

Statement of Lambda Legal
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Testimony to the New Jersey State Bar Association Task Force on Judicial Independence

Thank you, Judge Wefing, Judge Gallipoli, and all the other members of the Task Force. My name is Eric Lesh and I am the Fair Courts Project Manager at Lambda Legal Defense & Education Fund (Lambda Legal), a national non-profit legal organization committed to advancing the civil rights of lesbian, gay, bisexual and transgender (LGBT) people and individuals living with HIV through litigation, public policy advocacy and education. Lambda Legal has been on the ground advocating for the equal rights of LGBT and HIV-positive New Jerseyans for many years. Landmark cases include *Boy Scouts of America v. Dale*, which argued against the Boy Scouts of America's discriminatory policy of excluding gay people from leadership positions; *Doust v. Doe*, a case in which we represented a man refused dental care because he has HIV; and most recently *Garden State Equality, et al. v. Dow, et al.* in which we won the right to marry for same-sex couples in New Jersey.

In 2005, Lambda Legal established a Fair Courts Project to educate LGBT and HIV-affected communities about the proper role of the judiciary, the importance of judicial independence, and the need to encourage people across the nation to take action to support judicial fairness. The Fair Courts Project provides tools and information to counter harmful attacks on the courts that threaten hard-fought LGBT and HIV-related civil rights and that jeopardize the ability of our courts to make decisions based on constitutional and legal principles instead of politics or popular opinion.

In making the case for equality, Lambda Legal depends on the administration of fair and impartial justice in courtrooms across the nation. At the first Task Force hearing, former Chief Justice Deborah Poritz gave an impassioned call to action to preserve the integrity of New Jersey's courts, stating: "Some branch of government must exist to protect the minority from the majority." Unfortunately, when judges rule on civil rights issues they risk backlash from those who stand in opposition to the rights of minority populations, who the courts are charged to protect.

There is, perhaps, no better cautionary tale to illustrate the threat to judicial independence stemming from majoritarian politics and outside influence, than the Iowa judicial retention election in 2009. In that election, well-funded special interest groups successfully campaigned to oust from office three well-respected Iowa Supreme Court justices and did so to punish them for joining in a unanimous opinion in Lambda Legal's lawsuit, *Varnum v. Brien*, which struck down Iowa's marriage ban and ordered marriage licenses issued to same-sex couples. Antigay groups like the American Family Association, the Family Research Council and the National Organization for Marriage poured more than \$1 million into a campaign, culminating in a 20-city bus tour, urging voters to vote against the retention of these justices. The justices themselves declined to fund raise or campaign on their own behalf, deeming it unseemly for sitting judges to create an appearance of pandering for votes. The justices lost by a vote of 54 percent to 45 percent. The message that these groups delivered to judges in Iowa and across the country was clear: *Rule against us, and you will be next.*

Now, New Jersey faces a similar threat to judicial independence. Governor Christie's unprecedented decision to deny reappointment to sitting Supreme Court justices for the first time since the 1947 Constitution's ratification has placed the integrity of the courts and access to justice at risk.

It has recently become clear that, despite the original intent of the framers, the 1947 Constitution no longer protects qualified judges from being removed from the bench for political reasons. Justice Gary Stein has proposed a simple and clear amendment that is worthy of the most serious consideration by the Task Force. In addition, a fair and functioning court system also depends on an engaged and informed citizenry, which understands the important role that courts play as guardians of our constitution rights.

Lambda Legal respectfully offers the following recommendations for consideration by the Task Force:

I. Amend the New Jersey Constitution

In order to ensure the separation of powers and maintain the public's confidence in the ability of New Jersey's courts to render justice, free from political interference, this Task Force should consider recommending an amendment to the state constitution that would clarify the framers' intent that judges be reappointed unless deemed unqualified.

The threat to judicial independence from legislative or executive interference and pressure cannot be overstated. Courts across the country are increasing coming under attack from legislators and executives in all levels of government. Limiting the courts' jurisdiction, size, and pay and calling for impeachment for decisions in controversial cases are threats that legislators and interest groups could use as leverage over the impartiality of the courts. These attempts to control or intimidate the courts can have dangerous consequences for an independent judiciary. One recent and egregious example involves the April 2014 decision by the Oklahoma Supreme Court to stay the execution of two convicts in order to examine the legality of the state's lethal-injection secrecy law. After the decision, Oklahoma Governor Mary Fallin issued an executive order asserting that she would proceed with the execution.¹ The next day, when members of the legislature filed an impeachment resolution against the justices supporting a stay of execution, the Oklahoma high court caved to pressure and allowed the executions to proceed – resulting in the botched execution of one of the inmates.² According to the National Center for State Courts, this is the fourth time in four years that Oklahoma Supreme Court Justices have been threatened with impeachment over particular decisions.³

Not every state requires judges to be reappointed. As you know however, under the New Jersey Constitution, judges are selected for a seven-year term, after which, they must be reappointed by the governor. After reappointment, judges may serve until the mandatory retirement age of 70, unless removed for cause. The Constitution emphasized judicial independence and intended that reappointment would be denied only to a justice or judge who had demonstrated unfitness during his or her initial seven-year term.⁴

The New Jersey State Bar Association explains: “Eight governors, hailing from the Democrat and Republican political parties, who succeeded Governor Driscoll, reappointed 25 Supreme Court Justices because they understood judicial independence is an American value, and that a disagreement with a court

¹ Okla. Exec. Order No. 4-22-14 (2014), available at <http://www.scribd.com/doc/219717737/Mary-Fallin-Order-4-22-14>

² Okla. HR 1059 (2014), available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HR1059&Session=1400>

³ National Center for State Courts, Oklahoma “constitutional crisis” resolved, judges still targets for removal by legislator, April 25, 2014, available at http://www.ncsc.org/ncsc_org/Newsroom/Backgrounder/2014/April.aspx

⁴ See, Gov Alfred E. Driscoll, remarks as published in N.J. Constitutional Convention, vol. 4, p. 427 “Without independent courts, the whole republican system must surely fail. Our primary, our basic purpose in the drafting of a new Constitution is to secure beyond any question a strong, competent, easily functioning, but always independent, judiciary.” available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n427.html

decision or judicial philosophy was not under the 1947 Constitution as grounds for denying reappointment to a sitting justice.”⁵

Still, in 2010, Governor Christie became the first New Jersey governor since the ratification of the New Jersey Constitution in 1947 to refuse to reappoint a sitting Supreme Court justice. Many reacted with shock when he chose to end the service of Justice John Wallace, a respected jurist and the New Jersey Supreme Court’s only African-American justice. In 2012, the Governor declined to reappoint another sitting Supreme Court member, Justice Helen Hoens. In June, Chief Justice Stuart Rabner is up for reappointment and there is well-grounded fear that the Governor may punish him for his rulings.

The New Jersey State Bar Association recently passed a resolution stating that a decision not to reappoint Chief Justice Rabner would be an “unprecedented intrusion of politics into the third co-equal branch.”⁶ Even Governor Christie’s mentor, former Governor Tom Kean, refused to play politics with the courts saying: “If any judge in the state is worried about how he should make a decision that would affect his or her renomination, then the quality of justice is not going to be what you and I would want it to be in the state of New Jersey.”⁷

A decision not to reappoint the Chief Justice would take a toll on the state’s highest court, which would be left with only four justices and three vacancies. But the decision is also likely to have a chilling effect on the entire judiciary, as nearly 46 percent of judges do not yet have tenure.⁸

The New Jersey Constitution does not explicitly state whether reappointment is presumed or, if not, what criteria should be considered.⁹ This lack of clarity permitted Governor Christie to claim constitutional permission for his decision to deny tenure to judges for “legislating from the bench.” New Jersey Supreme Court Justice Gary Stein proposed, and the New Jersey State Bar Association Board of Trustees passed, a resolution endorsing an amendment to Article VI, Section VI, Paragraph 3 of the New Jersey Constitution. The proposed amendment would clarify that a judge “shall be reappointed by the Governor, with the advice and consent of the Senate, unless they have demonstrated unfitness for such reappointment, and upon reappointment shall hold office during good behavior.”

This simple amendment would clarify the framers’ intent and strengthen the principle of judicial independence embedded in the 1947 Constitution. Had this language been in the Constitution to begin with, it would likely have prevented Governor Christie from denying tenure to Justice Wallace and Justice Hoens. The amendment would restrain future administrations from traveling down this dangerous path of politicizing the judicial reappointment process at the expense of the public’s right to a judiciary that can safeguard their constitutional rights and administer justice with the highest degree of integrity. The public needs to have confidence that judges are deciding cases based on the law, not based on fear of political retribution.

⁵ New Jersey State Bar Association Resolution, (Apr. 11, 2014), available at <http://www.njsba.com/images/content/1/0/1007558.pdf>

⁶ New Jersey State Bar Association Resolution (Feb. 14, 2014), available at <http://www.njsba.com/images/content/1/0/1007415.pdf>

⁷ Paul Horvitz, Kean, *Differing with Some in GOP, Says He Will Renominate Wilentz*, The Philadelphia Inquirer, May 22, 1986, available at http://articles.philly.com/1986-05-22/news/26048777_1_chief-justice-kean-robert-nwilentz.

⁸ Gary S. Stein, New Jersey Supreme Court Justice (Ret.), Wientraub Lecture, Rutgers School of Law- Newark, Apr. 3, 2014, available at <http://www.njsba.com/images/content/1/0/1007600.pdf>

⁹ See, N.J. Const. art. VI, § 6 “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.”

II. Engage and Educate the Public

Public education is a critical component of an enduring and healthy judiciary in New Jersey. A recent poll revealed that two-thirds of Americans can't name a single U.S. Supreme Court justice.¹⁰ At the Task Force hearing in April, Justice Deborah Poritz recounted an experience she had where attendees at an event at which she was speaking were asked to name the three branches of government and one individual replied: "Federal, state and local?" In order to strengthen public confidence in the New Jersey court system, it is necessary for advocacy organizations, members of the bar, judges and courts must make a concerted effort to develop and participate in an education and engagement campaign.

The American Bar Association has developed "The Least Understood Branch Project," which is a joint effort of the Standing Committee on Judicial Independence and the Judicial Division.¹¹ The project focuses on partnering with state and local bar associations to carry the message of the importance of fair and impartial courts in our democracy to every possible venue in their communities.

In the aftermath of the Iowa election, it became clear that state bar association, grassroots organizations, ordinary citizens, and members of the judiciary needed to do more to prevent a similar occurrence in 2012, when the fourth justice from the *Varnum* decision would be up for retention. Groups from across the state came together to form *Justice Not Politics*, a broad based, nonpartisan coalition of organizations and Iowans committed to protecting Iowa's courts and the merit selection and retention system. The *Justice Not Politics* coalition's education and advocacy efforts effectively demonstrated the importance of impartial courts in all areas of life by building broad support for protecting Iowa's judicial system. Lambda Legal collaborated with One Iowa, the state's LGBT advocacy organization, to produce materials and hold public events to assist with this campaign.

In addition, the Iowa Supreme Court began to engage in a public relations effort of its own, sending justices to speak a public forums and even taking the work of the Court on the road.¹² As part of an outreach program to build the public trust in the judicial system, the Iowa Supreme Court frequently travels to different parts of the state to hold oral argument at community centers and public high schools so that citizens can observe the court at work. Afterward, attendees often participate in a question and answer session with the justices about the work of the court and what they just witnessed. Coinciding with each visit, the justices meet with high school government and American history classes visiting 36 schools in 21 cities in the course of their travels.

Lambda Legal's work in Iowa is just one example of how the Fair Courts Project educate and engage with the LGBT community, as well as the HIV, racial justice and reproductive justice advocates, about why courts matter and how to improve judicial independence, access to justice, and diversity on the bench.

¹⁰ Larry Downing, *Nearly Two-Thirds of Americans Can't Name a Single Supreme Court Justice*, Reuters, August 12, 2012, available at http://usnews.nbcnews.com/_news/2012/08/22/13413900-nearly-two-thirds-of-americans-cant-name-a-single-supreme-court-justice-can-you?lite

¹¹ A.B.A. *The Least Understood Branch Project*, available at http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_kit_on_fair_impartial_courts_lu_b.html

¹² Rob Boshart, *Supreme Court Schedules More Sessions Around Iowa*, Sioux City Journal, August 2, 2012, available at http://siouxcityjournal.com/news/local/govt-and-politics/supreme-court-schedules-more-sessions-around-iowa/article_6e6e150b-da25-5356-94d4-d7825f1e5191.html

Lambda Legal has developed the resource *Gear Up! a Fair Courts Toolkit for Everyday Advocates* -- a curriculum designed to educate, as well as provide a simple community training for in the states.¹³ The Toolkit's basic message is that in order to protect a fair and impartial court system, everyone needs to educate and organize. The Toolkit gives advocates the basic skills they need to engage with the public and policymakers to strengthen the ability of the courts to function at the highest levels.

A new wave of special interest spending has raised the stakes for fair courts. The 2011–12 election cycle saw \$33.7 million in television spending by special interest groups hoping to influence voters in state supreme court races. In 2011, Lambda Legal and Demos collaborated to author a special report on the courts, which appeared in the *The American Prospect* magazine.¹⁴ The report, entitled "Justice for Sale," examined the current threat to a fair and impartial American court system by highlighting frightening examples of special interest group spending and intimidation tactics aimed at the judiciary.

In addition to these materials, Lambda Legal frequently creates state-specific publications to educate the LGBT community about how judges are selected, how the state court system is structured and important cases that have a direct influence on their lives.

Here in New Jersey the Fair Courts Project has been working with other democracy, legal and citizen groups to educate the community about the current threat to judicial independence. This month, Lambda Legal produced a short video titled: *Bullying the Bench: Governor Christie's attack on New Jersey's Courts*. The video includes interviews from citizens and court users (including Lambda Legal's plaintiff couples in *Garden State Equality v. Dow*) teachers, students, and housing advocates, as well as members of the legal community, including former New Jersey State Bar President, Karol Corbin Walker and former New Jersey Supreme Court Justice Gary Stein. The video has been widely shared and received over 25,000 views.

If we don't take the time to educate and engage the public on the topic of judicial independence, we will end up with the kind of court system that the politicians and special interests can get away with.

Thank you for your consideration of these issues. We hope the important work of the Task Force will continue to strengthen the independence of New Jersey's judiciary.

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¹³ Lambda Legal Defense and Education Fund, *Gear Up! a Fair Courts Toolkit for Everyday Advocates* (2009), available at <http://www.lambdalegal.org/publications/gear-up>

¹⁴ *Justice for Sale*, *The American Prospect Magazine*, September 19, 2011, available at http://www.lambdalegal.org/sites/default/files/publications/downloads/justice-for-sale_1.pdf