THE INDEPENDENCE OF THE JUDICIARY

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Tonight I want to talk to you about an issue that should be of grave concern to all of you—the threat to an independent judiciary.

I am the last Justice to receive tenure on the New Jersey Supreme Court.[1] That is not a distinction that I want to hold. I knew that it was difficult to get on the Court. I never imagined that it would become more difficult to stay on the Court. And I never expected that a jurist in this State would be denied tenure because of the judicial views attributed to him or her.

I want to direct my remarks to the reappointment process for judges and justices. Every attorney who enters a courtroom wants to appear before an impartial judge or justice, one who issues rulings based on a principled interpretation of the law applied to the facts. None of you expect that a judge should consider what the political fallout might be in rendering a decision. Yet, we all know that our judiciary cannot remain truly independent if its judges or justices can be punished for making decisions that are constitutionally correct, but politically unpopular.

So this evening I am ringing an alarm bell. What is hanging in the balance is not an academic or theoretical issue, but whether you will have an independent judiciary.

What do I mean by an independent judiciary? I mean judges who are free to apply principles of law to the facts of a case without extraneous considerations. I mean judges who can decide difficult and unpopular cases, remaining faithful to the Constitution,[2] without fearing retribution because a decision may not be politically correct. An independent judiciary does not do the bidding for one side or another; it does not cater to Democrats or Republicans; it does not try to please liberals or conservatives or those of other ideological persuasions; it does not abandon constitutional commandments to satisfy the other branches of government. The calling of an independent judiciary is dedication to principles of law—and foremost in that hierarchy is obedience to the Constitution, which, we judges have taken a solemn oath to

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* Associate Justice, Supreme Court of New Jersey. These remarks were given to the Monmouth County Bar Association at the Navesink Country Club on November 20, 2013. A similar version of these remarks was given at the New Jersey State Bar Convention in Atlantic City on May 17, 2013. This annotated version identifies the sources and authorities for my remarks. I acknowledge with gratitude the assistance of Douglas Weck, my law clerk, in the preparation of the footnotes.

1. Since I received tenure on June 22, 2009, no sitting justice has been reappointed.

2. Unless otherwise indicated, "the Constitution" should be read to refer to both the New Jersey State Constitution and the United States Constitution.

uphold.[3] In that calling, there is no place for playing politics or courting popularity, even with those who have the power to decide the fate of a judge's career.[4]

How has it come to pass that the need for an independent judiciary is no longer self-evident—that I have come as a beggar asking you to support it? The American colonists in 1776 knew that an independent judiciary was indispensable to their individual liberties and were willing to fight a revolution for it. One of the specific grievances set forth in the Declaration of Independence was that King George III "made Judges dependent on his Will alone, for the tenure of their offices."[5]

The Framers of the United States Constitution understood that judges serve as the guardians of our fundamental rights and that, from time to time, the judiciary would have to check the other branches of government. Alexander Hamilton, in the *Federalist Papers*, recognized that "as faithful guardians of the constitution," judges would have to protect individual rights even against the will of the majority—even against the will of the legislature or the executive.[6] To carry out that mission, he understood that judges would have to show an uncommon degree of courage.[7] However, the Framers did not expect that the rights of our citizens should depend on judicial courage alone.[8] The Framers recognized that judges are human and might be improperly influenced if their judicial careers could be cut short for not sailing with the prevailing political winds. That is why the Federal Constitution gives lifetime tenure to federal judges.[9] The overall objective was to insulate judges and justices from outside

3. "Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability." N.J. CONST. art. VII, § 1, para. 1.

4. Canon One of the New Jersey Code of Judicial Conduct instructs: "A Judge Should Uphold the Integrity and Independence of the Judiciary." NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 1 (2012), *available at* http://www.judiciary.state.nj.us/rules/appendices/app1_jud.htm#P9_287. That Canon recognizes that "an independent . . . judiciary is indispensible to justice in our society." *Id.* For an overview of the concept of judicial independence and its impact at the federal level, see ABA COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/documents/indepenjud.authcheckdam.pdf.

5. THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

6. THE FEDERALIST NO. 78, at 416 (Alexander Hamilton) (J.R. Pole ed., 2005).

7. *Id.* ("But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.").

8. *Id.* at 417 ("That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.").

9. *See* U.S. CONST. art. III, § 1 (providing for lifetime tenure for federal judges); United States v. Saunders, 641 F.2d 659, 663 (9th Cir. 1980) (noting that the guarantee of lifetime tenure to federal judges is "designed to promote the independence of the federal judiciary as a separate and coequal branch of government").

pressures unrelated to dispassionate, impartial decision-making.

The federal model is not perfect. Lifetime appointments mean that a few unfit judges receive job security. But the trade-off is that all federal judges are protected from political retribution.

With the passage of our 1947 State Constitution, New Jersey believed that it had found a better way.[10] Our State Constitution provides for the nomination and confirmation of judges and justices for a term of seven years.[11] Judges and justices must then be renominated and reconfirmed after which they serve to the age of seventy[12]—the constitutional age of senility. Unlike the Federal Constitution, our State Constitution permits unfit judges to be removed from office by non-reappointment.

Our State Constitution sets no constraints on the governor's appointment or the senate's confirmation powers. Although the State Constitution gives the governor and senate broad powers in the reappointment process, the Drafters expected those powers would be exercised wisely and with restraint.

The Drafters of our State Constitution did not expect that the reappointment process would be used as a tool to get rid of a capable and experienced judge or justice whose judicial views did not meet the political litmus test of the day. The debates concerning the Judicial Article of our State Constitution[13] clearly show that the Drafters wanted a strong and independent judiciary, one committed to protecting fundamental rights, even in the face of opposition from the other branches.

At the 1947 Constitutional Convention, Governor Driscoll gave remarks, stating that "[w]ithout independent courts, the whole republican system must surely fail."[14] He added that an independent judiciary must be "in a position to curb any tendency on the part of the other two branches of government to exceed their constitutional authority."[15] Emphasizing the importance of checks and balances, Governor Driscoll stated that "'[t]here is no liberty if the powers of judging be not separate from the legislative and executive powers.'"[16]

The Convention's delegates were of the same mind. Some delegates stated that the initial seven-year appointment period would ensure that a judge "demonstrated . . . capacity for the position,"[17] and had the "temperament . . .

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10. The New Jersey State Constitution has gained both national and international respect, "serv[ing] as the model of an efficient and effective judiciary, emulated by a multitude of other states and by foreign countries as far away as Japan and Ceylon." JERSEY JUSTICE: 300 YEARS OF THE NEW JERSEY JUDICIARY i (Carla Vivian Bello & Arthur T. Vanderbilt II eds., 1978).

11. *See* N.J. CONST. art VI, § VI, para. 3 ("The Justices of the Supreme Court and the Judges of the Superior Court shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior . . . .").

12. *See id.* ("Such justices and judges shall be retired upon attaining the age of 70 years.").

13. N.J. CONST. art VI.

14. *New Jersey Constitutional Convention of 1947*, Comm. on the Judiciary, Vol. IV 428 (1947).

15. *Id.* at 429.

16. *Id.* (quoting Alexander Hamilton, who, in turn, was quoting Montesquieu).

17. *Id.* at 59 (statement of Mrs. Winfield B. Heinz).

need[ed] to qualify for a judgeship."[18] Some who addressed the Convention expressed concern that the reappointment process might compromise a judge's independence. One concerned citizen noted that "[a]bove all, [a judge] must be free from political pressure by those exercising the appointing power . . . . A test period to determine adequacy may properly be provided, but when the incumbent has proved his mettle, he should be assured of reappointment for an extended tenure."[19]

One clear theme comes from the discussions at the Convention—it was not envisioned that a judge or justice would face non-reappointment for political reasons or unpopular rulings. Reappointment of fit justices was the prevailing tradition even before the 1947 Convention, at a time when justices had to be reappointed every seven years.[20] It was a tradition, I believe, the Drafters of our modern State Constitution expected both parties would honor. They would honor the tradition for the principled reasons expressed by Governor Driscoll—and for pragmatic reasons as well. For if the party in power fails to respect the nonpartisan tradition of reappointment, why would anyone anticipate the next party in power to do so?

Judges cannot and should not operate in the political sphere. The judicial reappointment process is a matter within the exclusive domain of the other branches of government. Yet, in that process, judicial independence is at risk. Although judges have no role to play in the reappointment process, you do—you are citizens, you are stakeholders in our system of justice. You have a very good reason to be concerned about the reappointment process. When you appear in a courtroom, you do not want the judge to have any considerations affecting his or her judgment other than the application of the law to the facts. Nothing else should matter. A judge should not be looking in the rearview mirror.

To be sure, our system of appointing judges is far superior to the process of electing judges in other states. In 2009, the Chief Justice of the Iowa Supreme Court, Marsha Ternus, and her six colleagues unanimously ruled that denying same-sex couples the right to marry violated the Iowa Constitution.[21] For that decision, just one year later, she and two other Iowa Supreme Court justices, were ousted from the court in a retention election.[22] Afterwards, Chief Justice

18. *Id.* at 307 (statement of Mr. Walter G. Winne).

19. *Id.* at 21 (statement of Mr. Louis Le Duc).

20. The delegates to the 1947 Convention discussed whether, in New Jersey's history, there had ever been a failure to reappoint a judge in the "top level courts" other than "for cause." *Id.* at 209-10 (discussion between Justice Frederic R. Colie and the Vice Chairman of the Convention). Justice Colie stated: "The fact of the matter is, we have in practice had this opportunity for trial periods which has never been exercised." *Id.* at 210. The Justice noted that there had been, to his knowledge, only one situation in which a judge was not reappointed for a reason other than for cause, and another delegate stated that there had only been two or three examples of non-reappointment: one for physical disability and one "for another reason." *Id.*

21. Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

22. Frank Bruni, *Heartland Justice*, N.Y. TIMES, May 5, 2012, at SR3, *available at* http://www.nytimes.com/2012/05/06/opinion/sunday/bruni-heartland-justice.html?_r=0 (last visited Mar. 4, 2014).

Ternus said, "If people think that what happened here doesn't influence other judges, they're really naïve."[23]

The lesson, she suggested, is that when one judge is punished for issuing an unpopular decision that protects the rights of a disfavored group, it will not go unnoticed. She understood that retaliation against one judge has the potential to breed timidity among other judges, or at least create a public perception that a judge's fear for his own career might affect decision-making in a highly charged case. In those states with elected judiciaries, a litigant may be left to wonder, in a controversial case, whether the judge's ruling reflects a decision based on a faithful reading of the Constitution or whether the ruling reflects what will play best in the next election cycle.

Is Chief Justice Ternus's message any less meaningful if, in a state where a justice or judge must be renominated by a governor and reconfirmed by the senate, reappointment is denied because of disapproval with an opinion or series of opinions of a judge or justice? Would the Supreme Court Justices who issued *Brown v. Board of Education*[24] have survived a retention election in 1954? Certainly, not in the South, and perhaps not in other states. If they were untenured, would they have been renominated and reconfirmed?

For any of you who may have doubts whether the controversy over the reappointment process raises a real threat to an independent judiciary, here are comments recently made by an assignment judge in our State. He said: "There appears now to be concerns among nontenured judges that I don't recall . . . 10 to 20 years ago. I think judges now may be more mindful . . . when they are handling potentially more volatile and noteworthy cases."[25]

Let me say this: a litigant should never be left to ponder whether a judge is more concerned with his career than doing justice, whether in an elective or appointive judicial system.

Why am I talking about the independence of the judiciary this evening? I want to remind you that you get the judiciary you deserve. An independent judiciary is not for the benefit of judges; it is for the benefit of the public. This is your system of justice, and its fate is in your hands.

Each day, in courts throughout this State, courageous judges make difficult decisions that will not meet with public adulation or approval, but they make those decisions because faithful obedience to the Constitution and our laws commands the result. That is what we expect of an independent judiciary. But like the Framers of our Federal Constitution, you should not count on judicial courage alone. Judges are human.

No person will agree with every judicial opinion. Many legislative and

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23. *Id.*

24. 347 U.S. 483, 495 (1954) (holding that racial discrimination in public education violated the Equal Protection Clause of the U.S. Constitution).

25. Salvador Rizzo, *Experts: Christie, Senate Putting Justice Itself at Risk*, STAR-LEDGER, Aug. 18, 2013, *available at* http://www.nj.com/politics/index.ssf/2013/08/war_between_gov_christie_senate_threatens_justice_itself_experts_say.html (last visited Mar. 4, 2014).

constitutional provisions are written in broad language and must be applied to scenarios that the Drafters could not have imagined. Our jurisprudence may have strands that go in various different directions. A judge can engage in principled decision-making, and persons of goodwill can have a reasonable disagreement with the outcome. Therefore it is not surprising that judges disagree in majority and dissenting opinions. When the language of a law is not crystal clear, all that judges can do is give their best conception of what the drafters of that law intended. In that process, each of us should doubt a little of our own infallibility. No one has cornered the market on the truth.

Judges will not always make the correct decisions. Judges are not infallible. If mistakes are to be made, and they will, it is better that they be made for principled reasons and not for political ones. If the political branches believe that a judge has misinterpreted a statute or a constitutional provision, they can correct the error. They have the power to enact a clarifying law or constitutional amendment.[26] The Drafters of the 1947 Constitution did not anticipate that a judge might be removed by non-reappointment for making a good-faith, principled decision—even if that decision is considered mistaken by others.

Let us remember that Governor Thomas Kean renominated Chief Justice Robert Wilentz despite his strong disagreement with some of the decisions of the Wilentz Court.[27] But Governor Kean renominated Chief Justice Wilentz in the name of judicial independence. On this subject, Governor Kean in 1988 wrote the following:

> [Judges] should not have to think how their opinion will affect next year's election or even their reappointment. They should simply view the facts of the case and interpret the law. Accordingly, there has not been a judge since the constitution was adopted in New Jersey who has been denied reappointment based on court opinions or political beliefs. The day that happens, the New Jersey judiciary will be undermined.[28]

Friends, we know that day has arrived. Doing justice should not be a bad career move. Judges must do their jobs, summoning the courage to do what is right, without regard to whether they please some or offend others, and without regard to their judicial careers. Our judges will continue to do justice in their courtrooms, but they cannot fight for an independent judiciary. That is your fight. And for those of you willing to wage that battle, Godspeed.

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26. *See* N.J. CONST. art. IV, § VI (enumerating the powers of the legislature); N.J. CONST. art. IX, para. 1 ("Any specific amendment or amendments to this Constitution may be proposed in the Senate or General Assembly.").

27. *See* THOMAS H. KEAN, THE POLITICS OF INCLUSION 194-95 (1988) ("I deplored the chaos the court had created [with its decision in S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983)]. I even publicly supported a constitutional amendment to remove the court's power in the area. But I always knew that, when [Chief Justice Wilentz's] time came, no matter how much I disagreed with his individual decisions, I would reappoint the chief justice. The issue in my eyes was not *Mount Laurel* [*II*], but judicial independence.").

28. *Id.* at 195.