

## **A House Again Divided: Our Democracy and Courts in Peril**

**Hon. Rolando T. Acosta<sup>1</sup>**

I am grateful that the Fund for Modern Courts and other organizations have continued to stand up for the judiciary through their support of judicial independence, court simplification, and the constitutional requisite of merit selection for judges on New York's highest court. Many of the Fund's members spoke out during the previous Chief Judge nomination process of Hon. Hector D. LaSalle—Presiding Justice of the Appellate Division, Second Department—when the judiciary's reputation and independence, and the rule of law, were at stake. Not everyone voiced their concerns about the larger issues at play, involving the role of judges in a democracy and what it would mean to have the first Latino Chief Judge of the state. But you did, so I thank you.

I still strongly believe, as I'm sure many of you do, that Justice LaSalle would have been an excellent Chief Judge, who would have done so much to improve the Unified Court System, the administration of justice, and the lives of New Yorkers. It is a shame that his impeccable credentials were mischaracterized so unfairly.

Nonetheless, I am confident that our judiciary is in good hands under newly confirmed Chief Judge Rowan D. Wilson's leadership, with Justice LaSalle continuing as Presiding Justice of the Second Department and a member of the Administrative Board of the Courts.

The legitimacy of our Third Branch of government depends on members of the bench representing a cross-section of the community. The people of our great state, with

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all its diversity—the “gorgeous mosaic” as my former boss, David Dinkins, called it—deserve to see themselves reflected in their government officials, including judges. That is why it is so wonderful to have jurists like Chief Judge Wilson (the first African American Chief Judge in New York’s history), Presiding Justice LaSalle, and Justice Joseph A. Zayas (incoming Chief Administrative Judge and the first Latino to hold that position) leading the court system.

Moreover, we need judges who are willing to stand up for the rule of law, who are not mere political ideologues but are individuals with integrity, who know they are constrained by constitutional provisions, stare decisis, and legislative policy choices reflected in statutes. All of us, including our New York State legislators, must recognize that a key pillar of our democracy is a strong and independent judiciary that does not respond to individual political calls but to the law.

This is a lesson that we all need to learn, and relearn. The latest frontal attack on the judiciary is a proposal to jettison New York’s constitutionally established merit selection process—by which Court of Appeals Judges are evaluated by an independent, bipartisan commission, the Commission on Judicial Nomination, before nomination by the Governor and confirmation by the State Senate—in favor of a system where a governor could appoint whomever he or she wanted, subject only to confirmation by the Senate. This proposal is nothing more than a continuation of the escalating politicization of the judiciary and the role of judges—and the erosion of the public’s faith in our court system—that started at the federal level and continued with the State Senate majority’s flawed process involving Justice LaSalle’s nomination for Chief Judge.

Now, I understand that it is easier to talk about threats to judicial independence when those threats are coming from people with whom we disagree ideologically, but it is clear to me that the threats are now coming from inside the house, so to speak.

As you know, I am a lifelong Democrat, and I certainly consider myself progressive. So, in general, my views on policy matters tend to align with those senators who seek to place “liberal” judges on the Court of Appeals. But I cannot countenance their tactics, attempting to change a constitutionally prescribed procedure to solidify power.

Disregarding the constitution—saying, “[We’ll do what we can in order to create the process we like](#)”—makes them as anti-democratic as their adversaries who disregarded norms such as giving the President’s nominee for the U.S. Supreme Court a fair hearing and an up or down vote. If it was wrong for Mitch McConnell to deny Merrick Garland a hearing when President Obama nominated him for the Supreme Court, and wrong for the Republicans to prevent a vote on Caitlin Halligan’s nomination when President Obama nominated her for the U.S. Court of Appeals for the D.C. Circuit, it is wrong for our leaders now to disregard the constitutionally prescribed merit selection process that was enacted by the people in 1977. They are doing so in two ways: proposing to abandon the procedure while simultaneously twisting it to produce two nominees (one for Chief Judge and another for Associate Judge) from a single list vetted by the Commission on Judicial Nomination. This violated the State Constitution insofar as it requires the Commission to prepare a new list for the Governor each time a vacancy occurs on the Court ([NY Const, art VI, § 2](#)). Notwithstanding how well-qualified those two nominees were, distorting the process is not something I can support.

The proposal to alter that process ignores that our current system of appointing Court of Appeals Judges is the model that other jurisdictions are seeking to follow. While not perfect, the current system works by depoliticizing the process and providing a layer of insulation from the normal operation of politics. Merit selection was enacted to counterbalance the influence political parties hold over judicial elections, where they can often select candidates who are all but certain to be elected.

In a way, it is a testament to the resilience of the merit selection process that, in a few short months, it resulted in the nominations by Governor Kathy Hochul of two outstanding individuals for Chief Judge—Presiding Justice LaSalle and now-Chief Judge Wilson—although for both of them, those few months didn't feel so short. Both Wilson and LaSalle were pilloried by different sides of the partisan divide for particular decisions they had rendered. Yet both responded with an eloquence, dignity and steadfastness that exemplified the best of what we mean by an independent judiciary.

And now, despite a prolonged and fractious confirmation process, both are already working together as members of the Administrative Board, which sets policy for the court system, demonstrating their integrity and the maturity of New York's Judicial Branch.

Yet astonishingly, the State Senate majority seeks to emulate the appointment process used for U.S. Supreme Court Justices; look at how well that process has worked. Every poll reveals that confidence in the [U.S. Supreme Court has sunk to an all-time historic low](#)—and I regret to say, with good reason.

Perhaps, this is the natural consequence of party dominance over our nation's politics. I know that nowadays this is almost sacrilegious to say. But we should recall George Washington's warning that political parties

are destructive of th[e] fundamental principle [of government by the people] . . . They serve to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation, the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels, and modified by mutual interests.

However [political parties] may now and then answer popular ends, they are likely, in the course of time . . . , to become potent engines, by which cunning, ambitious, and unprincipled men [and women] will be enabled to subvert the power of the people, and to usurp for themselves the reins of government; destroying afterwards the very engines, which have lifted them to unjust dominion ([Washington's Farewell Address, 1796](#)).

This, I fear, is the trajectory we are on today.

Washington was so prescient as to anticipate that we might end up here, where political parties from both sides of the aisle draw election districts to favor themselves; where young Black lawmakers are expelled from the legislature in Tennessee (and reinstated days later); where a transgender representative is barred from the floor of the legislature in Montana; where someone who has no loyalty to the constitution can become president (perhaps twice); where a president's nominee for the Supreme Court is not even brought up for a hearing; and where lawmakers of a governor's own party prejudge her nominee for Chief Judge, stack the judiciary committee with senators who have already publicly announced their opposition to the nominee without having even heard from him, refuse to bring the nominee to a floor vote in contravention of the constitution until a lawsuit is commenced, and then seek to overturn the constitutional process for selecting future nominees.

So, as much as I might agree with those legislators ideologically, I cannot follow them down this path of anti-democratic governance. The constitution seems to be merely an obstacle to their raw exercise of power, rather than a guide by which to rule and promote Justice. To eliminate a merit-based evaluation of candidates for the Court of Appeals would mean that the Governor can select someone simply to please the majority, regardless of merit. She could pick an unqualified neighbor or political supplicant as long as it suits the senators who “advise and consent.”

In my view, the State Constitution should not be viewed as an impediment to be bypassed in the raw acquisition of power. Rather, it must be viewed as the embodiment of balancing and separating power—and *that* promotes a strong and independent judiciary.

Honestly, I am astounded that Democratic lawmakers would seek to alter the constitutional process of merit selection, which was a liberal, democratic initiative to begin with! I can only imagine how loudly they would object if the *Republicans* were now in the majority and threatened to do the same thing, and how deeply the Democrats will regret abandoning merit selection when, down the road, a Republican governor and a Republican senate pack the Court of Appeals with their own ideological bedfellows.

To say of a constitutional provision, “we’ll do what we can in order to create the process we like,” is, to put it bluntly, the type of statement that petty dictators make.

I have often [recounted my life experiences growing up in the Dominican Republic](#), where for decades the caprice of those in power passed for justice. I have seen and experienced where this contempt for constitutional procedure can lead us. The allowance for erosion of constitutional norms by people we like, or for causes we like, puts us on a very slippery slope toward a Hobbesian state of nature.

My friends, the constitution is not a document that we circumvent when it is inconvenient to our personal or political goals. It is a guide to maintain a cohesive and protective society. It is easy to make this point when castigating folks with whom we disagree, but it is no less important to do so with those “on our own side.” Just because we might like the result—getting a two-for-one deal (a brilliant and diverse Chief Judge and a brilliant Associate Judge from the same list of nominees, and even an excellent Chief Administrative Judge)—it is still wrong and unconstitutional. It is wrong when Republican presidents pick candidates from a list that is based on a litmus test to overturn a specific precedent. And it is wrong when progressive Democratic legislators and the Governor similarly disregard the constitution.

To prevent the United States (and New York) from backsliding into tyranny, we must recognize, as I previously stated, that a key pillar of our democracy is a strong and independent judiciary that does not respond to individual political calls but to the law. If our lawmakers don’t recognize that, how can we expect as much from our fellow citizens.

So, I call upon all of you to continue standing up for merit selection, for the constitution, and for an independent judiciary that includes excellent and diverse jurists like Presiding Justice LaSalle, Justice Zayas, Chief Judge Wilson, and Judge Halligan, who have tremendous integrity and are dedicated to the rule of law.

Once again, I thank the Fund for Modern Courts for this significant honor.