

Disorder In the Court!

For those who have occasion to practice in or to observe the Courts in other states, it has, until recently, been impossible to conclude other than that the New Jersey Courts, whatever flaws may exist, are among the best in the nation. Similarly, the New Jersey Supreme Court has been regarded as one of the best of the states' highest Courts in the nation.¹

However, the reputation of the New Jersey Courts and of the Supreme Court was placed in jeopardy, first by an avowed ideologue and then, unexpectedly, from within.

This imbroglio began when Governor Christie refused to reappoint Justice John Wallace (a moderate) on avowedly ideological grounds. Ironically, another Republican Governor, Thomas Kean (and not lawyer), considered that the reappointment of the late Chief Justice Robert Wilentz, with whom he disagreed on many issues, was one of the most significant and best decision he made as governor, keeping ideology out of the reappointment process.² By contrast Governor Christie, a lawyer, chose to introduce ideology as a criteria for reappointment.

While the decision by Governor Christie wounded the independence of the judiciary, it was unavoidable by the judicial branch given the fact that, however unwise, the determination was constitutionally the Governor's to make. However, following on the heels of Governor Christie's decision, a Justice of the New Jersey Supreme Court created a self-imposed wound.

In response to Christie's decision the Democratic leadership of the New Jersey Senate announced it would not hold hearings to confirm any nominee to Justice Wallace's seat until March 2012, when he would have retired.³ Then on Friday, December 10, the New Jersey Supreme Court issued a series of opinions in the case of *Lula Henry vs. New Jersey Department of Human Services*.⁴ The case involved the application of the Discovery Rule in the context of plaintiff's claim of racial discrimination. Five Justices joined in the opinion, authored by Judge Edwin Stern (temporarily assigned), which held that the Discovery Rule applies in an LAD case and that in the context of the allegation presented a Lopez hearing was necessary to determine whether the plaintiff acted in a reasonably timely way in pursuing her discrimination claim. The opinion itself appears to be a relatively non controversial extension of the Discovery Rule. All Justices, except one, joined the opinion.

However, a bombshell was also filed in a separate "abstaining opinion" of Justice Rivera-Soto. Justice Rivera-Soto not only, sua sponte, wrote that he believed the Court to be unconstitutionally constituted due to the fact that Chief Judge of the Appellate Division Edwin Stern had been temporarily assigned by Chief Justice Rabner to sit on the Supreme Court while a vacancy existed, caused by the New Jersey Senate's refusal to consider Christie's appointment to the vacancy caused by Justice Wallace's non-reappointment, and declared that he (Rivera-Soto) was abstaining not only from the decision at hand but from all future decisions while, as he claimed, "[the Court] remains unconstitutionally constituted."⁵

The authority for appointing a lower Court Judge to temporarily sit on the Supreme Court lies in Article VI, Section II, Paragraph 1 of the New Jersey Constitution, which reads:

The Supreme Court shall consist of a Chief Justice and six Associate Justices. 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.⁶

Pursuant to that constitutional clause, the Supreme Court has adopted the following current rule relating to temporary assignments: 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 therein, to serve temporarily in the Supreme Court.⁷

The essence of Justice Rivera-Soto's abstaining opinion was that he did not believe it was "necessary", in these circumstances, to appoint a Judge to sit upon the Supreme Court temporarily. He seemed to adopt an argument that necessity is defined as the need to have a quorum and further suggested that Chief Justice Rabner's action placed the Court in the middle of the current dispute between the Governor and the Legislature regarding Justice Wallace's replacement.

Justice Hoens, in a dubitante opinion (that is, an opinion expressing a view which falls short of a dissent), sympathized with the arguments of Justice Rivera-Soto, but noted, in our view significantly, that "in the final analysis the Constitution vests the power to make the temporary assignment in the Chief Justice, rather than in the Court as a whole."⁸ Thus, by logical extension it is up to the Chief Justice to determine when it is "necessary" to appoint a Judge to sit on the Supreme Court until a vacancy is filled or a Justice's unavailability is resolved.

Chief Justice Rabner explained, in his concurring opinion, why he believed it was "necessary" to appoint a judge to serve temporarily on the Supreme Court. He wrote that in his view it was necessary because:

About two thousand matters and issues requiring action will be presented to the Court for consideration this term. Each involves real parties and actual people who are trying to vindicate their rights as they await justice. To meet their needs fairly and expeditiously, the assignment of a judge to serve temporarily on the Supreme Court is necessary.⁹

Chief Justice Rabner in his opinion, went on to point out, additionally, that the potential for an evenly divided Court could preclude any judicial review in instances where the Supreme Court's review would constitute a first instance of judicial consideration. He pointed out that a majority of the Court is required to discipline members of the bar, to admit certain candidates to the bar, or to review a recommendation from the Advisory Committee on Judicial Conduct to discipline a Judge and that in such instances a split court could not act.

Chief Justice Rabner further noted that over the course of more than 40 years prior Chief Justices have appointed judges to sit on the Supreme Court pursuant to Article VI, § 2, cl. 1 in literally hundreds of instances.¹⁰

Though Justices Long, LaVecchia, and Albin joined in Chief Justice Rabner's opinion, we would respectfully point out that constitutionally this is irrelevant to the determination of the necessity of the Chief Justice's actions. The Chief Justice clearly gave reasons why he deemed it "necessary" to invoke the Constitutional powers given to him to appoint a judge to temporarily sit on the Supreme Court, and the New Jersey Constitution facially gives him the authority to make that determination.

The fact that Justice Rivera-Soto disagreed with Chief Justice Rabner's conclusion that a temporary appointment was "necessary" is his right. Indeed, if he believes the Court is unconstitutionally constituted it is his obligation to raise the issue and have it considered by his colleagues on the Court. However, as Justice Hoens pointed out, "in the final analysis" the call is constitutionally that of the Chief Justice.¹¹ Justice Rivera-Soto has no constitutional right, we would submit, to supersede his judgment for that of the Chief Justice and it is completely irresponsible to decide not to participate in the decisions of cases which come before the Supreme Court. It is on this point that the fact that Chief Justice Rabner's opinion was joined in by three additional Justices and that the fourth, in a separate opinion, recognized his authority to "make the call" is of great significance. Justice Rivera-Soto's argument regarding the lack of necessity to appoint an Acting Justice was considered and rejected by a majority of the Court. In that context, if one has respect for the process, he or she need not change a strongly held opinion but must respect that the majority of the highest court of competent jurisdiction has determined otherwise. All members of the bar who have argued cases have, from time to time, found themselves in that position. In such a context, attorneys do not refuse to recognize the rulings, and members of the judiciary do not properly refuse to honor them.

In *Johnson v. Johnson*, a case also decided on December 10, in responding to Justice Rivera-Soto's continued abstention, Chief Justice Rabner noted that he believed there was a duty on the part of Justice Rivera-Soto to continue to sit and decide cases, now that the issue he raised has been decided.¹²

A separate concurrence by Justice Albin (joined in by Justices LaVecchia and Long) used stronger language, suggesting that Justice Rivera-Soto's actions were taken to "undermine the Chief Justice's authority" and that Justice Rivera-Soto had made a "wild and corrosive supposition" that the Chief Justice was taking sides in the current dispute between the Governor and the Legislature regarding the appointment of a Justice to replace Justice Wallace.¹³

Justice Rivera-Soto, in response, referred in an abstaining opinion to "the tyranny of this particular majority"¹⁴ and asserted, by reference to an anecdote about a man whom he apparently views as "like minded," Justice William J. Brennan, that "the concurrence's insistence on its majoritarian will is nothing more than pure cynicism, a bankrupt view shared by like minds[.]"¹⁵

Clearly the language showed more than disagreement. Deep animosity was being paraded for all to see.

The Supreme Court was then politicized still more by the inevitable calls for Justice Rivera-Soto's impeachment from prominent Democratic politicians, a completely predictable response under the circumstances.

However, on Wednesday, January 12, 2011, Justice Rivera-Soto essentially reversed himself. Using a dissent in a case involving whether the filing of an action in lieu of prerogative writ was timely, *Hopewell Valley Citizen's Group, Inc. v. Berwind Prop. Group Dev. Co., L.P.*, Justice Rivera-Soto noted:

'Among the varied reactions to Henry, a particularly sober, thoughtful, measured and ultimately persuasive analysis stands out, a voice that has triggered additional reflection on the course I earlier charted. Although it does not modify my earlier conclusion concerning the unconstitutionality of the Court's present composition, that analysis has resulted in a more nuanced view of the intersection between the Chief Justice's exhortation that my 'considered views as a voting Justice are worthy of consideration by fellow members of this Court and the litigants who appear before it' and that I 'should fully participate in this matter and all others presented for the Court's review[.]'¹⁶

Justice Rivera-Soto then stated that he would vote in every case in which the:

'[J]udge of the Superior Court temporarily assigned to serve on the Supreme Court participates except for those in which the temporarily assigned Judge casts a vote that affects the outcome of the case. [T]he cases in which the judge of the Superior Court temporarily assigned to serve on the Supreme Court casts a vote that affects the outcome of the case 'I shall defer a decision casting a vote and reserve the right to abstain. . . .'¹⁷

In short, whether as a result of 'a particularly sober, thoughtful, measured and ultimately persuasive analysis' or not, Justice Rivera-Soto found a way back from the precipice on which he had placed himself and the rest of the Court. While Justice Rivera-Soto was flatly incorrect (in our view) in his initial determination to recuse himself from voting on cases while a Judge was temporarily assigned to sit on the New Jersey Supreme Court, his determination to reverse that position was ultimately wise and potentially allowed the Court to move on with its business without further politicization. However, it did not. Governor Christie raised the level of heat, if not light, still further when, on Valentine's Day (February 14) he addressed a crowd at a morning Town Meeting in Lincoln Park. His comments were no Valentine's Day card for those who hoped the level of rhetoric regarding the Court would decrease, as he blamed the New Jersey Supreme Court for tying his hands on school funds and affordable housing, further stating that 'the only way we're going to change that situation is to change the Supreme Court.'¹⁸ Perhaps as a response, the Senate on February 17 called for the resignation of Justice Rivera-Soto in a non binding resolution.¹⁹ The resolution is, of course, meaningless except as grist for the political mill, but the fact that it received a majority of votes in the Senate reflects the further politicization of the Court.

Governor Christie will have, in theory, three appointments to the New Jersey Supreme Court prior to the next gubernatorial election. Justice Rivera-Soto's term ends on September 1 of this year and he has announced he will not seek reappointment (perhaps forestalling the inevitable non-reappointment, which would have not been as controversial as was the non-reappointment of Justice Wallace due to Rivera-Soto's censure for an ethical lapse while on the Court). The Senate leadership has indicated that it will only block confirmation hearings on the confirmation of Anne M. Patterson (appointed to fill Justice Wallace's seat) until March of 2012, when Justice Wallace would have retired had he been reappointed.²⁰ Justice Helen Hoens is up for reappointment on October 26, 2013, during the height of the 2013 gubernatorial race and only a few days before the elections. If she is not reappointed it is highly unlikely that her replacement would be confirmed prior to the November elections, particularly if the Democrats keep control of the Senate through that time, which is why Governor Christie would have three appointments in theory only with only two likely to be confirmed by the next election.

While there has been controversy over ruling by the New Jersey Supreme Court in the past, the present politicization of the Court is unprecedented in the modern history of New Jersey. Politicization is an evil in a situation where the ideal is justice, free from partisanship. There is little the Court can do about outside forces such as the Governor or the Legislature, but in this context the members of the Court, to maintain credibility, must be seen to be above and apart from the political fury. Justice Rivera-Soto's actions have not been helpful in that regard, adding fuel to an already raging fire.

1 See, e.g. John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 Rutgers L. J. 701, 701 n.1(1998) (briefly surveying favorable comments about the stature of New Jersey Supreme Court); The Honorable Deborah T. Poritz, *The 2007 Chief Justice Joseph Weintraub Lecture: The New Jersey Supreme Court: A Leadership Court in Individual Rights* (April 18, 2007), in 60 Rutgers L. Rev. 705, Spring 2008.

2 Interview given by former Governor Tom Kean for *Opportunity of the Century: New Jersey's Constitution at 50*, a video co-produced by the New Jersey Network and the New Jersey Historical Commission.

3 Richard Pérez-Peña, *Appointment Fight Divides Judges*, N.Y. Times, Dec. 10, 2010 available at <http://www.nytimes.com/2010/12/11/nyregion/11court.html>.

4 *Henry v. New Jersey Dep't of Human Servs.*, 204 N.J. 320 (2010).

5 *Id.* at 372 (Rivera-Soto, J., abstaining).

6 N.J. Const. art. VI, § 2, cl. 1.

7 N.J. Ct. R. 2:13-2(a).

8 *Henry*, 204 N.J. at 528 (Hoens, J., dubitante).

9 *Id.* at 340-41 (Rabner, C.J., concurring).

10 *Id.* at 342 (Rabner, C.J., concurring).

11 *Id.* at 528 (Hoens, J., dubitante).

12 *Johnson v. Johnson*, 204 N.J. 529, 553 (2010) (Rabner, C.J., concurring).

13 *Id.* at 554-56 (Albin, J., concurring).

14 *Id.* at 563 (Rivera-Soto, J., abstaining).

15 *Id.* at 564 n.3 (Rivera-Soto, J., abstaining).

16 *Hopewell Valley Citizen's Group, Inc. v. Berwind Prop. Group Dev. Co., L.P.*, 204 N.J. 569, 586 (2010) (Rivera-Soto, J., dissenting)(quoting *Johnson*, 204 N.J. at 553 (Rabner, C.J., concurring)).

17 *Id.* at 587 (Rivera-Soto, J., dissenting).

18 Matt Friedman, *Christie blames N.J. Supreme Court for delay in changing school funding formula, affordable housing system*, NJ.COM, February 15, 2011, available at http://www.nj.com/news/index.ssf/2011/02/gov_christie_blames_nj_supreme.html; Matt Friedman, *N.J. Senate asks Supreme Court Justice Roberto Rivera-Soto to resign*, NJ.COM, Feb. 17, 2011, available at http://www.nj.com/news/index.ssf/2011/02/nj_senate_asks_supreme_court_j.html.

19 Matt Friedman, *N.J. Senate asks Supreme Court Justice Roberto Rivera-Soto to resign*, NJ.COM, Feb. 17, 2011, available at http://www.nj.com/news/index.ssf/2011/02/nj_senate_asks_supreme_court_j.html.

20 Tom Hester Sr., *N.J. Supreme Court Justice Rivera-Soto pressured to resign by Senate Democrats*, N.J. Newsroom, Feb. 17, 2011, available at

<http://www.newjerseynewsroom.com/state/nj-supreme-court-justice-rivera-soto-pressured-to-resign-by-senate-democrats>.