

## THE THREE-RING CIRCUS: NEW JERSEY'S 2010 JUDICIAL RETENTION CRISIS

*Roslyn F. Martorano\**

When Gov. Chris Christie of New Jersey chose not to renominate Justice John Wallace Jr. to the State Supreme Court in May, it was a case of political overreach. The situation is now a national disgrace, thanks to the governor, the State Senate president, Stephen Sweeney, and Justice Roberto Rivera-Soto.<sup>1</sup>

With America's twenty-four hour news cycle, media plays a major part in modern politics. The executive and legislative branches engage in media ventures so often,<sup>2</sup> it seems only "natural" this lust for information would creep into the government's most mysterious branch. Over the last several years, media backlashes forced state judges from the courts for perceived political actions. In Arizona, criticism forced the state's highly respected chief judge to resign after she merely circulated a letter to other judges.<sup>3</sup> She received the letter from Los Abogados Hispanic Bar Association<sup>4</sup> who

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\* J.D., Albany Law School 2011; B.S., Political Science, Ariz. State Univ.

<sup>1</sup> Op-Ed., *The Politicization of a Respected Court*, N.Y. TIMES, Dec. 16, 2010, at A38, available at <http://www.nytimes.com/2010/12/16/opinion/16thurs3.html> [hereinafter *Politicization*].

<sup>2</sup> See, e.g., David Freedlander, *Alec Baldwin Squares Off Against Dean Skelos in Twitter War*, POLITICKER (Oct. 26, 2011), <http://www.politickerny.com/2011/10/26/alec-baldwin-squares-off-against-in-dean-skelos-in-twitter-war/> (reporting New York Senate Majority Leader Dean Skelos engaged in a Twitter spat with Alec Baldwin over New York's proposed millionaire's tax); Press Release, Pew Internet & Am. Life Project, Social Media & Politics in 2010 Campaign (Jan. 27, 2011), available at <http://pewinternet.org/Press-Releases/2011/Politics-and-Social-Media.aspx> (finding the use of social media is a bipartisan "tool[] for political engagement").

<sup>3</sup> *Court: Quit Saying 'Illegal Aliens,'* WND.COM (Nov. 8, 2008), <http://www.wnd.com/?pageId=80436>; *Our Plan for an Activist Judge Who Thinks Her Personal Opinion Equals Rule of Law*, NOBADJUDGES.COM (Nov. 11, 2008), <http://nobadjudges.blogspot.com/2008/11/another-liberal-judge-substitutes-her.html>; News Release, Ariz. Supreme Court: Admin. Office of the Courts, Arizona Supreme Court Chief Justice Ruth V. McGregor Addresses Joint Session of Legislature, Announces Retirement (Mar. 23, 2009), available at <http://blogs.phoenixnewtimes.com/valleyfever/mcgregor%20retirement%20doc%202.pdf>.

<sup>4</sup> Chief Justice McGregor forwarded a letter from Los Abogados to other judges. Letter

cautioned against using terms like “illegal” and “alien” because the labels “establish[] a brand of contemptibility.”<sup>5</sup> After the Iowa Supreme Court opined on the legality of same-sex marriage,<sup>6</sup> interest groups from outside Iowa worked tirelessly to remove every judge running in the state’s retention election.<sup>7</sup> In New Jersey, the move was more public and more political, but only tangentially tied to any specific court action.

In early May 2010, newly elected Republican Governor Chris Christie issued three press releases, which thrust the New Jersey Supreme Court and its retention policies onto the national stage.<sup>8</sup> For the first time since New Jersey ratified its 1947 constitution, the governor refused to reappoint a sitting justice of the state’s supreme court—who is a registered Democrat.<sup>9</sup> Based on this executive action, within one year, the branches of government fractured and turned on each other. Tensions continue to run high between the executive and the judiciary. The legislature refused a fair hearing to the judicial nominee and called for the resignation of

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from Ruth V. McGregor, Chief Justice, Ariz. Supreme Court, to Lizzette Alameda Zubey, President, Los Abogados Hispanic Bar Ass’n & Salvador Ongaro, President Elect, Los Abogados Hispanic Bar Ass’n (Oct. 2, 2008), *available at* <http://www.judicialwatch.org/documents/2008/KFYI.McGregorLetter.pdf>. The forwarded letter had a cover sheet containing McGregor’s response to Los Abogados on her own letterhead. *Id.* However, the blog Judicial Watch declared McGregor “promise[d] to enforce the requests.” *Judge Bans Use of “Illegal” and “Aliens,”* JUDICIAL WATCH (Nov. 6, 2008), <http://www.judicialwatch.org/blog/2008/11/judge-ban-use-illegal-and-aliens>. In reality, the chief judge’s response to Los Abogados reads only, “I have taken several steps to notify our judges of your concerns.” Letter from Ruth V. McGregor, *supra* note 4. These steps included providing copies at a “scheduled meeting,” and “request[ing] that the Commission on Minorities in the Judiciary consider whether any further distribution of your request would be helpful.” *Id.*

<sup>5</sup> Letter from Lizzette Alameda Zubey, President, Los Abogados Hispanic Bar Ass’n & Salvador Ongaro, President Elect, Los Abogados Hispanic Bar Ass’n, to Ruth V. McGregor, Chief Justice, Ariz. Supreme Court (Sept. 12, 2008), *available at* <http://www.judicialwatch.org/documents/2008/KFYI.McGregorLetter.pdf>.

<sup>6</sup> *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

<sup>7</sup> A Tupelo, Mississippi, interest group financed a public initiative to remove the justices. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send a Tremor Through the Judicial Retention System*, 97 A.B.A. J. 56, 57 (2011), *available at* [http://www.abajournal.com/magazine/article/landmark\\_iowa\\_elections\\_send\\_tremor\\_through\\_judicial\\_retention\\_system](http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system). “The justices raised no money and declined to campaign.” *Id.* Chief Justice Marsha Ternus offered the only public response: the group “wants our judges to be servants of this group’s ideology, rather than servants of the law . . . . They simply refuse to accept that an impartial, legally sound and fair reading of the law can lead to an unpopular decision.” *Id.* (quoting Chief Justice Marsha Ternus); *see also* Marsha Ternus, *State Constitutional Commentary Symposium: Remarks: Chief Justice Marsha Ternus of Iowa*, 74 ALB. L. REV. 1569, 1573–74 (2010/2011).

<sup>8</sup> *See* discussion *infra* Parts I.B, II.A.2.

<sup>9</sup> *Politicization*, *supra* note 1; *see* discussion *infra* Parts I.B, II.A.

a sitting justice.<sup>10</sup> An associate justice authored the court's first abstaining opinion, wherein he charged the chief with unconstitutionally administrating the court.<sup>11</sup> Today, the court functions with two vacancies; the senate recently rejected two of Governor Christie's judicial nominations.<sup>12</sup>

### I. THE NEW JERSEY SUPREME COURT

I ask that each of us continue to hear cases with the integrity, scholarship, and independence that are the hallmarks of New Jersey's judiciary.<sup>13</sup>

Scholars frequently praise the New Jersey Supreme Court for its thoughtful opinions; however, some instate pundits criticize the court's judicial activism.<sup>14</sup> Much of the praise, and criticism, can be directly tied to the state's judicial selection and retention policies.<sup>15</sup> Following World War II, New Jersey ratified a new constitution, which, in part, streamlined the judicial selection process.<sup>16</sup> The new process mirrored federal selection.<sup>17</sup> "The governor independently chooses a judicial candidate, who is then subject to legislative confirmation."<sup>18</sup> Unlike its federal counterpart, these judges do not serve life-terms; instead, they serve and must be reappointed every seven years until they reach seventy, the mandatory retirement age.<sup>19</sup>

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<sup>10</sup> News Release, N.J. Senate Democrats, Sweeney: No Hearing for Christie Court Nominee (May 4, 2010), <http://www.njsendems.com/release.asp?rid=3305>.

<sup>11</sup> Henry v. N.J. Dep't of Human Servs., 9 A.3d 882, 903 (N.J. 2010).

<sup>12</sup> See discussion *infra* Part I.B; George Amick, *Senate Rejection of N.J. Supreme Court Nominee, and the Practice Behind It*, FOR THE TIMES, Apr. 9, 2012, [http://www.nj.com/mercer/index.ssf/2012/04/senate\\_rejection\\_of\\_nj\\_supreme.html](http://www.nj.com/mercer/index.ssf/2012/04/senate_rejection_of_nj_supreme.html).

<sup>13</sup> Tom Hester Sr., *N.J. Chief Justice Rabner's Letter to Judges Critical of Christie*, NEWJERSEYNEWSROOM.COM, May 3, 2010, <http://www.newjerseynewsroom.com/state/nj-chief-justice-rabner-reassures-other-supreme-court-judges> [hereinafter *Rabner's Letter*] (quoting Justice Rabner).

<sup>14</sup> John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701–02 (1998).

<sup>15</sup> *Id.* at 714–16.

<sup>16</sup> John E. Bebout & Joseph Harrison, *The Working of the New Jersey Constitution*, 10 WM. & MARY L. REV. 337, 337, 346 (1968).

<sup>17</sup> See 28 U.S.C. § 44 (2009) (explaining that the President appoints circuit judges who are then affirmed by consent of Congress).

<sup>18</sup> Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 6 (Matthew J. Streb ed., 2007).

<sup>19</sup> Compare N.J. CONST. art. VI, § 6, ¶ 3 (requiring reappointment of the judiciary every seven years and a mandatory retirement age of seventy), with 28 U.S.C. § 44 (allowing judges to stay remain in "office during good behavior").

*A. Appointments System & Brief History*

With this new process, elected officials in the executive and legislative branches adopted three ancillary policies. First, through “senatorial courtesy,” a senator from a judicial appointee’s home district may block the nomination.<sup>20</sup> If this occurs, no other senator will vote to confirm the appointee.<sup>21</sup> In previous years, this process did not apply to reappointments, but it appears to affect the current crisis.<sup>22</sup> The other policies reflect the intent behind constitutional language, reading: “[I]f reappointed he shall hold office during good behavior” until he reaches the mandatory retirement age.<sup>23</sup> Second, the court maintains “a tradition of political balance.”<sup>24</sup> The governor—notwithstanding his personal political affiliation—selects an appointee of the same philosophy as the outgoing justice.<sup>25</sup> Third, the governor gives a justice the initial seven-year term to set his record.<sup>26</sup> So long as the justice acts with “good behavior” in this first term, governors will reappoint him or her until age seventy.<sup>27</sup> The justice would only fail to receive reappointment if he or she acted in an inappropriate or partisan manner.<sup>28</sup> During his administration, Christie’s mentor, former Governor Tom Kean, explained the process:

Judges have to be totally free to make up their minds on a particular case. They should not have to think about how their opinion will affect next year’s election or even their reappointment. . . . 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

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<sup>20</sup> *NJSBA History Regarding the Practice of Invoking Senatorial Courtesy*, N.J. ST. B. ASS’N, <http://www.njsba.com/images/content/1/0/1003482.pdf> (last visited Feb. 21, 2012).

<sup>21</sup> *Id.*

<sup>22</sup> See discussion *infra* Part II.B.

<sup>23</sup> N.J. CONST. art. XI, § 4, ¶ 1.

<sup>24</sup> *Judicial Selection in the States: New Jersey*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NJ](http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ) (last visited Feb. 21, 2012); David W. Chen, *Corzine Elevates a Supreme Court Justice and Taps Another Judge to Succeed Him*, N.Y. TIMES, Sept. 22, 2006, at B5, available at <http://www.nytimes.com/2006/09/22/nyregion/22court.html>.

<sup>25</sup> In fact, the political balance of the court typically reflects three Democrats, three Republicans, and the chief justice is registered in the same party as the governor who appointed him or her. *Judicial Selection in the States: New Jersey*, *supra* note 24.

<sup>26</sup> Peggy Ackermann, *8 Retired NJ Supreme Court Justices Ask Gov. Chris Christie to Reconsider Wallace Reappointment*, NORTHJERSEY.COM, May 13, 2010, [http://www.northjersey.com/news/051310\\_8\\_retired\\_NJ\\_Supreme\\_Court\\_justices\\_ask\\_Gov\\_Chris\\_Christie\\_to\\_reconsider\\_Wallace\\_reappointment.html](http://www.northjersey.com/news/051310_8_retired_NJ_Supreme_Court_justices_ask_Gov_Chris_Christie_to_reconsider_Wallace_reappointment.html).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

political beliefs. The day that happens, the New Jersey judiciary will be undermined. And I was not going to be party to any such event.<sup>29</sup>

Taken together, these provisions and policies relieve pressure on judges. They encourage sound legal decisions based on interpreting the constitution, statutes, and precedent.

### B. “Balancing” the Court

Before and since becoming Governor, I was unambiguous in my intention to bring balance and change to the Supreme Court. My selection today is not a commentary on Justice Wallace. It is a fulfillment of my promise . . . .<sup>30</sup>

Chris Christie campaigned for judicial change, and frequently commented that judges should earn their seats.<sup>31</sup> It was a perceptive move because his promise captured the political zeitgeist. Other citizens, pundits, and politicians criticized state court judges for the expected rhetoric: legislating from the bench.<sup>32</sup> Christie probably hoped the successful campaign strategy would lessen criticism if he removed judges without obvious cause. This was an important distinction, because the governor would have the ability to change four of the seven high court seats in his first term.<sup>33</sup>

The relatively new court (the longest sitting justice was appointed in 1996) had seen three chief justices in three years.<sup>34</sup> The current

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<sup>29</sup> Raymond Lesniak, *Bad Behavior Must Have Consequences*, POLITICKERNJ, May 3, 2010, <http://www.politickernj.com/lesniak/38821/bad-behavior-must-have-consequences>. (quoting former Governor Tom Kean). Only Governor Christie took issue with this constitutional interpretation. *Id.*

<sup>30</sup> Press Release, Governor Chris Christie, Governor Chris Christie Announces Appointment to the New Jersey Supreme Court (May 3, 2010), *available at* <http://www.state.nj.us/governor/news/news/552010/approved/20100503a.html> [hereinafter Christie Press Release 2] (quoting Governor Chris Christie).

<sup>31</sup> See Press Release, Governor Chris Christie, Governor Christie on the New Jersey Supreme Court (May 3, 2010), *available at* <http://www.state.nj.us/governor/news/news/552010/approved/20100503c.html> [hereinafter Christie Press Release 1].

<sup>32</sup> *Id.*; see, e.g., *Bishops Criticize ‘Judicial Activism’ in Ruling on Same-Sex Marriage*, CATHOLIC NEWS SERV., Oct. 13, 2008, <http://www.catholicnews.com/data/stories/cns/0805192.htm>; Floyd Brown & Mary Beth Brown, *Activist Judges Gone Wild*, TOWNHALL.COM, May 21, 2008, [http://townhall.com/columnists/floydandmarybethbrown/2008/05/21/activist\\_judges\\_gone\\_wild](http://townhall.com/columnists/floydandmarybethbrown/2008/05/21/activist_judges_gone_wild). See generally Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591 (2007) (discussing judicial activism in state courts).

<sup>33</sup> See *infra* notes 34–41 and accompanying text.

<sup>34</sup> Chief Justice Stuart Rabner, N.J. COURTS, <http://www.judiciary.state.nj.us/supreme/rabner.htm> (last visited Feb. 22, 2012); Deborah T. Poritz, DRINKER BIDDLE, <http://www.drinkerbiddle.com/dporitz> (last visited Feb. 22, 2012); James R. Zazzali, GIBBONS, [http://www.gibbonslaw.com/biographies/attorney\\_biography.php?attorney\\_id=472](http://www.gibbonslaw.com/biographies/attorney_biography.php?attorney_id=472) (last visited

gubernatorial term will see four more potential changes. First, Justice John E. Wallace, initially nominated for his first term by Democratic Governor James McGreevey, was up for re-nomination in May 2010.<sup>35</sup> Even if reappointed, Wallace was only eligible to serve until March 2012.<sup>36</sup> Second, Justice Roberto A. Rivera-Soto reached the end of his first term in September 2011.<sup>37</sup> Though a registered Republican, Rivera-Soto was also nominated by Governor McGreevey.<sup>38</sup> Third, in March 2012, the longest tenured associate justice, Virginia Long, reached the mandatory retirement age.<sup>39</sup> Justice Long is a registered Democrat, originally nominated by Governor Christie Whitman.<sup>40</sup> Finally, Republican Associate Justice Helen Hoens ends her first term in October 2013.<sup>41</sup> In effect, Governor Christie has the opportunity to nominate and/or change one sitting justice each year of his first term.

## II. A THREE-RING CIRCUS

Unless this action is somehow reversed, our courts will be reconstituted after every election, and their independence, their integrity and their prestige will be swamped by politics.<sup>42</sup>

Governor Christie publicly stated that unseating Justice Wallace would be a major step on the path to correcting New Jersey state government.<sup>43</sup> The truth of this statement remains unproven. The very public move was the opening act of a media circus, and all three branches played a part. Even the traditionally quiet judiciary chimed in when Chief Justice Rabner released a rare public statement to other justices.<sup>44</sup> He praised Wallace and urged other

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Feb. 22, 2012).

<sup>35</sup> *Supreme Court Justice Timeline*, THE STAR LEDGER, available at [http://media.nj.com/ledgerupdates\\_impact/photo/supreme-court-justices-timelinejpg-bc77902f15d07fe9.jpg](http://media.nj.com/ledgerupdates_impact/photo/supreme-court-justices-timelinejpg-bc77902f15d07fe9.jpg) (last visited Feb. 22, 2012); JAMES E. MCGREEVEY, THE CONFESSION 111 (2006) ("As a Democrat, I couldn't expect to get much higher in Kean's administration than the Parole Board.").

<sup>36</sup> Chris Megerian, *N.J. Supreme Court Stand-off May Leave 2 Seats Open at End of Justice Rivera-Soto's Term*, NJ.COM, Jan. 4, 2011, [http://www.nj.com/news/index.ssf/2011/01/christie\\_refuses\\_to\\_name\\_repla.html](http://www.nj.com/news/index.ssf/2011/01/christie_refuses_to_name_repla.html).

<sup>37</sup> *Id.*; *Supreme Court Justice Timeline*, *supra* note 35.

<sup>38</sup> *Supreme Court Justice Timeline*, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Editorial, *Judicial Independence*, N.J. L.J., May 10, 2010, at 22 col. 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Rabner's Letter*, *supra* note 13.

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state judges to continue their work without concern for future reappointment.<sup>45</sup>

### A. *Ring One: Executive Branch*

The constitution gives us seven years to judge somebody, and my view is that each of those judges get their seven year record to make their case for reappointment.<sup>46</sup>

When asked what the governor sought in a judicial nominee, he said, “I want someone who is extraordinarily bright and I want someone who will interpret laws and the Constitution, not legislate from the bench.”<sup>47</sup> Despite this statement, his mentor, former Governor Tom Kean criticized Christie’s decision: “I might have come down differently if I was governor. Probably would have, . . . [b]ut he’s the governor and I respect his decision.”<sup>48</sup> Tom Kean, although a staunch Republican, was also the first to appoint John E. Wallace, Jr., a registered Democrat, to the bench of the Superior Court in 1984.<sup>49</sup>

#### 1. Lessons From a Mentor

Governor Christie frequently cites former Governor Kean as a mentor and friend. Tom Kean is a respected Republican, who advocates for issues across party lines. He endorsed judicial independence, worked tirelessly as Chair of the 9/11 Commission, and is a fierce advocate for climate change.<sup>50</sup> Kean has known Christie since his teenage years, and recently, acted as the

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<sup>45</sup> *Id.*

<sup>46</sup> Christie Press Release 1, *supra* note 31 (quoting Governor Chris Christie).

<sup>47</sup> *Id.* (quoting Governor Chris Christie).

<sup>48</sup> Lisa Fleisher & Chris Megerian, *Gov. Chris Christie Draws Sharp Criticism on Decision to Not Reappoint N.J. Supreme Court Justice Wallace*, NJ.COM, May 4, 2010, [http://www.nj.com/news/index.ssf/2010/05/gov\\_chris\\_christie\\_draws\\_sharp.html](http://www.nj.com/news/index.ssf/2010/05/gov_chris_christie_draws_sharp.html) (quoting former Governor Tom Kean).

<sup>49</sup> *Id.*; *Supreme Court Justice Timeline*, *supra* note 35; *Governor Tom Kean*, RUTGERS U. PRESS, [http://rutgerspress.rutgers.edu/acatalog/\\_governor\\_tom\\_kean\\_2520.html](http://rutgerspress.rutgers.edu/acatalog/_governor_tom_kean_2520.html) (last visited Feb. 22, 2012) (reviewing ALVIN S. FELZENBERG, GOVERNOR TOM KEANE: FROM THE NEW JERSEY STATEHOUSE TO THE 9–11 COMMISSION (2006)).

<sup>50</sup> *Governor Tom Keane*, *supra* note 49 (quoting President Bill Clinton who praised his “demonstrated commitment to bipartisanship and fact-finding”); *see, e.g.*, N.J. Exec. Order No. 219 (Oct. 23, 1989), *available at* <http://www.nj.gov/infobank/circular/eok219.htm> (executive order by then Governor Keane discussing the environment and climate change); News Release, N.J. Senate Democrats, Sweeney: In Kowtowing to Far Right by Dumping Wallace, Governor Inserts Politics into the Judicial System (May 3, 2010) (on file with author), *available at* <http://www.njsendems.com/release.asp?rid=3304> [hereinafter Kowtowing].

“confidant” who reignited rumors Christie was considering a presidential run.<sup>51</sup> One online editorial told the tale of a fourteen-year-old Christie ringing the doorbell of gubernatorial candidate Kean’s house in 1977.<sup>52</sup> The earnest teenager “heard Kean speak at Livingston High School” and pestered his mother until she took him to ask Kean “how to get into politics.”<sup>53</sup> Kean took Christie out to campaign with him that very night.<sup>54</sup> According to political and media lore, they have been close friends ever since.<sup>55</sup>

This mentor/mentee relationship seems odd in light of Kean’s reputation as a strong defender of judicial independence. The most famous illustration occurred in 1986, during Kean’s second term.<sup>56</sup> He faced heavy criticism from his party when he decided to reappoint Democratic Chief Justice Robert N. Wilentz.<sup>57</sup> The controversy was somewhat unusual because “Wilentz’s intellectual and judicial capacities and his personal integrity were beyond reproach.”<sup>58</sup> However, Wilentz was at the helm of a court that conservatives lambasted for activist decisions.<sup>59</sup> Indeed, some were the very decisions Governor Christie cited when he vowed to balance the court.<sup>60</sup> During this reappointment process, “[s]even Republican senators who were opposed to the reappointment sent letters to between seven and ten thousand Republican activists, advising them to urge Kean not to reappoint the chief justice.”<sup>61</sup> Despite criticism, Kean stood fast: “In the end, I knew some would never forgive me for the reappointment (Wilentz). But I upheld the

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<sup>51</sup> Maggie Haberman, *Tom Kean Calls Christie 2012 Craze ‘Real,’* POLITICO.COM, Sept. 26, 2011, <http://www.politico.com/news/stories/0911/64459.html>; Mark Hemingway, *Former N.J. Gov. Tom Kean Reports Christie ‘Seriously’ Considering Presidential Run*, WEEKLY STANDARD BLOG (Sept. 26, 2011), [http://www.weeklystandard.com/blogs/former-nj-gov-tom-kean-reports-christie-seriously-considering-presidential-run\\_594233.html](http://www.weeklystandard.com/blogs/former-nj-gov-tom-kean-reports-christie-seriously-considering-presidential-run_594233.html); Newsmax Wires, *Tom Kean: Chris Christie is Thinking of 2012*, NEWSMAX.COM, Sept. 26, 2011, <http://www.newsmax.com/InsideCover/TomKean-ChrisChristie-WhiteHouse-2012/2011/09/26/id/412344>.

<sup>52</sup> Michael Daly, *The One Who Got Away*, THE DAILY BEAST, Oct. 4, 2011, <http://www.thedailybeast.com/articles/2011/10/04/chris-christie-displays-likable-touch-even-as-he-opts-out-of-2012-bid.html>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; Haberman, *supra* note 51.

<sup>56</sup> FELZENBERG, *supra* note 49, at 347.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 349.

<sup>60</sup> *Id.* at 351–52; Terrence Dopp, *Christie’s New Jersey Court Nominee Replacing Wallace May Be Stalemated*, BLOOMBERG, May 3, 2010, <http://www.bloomberg.com/news/2010-05-03/christie-names-patterson-to-new-jersey-s-supreme-court-replacing-democrat.html>.

<sup>61</sup> FELZENBERG, *supra* note 49, at 353 (footnote omitted).



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principle of the independence of the judiciary, something that will matter long after my term in office has expired.”<sup>62</sup> He further remarked, “I disagree with [Wilentz] half the time, too, but he’s not there to agree with me. He’s there to uphold the constitution.”<sup>63</sup>

## 2. Diverging Paths

Unlike his mentor twenty years before, Christie harnessed the power of the media and made his move.<sup>64</sup> Several weeks before he needed to announce any reappointment news, the governor issued three rapid-fire press releases. First, he included various personal quotes about the New Jersey Supreme Court.<sup>65</sup> Second, he appointed Anne M. Patterson to the court, and thanked Justice Wallace for his service.<sup>66</sup> Third, he stressed this was not a personal decision.<sup>67</sup> However, “[a]t a briefing for reporters, the governor declined to specify exactly which of Wallace’s decisions he disagreed with and said he had reviewed them ‘extensively.’”<sup>68</sup> By all accounts, Mrs. Patterson was an extremely different candidate from Justice Wallace. Unfortunately, the media blitz that followed both lamented and praised the outgoing Wallace and demeaned the professional Patterson.

John E. Wallace attended Harvard Law School, and, thereafter, enlisted for two years in the United States Army; he reached the rank of captain.<sup>69</sup> During his career, he worked “as an assistant county prosecutor, a criminal defense attorney, and as an appellate court judge for almost twenty years.”<sup>70</sup> In addition to his intellect

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<sup>62</sup> Kowtowing, *supra* note 50 (quoting the former governor of New Jersey, Tom Kean).

<sup>63</sup> *Id.* (quoting the former governor of New Jersey, Tom Kean).

<sup>64</sup> “Christie said last week that his consideration of Wallace was not purely political. However, on Monday, he said Patterson would rebalance the court so it contained an equal number of Republicans and Democrats.” *Justice John E. Wallace OUSTED: Anne M. Patterson Picked to Replace Only Black Justice on NJ Supreme Court by Chris Christie*, HUFFINGTON POST, July 4, 2010, [http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou\\_n\\_562640.html](http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou_n_562640.html) [hereinafter *OUSTED*].

<sup>65</sup> Christie Press Release 1, *supra* note 31.

<sup>66</sup> Christie Press Release 2, *supra* note 30; Press Release, Governor Chris Christie, Biographical Information for Supreme Court Nominee Anne M. Patterson (May 3, 2010), available at <http://www.state.nj.us/governor/news/news/552010/approved/20100503b.html> [hereinafter Christie Press Release 3].

<sup>67</sup> Christie Press Release 2, *supra* note 30.

<sup>68</sup> Dopp, *supra* note 60.

<sup>69</sup> *John E. Wallace, Jr.*, BROWN & CONNERY, LLP, <http://www.brownconnery.com/Of-Counsel/John-Wallace-Jr.shtml> (last visited Feb. 22, 2012).

<sup>70</sup> Roslyn F. Martorano, *The Jester’s Exit: Justice Roberto A. Rivera-Soto*, CTR. FOR JUD. PROCESS 1, 10 (Oct. 26, 2011), [https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B9ni\\_CWsunTcYjRhNzY5MzItYjY3ZS00ZjBjLTlhYjgtYmNjOTk0OTA3YWU3](https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B9ni_CWsunTcYjRhNzY5MzItYjY3ZS00ZjBjLTlhYjgtYmNjOTk0OTA3YWU3)

and professional experience, Justice Wallace brought a racially diverse perspective to the court.<sup>71</sup> By all accounts, colleagues and pundits alike lauded Wallace for his centrist views.<sup>72</sup> Professor Frank Askin, Director of Rutgers University's Constitutional Litigation Clinic, responded, "John Wallace had no real ideology, and he called them like he saw them."<sup>73</sup> Moreover, he was not on the court for any of the controversial cases cited by Christie; in fact, he voted with the majority to nullify the effects of the most criticized decision.<sup>74</sup>

Following the announcement, Anne M. Patterson stood next to the governor and declared, the "nomination [to be] the highest professional honor [she] could receive."<sup>75</sup> She was probably unaware that intense criticism of her professional and private lives would follow—all because she had a very different personal and political background than the sitting justice. Superficial differences include race, gender, and geography; Patterson is a Caucasian female from the governor's hometown.<sup>76</sup> Professionally, Anne Patterson spent the majority of her career in private practice.<sup>77</sup> There she became partner at a large firm, where her practice centered on commercial litigation, including product liability and restrictive covenants.<sup>78</sup> Outraged critics decried her racial homogeneity, lack of judicial experience, and frequent contributions to Republican candidates.<sup>79</sup> However, colleagues who advocated

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&hl=en\_US (citing *John E. Wallace, Jr.*, *supra* note 69).

<sup>71</sup> *Trenton: State Supreme Court Nominee Confirmed*, N.Y. TIMES, May 20, 2003, at B6, available at <http://www.nytimes.com/2003/05/20/nyregion/metro-briefing-new-jersey-trenton-state-supreme-court-nominee-confirmed.html?ref=johnnewallacejr>.

<sup>72</sup> Chief Justice Stuart Rabner praised the departing Justice Wallace as "an intellectually honest, wise, and independent thinker, a fair-minded jurist, a gifted, thoughtful writer, and a model of integrity and character. His exemplary and honorable record speaks for itself, and his departure is a loss to the Judiciary." *Rabner's Letter*, *supra* note 13; see also *Politicization*, *supra* note 1; *OUSTED*, *supra* note 64.

<sup>73</sup> Dopp, *supra* note 60 (quoting Frank Askin).

<sup>74</sup> Kowtowing, *supra* note 50. Governor Christie "said the court overstepped its bounds when it legalized same-sex unions, ordered towns to build affordable housing and gave billions in aid to poor school districts." *OUSTED*, *supra* note 64. As for the case of same-sex unions, "[i]n a unanimous decision in 2006 that gay couples must receive treatment equal to that of married heterosexual couples, Wallace was one of four judges who stopped short of saying that gay couples had to have the right to marry to attain that equality." *Id.*

<sup>75</sup> Dopp, *supra* note 60 (quoting Anne Patterson).

<sup>76</sup> Christie Press Release 2, *supra* note 30; *OUSTED*, *supra* note 64.

<sup>77</sup> Christie Press Release 3, *supra* note 66.

<sup>78</sup> *Id.*

<sup>79</sup> Matt Friedman, *Gov. Christie's Nominee for N.J. Supreme Court has Donated \$23,680 to Republicans in Past 17 Years*, NJ.COM, May 3, 2010, [http://www.nj.com/news/index.ssf/2010/05/nj\\_gov\\_christies\\_nominee\\_for\\_s.html](http://www.nj.com/news/index.ssf/2010/05/nj_gov_christies_nominee_for_s.html); see *OUSTED*, *supra* note 64.

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against her in cases had nothing but praise for the attorney. Frank Askin, her one-time opposing counsel, said, “[s]he’s a very ethical, collegial lawyer . . . [and] I have nothing but respect and good regards for her.”<sup>80</sup>

### B. Ring Two: Legislature

It’s sad that the Governor would play politics with a court seat that he’ll have the chance to fill, anyway . . . . In his desire to finally be accepted by the conservative wing of his party and draw applause from right-wing pundits, the Governor sold out the independence of the judiciary in the name of politics.<sup>81</sup>

Much like many other state governments, New Jersey has a balance of political power in its three coequal branches.<sup>82</sup> Unfortunately for the supreme court and Anne M. Patterson, the legislature’s outrage at the governor’s political maneuvering halted the appointment process.<sup>83</sup> Senate President Stephen M. Sweeney, a longtime supporter and friend of John E. Wallace,<sup>84</sup> lashed out hard and fast: “The Senate cannot in good conscience play a role in the Governor’s reckless politicization of the courts . . . . I will not allow the dismantling of New Jersey’s independent judiciary. This nomination will not be taken up by Senate Judiciary Committee.”<sup>85</sup> Throughout 2010, the legislature dragged its feet,<sup>86</sup> and the media continued to report on the lack of action.<sup>87</sup> Reports speculated that

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<sup>80</sup> Fleisher & Megerian, *supra* note 48 (quoting Frank Askin).

<sup>81</sup> Kowtowing, *supra* note 50 (quoting Senate President Stephen M. Sweeney).

<sup>82</sup> *Our Legislature*, N.J. LEGISLATURE, <http://www.njleg.state.nj.us/legislativepub/our.asp> (last visited Feb. 22, 2012).

<sup>83</sup> See News Release, N. J. Senate Democrats, Sweeney: No Hearing for Christie Court Nominee (May 4, 2010) (on file with author), <http://www.njsendems.com/release.asp?rid=3305> [hereinafter *No Hearing*].

<sup>84</sup> *Confirmation Hearing Set for NJ Supreme Court Nominee*, CBS NEW YORK (May 30, 2011), <http://newyork.cbslocal.com/2011/05/30/confirmation-hearing-set-for-nj-supreme-court-nominee/>.

<sup>85</sup> *No Hearing*, *supra* note 83 (quoting Senate President Stephen M. Sweeney).

<sup>86</sup> Understandable given the “professional courtesy [that] other senators will not proceed with confirmation of a judicial candidate unless the senators from the home district have signed off.” *Judicial Selection in the States: New Jersey*, *supra* note 24. This practice traditionally applies only to new appointees, but given the close relationship between Senate President Sweeney and Justice Wallace, it could be accepted for this situation. *Id.*; see *No Hearing*, *supra* note 83.

<sup>87</sup> See Kathryn Jean Lopez, *Constitutional Crisis in the Garden State*, NAT’L REV. ONLINE (Dec. 11, 2010), <http://www.nationalreview.com/corner/255108/constitutional-crisis-garden-state-kathryn-jean-lopez>; *Politicization*, *supra* note 1; Kerry Pickett, *Governor Christie Strikes at New Jersey’s High Court*, WASH. TIMES WATER COOLER BLOG (Dec. 11, 2010), <http://www.washingtontimes.com/blog/watercooler/2010/dec/11/governor-christie-strikes-new->

the legislature might make good on its threat not to confirm Patterson until after Wallace's seventieth birthday.<sup>88</sup>

The executive continued to placate the press. On behalf of Governor Christie, Michael Drwaniak remarked to Bloomberg News, "the governor has the authority to reappoint or not reappoint . . . I'm sure Senator Sweeney will respect [the constitutional] process. We've fulfilled our constitutional duties. All we ask is that Senator Sweeney now fulfill his and provide a hearing for the nominee."<sup>89</sup> Then, yet another outrageous action—this time from the judiciary—diverted the legislature and national audience. Suddenly, they ignored the appointments process completely<sup>90</sup> and called for the resignation of Associate Justice Roberto A. Rivera-Soto instead.<sup>91</sup> Although many of the senators behind this initiative criticized the governor for removing a racial minority from the court, they failed to recognize that forcing Rivera-Soto from the bench would remove the only remaining minority member.<sup>92</sup>

The court attempted to function without Wallace, but Associate Justice Rivera-Soto shocked the remaining members when he authored the court's first abstaining opinion. He opined that the court—as it stood, one justice down—could not reach quorum, so he would abstain until the chief justice corrected the error.<sup>93</sup> The move further outraged the legislature. For Sweeney, "[i]t officially cements his place as the worst and most ethically challenged justice in the history of the modern judiciary. . . . This isn't the first mistake Rivera-Soto's made since joining the Court, but it should be his last."<sup>94</sup> The mistakes Sweeney referred to included, "at least

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<sup>88</sup> Paul Mulshine, Op-Ed., *The Governor Should Be Running for Precedent*, STAR-LEDGER, Dec. 16, 2010, at 21, available at [http://blog.nj.com/njv\\_paul\\_mulshine/2010/12/the\\_governor\\_should\\_be\\_running.html](http://blog.nj.com/njv_paul_mulshine/2010/12/the_governor_should_be_running.html).

<sup>89</sup> Dopp, *supra* note 60 (quoting Governor Christie's spokesman, Michael Drwaniak).

<sup>90</sup> See Richard Pérez-Peña, *Appointment Fight Divides Judges*, N.Y. TIMES, Dec. 11, 2010, at A19, available at <http://www.nytimes.com/2010/12/11/nyregion/11court.html>.

<sup>91</sup> *Id.*

<sup>92</sup> Op-Ed., *The Record: Christie Supreme*, NorthJersey.com, Jan. 23, 2012, [http://www.northjersey.com/news/opinions/137943263\\_Christie\\_supreme.html](http://www.northjersey.com/news/opinions/137943263_Christie_supreme.html); Associated Press, *Group Urges Gov. Christie to Appoint Minority to N.J. Supreme Court*, NJ.COM, Oct. 21, 2011, [http://www.nj.com/news/index.ssf/2011/10/gov\\_christie\\_urged\\_to\\_appoint.html](http://www.nj.com/news/index.ssf/2011/10/gov_christie_urged_to_appoint.html).

<sup>93</sup> *Henry v. N.J. Dep't of Human Servs.*, 9 A.3d 882, 903 (N.J. 2010) (Rivera-Soto, J., abstaining); see also Martorano, *supra* note 70, at 11–18 (discussing arguments and counter-arguments by the supreme court's justices concerning Rivera-Soto's abstention).

<sup>94</sup> Martorano, *supra* note 70, at 12 (quoting Tom Hester Sr., *N.J. Supreme Court Justice Rivera-Soto Abstaining from Decisions in Protest*, N.J. NEWSROOM, Dec. 10, 2010, <http://www.newjerseynewsroom.com/state/nj-supreme-court-justice-rivera-soto-abstaining-from-decisions-in-protest>).

three instances, [wherein] colleagues and professional organizations . . . questioned his practices and ethics.”<sup>95</sup> In one situation, “his own court censured” his behavior.<sup>96</sup>

Democratic Senator Nia H. Gill proposed the Gill Resolution, which called for Justice Rivera-Soto’s resignation “if the Assembly does not seek to impeach him.”<sup>97</sup> On the senate floor, she castigated the justice and his attempt to “turn[] his position ‘into a no-show job.’”<sup>98</sup> This action only further fanned the flames between the legislature and executive. Chair of the Senate Judicial Committee, Senator Nicholas P. Scutari, responded, “With his reappointment around the corner, this smacks of a desperate attempt to distract from his ethical lapses and grab the attention of right wing pundits who share his disdain for the court.”<sup>99</sup> Alternately, the governor found it “ironic” senate Democrats would criticize Rivera-Soto for his inaction when they refused to do their own job in the appointments process.<sup>100</sup> He otherwise refused to take a stance on Rivera-Soto’s constitutional argument.<sup>101</sup> Senate President Sweeney publicly condemned the governor’s equivocation, stating “[i]f you’re not opposing it, you must be supporting it.”<sup>102</sup>

### C. Ring Three: Judiciary

Citizens who turn to the courts for relief are entitled to have their cases resolved by impartial judges who focus only on the even-handed pursuit of justice; litigants should never have to worry that a judge may be more concerned about how a decision could affect his or her reappointment.<sup>103</sup>

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<sup>95</sup> Martorano, *supra* note 70, at 4.

<sup>96</sup> *Id.* The supreme court “censured him for overstepping the bounds of the personal/professional divide and using his office to obtain preferential treatment.” *Id.*

<sup>97</sup> Statehouse Bureau Staff, *N.J. Senate Democrats Urge Supreme Court Justice Rivera-Soto to Resign for Abstaining on Cases*, NJ.COM, Dec. 20, 2010, [http://www.nj.com/news/index.ssf/2010/12/nj\\_senate\\_democrats\\_propose\\_fo.html](http://www.nj.com/news/index.ssf/2010/12/nj_senate_democrats_propose_fo.html) [hereinafter *N.J. Senate Democrats*]; Statehouse Bureau Staff, *Gill Resolution Calls for Rivera-Soto to Resign*, SENATOR NIA H. GILL (Dec. 21, 2010), <http://niahgill.com/2011/01/30/gill-resolution-calls-for-rivera-soto-to-resign/>.

<sup>98</sup> *N.J. Senate Democrats*, *supra* note 97.

<sup>99</sup> Martorano, *supra* note 70, at 12 (quoting Senator Nicholas P. Scutari); Hester Sr., *supra* note 94.

<sup>100</sup> *N.J. Senate Democrats*, *supra* note 97.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting Senate President Stephen Sweeney).

<sup>103</sup> Tom Moran, *Gov. Christie May Have Picked a Fight He’s ‘Almost Certain to Lose’ with N.J. Supreme Court Nominee*, NJ.COM, May 4, 2010, [http://blog.nj.com/njv\\_tom\\_moran/2010/05/gov\\_christies\\_may\\_have\\_picked.html](http://blog.nj.com/njv_tom_moran/2010/05/gov_christies_may_have_picked.html) (quoting Chief Justice Stuart Rabner).

On December 10, 2010, the supreme court handed down a shocking decision. It was not shocking for its substantive take on the parties and their dispute, but for the additional opinions. Justice Rivera-Soto filed a 183-page abstaining opinion based entirely on a constitutional argument he raised *sua sponte*.<sup>104</sup> The other justices responded.<sup>105</sup> The argument stemmed from the administrative action of Chief Justice Rabner, who followed in the footsteps of other chief justices.<sup>106</sup> He temporarily appointed a recently retired, and well respected, Court of Appeals Judge—in this case Edwin Stern.<sup>107</sup> This temporary appointment helped the court fulfill its calendar obligations.

The legal controversy concerned a constitutional provision and subsequent supreme court rule.

Article VI, Section II, Paragraph I [of the New Jersey Constitution] reads as follows:

Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.”<sup>108</sup>

The supreme court rules expanded on this constitutional provision:

Five members of the court shall constitute a quorum. When necessary to constitute a quorum, to replace a justice who is absent or unable to act, or to expedite the business of the court, the presiding justice may assign one or more retired justices of the Supreme Court who are not engaged in the practice of law and who consent thereto or the judge or judges of the Appellate Division, senior in length of service

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<sup>104</sup> *Henry v. N.J. Dep't of Human Servs.*, 9 A.3d 882, 903–1002, 204 N.J. 320, 354–525 (N.J. 2010) (Rivera-Soto, J., abstaining) (New Jersey reporter opinion spans only twenty pages, but it has a 153-page appendix with hundreds of case citations).

<sup>105</sup> *Id.* at 895–903 (Rebner, C.J., concurring). Justices Long, LaVecchia, and Albin joined Justice Rebner's concurring opinion. *Id.* at 903.

<sup>106</sup> *Id.* at 895. “[T]his practice ‘is consistent with more than 800 similar assignments made by Chief Justices over the course of four decades.’” Martorano, *supra* note 70, at 18 (quoting *Henry*, 9 A.3d at 894 (Rabner, C.J., concurring)).

<sup>107</sup> Terry Hurlbut, *Appellate Division Chief Judge New Temporary Associate Justice*, ESSEX CNTY. CONSERVATIVE EXAM’R, Sept. 9, 2010, <http://www.examiner.com/essex-county-conservative-in-newark/appellate-division-chief-judge-new-temporary-associate-justice>.

<sup>108</sup> *Henry*, 9 A.3d at 895 (Rabner, C.J., concurring) (quoting N.J. CONST. art VI, § 2, ¶ 1); *see also*, Martorano, *supra* note 70, at 12–13 (discussing the related constitutional arguments of the justices).

therein, to serve temporarily in the Supreme Court.<sup>109</sup>

Rivera-Soto borrowed his argument from constitutional scholar Professor Edward Hartnett's 2003 article, *Ties in the Supreme Court of New Jersey*.<sup>110</sup> Professor Hartnett asserted the provisions should be narrowly construed; a temporary appointment is only permissible when that seat is necessary to constitute a quorum of five.<sup>111</sup> However, when asked publicly to comment on the controversy, Professor Hartnett denounced the associate justice's actions. "Rivera-Soto's refusal to participate in cases was unproductive and . . . he ran the risk of the court's producing a different decision than it would have otherwise."<sup>112</sup> His fellow justices were less kind. In response to the abstention, Chief Justice Rabner laid a clear constitutional and historical foundation for his actions.<sup>113</sup>

In *Johnson v. Johnson*, Chief Justice Rabner also politely rebuked Rivera-Soto for failing to act in his full capacity as a judge, lecturing him with the words of former Chief Justice William Rehnquist.<sup>114</sup> Justice Albin's concurrence was less restrained:

[Rivera-Soto] undermine[s] the Chief Justice's authority . . . [and] has chosen to abstain in hundreds of cases, . . . depriving litigants of his vote in matters of utmost importance. He has taken the bench in cases argued before the Court, and plied the litigants with questions, all the while knowing that he would abstain.<sup>115</sup>

In less than one month, Justice Rivera-Soto abstained from 561 cases<sup>116</sup> and changed his position twice. First, he amended his abstention to only refrain from opinions wherein the court required Stern's vote to constitute a quorum of five.<sup>117</sup> Perhaps this change

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<sup>109</sup> *Henry*, 9 A.3d at 895 (Rabner, C.J., concurring) (citing N.J. Sup. Ct. R. 2:13-2).

<sup>110</sup> *Henry*, 9 A.3d at 905–06, 909, 910, 912, 913–14 (Rivera-Soto, J., abstaining) (citing Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735 (2003)); *N.J. Supreme Court Justice Abstains from Decisions*, ABOUT SETON HALL L., [http://law.shu.edu/About/News\\_Events/Program\\_Highlight/program-highlight-spotlight.cfm?customel\\_datapageid\\_4661=175377](http://law.shu.edu/About/News_Events/Program_Highlight/program-highlight-spotlight.cfm?customel_datapageid_4661=175377) (last visited Feb. 22, 2012).

<sup>111</sup> Hartnett, *supra* note 110, at 744–46.

<sup>112</sup> Maya Rao, *N.J. Justice Roberto Rivera-Soto Says He Will Not Seek Reappointment*, PHILA. INQUIRER, Jan. 4, 2011, available at [http://articles.philly.com/2011-01-04/news/26357874\\_1\\_reappointment-christie-conservative-judges/2](http://articles.philly.com/2011-01-04/news/26357874_1_reappointment-christie-conservative-judges/2).

<sup>113</sup> *Henry*, 9 A.3d at 895 (Rabner, C.J., concurring).

<sup>114</sup> *Johnson v. Johnson*, 9 A.3d 1003, 1016 (N.J. 2010) (Rabner, C.J., concurring).

<sup>115</sup> *Id.* at 1018 (Albin, J., concurring).

<sup>116</sup> Martorano, *supra* note 70, at 18.

<sup>117</sup> Tom Hester Sr., *Justice Roberto Rivera-Soto Now Voting on Some N.J. Supreme Court Decisions*, NEWJERSEYNEWSROOM.COM, Jan. 12, 2011, <http://www.newjerseynewsroom.com/state/justice-roberto-rivera-soto-now-voting-on-some-nj-supreme-court-decisions>.

stemmed from a practical flaw in his argument. “Since his 2004 appointment, Justice Rivera-Soto voted in seventeen cases *with* temporarily assigned justices. . . . Moreover, the court decided thirteen of those cases *before* Justice Wallace, Jr. vacated the bench.”<sup>118</sup> However, Rivera-Soto publicly announced another reason behind the shift.

On January 12, 2011, he issued a lone dissent in another case.<sup>119</sup> This dissent dealt only with his previous abstention.<sup>120</sup> He heard “a voice” in “the varied reactions to *Henry*,” which convinced him to realize “a more nuanced view of the” debate.<sup>121</sup> In effect, this meant he no longer agreed with his previous position. He then “came out in public support of Governor Christie, declared that he would not seek reappointment” and brokered a political deal to ensure Anne Patterson’s appointment.<sup>122</sup> The deal required three actions, one from each branch. Associate Justice Rivera-Soto would step down, future nominations from Governor Christie would reflect racial diversity, and Senate President Sweeney would ensure speedy confirmation hearings (so approved justices could be seated before Associate Justice Long’s March 2012 retirement).<sup>123</sup> Sweeney did not hold up his end of the bargain; in May 2012, the senate judicial committee rejected two racially diverse nominees because it felt they were too Republican.<sup>124</sup>

### III. WHERE ARE THEY NOW?

For judges facing reappointment, I know that you will continue to focus on the quality of your work. I am proud of your scholarship, industry, and dedication and will continue to advocate on your behalf.<sup>125</sup>

During 2011, some journalists reported that the court continued to punish Governor Christie.<sup>126</sup> This assertion stemmed from two

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<sup>118</sup> Martorano, *supra* note 70, at 17.

<sup>119</sup> Hopewell Valley Citizens’ Grp., Inc. v. Berwind Prop. Grp. Dev., 10 A.3d 211, 221 (N.J. 2011) (Rivera-Soto, J., dissenting).

<sup>120</sup> *Id.* at 221–22.

<sup>121</sup> *Id.* at 222.

<sup>122</sup> Martorano, *supra* note 70, at 20 (citing *Court Pick Deal Good for State*, NJ.COM, May 4, 2011, <http://www.nj.com/gloucester/index.ssf?/base/news-2/130449750935281.xml&coll=8>).

<sup>123</sup> *Id.*; Kevin McArdle, *Diversity and N.J.’s Supreme Court*, JERSEY101.5, Nov. 3, 2011, <http://nj1015.com/diversity-and-njs-surpreme-court-audio/>

<sup>124</sup> See discussion *infra* Part III.

<sup>125</sup> *Rabner’s Letter*, *supra* note 13 (quoting Chief Justice Stuart Rabner).

<sup>126</sup> See, e.g., Sam Favate, *NJ Supreme Court Takes on Judicial Benefits Case, Christie Fumes*, WALL ST. J. BLOGS (Nov. 11, 2011), <http://blogs.wsj.com/law/2011/11/11/nj-supreme-court-takes-on-judicial-benefits-case-christie-fumes>; Chris Megerian, *Christie Says He Won’t*



recent decisions wherein the court opposed the governor's wishes.<sup>127</sup> No member of the court confirmed or denied this assertion—perhaps because the court returned to tradition: it let the opinions speak for themselves.<sup>128</sup> The legislature and the executive had a *slightly* better dynamic. The governor, senate president, and Justice Rivera-Soto reached a joint decision that Anne M. Patterson would fill the departing Rivera-Soto's seat.<sup>129</sup> Although the agreement stamped out much of the controversy, it marked yet another political maneuver to influence judicial retention. As for the court itself, Chief Justice Rabner now has a bench comprised of five women and two men, all Caucasian.<sup>130</sup> (The court still functions with two vacancies.)<sup>131</sup>

In January 2012, Governor Christie upheld his portion of the brokered agreement when he nominated former Assistant U.S. Attorney Phillip Kwon and Chatham Mayor Bruce A. Harris.<sup>132</sup>

Despite promising expedited confirmation proceedings—as required by Senate President Sweeney's promise to hold confirmation hearings in time for Associate Justice Long's March retirement—in April and May, the judicial committee rejected Christie's nominations because it did not want a high court with too

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*Fight N.J. Supreme Court Order to Add \$500M in Funding for Poor School Districts*, NJ.COM, May 24, 2011, [http://www.nj.com/news/index.ssf/2011/05/christie\\_says\\_he\\_will\\_comply\\_w.html](http://www.nj.com/news/index.ssf/2011/05/christie_says_he_will_comply_w.html).

<sup>127</sup> See *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011); *Depascale v. State of New Jersey*, 2011 WL 6034457 (N.J. Super. Ct. App. Div. Nov. 11, 2011); MaryAnn Spoto, *Judge Nixes Christie Request to Have N.J. Judges Contribute More Toward Pensions and Benefits*, NJ.COM, Oct. 26, 2011, [http://www.nj.com/news/index.ssf/2011/10/judge\\_nixes\\_christie\\_request\\_t.html](http://www.nj.com/news/index.ssf/2011/10/judge_nixes_christie_request_t.html); Favate, *supra* note 124; Megerian, *supra* note 124.

<sup>128</sup> See *Rabner's Letter*, *supra* note 13.

<sup>129</sup> See Richard Pérez-Peña, *Legislators and Christie Reach Deal in Court Fight*, N.Y. TIMES, May 2, 2011, at A18, available at [http://www.nytimes.com/2011/05/03/nyregion/christie-and-democrats-agree-to-truce-over-court-seat.html?\\_r=1](http://www.nytimes.com/2011/05/03/nyregion/christie-and-democrats-agree-to-truce-over-court-seat.html?_r=1).

<sup>130</sup> See *Supreme Court of New Jersey*, N.J. COURTS, <http://www.judiciary.state.nj.us/supreme/index.htm> (last visited June 23, 2012). This count includes retired Associate Justice Virginia Long and the temporarily assigned Judge Dorothea O'C. Wefing. See *Supreme Court of New Jersey*, N.J. COURTS, <http://www.judiciary.state.nj.us/supreme/index.htm> (last visited June 23, 2012); see also MaryAnn Spoto, *Appellate Judge Appointed Temporary N.J. Supreme Court Justice*, NJ.COM, June 11, 2011, [http://www.nj.com/news/index.ssf/2011/06/apellate\\_judge\\_dorothea\\_wefing.html](http://www.nj.com/news/index.ssf/2011/06/apellate_judge_dorothea_wefing.html).

<sup>131</sup> See discussion *supra* Part I.B.

<sup>132</sup> Press Release, Governor Chris Christie, Governor Chris Christie Makes Historic New Jersey State Supreme Court Nominations with Bruce Harris and Phillip Kwon (Jan. 23, 2012), <http://www.state.nj.us/governor/news/news/552012/approved/20120123a.html>; see also Angela Delli Santi, *N.J. Gov. Pressed to Add Black, Latino to NJ High Court*, ASSOCIATED PRESS, Oct. 21, 2011, available at [http://www.northjersey.com/news/state/Christie\\_pressed\\_to\\_add\\_black\\_Latino\\_to\\_NJ\\_high\\_court.html](http://www.northjersey.com/news/state/Christie_pressed_to_add_black_Latino_to_NJ_high_court.html).

many Republicans.<sup>133</sup> Whether in response to the senate or for an unrelated reason, Christie decided to take on “activist” judges at the superior court level the same month; in June, he nominated six new judges.<sup>134</sup> After two years of infighting, it seems no one—Executive, Senate, Republican, or Democrat—will set aside pride for judicial function. When will they realize that New Jersey residents are paying the price?

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<sup>133</sup> Amick, *supra* note 12, at 1.

<sup>134</sup> “Last week at a town hall meeting, Christie said he’s fed up with the judiciary, which he views as too activist.” MaryAnn Spoto, *N.J. Superior Court Judges Beware: Gov. Christie May Be After You*, N.J. STAR-LEDGER, May 7, 2011, available at [http://www.nj.com/news/index.ssf/2012/05/nj\\_superior\\_court\\_judges\\_bewar.html](http://www.nj.com/news/index.ssf/2012/05/nj_superior_court_judges_bewar.html); Press Release, Governor Chris Christie, Governor Chris Christie Files Nominations (June 22, 2012), <http://www.state.nj.us/governor/news/news/552012/approved/20120621c.html>.