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By Earl M. Maltz

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In the wake of Governor Chris Christie's decision not to reappoint Justice John E. Wallace, Jr., to the New Jersey Supreme Court, the President of the State Senate has refused to hold hearings on the nomination of Anne M. Patterson, whom Governor Christie has chosen to succeed Justice Wallace. With the timing of the confirmation of a permanent replacement for Justice Wallace thus uncertain, some have urged Chief Justice Stuart J. Rabner to temporarily assign either a retired justice or a senior judge of the Superior Court to fill the seat until Justice Wallace's replacement has been confirmed. This paper addresses the constitutional issues that would be raised by a decision to make such an assignment, and concludes that the text and legislative history of the relevant constitutional provisions raise serious questions about whether the constitution endows the chief justice with the authority to make such an assignment.

The New Jersey state constitution of 1947 vests the power to appoint the justices of the state supreme court in the Governor, with the advice and consent of the state senate. However, Article VI, section 2, paragraph 1 of the constitution also provides that "[t]he 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." The problem is that the provision does not explicitly state how one determines when it is "necessary" to make a temporary assignment.

The current practice of the court can be traced to an action that was taken on September 26, 1967. Seeking to vindicate the appointment of Judge Sidney Goldmann to sit temporarily in place of the absent Justice Frederic Hall, the court promulgated a rule which declared that "[w]hen necessary to constitute a quorum, to replace a judge who is absent or unable to act, or to expedite the business of the court, the presiding judge may assign the judge or judges of the Appellate Division, senior in length or service therein, to serve temporarily on the Supreme Court."[1] In 1978, the rule was once again amended, this time to allow the temporary assignment of "one or more retired justices of the Supreme Court who are not engaged in the practice of law and consent thereto."[2]

Against this background, since 1967, successive chief justices have asserted broad authority to make temporary assignments of both retired justices and senior judges from the Appellate Division whenever a full complement of permanent justices has not been available to hear cases. This authority has been invoked in two different kinds of situations in which temporary assignments have been made, even though the assignments were not necessary to provide the quorum necessary for the consideration of cases that came to the court. In one group of cases, judges have been assigned to sit in the place of individual justices who have recused themselves from participation in specific cases, notwithstanding the fact that five or more justices remained available to consider those cases. At other times, judges have been temporarily assigned indefinitely to fill vacancies caused by a retirement until a successor has been appointed and confirmed.[3] But, despite its relatively long pedigree, this regime faces significant constitutional problems.

First, the recall of retired justices to serve temporarily on the Supreme Court under any circumstances is flatly inconsistent with the language of the constitution. Article VI—the only source of authority to make temporary assignments—explicitly states that when such an assignment is necessary, the chief justice is to choose "the judge or judges of the Superior Court, senior in service" for the assignment. By definition, a retired justice of the Supreme Court is not such a judge. Thus, the chief justice has no authority to assign such a justice to serve on the court, either temporarily or permanently.

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The constitutional analysis of the practice of temporarily assigning senior Superior Court judges to the court is more complex. Clearly, the constitution provides for such assignments when necessary to create a quorum of five justices to decide a case. The issue is whether a temporary assignment is constitutional in situations where five or six of the permanent members of the court remain available to hear and decide a case.

An earlier draft of the relevant constitutional provision would have made the proper resolution of this issue crystal clear. As initially proposed by the committee charged with drafting the judiciary article, the provision had read "[w]hen necessary *to make the quorum*, 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."[4] This language plainly would have limited the appointment authority of the chief justice to cases in which an appointment is necessary to create a quorum of five justices. Thus, the key question is whether the elimination of the explicit reference to the necessity of the quorum was simply stylistic or was instead designed to significantly expand the power of the chief justice to make temporary appointments.[5]

There is no record of the reasons for the change. However, the contemporaneous rules adopted by the Supreme Court to implement this provision in 1947 were based on the view that the change in language was only stylistic, made in response to the admonition of Governor Alfred E. Driscoll that the Judiciary Committee should make the constitution "brief and very much to the point."[6] The rules did provide that the chief justice would have the authority to temporarily appoint the most senior Superior Court judge if the appointment was necessary to create a quorum of five justices to hear a case. However, the rules did not provide for temporary appointments in any other circumstances.[7] In 1953, while still focusing only on appointments necessary to create a quorum, the rule was revised to track the language of the constitution itself more closely. The revised rule stated that "[f]ive members of the court shall constitute a quorum. If a quorum does not attend a session of the court . . . [w]hen necessary, the presiding judge shall assign the senior judge or judges of the Superior Court to serve temporarily."[8] It was not until 1967—twenty years after the state constitution was adopted—that the rules were changed to allow the chief justice to make temporary assignments despite the presence of a quorum. The 1967 amendment transformed the temporary assignment power from one which the chief justice was required to exercise in a specific, narrowly-defined set of circumstances to one in which he has discretion to make such an appointment in a wide variety of amorphous situations.

The strongest support for a broad reading of the temporary assignment authority is found in the appendix to the report of the Judiciary Committee accompanying the proposed constitution in 1947. The report avers that

> [t]he provision for supplementing the membership of the Supreme Court is operative whenever a Justice is unavailable at the time a case is argued or submitted. Provisions of this general character are found in several state constitutions, notably that of New York, to which it was added in 1915 upon recommendation of the Court of Appeals.[9]

If in fact Article VI was designed to allow for temporary assignments "whenever a Justice is unavailable," then it would provide constitutional support for a far broader use of such assignments than was allowed prior to 1967.

But while certainly relevant to the inquiry, the language of the report is not necessarily dispositive. As the New Jersey Supreme Court has noted in downplaying the significance of the report in another context, the members of the Constitutional Convention did not have access to the committee report when voting on the language of Article VI..[10] Moreover, the report fails to come to grips with the differences between the language of the New Jersey constitution and that of many state constitutions that the report describes as being of the same "general character."

This point is well-illustrated by a comparison between Article VI and the New York constitutional provision that the report cites as analogous.[11] The New York provision states that "[i]n case of the temporary absence or inability to act of any judge of the court of the court of appeals, the court may designate any justice of the supreme court to serve as associate justice of the

court of appeals during such absence or inability to act."[12] This language is notable in two respects: First, it explicitly recognizes the authority of the New York court to designate a replacement whenever a sitting judge is temporarily unavailable. Second, it vests the court with the discretion to use its own independent judgment, whether such a replacement should be appointed.

In contrast, by its terms the language of the New Jersey constitution seems consciously designed to limit the discretion of the chief justice. Article VI vests him with the authority to make temporary assignments only when "necessary" and then *requires* him to make assignments in those circumstances. This language stands in stark contrast to the New Jersey constitutional provision that gives the chief justice unfettered discretion to "assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and . . . . transfer Judges from one assignment to another, as need appears." By its nature, the term "necessary" must mean necessary for something. Given that the phrase "[w]hen necessary" follows directly after the description of the requirements for a quorum (rather than after the more general description of the makeup of the court), the most logical reading of the phrase is that it refers to the creation of a quorum. But at most, "[w]hen necessary" should be read as "when necessary to the fulfillment of the court's constitutional responsibilities."

Measured against this standard, the practice of making temporary assignments cannot be justified in cases where five or six justices are available to hear appeals. Since the court has a quorum, the appeals can be heard, considered, and adjudicated. To be sure, when six justices hear a case, they will at times be divided three to three. But while this situation might not be optimal, the appeal will nonetheless have been heard and adjudicated. The only difference between a decision by an equally-divided court and one in which a clear majority of the justices vote to affirm a judgment of the lower court is that no binding precedent will have been created to govern future, similar cases. However, if the legal issue presented by an appeal in fact recurs with any frequency, that issue will probably soon be resolved in some case in which none of the judges feel compelled to recuse themselves.

Moreover, the recent practice of the court itself belies any suggestion that a full complement of judges is in any meaningful sense "necessary" to the performance of the court's constitutional duties. If the justices believed that seven members were necessary for the court to function properly, then one would have expected that temporary assignments would have been made in virtually every case in which a judge recused himself or fewer than seven justices were available for other reasons. But in fact, the court's practice in recent years has been uneven at best. While a succession of chief justices has made temporary assignments in a substantial number of cases where five or six of the sitting justices were available, such assignments have not been made in a number of other cases where a full complement of justices was lacking.[13] This pattern (or lack thereof) is inconsistent with any claim that temporary assignments are necessary in cases in which a quorum would be available in any event.

Temporary assignments are especially problematic where the assigned judge is filling a vacancy on the court rather than simply replacing a sitting justice who has recused himself or is temporarily absent from the bench for some other reason. Strikingly, the committee report that took a broad reading of the temporary assignment power did not mention vacancies at all; instead, the report refers only to situations where "a Justice is unavailable at the time a case is argued or submitted." While the two cases might seem similar on their face, the implications for the separation of powers are radically different.

When a sitting justice is temporarily unavailable for any reason, the New Jersey constitution does not vest either the governor or the state legislature with the power to replace him. Thus, if one takes the view that the assignment of a replacement is "necessary," the chief justice would be the only person with the authority to make the necessary appointment. But when a justice leaves the court permanently, the constitution clearly vests the power to name a replacement not with the chief justice, but rather with the Governor and the state senate.

Of course, a political deadlock between the Governor and the state senate might in theory leave the court short-handed for an extended period of time. But

even if this concern is considered to be of constitutional magnitude, the power to deal with the problem is not vested in the chief justice. Instead, the state constitution provides the Governor with the authority to deal with the problem.

Art. V, sec. 1, para. 13 of the constitution states that the Governor may "fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate," and that persons appointed under this provision should serve until the end of the next regular session of the Senate or until a permanent replacement is confirmed, whichever comes first. Moreover, the Governor is allowed to repeat the process and name another interim replacement if he submits a permanent nominee and the Senate fails to confirm the appointment before the term of the first interim replacement expires.

Apparently, no governor has invoked this clause to make a recess appointment to the bench in New Jersey under the 1947 constitution.[14] However, such appointments have a long historical pedigree at the federal level, and in the leading case of *Fritts v. Norton*,[15] the New Jersey Supreme Court concluded that the provision should be given the same interpretation as its federal counterpart, observing that the "history of the federal government had shown frequent disagreement between the president and the federal senate, and [it] could not have [been] supposed that the experience of our state government would be different." Further, under established federal practice—recently vindicated by the United States Court of Appeals for the Eleventh Circuit—interim appointments may legitimately be made during brief, intra-session recesses and need not await the final adjournment of the legislative session.[16] Thus, if it becomes apparent that a six-member court is inadequate for any reason, the Governor would be able to move quickly to remedy the situation.

Endnotes

1 *Rule Amendment*, 90 N.J. L. J. 649 (Order dated September 26, 1967, published October 5, 1967).

2 The current version of the rule is N.J. R. 2:13-2(a).

3 The court's practice is described in detail in Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 Seton Hall L. Rev. 735, 752-53 (2001-2003).

4 *Tentative Draft of Judicial Article*, sec. 2, para. 1, in 2 N.J. Const. Conv. 1167 (July 24, 1947) (emphasis added).

5 The analysis which follows mirrors that of Hartnett, *supra* note 3.

6 4 N. J. Const. Conv. 430 (July 10, 1947).

7 N.J. R. 1:1-3 (1948).

8 N.J. Rev. R. 1:1-5 (Gann, 1953).

9 *Report of the Committee on the Judiciary* in 2 N.J. Const. Conv. 1190 (Aug. 26, 1947).

10 Winberry v. Sanders, 74 A.2d 406, 410 (N.J. 1950).

11 As Edward A. Hartnett has noted, the report was almost certainly referring to a provision that was adopted in 1925 rather than 1915. Hartnett, *supra* note 3, at 747-48 n.50.

12 *Id.*

13 *E.g.*, Jump v. City of Ventnor, 828 A.2d 905 (N.J. 2003); State v. Manzie, 773 A.2d 659 (N.J. 2001).

14 *See generally* Hartnett, *supra* note 3, at 753-54 n.81.

15 51 N.J.L. 191 (1899).

16 Evans v. Stephens, 387 F.3d 1220 (2004) (en banc). The history of the use of the President's power to make recess appointments of judges is reviewed in detail in Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377 (2005).

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