pre-approved candidates, nominating commissions have the potential to help depoliticize New Jersey's appointments process.

Nominating commissions also have the potential to foster a more diverse applicant pool for judgeships. As outlined in the Brennan Center's report, *Improving Judicial Diversity*, judicial nominating commissions can help promote diversity on the bench by, among other things, undertaking strategic recruitment and outreach efforts, establishing a transparent application process and nomination timeline, and providing clearly defined parameters for the role of diversity in the evaluation process.²¹

The example set by Hawaii provides a potential roadmap for integrating judicial nominating commissions into New Jersey's appointments system. In 1978, Hawaii altered its judicial

¹⁸ STATE BAR OF WISCONSIN JUDICIAL TASK FORCE, JUDICIAL TASK FORCE REPORT AND RECOMMENDATION (2013), available at <http://www.wisbar.org/SiteCollectionDocuments/Publications/JudicialTaskForce-September2013-FINAL.pdf>.

¹⁹ *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state (last visited June 13, 2014).

²⁰ A group called the judicial advisory panel currently reviews candidates and submits evaluations that "constitute advisory, consultative, and deliberative materials for the Governor's review." However, the role of the panel is purely advisory. N.J. Exec. Order No. 36, (2006), available at <http://nj.gov/infobank/circular/eojsc36.htm>.

²¹ CIARA TORRES-SPELLISCY ET AL., *IMPROVING JUDICIAL DIVERSITY* 9 (2010), available at <http://www.brennancenter.org/publication/improving-judicial-diversity>.

appointment process, which was at the time nearly identical to New Jersey's, by amending the state constitution to establish a nonpartisan judicial selection commission²² that was reportedly designed "to remove political patronage from the selection process."²³ This commission, with members selected by all three branches of state government as well as the state bar, reviews candidates for all judicial vacancies and presents the governor with a list of three to six names from which to select a nominee.²⁴ The commission is also responsible for determining whether judges should be reappointed. The system has been highly successful in promoting a diverse bench; according to 2008 data from the American Bar Association, Hawaii has the highest percentage of minority and female judges in the country.²⁵

Moreover, if New Jersey were to adopt the Bar Association's proposed amendment and require reappointment of judges unless they are found unfit, Hawaii provides a model for how an independent commission could be utilized to make this assessment. In Hawaii, the judicial commission is responsible for reappointing judges based on its investigation of their qualification for continued judicial office. Applying this standard, the commission earlier this year denied reappointment to a circuit court judge who had received numerous complaints for his "erratic" and "bizarre" behavior.²⁶ A similar system in New Jersey would enable assessment of "fitness" by actors not enmeshed in politics, thus reducing the risk of politicization of the reappointments process.

As Governor Alfred E. Driscoll recognized during New Jersey's 1947 Constitutional Convention, "[w]ithout independent courts, the whole republican system surely must fail."²⁷ Judicial independence is central not only to the vitality of our courts, but to the functioning of our democratic system. We thank you for your consideration of these important issues and urge you to consider the Brennan Center's recommendations for improving judicial independence in New Jersey.

²² HAWAII CONST. art. VI, § 4, available at <http://rbhawaii.org/con/conart6.html>.

²³ SEAN O. HOGAN, THE JUDICIAL BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 248 (2006).

²⁴ Haw. Jud. Selection Rules (1979), available at http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf.

²⁵ MALIA REDDICK ET AL., RACIAL AND GENDER DIVERSITY ON STATE COURTS 3 (2009), available at http://www.judicialselection.com/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf.

²⁶ Keoki Kerr, *EXCLUSIVE: Judge denied second term for "erratic" and "bizarre" behavior*, HAWAII NEWS NOW (Mar. 20, 2014), <http://www.hawaiinewsnow.com/story/25023722/circuit-judge-denied-a-second-term-for-erratic-and-bizarre-behavior>.

²⁷ Gov. Alfred E. Driscoll, State of New Jersey Constitutional Convention, Comm. on the Judiciary (July 10, 1947), available at

http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n428.html.