

Standing Up for the Third Branch: Hon. Rolando Acosta

John Caher: Welcome to Amici, news and insight from New York Courts. I'm John Caher.

Today we have a return guest, although he's returning in a different capacity. Regular listeners may recall an Amici program in 2020 with Rolando Acosta, then Presiding Justice of the Appellate Division, First Department. Earlier this year, Justice Acosta retired from the bench to join the Manhattan firm of Pillsbury Winthrop Shaw Pittman, where he's a partner. No longer constrained by judicial ethics rules that prevented him from speaking out, Justice Acosta has emerged as a strong and forceful advocate for the judicial system and judges.

Judge, thank you for coming on the program and thank you for standing up for the Judiciary and the judicial system. You chose to announce your retirement in an article in the *New York Law Journal* in which you quoted one of your illustrious predecessors, the late Bernard Botein, who said, "The judicial robe can be very hampering, sometimes even a straight jacket when *vigorous action is required*." When "vigorous action is required." Are we now in such an era?

Justice Acosta: I think we are in that era, John. We are, I believe, in very perilous times. I think that the latest frontal attacks on the Judiciary, particularly by folks who should know better, law professors and members of the bar, I believe that's intolerable in a society under the rule of law.

As you know, I was happy being a judge for the last 25 years after being a community activist and a public interest lawyer. But the last few years of my tenure were a bit frustrating because, notwithstanding my vigorous writings and discussions about strong democratic institutions and the importance of the rule of law, I found that there were significant constraints to my ability to discuss these issues beyond, obviously, what's permitted of judges. Judges can talk about administration of justice, but it was difficult for me given the aggressiveness of the attacks. It was, I think, a combination of national unfair attacks on judges, but as you know, and I hope we get an opportunity to discuss it a little more, sometimes castigating them based on something like the immutable characteristics like their national origin. I thought that that was horrendous.

And frankly, I think that part of what prompted me to do this, or to speak more loudly, was the deafening silence from the organized bar, which except for a few organizations, primarily the New York County Lawyers,

did not feel compelled to defend the Judiciary as they had always done in the past. That has always been the tradition, that the organized bar always speaks out for the Judiciary because, obviously, they are constrained. So it was only after the attacks began to take place within New York that with the strait jacket of which PJ Botein talked that I simply couldn't breathe. That strait jacket was really squeezing too hard and I felt the need to retire and regain my First Amendment rights.

John Caher: What brought us to this stage in New York?

Justice Acosta: That's a great question, John.

I think that as attacks on the Judiciary and attacks on democratic institutions began to accelerate, there was nothing that was sacred. The Judiciary was not exempted. As people began to separate, I believe, around blue and red lines, blue and red states, even the most progressive elements in New York began to advocate for changes in the role of judges to make them more political.

Some see it as a way to combat, frankly, national tendencies, including US Supreme Court decisions that have curtailed significantly rights that we have begun to take for granted. You even had Clarence Thomas, US Supreme Court Justice, announcing in his concurring opinion overturning *Roe v Wade* that gay rights, as recognized in *Lawrence v Texas*, and rights to contraceptives that were recognizing beginning with *Griswold v Connecticut*, should be reconsidered because, as Justice Thomas put it, "They were demonstrably erroneous decisions." So this was very threatening to folks who refused to go back to an America of the last century. People have gone too far in gaining empowerment and rights for folks, including a woman's right to control her own body, and to go back to those days is not acceptable. So again, it is very threatening to folks who refuse to go back to that America.

My argument is that just because of the risks of retrenchment at the federal level, and some will say even at the state level in New York State in the last few years, it doesn't mean that we can now somehow change the role of judges in New York to make it more political or less "carceral," to use that term that you mentioned before. I think that's a mistake. I think that we have to hold both sides, everyone, to the same standard.

John Caher: You mentioned the retrenchment at the Supreme Court, which obviously, opens up an opportunity for state constitutionalism. And with that renewed emphasis on state courts, is it even more important to stand up for the independence of the state Judiciary?

Justice Acosta: Absolutely. Absolutely. You need a Judiciary, John, that understands its constraints, that understand that they are bound by precedent, that they are bound by constitutional or statutory provisions, that they are obligated to honor legislative policy choices. Can you imagine going into a courtroom and being judged or getting a quality of justice depending on what your political affiliations are and whether the judge thinks that it's okay for you to engage in that particular kind of speech? It's horrendous.

I simply do not understand what the thinking is or the shortsightedness of the progressives in New York, and that includes, again, folks who should have an understanding of history and should understand what that kind of abuse would entail. Law professors should not be in the business of castigating individual judges to get them out of office. They understand how judges are bound. They understand the constraints. They understand how we make decisions. We're not political ideologues. We are judges constrained and bound by the law. I can assure you that in 25 years as a judge that was never one of the considerations for us to make a decision and dispense justice. So we are in very perilous times, John.

John Caher: Now, you grew up in a place, the Dominican Republic, where an independent Judiciary was not necessarily a priority or maybe not even an aspiration. Is there anything from your background that impressed upon you the importance of an independent, of judicial independence?

Justice Acosta: Absolutely, John. It is that background that makes me a zealous advocate for the rule of law and an independent Judiciary.

I grew up in the Dominican Republic during the Trujillo regime, a dictator of 31 years, and then a very underdeveloped democracy in the early seventies. My father was the president of the driver's union. And as you know in those days there was no Internet. There was no way to proliferate ideas and political information throughout the island except through the drivers because the drivers would travel throughout the island. So being the president of a driver's union was a very dangerous occupation for my father. And I remember whenever the dictator wanted to have so-called "free elections," what he did was he locked up the political oppositions, and the courts, which were not independent, would kowtow to the dictator. My father would be locked up for months until the dictator got done creating his illusion of a free election.

So I grew up seeing my father go to jail for the "crime" of exercising constitutional guarantees that we have taken for granted in the United States. So to me, this is sacred. An independent Judiciary, a Judiciary that

stands up to oppression, that stands up to the Executive and the Legislative branch when they try to get around constitutional guarantees, is crucial. To me, this is not an intellectual exercise or an intellectual discussion. I lived it. I lived it so I know how important it is.

So it is always very disconcerting to me to see people who should know better, again, playing footsie with that very same sacred constitution at the federal level and state constitution at the state level, which you know is much more expansive and protective of rights than the federal constitution. It concerns me when I see in New York people who should understand and should know what oppression looks like, what discrimination looks like, what abuse of power looks like. My background undergirds those strong beliefs that I have about an independent Judiciary.

I understand that as a Brown man of color in New York City. I drive a nice car and I get stopped by the police three or four times a month, especially now that I'm not the PJ and I don't go around with a security detail anymore.

John Caher: Three or four times a month?

Justice Acosta: At one point, yes. Anytime, for example, that you cross the George Washington Bridge to New Jersey, there are all kinds of police units. They are trying to deal with drug transportation or drugs throughout Jersey, Connecticut. As you know, Washington Heights, Inwood, where I live, it's very accessible to different states and there has been a drug problem throughout.

John Caher: Yes, but to be stopped that many times. I mean, I'm basically the same age you are and I've been stopped three or four times in my life!

Justice Acosta: Yeah, I understand that. And that's what I try to tell my progressive friends. I understand discrimination. I understand institutional racism. I understand the indignity of being treated differently because of my higher melanin count or my national origin or those immutable characteristics. I understand all that. But when you start naming judges by name and calling them "carceral," and frankly I don't understand what "carceral" means because the job of a judge, among many, is to deal with the person being accused of a crime and make bail determinations -

John Caher: On a case-by-case basis.

Justice Acosta: On a case-by-case basis, and based on a very progressive statute that was just enacted or tweaked back in June. The job of a judge is to apply that statute and the different elements that were enacted by the Legislature. We are obligated as judges to honor legislative policy choices. We'll make a decision based on the facts of the particular case and the applicable law in that particular case.

John Caher: And I'm sure if you get it wrong, Chief Judge Wilson and his six colleagues in the Court of Appeal will let you know.

Justice Acosta: Absolutely right! Absolutely right!

John Caher: What can the Judiciary, and especially Chief Judge Wilson and your former clerk, the Honorable Joseph Zayas, Chief Administrative Judge, what can they do on their end to protect the independence of the third branch of government?

Justice Acosta: Their obligation, initially, is to make sure that they instill in, not just lawyers and the bar, but others to create a level of confidence that they're going to get justice, that they're going to be heard. And one of the things that Rowan, that Judge Wilson, and Joe Zayas have done is they have gone throughout the entire state, they've met with everyone who's willing to meet with them to get them to participate in this wonderful level of transparency and justice that Judge Wilson and Joe Zayas want to create. We don't want an opaqueness or lack of transparency that would instill lack of confidence in the courts and in the Judiciary, particularly given some of the latest trends. We need to make sure that we have a robust, strong but independent Court of Appeals. And I believe that that's what we have and that's what we will continue to have with this current Court of Appeals.

I think with the Chief Judge's view of his role and the role of the court as an institution, it is going to really be tremendous. I'm already hearing, after only a few months, the excitement. Bar associations, judicial associations that were always at odds with OCA and with the court system, now are not only asking to participate but begging Rowan and Joe to be part of the solution. I've never seen that level of excitement before and we need it. We absolutely need it.

John Caher: Judge Acosta, it's always a pleasure and a treat to chat with you and I so appreciate your taking time out of your schedule as a litigator to come on the program. More than that, I appreciate what you're doing to stand up for judges who cannot stand up for themselves.

Justice Acosta: Thank you so much, John. It's an honor for me to do that. I can't think of anything more important in today's society than to defend the Judiciary.