

THE INDEPENDENCE OF THE JUDICIARY?

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I. INTRODUCTION

New York State and New York City, like most states and cities, elect many of their judges.¹ These elections can produce good judges, bad judges, and mediocre judges. Many efforts have been made to change the City of New York's current system and establish one of merit-based judicial selection.² The State of New York, however, has successfully moved to a merit-based system for some positions. For example, New York State Court of Appeals judges are appointed by the governor.³ The governor must choose from a short list of well-qualified candidates who are nominated by the Court of Appeals Nominating Commission.⁴ That commission is bipartisan in nature, and the governor may appoint only four of its twelve members.⁵ Efforts at constitutional change to unify all New York courts by appointing judges, instead of electing them, have not been successful.

I believe that the caliber of judges is not necessarily determined by the process used in their ascension to the bench. However, I believe that a merit-based judicial selection system is better overall. It is far less political and more openly public. Moreover, there is strong evidence that this appointment system enables more women and minorities to reach the bench than in the elective

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¹ See, e.g., N.Y. CONST. art. VI, §§ 6(c), 10(a), 13(a), 15(a), 16(h), 17(d).

² Generally, merit selection is a strategy to select judges "on the basis of ability, character, training, and experience . . ." HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 299 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993) (internal citation omitted). Merit selection, or the Missouri Plan, "requires the creation of a non-partisan nominating board consisting of the chief justice of the state supreme court, who acts as chairperson, three lawyers elected by the state bar association, and three laymen . . ." *Id.* (internal citations omitted).

³ See N.Y. CONST. art. VI, § 2(b)-(e); see also U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1993, at 38-39 (1995). The governor's appointments are confirmed by the New York State Senate. See N.Y. CONST. art. VI, § 2(e); see also ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 258 (3d ed. 1996).

⁴ See N.Y. CONST. art. VI, § 2(c); see also U.S. DEP'T OF JUSTICE, *supra* note 3, at 80-83; HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT, *supra* note 2, at 299.

⁵ See N.Y. CONST. art. VI, § 2(d) (1); see also HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT, *supra* note 2, at 299.

system.⁶

In New York State, each party's judicial convention determines candidates for the state supreme court judicial elections. Consequently, many of those nominated by the conventions will have political obligations to the party leaders instrumental in getting them the party designation. On the other hand, senators in some states designate the federal district court nominees using a merit-based judicial selection process. Many conversant with both the federal and state judiciary would say that the appointment system used in the federal selection system leads to fewer political obligations and, overall, attracts more distinguished jurists.

II. MERIT-BASED JUDICIAL SELECTION IN THE CITY OF NEW YORK

When I became Mayor of the City of New York in 1978, I, like every mayor before me, had absolute power to appoint anyone I decided worthy to the criminal and family courts.⁷ The only limitations were constitutional requirements that the appointee must have been a lawyer for at least ten years and a resident of the City of New York.⁸

Mayor Wagner,⁹ followed by Mayors Lindsay¹⁰ and Beame,¹¹ created a screening, non-merit judicial selection system. While still not a merit-based selection system, it was better than that of their predecessors because qualifying committees were asked to appraise the proposed candidates' professional qualifications. Nevertheless, it also happens that each of the three mayors, on at least one occasion during their time in office, rejected the negative rating given to a particular candidate by the qualifying committee and appointed him or her anyway.¹² As mayor-elect, I denounced this ac-

⁶ See, e.g., The Fund for Modern Courts, Inc., *The Success of Women and Minorities in Achieving Judicial Office: The Selection Process* 32-33 (1985).

⁷ See N.Y. CONST. art. VI, §§ 13(a), 15(a).

⁸ See *id.* §§ 13(a), 15(a), 20(a).

⁹ Robert F. Wagner served as Mayor of the City of New York from 1954 to 1965. See CITY OF NEW YORK, THE 1994-95 GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 4 (1994) [hereinafter THE GREEN BOOK].

¹⁰ John V. Lindsay served as Mayor of the City of New York from 1966 to 1973. See *id.*

¹¹ Abraham D. Beame served as Mayor of the City of New York from 1974 to 1977. See *id.*

¹² For example, in Mayor Beame's case, after losing the primary in 1977 and before leaving office, he appointed ten people to fill judicial vacancies. The two committees authorized to review the candidates' qualifications were the Mayor's Committee on the Judiciary (to which he appointed all the members) and a committee of The Association of the Bar of the City of New York. The latter found the ten selections

tion and announced my intention to not reappoint these candidates when their terms ended. That self-imposed prohibition ended with my creation of a merit-based judicial selection system for the City of New York.

After I was inaugurated, I asked members of my administration to propose a totally merit-based selection system for the appointment of judges. I adopted and created by Executive Order the system that they proposed.¹³ In this system, the mayor appointed the Chair of the Mayor's Committee on the Judiciary ("Mayor's Committee") and twelve of its members.¹⁴ The two presiding justices of the First and Second Departments of the Appellate Division of the State Supreme Court each appointed another six members, and the deans of various law schools in the city appointed the other two members on a rotating basis.¹⁵ Thus, the Mayor's Committee had twenty-seven members¹⁶ and fewer than half were appointed by the mayor.

I also made a commitment concerning all reappointments. If both committees, the Mayor's Committee and The Association of the Bar of the City of New York ("City Bar Association"),¹⁷ recommended that any sitting judge be reappointed at the end of his or her term, I would reappoint that person without exception. Similarly, if either of those two committees recommended that a sitting judge not be reappointed, I would, without exception, follow its advice.

The most important aspect of the new merit-based judicial selection system was that I, as Mayor, voluntarily waived my rights to submit names for consideration to the Mayor's Committee. I requested that the Mayor's Committee submit three names to me for each vacancy.¹⁸ I retained overall responsibility and accountability by personally interviewing the three candidates, from which I selected one. If I found none of the three submissions to be satisfactory, I would ask the Mayor's Committee for three more names. This did not apply to sitting judges where both committees recommended reappointment. If either committee recommended de-

unqualified to sit as criminal or family court judges, but Mayor Beame appointed them anyway.

¹³ Exec. Order No. 10 (Apr. 11, 1978).

¹⁴ *Id.* The Mayor's Committee on the Judiciary nominates candidates for criminal, civil, and family courts. See U.S. DEP'T OF JUSTICE, *supra* note 3, at 82-83.

¹⁵ Exec. Order No. 10, § 5 (Apr. 11, 1978).

¹⁶ *Id.*

¹⁷ An unofficial arrangement, started by mayors before me, allows the City Bar Association to evaluate judicial candidates.

¹⁸ See Exec. Order No. 10, § 2(d) (Apr. 11, 1978).

nial of the reappointment, the vacancy would be filled in the above way.¹⁹ I also directed that anyone who wanted to be a judge could apply directly to the Mayor's Committee and ask for a hearing on his or her request for appointment.²⁰ In addition, the Mayor's Committee was authorized to seek candidates.²¹

I believe my appointments to the family and criminal courts enormously raised the caliber of the judiciary in those courts. This quality was affirmed by Governors Carey²² and Cuomo²³ when they selected many of my appointees to serve as New York State Court of Claims judges. A further indication of the quality of my appointments was the selection of many of these individuals by the judicial convention to become candidates for the New York State Supreme Court. The convention is a highly political candidate selection process. This merit-based judicial selection system was continued by Mayor Dinkins²⁴ without change, and by Mayor Giuliani²⁵ for a brief period.

I served as the Mayor of New York City for twelve years, from 1978 to 1989. Since the terms of both criminal and family court judges are ten years, all ten of Mayor Beame's original non-qualified candidates came up for reappointment during my third term.²⁶ When that happened, despite my original intention not to reappoint them, I abided by the decisions of the two committees to reappoint without exception. Those committees recommended that about one-half of the original ten be reappointed and that the others not be reappointed. I adhered to their decisions.

Indeed, there were other occasions when both committees recommended that individuals not be reappointed. Often judges were highly regarded by other members of the judiciary, who asked me to override the committees' recommendations. I never did. If the mayor had knowledge concerning a candidate or someone seeking reappointment, it would have been perfectly proper for him or her to bring the information to the attention of his or her

¹⁹ *Id.* § 2(e).

²⁰ *Id.* § 2(b).

²¹ *Id.* § 2(a).

²² Hugh L. Carey served as Governor of the State of New York from 1975 to 1982. See THE GREEN BOOK, *supra* note 9, at 367.

²³ Mario M. Cuomo served as Governor of the State of New York from 1983 to 1994. See THE GREEN BOOK, *supra* note 9, at 367.

²⁴ David N. Dinkins served as Mayor of the City of New York from 1990 to 1993. See THE GREEN BOOK, *supra* note 9, at 4.

²⁵ Rudolph W. Giuliani took office as Mayor of the City of New York in 1994. See THE GREEN BOOK, *supra* note 9, at 4.

²⁶ See *supra* note 12 and accompanying text.

committees. However, under my "procedure" once the committees made a recommendation on reappointment, the mayor would accept and implement it.

I should point out that it is often a painful decision not to reappoint judges, particularly when, as is often the case, they and their friends importune you to change your mind. However, if a mayor wishes to claim the judicial system is non-political and totally meritorious, such decisions are a necessary part of the process.

My original Executive Order on reappointments directed the Mayor's Committee to "[e]valuate the qualifications of each incumbent judge for reappointment to judicial office and report the committee's recommendation to the Mayor, provided that if the committee shall recommend against reappointment it shall nominate three candidates for appointment to the resulting vacancy as provided above."²⁷ However, Mayor Giuliani issued a revised provision on reappointments.²⁸ Through this revision, the Mayor gave himself the authority to deny reappointment to a sitting judge, even if the Mayor's Committee had recommended reappointment, and to direct the Mayor's Committee to propose three new candidates.

²⁷ Exec. Order No. 10, § 2(e) (Apr. 11, 1978).

²⁸ Exec. Order No. 10 (July 20, 1994). This section of the Executive Order now reads in its entirety:

Section 2. Functions. The Committee shall:

(a) Recruit and receive from any source the names of candidates appearing to have the highest qualifications for judicial office;

(b) Evaluate and conduct all necessary inquiry to determine those persons whose character, ability, training, experience, temperament and commitment to equal justice under law fully qualify them for judicial office;

(c) Consider all relevant information to determine which of the fully qualified candidates are best qualified for judicial office, and refer to the Department of Investigation for screening all persons the Committee proposes to nominate for appointment;

(d) Nominate and present to the Mayor three candidates for appointment to each vacant judicial office, except that if there are numerous vacancies the Committee, in its discretion, may present less than three nominations (unless the Mayor requests three nominations) for each vacancy, and provide such information as may be necessary to inform the Mayor of the qualifications of each nominee; and

(e) Evaluate the qualifications of each incumbent judge for reappointment to judicial office and present the Committee's recommendation to the Mayor, provided that either at the request of the Mayor, or if the Committee shall recommend against reappointment of an incumbent, the Committee shall nominate and present to the Mayor three candidates for appointment to the resulting vacancy other than the incumbent.

Id. (emphasis added to amended text).

III. THE INDEPENDENCE OF JUDGES SCHWARTZWALD, KAY, AND FREEDMAN?

Early in Mayor Giuliani's administration, I received a call from his counsel, Dennison Young, who told me that the Mayor was considering reducing the Mayor's Committee from the existing twenty-seven members to nineteen. He wanted to know my opinion. I told him that I thought it was a bad idea; the system was not broken and there was no need to fix it. He raised no other change with me.

Subsequently, Mayor Giuliani announced that he was not reappointing Judges Eugene Schwartzwald and Jerome Kay, two of the original ten criminal court judges appointed by Mayor Beame, and whom I reappointed, and who had been recommended for reappointment by the two committees for the second time. I immediately criticized Mayor Giuliani for rejecting the recommendations of the committees.²⁹

Mayor Giuliani denounced those of us who criticized his actions, including Judith Kaye, Chief Judge of the New York State Court of Appeals.³⁰ Judge Kaye met with Mayor Giuliani when the Mayor announced he was rejecting the committees' recommendations, and asked him to reappoint both judges to full ten-year terms. When she publicly criticized Mayor Giuliani's decision, he, in turn, "criticized her for criticizing him, saying she had overstepped her bounds."³¹ Furthermore, the *New York Law Journal* reported that "[o]ne court administrator, angered by the way the reappointments had been handled, said, '[n]o one in the mayor's office' can point to 'any complaints about (the judges') work performance.' The administrator added that failure to reappoint the two 'destroys the whole idea of a non-political merit appointment process.'"³²

²⁹ David Firestone, *Koch and Dinkins Denounce Mayor in a Feud Over Judges*, N.Y. TIMES, Dec. 23, 1995, at 29 ("[F]ormer Mayor Edward I. Koch called the decision 'scandalous' and 'calamitous,' and said he could never endorse a candidate for mayor who had injected politics into the courtroom.").

³⁰ David Firestone, *Giuliani and Ex-Mayors Intensify Battle over Judicial Demotions*, N.Y. TIMES, Dec. 28, 1995, at A1.

³¹ *Id.*

³² Daniel Wise & Matthew Goldstein, *Mayor's Action on Judges Stirs Dissent*, N.Y.L.J., Dec. 26, 1995, at 1 [hereinafter Wise & Goldstein, *Mayor's Action*]. Moreover, as the *New York Law Journal* further pointed out, Mayor Giuliani "may not have followed his own procedure for naming judges to replace [Schwartzwald and Kay]." Matthew Goldstein & Daniel Wise, *Process Used by Giuliani for Judges Is Questioned*, N.Y.L.J., Jan. 5, 1996, at 1.

Seven months after taking office, the Mayor issued an executive or-

In support of his decision, Mayor Giuliani announced that his standards were higher than those of the committees.³³ He further stated he would exercise those standards in overruling the committees in these two cases and where appropriate in the future because he wanted judges of the very highest quality.³⁴ At a press conference, Mayor Giuliani attacked former Mayor Dinkins and me and accused both of our administrations of making political appointments to the bench.³⁵ Later in the press conference, he stated that "[former Mayor] Dinkins and [former Mayor] Koch reappointed 'a significant number of Democratic machine politicians despite their hypocritical allegiance to some pristine process.'"³⁶ Mayor Giuliani then added that his process was a way to protect himself politically.³⁷ Moreover, he stated that former Mayor Dinkins and I used our process in an "under the table"³⁸ manner, then added "I know that went on . . ."³⁹ Mayor Giuliani then held up a copy of *City for Sale*,⁴⁰ a book written by two reporters who were hostile to me during my administration. Mayor Giuliani twice repeated a partial line from the book about "[t]he Koch collapse on judicial selection."⁴¹ *The New York Times* columnist Joyce Purnick later pointed out that Mayor Giuliani failed to note "that the reference was to a different

der that altered the process for reappointing incumbent judges and gave himself somewhat greater latitude than his two predecessors.

The provision in the July 20, 1994, order gave the Mayor authority to ask his Advisory Committee on the Judiciary to provide him with the names of three qualified candidates to succeed an incumbent judge in the event he decided not to reappoint a sitting judge, even if the committee had recommended reappointment of the sitting judge. According to City Hall officials, no additional names were requested to replace the two demoted judges, Eugene Schwartzwald and Jerome M. Kay.

The Mayor's counsel, Dennison Young, Jr., said the new language was added "to try to enhance the quality of the judiciary." But Mr. Young vigorously disputed that the change obligated the Mayor to request three new names and asserted that the Mayor already had an adequate number of candidates before him when he made his choice.

Id.

³³ Don Van Natta, Jr., *Giuliani's Choice for Judge: A Question of Experience*, N.Y. TIMES, Dec. 30, 1995, at 29.

³⁴ Firestone, *supra* note 29, at 29 ("Mr. Giuliani . . . said that if anything he planned to remove more sitting judges from the bench when their terms ended . . .").

³⁵ Firestone, *supra* note 29, at 29.

³⁶ Joyce Purnick, *Heeding Only His Own Gavel, A Mayor Pays*, N.Y. TIMES, Dec. 28, 1995, at B1.

³⁷ Firestone, *supra* note 29, at 29.

³⁸ Firestone, *supra* note 29, at 29.

³⁹ Firestone, *supra* note 29, at 29.

⁴⁰ JACK NEWFIELD & WAYNE BARRETT, *CITY FOR SALE* (1988).

⁴¹ *Id.* at 172.

process and court—a 1979 nomination for the [New York] State Supreme Court, an elective position unrelated to the Koch judicial screening committee, and his own judicial appointments.”⁴²

An inference could be drawn from Mayor Giuliani’s statements that, as a U.S. Attorney,⁴³ he had access to confidential information. There was a false implication that I lied when I said I never recommended anyone to the Mayor’s Committee. If in fact I did what Mayor Giuliani implied, then it would mean that twenty-seven members of the Mayor’s Committee, most of them outstanding lawyers with great reputations, were part of a conspiracy. This would include David Trager, the Chairman of the Mayor’s Committee during my last eight years in office. Mr. Trager also served as the Dean of Brooklyn Law School, was a former U.S. Attorney, and now sits as a federal judge. Moreover, the conspiracy would also include all the members of the judicial committee of the City Bar Association. Furthermore, how could I send anyone to the Mayor’s Committee for evaluation without actually intending an evaluation to occur? Had there been a conspiracy, would not a number of the several dozen lawyers involved have broken ranks and confirmed the Mayor’s false, cowardly, and unprofessional statements?

Suffice it to say that the two persons appointed by Mayor Giuliani do not appear to bear out his stated reason for the appointments, that they were far superior to those whom they were replacing. It now seems, according to *The New York Times*, that the Mayor’s first replacement, Charles A. Posner, had “very little courtroom experience, having tried just seven cases in his six years as a top aide” to Brooklyn District Attorney Joe Hynes.⁴⁴ Mayor Giuliani’s other replacement, Robert Torres, according to *The New York Times*, “flunked out of Brooklyn Law School twice and never earned a law degree but became a lawyer by studying on his own and passing the bar exam.”⁴⁵ *The New York Times* further stated that Judge Torres had unsuccessfully applied for a seat on the bench before three other committees:⁴⁶ Governor Cuomo’s, Mayor Dinkins’, and mine. With all due deference to Judge Torres, Mayor Giuliani’s comparing him, as he did, to Abraham Lincoln is

⁴² Purnick, *supra* note 36, at B1.

⁴³ Rudolph W. Giuliani served as the U.S. Attorney for the Southern District of New York from 1983 to 1989. See CHRIS McNICKLE, TO BE MAYOR OF NEW YORK: ETHNIC POLITICS IN THE CITY 296-99 (1993).

⁴⁴ Don Van Natta, Jr., *Giuliani Judicial Selection Passed the Bar Exam Despite Lacking a Law Degree*, N.Y. TIMES, Jan. 2, 1996, at B3.

⁴⁵ *Id.*

⁴⁶ *Id.*

a bit of a stretch.⁴⁷ It is amusing that Mayor Giuliani would refer to the suggestion that a prospective judge should have graduated from law school as "elitist criteria."⁴⁸

Following Mayor Giuliani's announcement of his replacements, I immediately wrote to every member of his Mayor's Committee and urged them to resign if the Mayor did not recant this change in the merit-based judicial selection system. Of the twenty-seven members, only Paul Curran, Chairman of the Mayor's Committee, replied. He, in high dudgeon and defending the Mayor's position, criticized me in a letter, saying "it is unassailable that the Mayor's decisions as to Judges Kay and Schwartzwald were not based upon partisan political considerations. I regret I cannot say the same for your letter to me."⁴⁹ President Kennedy said "loyalty sometimes demands too much."⁵⁰

I must confess, I thought there would be a rallying of support for my position. When that did not occur and lawyers stood mute, I felt quite alone. It was not until *The New York Times* spoke out in a brilliant editorial⁵¹ that I felt there was still a chance to convince the public that what Mayor Giuliani had done was absolutely wrong, and perhaps even see the Mayor correct the error. When Mayor Giuliani overruled the two independent judicial panels' recommendations that both Judges Schwartzwald and Kay be reappointed, *The New York Times* wrote that "[t]he argument shifted from a debate about the quality of judges to the fitness of Mr. Giuliani as judicial arbiter."⁵² *The New York Times* editorial went on:

Mayor Edward Koch voluntarily relinquished enormous patronage power when he created an independent panel to review judicial candidates It was one of Mr. Koch's great achievements, and Mayor Giuliani's refusal to acknowledge that during this spitting match is a stark example of his worst failure as a leader — the compulsion to demonize everyone who disagrees with him.⁵³

⁴⁷ See *id.*; see also David Seifman, *Hizzoner Plays the Shrink*, N.Y. Post, Jan. 3, 1996, at 3.

⁴⁸ Van Natta, Jr., *supra* note 44, at B3.

⁴⁹ Letter from Paul J. Curran, Chairman, Mayor's Advisory Committee on the Judiciary, to Hon. Edward I. Koch, Partner, Robinson Silverman Pearce Aronsohn & Berman LLP (Dec. 26, 1995) (copy on file with the *New York City Law Review*).

⁵⁰ This quote has been attributed to President Kennedy. See Albert R. Hunt, *People & Politics: Clinton's Final Campaign Hurrah, and Two Who Deserve to Lose*, WALL ST. J., Oct. 31, 1996, at A23 ("John F. Kennedy: 'Party loyalty sometimes demands too much.'").

⁵¹ *The Mayor Ruins His Own Case*, N.Y. TIMES, Dec. 29, 1995, at A34.

⁵² *Id.*

⁵³ *Id.*

Putting to rest the issue of my alleged political appointments, *The New York Times*' editorial stated that "Mr. Giuliani and his aides suggested, *with no evidence whatsoever*, that Mayors Koch and Dinkins had practiced behind-the-scenes politics to influence the process and reward loyal Democrats with judgeships."⁵⁴

When *The New York Times*' editorial was followed by an equally scathing editorial in *Crain's New York Business*,⁵⁵ I thought there was indeed hope that Mayor Giuliani would be held responsible for destroying the merit-based judicial selection system, by replacing it with a political system that allows him to determine with absolute unchecked authority who should be reappointed. *Crain's New York Business* stated, "Mr. Giuliani's virulent reaction [to his critics] is part of a pattern of disparagement that he heaps upon his critics and opponents. Adversaries must not merely be overcome, they must be pulverized."⁵⁶

In 1995, Mayor Giuliani denied Judge Eugene Schwartzwald reappointment to the criminal court and instead appointed him to a one year interim civil court judgeship.⁵⁷ At the swearing-in ceremony, Judge Schwartzwald refused to shake the Mayor's hand.⁵⁸ In December 1996, the Mayor's Committee apparently found Judge Schwartzwald's refusal to shake the Mayor's hand indicative of a lack of judicial temperament. News reports conveyed that the Mayor's Committee recommended against Mayor Giuliani providing Judge Schwartzwald with another interim civil court appointment because of that incident.⁵⁹ I concurred with the Mayor's Committee's decision, publicly saying that Judge Schwartzwald's refusal to shake the Mayor's hand "showed a lack of judicial temperament."⁶⁰ I drew a distinction between Mayor Giuliani making the decision not to reappoint Judge Schwartzwald, for his own political reasons, and the Mayor accepting the decision of the Mayor's Committee.

Under the New York State Constitution, any judicial appointee

⁵⁴ *Id.* (emphasis added).

⁵⁵ Alair Townsend, Editorial, *By Demonizing Dissenters, Rudy Risks Retribution, Throttles Debate*, *CRAIN'S N.Y. BUS.*, Jan. 8-14, 1996, at 9.

⁵⁶ *Id.*

⁵⁷ Susan Rubinowitz & Devlin Barrett, *Axed Judge: Rudy Didn't Give Me Fair Shake*, *N.Y. POST*, Dec. 28, 1996, at 3.

⁵⁸ David Firestone, *At Swearing-In Ceremony, A Judge Snubs the Mayor*, *N.Y. TIMES*, Dec. 29, 1995, at B3.

⁵⁹ See Rubinowitz & Barrett, *supra* note 57, at 3; see also Joel Siegel, *Veteran Judge Dismissed by Mayor's Panel*, *DAILY NEWS* (New York), Dec. 11, 1996, at 22.

⁶⁰ Rubinowitz & Barrett, *supra* note 57, at 3.

must be "well[-]qualified."⁶¹ One must assume that both judicial committees are aware of that requirement. In fact, I know that the City Bar Association is aware of it because its former president, Barbara Paul Robinson, brought it to my attention. Ms. Robinson told me that if the Mayor wanted to raise the standards for any judicial appointment, there would be no question that the City Bar Association would oblige him.

Ms. Robinson also showed me an unpublished op-ed article submitted to *The New York Times* wherein she wrote:

While the standards should be sufficiently high to approve only well[-]qualified incumbents, once met, incumbent judges should be re-appointed. Otherwise, there is a real danger that, at the very least, there will be an appearance of politics intruding into the decisions of the courts. . . . A judge who had been approved by both judiciary committees should not have to worry whether a particular mayor will find them appropriate for re-appointment.⁶²

Additionally, Ms. Robinson responded to written questions I had concerning the Mayor's changes in the judicial selection process and the City Bar Association's role in that process. The following are excerpts from her reply:

First, I can confirm that the [City Bar Association] was not consulted about any changes made to the relevant executive order. While we did respond to certain changes in the language regarding diversity, we did not comment on any other changes. . . .

As you know, our Judiciary Committee evaluates all candidates for judicial office in our city As I told you, our Judiciary Committee applies the same standards to all candidates it reviews and I provided you a copy of the relevant language. . . .

The Mayor had not asked our Committee on the Judiciary to review or upgrade its standards. However, the Mayor's recent decision not to re-appoint two incumbent judges who had been approved by both his and our Judiciary Committees and the ensuing controversy presented us with an opportunity to meet with the Mayor and his advisors to discuss our concerns. We suggested that we work cooperatively together to review the standards being applied by both Committees to be sure that only

⁶¹ N.Y. CONST. art. VI, § 2(c). While the New York State Constitution specifies only that appointees to the New York State Court of Appeals be "well[-]qualified," *id.*, the City Bar Association applies this standard to all appointees.

⁶² Barbara Paul Robinson on merit selection and the New York City judicial selection process 2 (Jan. 28, 1996) (unpublished op-ed article, on file with the *New York City Law Review*).

those candidates found "well-qualified" were approved, the standard required by the State Constitution. We agree with you that the re-appointment of incumbent judges raises special concerns about judicial independence

Whenever an appointing authority appoints someone who has been disapproved by []our Judiciary Committee, we do speak out publicly and expect to continue to do so. We also publicize our approvals and disapprovals of all candidates we review who participate in judicial []elections. Finally, you asked whether we would support a change in the law to require the Mayor to submit all nominees to the City Council for it to []"advise and consent[.]" We have never considered such a proposal so we have no position at the present time. Naturally, we would expect to review the specifics of any such proposal before we could do so. Thanks to the process you established, candidates for mayoral appointment who have been disapproved by our Judiciary Committee have not been appointed to the bench.

Thank you again for everything you have done and continue to do to protect the integrity and independence of the []judiciary.⁶³

In my opinion, if Mayor Giuliani wants to raise judicial standards, all he has to do is direct the committees to raise theirs. By substituting his judgment for theirs, as Gary Brown, Executive Director of The Fund for Modern Courts, Inc. said, "[it] may very well have a chilling effect on judges"⁶⁴

It is interesting, and disappointing, that so many lawyers have chosen to remain silent, undoubtedly fearful of Mayor Giuliani's vindictiveness. One well-known lawyer recently told me that he was glad I stood up to the Mayor and spoke out. I replied, "[i]t would be even better if you did." Another equally prominent lawyer told me that he would have spoken out, but due to his position with an organization receiving funds from the city, he did not because he was afraid the Mayor would cut off the funding.

Most lawyers are familiar with the 1866 saying of a New York State Surrogate, to wit, "[n]o man's life, liberty, or property are safe while the legislature is in session."⁶⁵ I think this sentiment is probably still true. I believe that it could also apply to the same extent to mayors and chief executives alike. It is also still true that

⁶³ Letter from Barbara Paul Robinson, then President, Association of the Bar of the City of New York, to Hon. Edward I. Koch, Partner, Robinson Silverman Pearce Aronsohn & Berman LLP (Feb. 9, 1996) (copy on file with the *New York City Law Review*).

⁶⁴ See Wise & Goldstein, *Mayor's Action*, *supra* note 32, at 1.

⁶⁵ Estate of A.B., 1 Tuck. 247, 249 (N.Y. Sur. Ct. 1866).

our recourse is through the courts. Only if we are certain that the courts are not politically dominated and only if we are certain that nominations to those courts are outside the political process can we, while the legislature is in session, sleep without fear. Regrettably, that is not the case in New York. It was true in the City of New York in the appointment of criminal and family court judges under the merit-based selection system I created, but it is no longer true under the procedures used by Mayor Rudolph Giuliani. Recently, the public danger created by Mayor Giuliani's rescission of automatic reappointment for sitting judges was vividly illustrated. In *McCain v. Giuliani*,⁶⁶ The Legal Aid Society's Homeless Family Rights Project (the "Project") won its case at trial by establishing that the city had violated both law and court orders in processing homeless families seeking housing. The Project was required to go to the appellate division after the city filed a notice of appeal. If this case simply involved an appeal by the city, as is its right, no one could fault the Giuliani Administration. However, the Mayor went far beyond the filing of the notice of appeal, and undertook to personally attack Judge Helen Freedman with his demeaning language, a deplorable and dangerous action.⁶⁷

During the Dinkins and Giuliani Administrations, Judge Freedman imposed fines totalling \$5 million against the city for disobeying her orders in this ongoing matter.⁶⁸ The City of New York faces another \$1 million in penalties, currently stayed on appeal.⁶⁹ Understandably angered, the Mayor viciously and personally attacked Judge Freedman, saying, "[s]he [is not] ruling on the law, [she is] ruling on her own personal ideology."⁷⁰ However, if that were true, she would be reversed on appeal. Mayor Giuliani, according to the *New York Post*, said that Judge Freedman has been issuing "irrational orders" to mayors for thirteen years and that "[it is] about time she step aside. Any judge that holds a case for a decade or more should get off the case because what happens is they become the purveyors of policy rather than deciders of cases that come before them."⁷¹

⁶⁶ N.Y.L.J., May 16, 1996, at 28 (N.Y. Sup. Ct. May 14, 1996), *aff'd*, N.Y.L.J., Feb. 14, 1997, at 29 (N.Y. App. Div. Feb. 11, 1997).

⁶⁷ Mike Pearl & David Seifman, *'Workfare' Judge Ought to Quit*, *Rudy*, N.Y. Post, Aug. 21, 1996, at 5.

⁶⁸ See Matthew Goldstein, *City Held in Contempt Again for Keeping Homeless in Office*, N.Y.L.J., May 15, 1996, at 1.

⁶⁹ *Id.*

⁷⁰ Pearl & Seifman, *supra* note 67, at 5.

⁷¹ Pearl & Seifman, *supra* note 67, at 5.

Mayor Giuliani also asserted that Steven Banks, The Legal Aid Society's coordinating attorney in *McCain*, "[b]y and large controls her ideology because she constantly rules his way."⁷² Was the Mayor suggesting collusion between Mr. Banks and Judge Freedman with impeachment and disbarment proceedings in the offing?

In this particular instance, Mayor Giuliani is facing a New York State Supreme Court justice who, because she is elected, does not have to rely upon a chief executive's generosity of spirit to be reappointed at the end of her term, and cannot be terrorized. However, there are many who do rely upon this generosity, particularly criminal and family court judges, who are often appointed to preside as acting supreme court justices. Surely, some judges would be fearful of Mayor Giuliani and his implied and expressed threats that they will not be reappointed unless they meet his standards regardless of the evaluations given by the Mayor's Committee and the City Bar Association. What would such a message convey to Judge Freedman if she were an appointed judge, that is, a criminal or family court judge presiding as an "acting" New York State Supreme Court judge?

On February 11, 1997, the appellate division affirmed Judge Freedman's ruling holding the Mayor and the city in contempt.⁷³ Imagine what the consequences would be for Judge Freedman if she needed Mayor Giuliani's consent for her reappointment.

The Mayor's vicious personal attacks on the judiciary go far beyond responsible criticism, which is always legitimate. He is seeking to place judges in a state of fear, making a government of men, not of laws. This brings to mind a quote from Shakespeare's *Julius Caesar*: "Upon what meat doth this our Caesar feed, that he is grown so great?"⁷⁴ The City of New York is the number one litigant in the civil and criminal courts of this city. Do we want our judges to succumb to the extralegal pressures of the Mayor?

IV. THE INDEPENDENCE OF JUDGES BAER, FRIEDMAN, AND CHIN?

In several cases, Governor Pataki⁷⁵ and President Clinton⁷⁶

⁷² Pearl & Seifman, *supra* note 67, at 5.

⁷³ *McCain v. Giuliani*, N.Y.L.J., Feb. 14, 1997, at 29 (N.Y. App. Div. Feb. 11, 1997).

⁷⁴ WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 1, sc. 2, ln. 149-50 (Sylvan Barnet ed., Signet Classic 1987).

⁷⁵ George E. Pataki took office as Governor of the State of New York in 1995. See *THE GREEN BOOK*, *supra* note 9, at 367.

⁷⁶ William J. Clinton took office as President of the United States in 1993. See *THE GREEN BOOK*, *supra* note 9, at 459.

joined the Mayor in criticizing judges and threatening the independence of the judiciary. One such case involving U.S. District Court Judge Harold Baer, Jr., who serves in the Southern District of New York, received nationwide attention.⁷⁷ In *United States v. Bayless*,⁷⁸ Judge Baer invalidated a police investigative stop⁷⁹ where police recovered thirty-four kilograms of cocaine and two kilograms of heroin.⁸⁰ In *Bayless*, a plainclothes police officer testified that at approximately 5:00 a.m., he and his partner observed Carol Bayless drive her rented 1995 Caprice, fitted with Michigan license plates, "slowly along 176th Street. Before reaching the intersection of 176th Street and St. Nicholas Avenue [Bayless] pulled over to the north side of the street and double parked the car."⁸¹ He further testified that

once the car stopped, four men emerged from between parked cars on the south side of the street. The males crossed the street walking single file, [Bayless] leaned over to the passenger side of the car and pushed the button for the trunk release. The first male then lifted the trunk open, the second and third males each placed a large black duffel bag into the trunk and the fourth male closed the trunk.⁸²

Police did not observe any conversation between any of the four men.⁸³ Bayless drove away and the police followed.⁸⁴ At a stoplight, two of the four males, who were standing nearby, recognized the police officers.⁸⁵ At that time, all four males "moved in different directions at a rapid gait."⁸⁶ After the stoplight turned green, the officers continued to follow Bayless.⁸⁷ The officer testified that in order to prevent Bayless from entering a major highway and before they could "run a [computer] check,"⁸⁸ they pulled Bayless over.⁸⁹ He testified that they pulled Bayless over because they observed that

the car had an out-of-town license plate; the actions of the four

⁷⁷ Al Guart, *Judge Throws Out \$4M Drug Bust Seizure on Technicality*, N.Y. Post, Jan. 25, 1996, at 4.

⁷⁸ 913 F. Supp. 232, *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

⁷⁹ *Id.* at 239.

⁸⁰ *Id.* at 234.

⁸¹ *Id.* at 235.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* (quoting police officer's testimony).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 235-36.

males, particularly the way they crossed the street in single file and did not speak with the driver of the car; the fact that the males ran once they noticed the officers; and the duffel bags the males placed in the trunk of the car.⁹⁰

After police stopped Bayless, they looked in the trunk of her car,⁹¹ wherein they found thirty-four kilograms of cocaine and two kilograms of heroin.⁹² Bayless was arrested at the scene.⁹³

After her arrest, Bayless made a videotaped statement.⁹⁴ Bayless' "version of the events surrounding her arrest differ[ed] significantly from that recounted by [the police]."⁹⁵ In her videotaped confession, Bayless admitted driving from Detroit to New York with \$1 million in the trunk in order to pick up drugs.⁹⁶ Bayless further admitted she made the same trip to buy drugs more than twenty times since 1991.⁹⁷ For this trip, Bayless expected to be paid \$20,000 by her son.⁹⁸ Judge Baer found that Bayless' "candor and the nature of her statements [gave] her statement great credibility."⁹⁹ Judge Baer opined, "I place considerable weight on the defendant's statements because of how they incriminate her, her son and others and because at the time the statements were made, defendants, unlike the [o]fficer, had no reason to color the facts."¹⁰⁰

Following the suppression hearing, at which Bayless did not testify,¹⁰¹ Judge Baer chose not to believe the police officer's sworn testimony that the men loading duffel bags into Bayless' trunk ran when they spotted the police officers.¹⁰² Rather, Judge Baer suppressed the seized narcotics and Bayless' videotaped confession.¹⁰³ In granting Bayless' motion to suppress, Judge Baer stated:

Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in [Washington

⁹⁰ *Id.* at 236.

⁹¹ *Id.*

⁹² *Id.* at 234.

⁹³ *Id.* at 236.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 237.

⁹⁸ *Id.*

⁹⁹ *Id.* at 236.

¹⁰⁰ *Id.* at 239.

¹⁰¹ During the suppression hearing, "defense counsel notified the court that [Bayless] was ill with a stomach ailment and needed to be removed from the courtroom. [Bayless] waived her right to be present at the remainder of the proceedings." *Id.* at 236 n.8.

¹⁰² *Id.* at 239 ("[t]he testimony offered by [the police officer] . . . is at best suspect.").

¹⁰³ *Id.* at 243.

Heights] tended to regard police officers as corrupt, abusive and violent. . . . [H]ad the men not run when the cops began to stare at them, it would have been unusual.¹⁰⁴

He further added, "[w]hat I find shattering is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person."¹⁰⁵

For most of the country, Judge Baer's decision flew in the face of common sense. In order to sustain a police officer's investigative stop and search of Bayless' car trunk, Judge Baer had to find that the officer's had a "'reasonable suspicion' supported by articulable facts that criminal activity 'may be afoot.'"¹⁰⁶ Judge Baer's decision is laden with evidence that demonstrates an appalling anti-law enforcement bias. For example, he tortured the facts and circumstances in order to conclude that the police lacked the requisite "reasonable suspicion" to support their stop; his out-of-hand rejection of the police officer's testimony based upon the statement of a defendant never subjected to cross-examination; and his statement that the men were correct to run when they saw the police. In a final stroke, Judge Baer branded the U.S. Attorney's efforts to have him reconsider the suppression motion "a juvenile project."¹⁰⁷

President Clinton's spokesman, Michael D. McCurry, called Judge Baer's decision "wrongheaded"¹⁰⁸ and said that "the White House was waiting to see what happened in the hearing being conducted by Judge Baer [and urged by President Clinton]"¹⁰⁹ and left open the possibility that Mr. Clinton might ask the judge to step down.¹¹⁰ Mayor Giuliani called the ruling "mind-boggling in its effect"¹¹¹ and further stated that he "read the decision twice. . . . There [was] no basis for it."¹¹² Governor Pataki joined the criticism, saying through his spokesman, "[t]his sadly is too often what happens when liberal elites in powerful positions treat the

¹⁰⁴ *Id.* at 242 (emphasis added).

¹⁰⁵ *Id.* at 240.

¹⁰⁶ *Id.* (citing *United States v. Sokolow*, 490 U.S. 1 (1989); *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁰⁷ Don Van Natta, Jr., *Judge to Hear Bid to Reverse a Drug Ruling*, N.Y. TIMES, Feb. 3, 1996, at 25.

¹⁰⁸ Alison Mitchell, *Clinton Defends His Criticism of a New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12.

¹⁰⁹ Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

¹¹⁰ Mitchell, *supra* note 108, at A12.

¹¹¹ Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, at 25.

¹¹² *Id.*

criminals as victims and victims as criminals."¹¹³

Under obvious intense public pressure, Judge Baer heard reargument of the original suppression motion and overruled his first decision.¹¹⁴ Perhaps he acted out of fear of inevitable condemnation by editorials, as well as concern that President Clinton would call for his resignation. Judge Baer would have been better off—and more intellectually honest and better preserving of his good reputation—had he urged the U.S. Attorney to appeal his first decision to the Second Circuit Court of Appeals, or, in the alternative, recuse himself from the argument on rehearing, allowing another judge to decide the issue.¹¹⁵

In another widely reported state criminal court case, Criminal Court Justice David Friedman ruled evidence collected in a Brooklyn rape case inadmissible because police conducted their search after nine p.m.¹¹⁶ Under New York law, "[a] search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 [a.m.] and 9:00 [p.m.], unless the warrant expressly authorizes execution thereof at any time of the day or night."¹¹⁷ In fact, Justice Friedman later discovered the search was executed at approximately six p.m.¹¹⁸ The Brooklyn District Attorney's Office was delinquent in not refuting the defense counsel's allegation that the search warrant was executed after nine p.m. Subsequent to his original decision, and after pointing out the defense counsel's error, Justice Friedman reversed his decision and

¹¹³ Greg B. Smith & Frank Lombardi, *Rudy, Gov Hit Judge for Axing Drug Case*, Jan. 26, 1996, DAILY NEWS (New York), at 4.

¹¹⁴ *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). At the initial hearing, the government put forth the testimony of only one of the officers involved in Bayless' arrest. *Id.* at 214. Judge Baer noted that upon rehearing, the government brought forth the "other officer who observed the events at issue here, [and] also the report he prepared hours after the arrest . . ." *Id.* at 215. After the rehearing, Judge Baer found that the second officer "corroborated several significant portions of [his partner's] story and presented a more credible chronology of the events of April 21st." *Id.* Judge Baer added that "as a consequence of the defendant's testimony and that of the [second officer], her story is now less convincing." *Id.* at 216.

¹¹⁵ Before Bayless' case went to trial, she made motion under 28 U.S.C. § 455(a) to have Judge Baer recuse himself. *See United States v. Bayless*, 926 F. Supp. 405 (S.D.N.Y. 1996). Judge Baer denied Bayless' motion. *Id.* at 406. However, Judge Baer removed himself from the case to avoid "unnecessary and otherwise avoidable problems and attendant delays," *id.*, and ordered a new judge for trial. *Id.*

¹¹⁶ *See People v. Gardner*, N.Y.L.J., Feb. 1, 1996, at 32 (N.Y. Sup. Ct. Jan. 25, 1996); *see also* Anthony M. DeStafano & Paul Moses, *Ruling Raises a Searching Question*, NEWS-DAY (New York), Feb. 2, 1996, at A4.

¹¹⁷ N.Y. CRIM. PROC. LAW § 690.30(2) (McKinney 1995).

¹¹⁸ DeStafano & Moses, *supra* note 116, at A4.

ruled that the seized evidence could be admitted.¹¹⁹ Justice Fried-

¹¹⁹ On February 6, 1996, Justice Friedman, ruling from the bench, modified his January 25th order, and denied suppression of evidence recovered by police in the execution of their warrant. No formal opinion was written. What appears below is a transcript of the statement read on the record in open court.

In a decision and order dated January 25, 1996, this court granted defendant's motion to suppress certain evidence. In so doing the court stated that it was constrained to suppress certain evidence. When the court used the word constrained it was indicating disfavor with the result but recognizing its obligation under oath of office to follow the law of this state and the [C]onstitution[s] of the United States and New York State. [It did so because the District Attorney conceded that the search warrant was executed at night.

At the outset I want to applaud the candidness at oral argument of the District Attorney in agreeing that the law as the court saw it in the decision of January 25, 1996 was correct.

The Criminal Procedure Law provides that a warrant may only be executed at night (that is between the hours of 9 [p.m.] and 6 [a.m.]) if certain conditions are met. These are: (1) the application for the warrant must set forth reasons showing that there is a need to search at night, and (2) the warrant must specifically authorize a nighttime search.

In this case, the warrant did not permit a nighttime search; the application for the warrant did not provide any reason for needing to search at night; and the police officer did not request a nighttime search. This court was therefore left with a choice [—] the choice of following and obeying the law passed by the legislature of this state or trashing the law. I chose to follow and obey the law. Neither this court nor any other person is above the law.

In any event, the People have now moved to reargue and renew the motion leading to the January 25, 1996 decision. It has become apparent from the information the District Attorney has belatedly supplied that the search did indeed take place during the hours that the Criminal Procedure Law regards as day. Moreover, the court has heard testimony by Police Officer Forbes verifying the People's Claim. I find the testimony credible. Defendant has offered nothing other than speculation to contradict the sworn testimony. While no satisfactory explanation has been offered by the District Attorney for the failure to present this information at the outset, the interests of justice and the protection of society mandate that the court reexamine its original decision.

It has become evident that the court's prior order was based upon misinformation. In this regard, defense counsel sought suppression of evidence alleging that the search impermissibly took place during a prohibited time. He in fact had no basis for such a claim.

Thus the claim made in defendant's original motion is without merit. Accordingly, I grant the District Attorney's motion to the extent of granting renewal. Upon renewal and the hearing conducted this day, this court's order dated January 25, 1996 is hereby modified so as to deny suppression of the evidence in issue.

Justice David Friedman modifying, without written opinion, *People v. Gardner*, N.Y.L.J., Feb. 1, 1996, at 32 (N.Y. Sup. Ct. Jan. 25, 1996) 1-3 (Feb. 6, 1996) (emphasis in original) (copy on file with the *New York City Law Review*); see also Joseph P. Fried, *Evidence is Reinstated in a Brooklyn Rape Case*, N.Y. TIMES, Feb. 7, 1996, at B2.

man deserved applause for both decisions. He did what the law required in the first proceeding based on the evidence before him.¹²⁰ Then he did what the new evidence warranted; he reversed his first ruling based on the evidence before him.¹²¹

Despite the fact that Justice Friedman did the right thing—indeed, exactly what the law required in both decisions—he was criticized by public officials. Governor Pataki called Justice Friedman's first decision "just the latest demonstration that New York's courts have gone too far in protecting criminal[s'] rights."¹²² Mayor Giuliani said "[t]his is a good illustration of how far people will go to show the police are wrong. . . . Maybe the police are right."¹²³ The Mayor and the Governor should have apologized to Justice Friedman after his second decision and congratulated him on his actions. However, they chose not to. New York State Court of Appeals Judge Vito Titone, outraged by the unfair attacks on Justice Friedman, said, "[i]t was the last straw. . . . I know him. I worked [with him] in the [a]ppellate [d]ivision. He [is] a fine lawyer and a fine judge. To go after him on half the facts is so wrong."¹²⁴ *The New York Times* columnist Clyde Haberman commented on what seemed to be "open season on judges,"¹²⁵ saying "Justice Friedman . . . has fallen victim to what may charitably be called a political and journalistic mugging."¹²⁶

When he seeks reappointment, does Justice Friedman have to be concerned that he embarrassed Mayor Giuliani? I believe so. What if Justice Friedman had not detected the Assistant District Attorney's error with respect to the timing of the search? Would the Mayor, incensed at the original decision granting the suppression motion, reappoint him? I do not believe so.

Governor Pataki introduced legislation,¹²⁷ because of his distress with Justice Friedman's decision, that "would loosen search-and-seizure rules for the police and prosecutors in New York by

¹²⁰ N.Y. CRIM. PROC. LAW § 710.60(2)(a) (McKinney 1995).

¹²¹ *Id.* § 710.60(3)(a)-(b).

¹²² Randy Kennedy, *Ruling in Favor of a Suspect Puts State Judge Under Fire*, N.Y. TIMES, Feb. 2, 1996, at B3.

¹²³ *Id.*

¹²⁴ Lynette Holloway, *Appeals Judge Says Colleagues Are Not Being Soft on Criminals*, N.Y. TIMES, Feb. 4, 1996, at 38.

¹²⁵ Clyde Haberman, *Under Fire, Judge Decides to Fire Back*, N.Y. TIMES, Feb. 27, 1996, at B1.

¹²⁶ *Id.*

¹²⁷ S. 6041, 219th Gen. Assembly, 2d Reg. Sess. (N.Y. 1996). Governor Pataki's Police and Public Protection Act of 1996 (the "PPPA") failed to pass the New York State Assembly.

basing rules of evidence on [f]ederal [l]aws rather than more stringent state standards."¹²⁸ In responding to Judge Titone's remarks attesting to Justice Friedman's character and ability, the Governor's spokesman said, "[t]he Governor believes Judge Titone is entitled to his opinion, but the [New York State] Legislature must pass the Police and Public Protection Act in order to restore a sensible balance between victims' rights and criminals' rights. . . . As it stands now, criminals' rights too often come before victims' rights."¹²⁹ This would have been the appropriate time to acknowledge that Justice Friedman correctly applied the existing law. The Governor chose not to do so.

It is not just public officials who are guilty of exerting pressure against judges. Recently, U.S. District Court Judge Denny Chin ruled that New York State's Sex Offender Registration Act,¹³⁰ known as Megan's Law, which mandates that the addresses of released sex offenders be made public,¹³¹ cannot be applied retroac-

¹²⁸ See Holloway, *supra* note 124, at 38. For example, the PPPA proposed to amend the New York State Criminal Procedure Law to provide that:

when engaged in criminal law enforcement duties a police officer may approach a person in a public place located within the geographical area of such officer's employment when he has an objective, credible reason not necessarily indicative of criminality, and to the full extent permissible under the Constitution of this State and the United States of America may ask such questions and take such other actions as the officer deems appropriate.

S. 6041, 219th Gen. Assembly, 2d Reg. Sess. (N.Y. 1996).

¹²⁹ See Holloway, *supra* note 124, at 38.

¹³⁰ N.Y. CORRECT. LAW §§ 168-168-v (McKinney Supp. 1996).

¹³¹ New York State's Sex Offender Registration Act provides that the names, addresses and other significant information of any person convicted of any "sex offense" or any "sexually violent offense" be made public under the following circumstances:

(a) If the risk of repeat offense is low, a level one designation shall be given to such sex offender. In such case the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified pursuant to this article.

(b) If the risk of repeat offense is moderate, a level two designation shall be given to such sex offender. In such case the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified and may disseminate relevant information which may include approximate address based on sex offender's zip code, a photograph of the offender, background information including the offender's crime of conviction, modus of operation, type of victim targeted and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion.

(c) If the risk of repeat offense is high and there exists a threat to the

tively.¹³² The *Daily News*, in an outrageous attack, disagreed. Of course, disagreement would be in order, but the language employed certainly was not. Leading off with the headline, "Perverts' Pal,"¹³³ the *Daily News* wrote:

Because of him, the state cannot notify New Yorkers when most sex offenders and pedophiles are living in their midst.

His junk justice ruling makes permanent his earlier decision to prevent the police from alerting the public about the release of any sex fiend who was convicted before New York's Megan's Law took effect Jan[uary] 21.¹³⁴

V. CONCLUSION

The importance of maintaining an independent judiciary requires an assurance to the judiciary that they will be appointed without regard to political affiliations and obligations. Furthermore, assurances must be made that reappointments will come to those found deserving by the two committees assigned the responsibility of making such decisions.

I have praised Mayor Giuliani on many issues. I have disagreed with him on many as well. I have never sought to court him or seek his favor. I offered my advice to be helpful when asked for my opinion. However, the Mayor's¹³⁵ interference is so outrageous

public safety, such sex offender shall be deemed a "sexually violent predator" and a level three designation shall be given to such sex offender. In such case, the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified and may disseminate relevant information which may include the sex offender's exact address, a photograph of the offender, background information including the offender's crime of conviction, modus of operation, type of victim targeted, and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion. In addition, in such case, the information described herein shall also be provided in the subdirectory established in this article and notwithstanding any other provision of law, such information shall, upon request, be made available to the public.

Id. § 168-l(6)(a)-(c).

¹³² *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996).

¹³³ *Perverts' Pal*, *DAILY NEWS* (New York), Sept. 26, 1996, at 44.

¹³⁴ *Id.*

¹³⁵ The Mayor does not stand alone. As this article has demonstrated, other politicians and chief executives also threaten the independence of the judiciary.

it must be condemned and is, regrettably, reflective of his character. As Heraclitus said 2,500 years ago, "[a] man's character is his fate."¹³⁶

¹³⁶ JOHN BARTLETT, FAMILIAR QUOTATIONS 62 (1992).