



May 9, 2024

Senate President Scutari,

We, the undersigned, represent a broad coalition of advocates from across our state fighting to make New Jersey fairer, more equitable, and more just.

We are writing to express extreme concern about conversations being had in the Senate to propose a constitutional amendment that would fundamentally alter the functioning of our judiciary and transfer vast power over the courts to the political branches of government. We are particularly alarmed at the possibility that this critical change to our constitutional structure would be fast-tracked through the Legislature without an opportunity for input from stakeholders.

Reasonable people can disagree about the best way to select appellate judges. But the proposal to shift from a system where the Chief Justice selects appellate judges from the most qualified trial judges to one where the political branches select appellate judges raises significant concerns. While there may be sound reasons for the change, the rushed process gives the impression that it is yet another attempt by elected officials to consolidate power in the hands of a few elected officials.

The public deserves answers: how will this constitutional amendment impact judicial diversity, vacancies, competence, and independence? Based on what evidence and expertise was it conceived? And why is it being pursued now, at breakneck pace, without an opportunity for discussion and deliberation?

Across the country, judicial selection processes are increasingly politicized, public confidence in courts is dwindling, and the promise of even-handed justice is imperiled. Against this backdrop, the New Jersey Legislature appears poised to further erode public trust by upending the state's judiciary behind closed doors.

The Senate should not vote on this proposed amendment until there has been an open, robust discussion about the critical questions implicated by such a radical change in the way our courts are constituted.

The Proposed Constitutional Amendment

Because the Legislature has drafted this proposed constitutional amendment in secret, shutting out experts, stakeholders, and the public at large, its precise contours are presently unknown. We understand, however, that the amendment would work as follows:

Under the current system, the Chief Justice has the constitutional authority to assign judges of the Superior Court to any court in the state. Thus, the Chief Justice may make geographic assignments, may determine whether a judge sits in family, criminal or civil court, and, critically, may elevate trial judges to the Appellate Division. For decades, every Appellate Division judge has served in the lower courts and serves a 10-week trial run in the Appellate Division before the Chief Justice appoints them to serve there. The constitutional amendment would strip the Chief Justice of that assignment power and allow the Governor to name people directly, subject to Senate confirmation, to a “Court of Appeals,” that would have all the same powers as the Appellate Division. This would transfer a tremendous amount of power to the political branches and away from the courts.

Diversity

As currently constituted, the Appellate Division has gender parity (slightly more women than men) and political balance (52% of the judges on the Appellate Division are Democrats). There are more people of color serving on that court now than ever before. More racial diversity is needed in all of our courts, but with eight judges who identify as people of color, the diversity of the Appellate Division is improving.

How will a departure from the status quo impact the diversity of the appellate bench? Will gender diversity and political balance persist? What efforts will be taken to increase racial and ethnic diversity? Did these questions and considerations play any part in the drafting of the proposed constitutional amendment?

Vacancies

The political branches have shown that they cannot consistently keep the bench filled through the process of appointment and confirmation. For seven of the last 11 years – across multiple gubernatorial administrations – the average number of judicial vacancies has been over 50. This has had a catastrophic effect on the provision of justice to the most vulnerable New Jerseyans. Fortunately, under the current system, the Appellate Division has been largely insulated from this problem. The Chief Justice has diligently tended to the composition of the appellate bench, while the trial courts, which can be filled only by political actors, have suffered. The constitutional amendment would put total power over judicial staffing of the Appellate Division into the same hands that have long mismanaged the process of filling the lower courts. The Appellate Division is the busiest court in the state – dealing with complex cases and emergent issues. Vacancies in that court would have a devastating effect on the provision of justice for all New Jerseyans.

If New Jerseyans are being asked to endorse colossal changes to the way we select Appellate Division judges, why should they have any confidence that the next Governor and Legislature will be able to keep the seats in the Appellate Division filled?

Competence & Politicization

Today, judges are selected for assignments in the Appellate Division after they have presided over trial courts and have served a 10-week temporary assignment at the Appellate Division. This has proven a useful model for two main reasons. First, experience in trial courts informs appellate judges' perspectives on the cases they are tasked with reviewing.¹ It is hard, for example, to ask a judge who has never seen a criminal trial to determine whether a particular error during the trial impacted the result of the case. Second, not all great trial judges will be great appellate judges. Appellate judges must be able to write clearly, cogently, and quickly; although some trial judges possess those skills, not all do. Also, not all trial judges enjoy the job of appellate judges, which involves far less interpersonal interaction and far more time reading cases and writing opinions.

¹ Hon. Douglas Fasciale, *Justitia*, Invaluable Knowledge: How Trial Judge Experience Shapes Intermediate Appellate Review, Vol. 107 No. 3 (2024).

Under the current system, judges – trial and appellate – serve for seven years and then must be again appointed by the Governor and confirmed by the Senate. They then enjoy lifetime tenure (until age 70). Reappointment and reconfirmation occur at extremely high rates. Thus, New Jersey judges have the ability to focus on making decisions that are correct, rather than those that are popular. If judges seeking to be selected to sit on an appellate court had to impress the Governor, their home county Senators, and, indeed, the entire Senate, they might be concerned with how their decisions will be received rather than whether they are correct. Judges willing to make unpopular decisions protect the interests of those without political power and are vital to a functioning judiciary.

There might be ways to guarantee competence and prevent politicization in systems where the political branches select appellate judges. But there are enough questions about those issues that the Senate should not move ahead with any change until and unless there is a robust discussion and proponents of the change can produce satisfactory answers to these critical questions.

Conclusion

New Jersey courts, including the Appellate Division, have a well-earned national reputation for independence and excellence. Why the need to change the process for selecting judges so radically, and with so little deliberation and debate, now? We are calling on you to stop efforts to push through a proposed constitutional amendment without serious, public conversations about the important concerns raised in this letter. We urge you to actively engage with stakeholders on this issue and pursue a thoughtful and deliberative process — one that is transparent and open to the broad range of voices and expertise needed to shape the best system of choosing judges for all New Jerseyans.

Signed,

Action Together New Jersey
American Civil Liberties Union of New Jersey
American Friends Service Committee Prison Watch
Association of Criminal Defense Lawyers of NJ
Black Lives Matter -- Paterson
BlueWaveNJ
Cherry Hill Women's Center
Crossing Wellness, LLC
El Pueblo Unido of Atlantic City

Fair Share Housing Center
Faith in New Jersey
First Friends of New Jersey & New York
Gloucester County NAACP
Ironbound Community Corporation
League of Women Voters of New Jersey
Make the Road New Jersey
National Center for Advocacy and Recovery, Inc.
National Council of Jewish Women Bergen County
National Council of Jewish Women New Jersey
New Jersey Institute for Social Justice
Newark Communities for Accountable Policing
NJ Alliance for Immigrant Justice
NJ Citizen Action
NJ Policy Perspective
NJ Resistance
NJ Working Families Alliance
Our Revolution NJ
Palestinian American Community Center
People's Organization for Progress
Pilgrim Medical Center
Salvation and Social Justice
South Jersey Now Alice Paul Chapter
SPAN
Stanton Strong Inc
Thrive
Unitarian Universalist Faith Action NJ
United Black Agenda
UU Faith Action Reproductive Justice Task Force
Wind of the Spirit