Available Compromises for Continued Judicial Selection Reform

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AVAILABLE COMPROMISES FOR CONTINUED JUDICIAL SELECTION REFORM

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I. INTRODUCTION

The dogma of judicial reformers in New York for more than one hundred years has been not to compromise or accept what they deem to be half-way measures on the issue of judicial reform.1 Persistence, belief in the correctness of their cause, and faith in ultimate victory have been the talisman of the judicial reform movement. If they were beginning to waiver in recent years, the successful passage of the 1977 constitutional amendment adopting merit selection for the New York Court of Appeals2 and the gains of judicial reformers

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2 See, e.g., Court-Reform Amendments Pass Final Test, N.Y.L.J., Mar. 29, 1978, at 1,
elsewhere have breathed new verve into the judicial reform movement. This is a welcome development because a pressing need still exists for improvement in the selection of judges at the trial level. While an ambitious program for broadening reform to all state courts was undertaken in 1978, and mobilization for more vigorous efforts in 1979 and beyond is already underway, there appears to be a logjam between those who favor an across-the-board switch to a merit system of appointment and those who favor retention of our current elective method of selecting trial judges. The purpose of this article is to briefly capsulize this dispute and review several possible compromise reforms which appear to be available to break the stalemate in New York.

1 See Schulte & Hoelzel, Court Reform, the Unheralded of the 1976 Elections, 60 JUDICATURE 281 (1977).


II. THE NEED FOR COMPROMISE

Surprisingly, there is virtual agreement among interested parties that we need or at least will benefit from reform in our method of selecting judges. The real dispute is over the form and nature that reform should take. The need for compromise results from the conclusion of many that there will be no quick resolution of the appointment versus election debate.

For all our certainty about what is the best way to select judges, the simple fact is that both sides in the appointment versus election controversy proceed, to a great extent, on the basis of generalizations that do not necessarily comport with the facts. For example, regardless of the method provided in the state constitution for the selection of judges, the majority in New York and elsewhere are


See, e.g., Alfini, The Judicial Selection Puzzle, 12 TUAL 9, 27 (1976) where a noted pro-appointment advocate acknowledged:

Although the author intuitively agrees with these national standards [favoring the merit system], it must be pointed out, in all fairness, that there is no empirical evidence to support this position. No comprehensive study of judicial selection methods has compared the qualifications of judges selected under the various plans in an effort to demonstrate that judges selected under any one plan are better than those selected under the other plans.

appointed by the chief executive, generally to fill vacancies or interim positions. Hence, the suggestion that the problem lies solely with the use of election and that a switch to appointment will suddenly elevate the judiciary several notches is unsupported. By the same token, this same fact should have long ago dispelled the prophesy of pro-election advocates that a switch to appointment would inject elitism and classism into our judicial system.

Facing other realities is long overdue by both sides. It is true, for instance, that our present system is not a complete failure; as the pro-electionists are quick to point out, it has produced many great judges. Yet, this fact proves very little. It does not prove that the present system does not need and cannot stand improvement. It is significant that many of the most vocal advocates for change and reform are highly regarded judges that the current system has

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In some states it has only been through appointment that minority judges have reached the bench. See Jasen, An Elected Judge Favors Merit Selection, N.Y.L.J., Oct. 28, 1977, at 1, col. 1, wherein the author notes: “The appointive system, it has been said, will work against qualified women, blacks and other current minorities. One need only look to California, an appointing state, to refute this argument. A woman and a black, both found well qualified, were recently appointed to its highest court.” But see Crockett, Judicial Selection and the Black Experience, 53 JUDICATURE 438 (1976). In New York, the first black judge to sit on the Court of Appeals, Harold Stevens, was appointed to that post and then defeated in the next election. See generally C. Philip, P. Nowelski & A. Press, Where Do Judges Come From? (Inst. of Judicial Ad. 1976). Interestingly, Judge Stevens has been an open advocate of election of judges rather than appointment. Judges Fuld and Stevens Comment on Carey's Judicial Reform Proposal, Vesey Street Letter, at 5 (June 1976). By way of contrast, in Florida, Justice Joseph Hatchett was appointed to become the first black Supreme Court Justice and was then reelected in a general election. Karl, Electing Supreme Court Justices—For the Last Time, 60 JUDICATURE 290, 292 (1977).


12 In the words of Chief Justice Roger J. Traynor of the California Supreme Court: As head of the California judiciary, I speak perhaps as an interested party for the proposed judicial selection plan. If we ever could have afforded patronage as the basis for selecting our judges, we can no longer do so under the pressure that the dramatic social changes of the last half of the twentieth century are imposing upon our court system. Workbook Prepared for the Citizens' Committee on the Merit Plan for Judicial Selection, 43 CAL. ST. B.J. 163, 162 (1968). See generally Allard, Application of the Missouri Court Plan to Judicial Selection and Tenure in America, 16 BUFFALO L. REV. 378, 385 (1966).
produced. Even those judges leading the fight for continuation of our elective system openly acknowledge and advocate reform, albeit of a less radical nature than a complete switch to merit appointment.

Regrettably, but understandably, much of the blame for the absence of compromise lies largely with the reformers, principally those favoring merit appointment. They fear that to agree on a compromise will result in a judicial "Berlin wall," hindering any chance for the longrun adoption of full merit selection. Buoyed by their 1977 success, they believe they must not yield now. They would do well to show flexibility, not only because their opponents appear ready to compromise, but because they may not have properly gauged either the benefits that compromise can produce or the view of the public.

Moreover, it would appear to be self-deluding to believe that the political leaders will not vigorously oppose such reforms at the local level. The late State Senator Bernard Gordon, former head

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15 One cannot ignore the fact that, during the past 30 years, most of the states in the union have adopted merit selection for at least some of their courts. See note 174 infra. It is significant, however, that many of the states which have adopted merit selection—including Missouri, which was the first to do so—have adopted it only for some of their appellate courts, and not their trial courts. New York has, of course, adopted merit selection for its highest court.

16 It should be noted that the failure to enact proposals for a constitutional amendment to extend merit selection to the trial courts this year means that the earliest that such proposals could become effective would be 1983. See, e.g., Hochberger, No Chance Seen Now to Extend Merit Selection of Judges, N.Y.L.J., Feb. 3, 1976, at 1, col. 3. This is because a constitutional amendment must be passed by two separately elected legislatures before it is even submitted to the voters for approval. See N.Y. Const. art. XIX, §§ 1-2. See also Abrams, Getting Better Judges, N.Y. Times, Mar. 5, 1976, at 31, col. 2; Committee on State Courts of Superior Jurisdiction, A Proposal to Restructure the Judicial District Nominating Convention System, 32 Rec. of N.Y.C.B.A. 615, 618 (1977).


18 The most recent indications are that the public is not ready for a full switch to appointment. See, e.g., Fowler, Carey's Proposals for Court Reorganization Jeopardized by Partisan Disputes in Albany, N.Y. Times, Feb. 22, 1977, at 25, col. 1.

of the Select Task Force on Court Reorganization, reached the conclusion that obtaining legislative approval for a switch to merit selection at the trial level was so highly unlikely that to include it in a constitutional amendment for reform of the judiciary would cause the defeat of the entire amendment. Thus resulted the compromise whereby the voters in 1977 were asked to adopt merit selection only for the court of appeals. Senator Gordon and others in the fight correctly realized that the real interest of politicians is in the lower level courts where there are many judgeships and where public visibility is much more unlikely.

The legislators need not look far for support for their dogged protection of elective judicial selection. A 1976 statewide poll by the Gannett newspapers showed that a surprising seventy-five per cent of persons polled favored continued election of judges; only twenty-one per cent favored appointment. While roughly the same had been true in a 1973 poll relating to the court of appeals, the poll had shown that the voters were more interested in the selection of court of appeals judges and were concerned about their lack of meaningful information and knowledge of the candidates. The public is also generally aware that United States Supreme Court justices are appointed by the executive and, thus, more likely to accept that notion for the highest court of the state.

More to the point, it is at the trial level that reform is particularly important. It is there that the public has actual contact with judges, and it is there that the proposed reforms may sound to the

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2 See note 2 supra.
21 Fitzhugh, 'First Step' In State Court Reform Hailed, N.Y.L.J., Aug. 6, 1976, at 1, col. 2.
22 An important factor which contributed to the success of the 1977 amendment was that, in the area of high court selection, New York was in a distinct minority. See Jasen, An Elected Judge Favors Merit Selection, N.Y.L.J., Oct. 28, 1977, at 1, col. 1. The other states were Alabama, Arkansas, Georgia, Mississippi, North Carolina, Tennessee, Texas, West Virginia, Pennsylvania, Illinois and New Mexico. Id. at n.1. Some commentators felt that this gave the impression that New York was lagging behind the nation. See, e.g., Shestakofsky, Should State's Top Judges Be Appointed? Yes, Newsday, Nov. 3, 1977, at 94, col. 1.
public like efforts to affect them directly. It is the trial judge whose performance represents the judicial system in the public's mind.

In the words of Columbia Law School Professor Harry W. Jones:

The trial judge is the parish priest of our legal order. The impression that prevails in society concerning the justice or injustice of our legal institutions depends almost entirely on the propriety, efficiency, and humaneness of observed trial court functioning. "Important as it is that people should get justice," said the Victorian chancellor, Lord Herschell, "it is even more important that they be made to feel and see that they are getting it."

The typical citizen will never see an appellate court in action, but there is every likelihood that he will sooner or later be drawn into the operation of one or another of our trial courts whether as litigant, witness or juryman.

Another reason for compromise is the lack of uniformity even among pro-appointment advocates. There are approximately a dozen variants of the merit selection plan and there has been considerable debate as to which is best or even acceptable. Most of the pro-appointment reform groups favor a version of the so-called Mis-

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27 As Yale University political science professor Austin Sarat recently explained:
The trial courts are the primary objects of increasing public dissatisfaction with the administration of justice. This dissatisfaction is linked to a marked escalation in the expectations which citizens have for the law. Legal remedies now are deemed appropriate for a vast array of social problems which were formerly dealt with privately within the context of families, schools and churches. Paradoxically, the public seems to expect more from the law and the courts and not to like what it gets.


28 As stated in S. Escovitz, JUDICIAL SELECTION AND TENURE (Am. Jud. Soc'y 1975): "For most individuals the [trial] judge is the law; what happens to an individual in a particular courtroom on a particular day probably is all the justice he or she is going to get from the system." Id. at 1.


30 The differences among the various plans are succinctly summarized in Atkins, Merit Selection of State Judges, 50 Fla. B. J. 203, 204-07 (1976). Detailed descriptions of the selection plans in effect in the various states are included in AMERICAN JUDICATURE SOCIETY, VOLUNTARY MERIT SELECTION PLANS (Rep. No. 36 1972); AMERICAN JUDICATURE SOCIETY, THE EXTENT OF ADOPTION OF THE MERIT PLAN OF JUDICIAL SELECTION AND TENURE (Rep. No. 18 1970); Seiler, supra, note 6, at 788-96; Judicial Selection, supra note 1, at 326-53.
souri Plan, whereby a blue-ribbon nominating panel screens and proposes potential appointees before selection. Former Chief Judge Breitel, however, was on record in favor of the California Plan under which appointees are approved after the governor has already selected them. That kind of disagreement stalled and almost blocked entirely the implementing legislation which was drafted to make the 1977 constitutional amendment for court of appeals' judges a reality.

Recent outcries of criticism about appointment to the federal bench, previously considered above such problems, also may cause a certain hesitancy on the part of many to accept an appointive system. This criticism improperly lumps merit selection with mere appointment and fails to take account of the recent adoption of a merit selection system for federal appellate appointments. It also

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33 See N.Y. Times, Apr. 25, 1978, at 36, col. 3 (Letter to Editor from Schair and Sperling).
34 See discussion at notes 190-95 and accompanying text infra.
35 When President Carter was elected, he immediately adopted merit selection procedure
ignores the preconfirmation screening done by the American Bar Association and the Senate Judiciary Committee and the preselection screening procedures which both United State Senators in New York have used for the past decade. Nevertheless, whether or not justified, this criticism of the federal system appears to pose an unexpected hindrance to pro-appointment advocates.

Another deterrent to reform is the continued belief of many that the problem can be cured simply by improving the mechanism for judicial discipline and the overseeing of judicial conduct. The Temporary State Commission on the Courts (The Dominick Commission), for example, strongly advocated improving the procedures for disciplining and removing judges, but favored retention of the elective system of selecting judges for the trial courts. The Commission on Judicial Conduct, which grew out of the Dominick Commission's study and the work of the Joint Legislative Committee on Court Reorganization in the early 1970's, has certainly helped to improve the bench. But such after-the-fact reform efforts fail to correct the source of the problem. It is difficult to quarrel with the contention that we should attempt to keep inferior or mediocre judges off the bench in the first place, leaving to the Commission on Judicial Conduct the task of correcting any errors that may slip by the pre-selection screening process. Yet the belief that the


The Court of Appeals recently adopted rules of procedure for the review of determinations by the State Commission on Judicial Conduct. See Review Rules Issued for Panel Findings on Judicial Conduct, N.Y.L.J., Nov. 6, 1978, at 1, col. 3.


For a thorough discussion of the possible processes to correct such errors, see Judicial
disciplinary process is an adequate safeguard in itself has hindered reform efforts, particularly those favoring a radical change in the mode of selection.

One hundred years of relenting and unresolved debate without significant change should be enough to warrant a brief pause to consider compromise. The debate can go on, but this should not preclude temporary compromise reforms.

III. Possible Compromises

Several partial or temporary reforms are available and may be adopted to resolve the impasse which appears to be blocking improvement of the selection process. These are not mutually exclusive, nor do they necessarily relate to the same facets of the judicial selection problem. Most can be instituted by mere legislation, rather than constitutional amendment, and therefore can be accomplished without inordinate delay.

A. Mandatory Preselection Screening

Most reformers agree that the key element of any merit plan is its mechanism for mandatory preselection screening of possible judicial appointees. Yet, the legislation which would institute such a procedure has not gained sufficient sponsorship among the reformers to achieve adoption.

The principal features which would underlie a plan of mandatory preselection screening are the following. Blue-ribbon screening committees would be created for each judicial district and judicial department in the state. The screening committees would be of moderate size (ten to fifteen persons), with a membership of laymen as well as lawyers representing a broad cross section of the com-


43 The same system of blue-ribbon screening committees is used by Governor Carey in making his appointments. It also features nominating commissions for the judicial districts. See Exec. Order No. 5 (1975); Rubin, Judicial Screening by Governor's Committee, N.Y.L.J., July 27, 1976, at 1, col. 2. Cf. Glasser, Fuchseberg: Smooth Shift from Advocate to Judge, N.Y.L.J., Feb. 7, 1976, at 1, col. 6 (arguing for preselection screening by the entire bar, not merely by screening committees).
community they serve.44 These committees would undertake a thorough review of the qualifications of each designee for judicial office regardless of whether the candidate is a proposed appointee or a nominee for elected office.45 Statutory subpoena power and the ability to require written responses to questions,46 together with proper staffing and funding,47 would be provided to enable the committees to investigate and review each candidate thoroughly. Following its review, the committee would issue a written report, detailing its findings and reasoning with respect to the candidate.48 No candidate would be permitted to become a judge unless found qualified by the appropriate screening committee.49

While there has been much debate over the constitutionality50 or the propriety of making some of these goals express statutory requirements, there appears to be no dispute that they would be intended by whatever implementing language is used. Some proposals have grappled directly with the potential problems of the procedures for the screening committees,51 the tenure and possible re-

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44 See, e.g., Robertson & Gordon, Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee, 58 Mass. L.Q. 131, 138 (1973); Sheldon, supra note 41, at 378; A Need for Change, supra note 6, at 630. Some have criticized lay membership on the ground that lay members will be unduly influenced by the lawyers on the committees. See Niles, The Changing Politics of Judicial Selection: A Merit Plan for New York, 22 Rec. N.Y.C.B.A. 242, 249-50 (1967). Most persons, however, who have direct experience with the functioning of nominating committees speak up and act as a constructive check on the lawyers. See Robertson & Gordon, supra, at 138; Sheldon, supra note 41, at 378; Winters, One-Man Judicial Selection, 45 Judicature 198, 201-02 (1962). See also Ashman & Alfini, supra note 41, at 38-40. Thus, Governor Carey’s voluntary merit plan for judicial appointments includes laymen on the nominating committees. See note 43 supra.


46 Fish, Questioning Judicial Candidates: What Can Merit Selectors Ask?, 62 Judicature 8, 14-16 (1978); Kaminsky, supra note 42, at 547; Judicial Selection, supra note 1, at 308.

47 Kaminsky II, supra note 42, at 552; A Need for Change, supra note 6, at 633.

48 Kaminsky II, supra note 42, at 547-48. There has been much debate over the advisability and propriety of making public the committee’s report. Those in favor feel that it is of primary importance to educate the people regarding the candidates. Critics of this aspect of the screening process feel that it is more important to preserve confidentiality. See notes 57-64 infra.

49 Hunting, Toward the Best Possible Judges, 15 Rec. N.Y.C.B.A. 400, 405-06 (1960); Kaminsky II, supra note 42, at 530.


51 See Carbon, supra note 44, at 243-45; Fish, Questioning Judicial Candidates: What
moval of committee members,\(^5\) the scope of investigatory and sub-
opena power the committee should have\(^6\) and the degree of confi-
didentiality which is to clothe its activities.\(^7\) Whether these matters
are expressly provided for in the statute or constitutional amend-
ment which adopts a preselection screening plan or are left to later
legislation or rulemaking by the screening committee themselves,
their resolution is necessary if the plan is to function effectively.\(^8\)

One of the most significant issues is whether the information
obtained by the screening committees and their reports should be
confidential or public.\(^9\) On the one hand, it is argued that a promise
of confidentiality is necessary in order to enable the committees to
obtain information and to avoid discouraging able candidates from
allowing their names to be considered.\(^10\) The committees must seek

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\(^{11}\) See, e.g., Atkins II, supra note 42, at 552-53.

\(^{12}\) See note 46 supra.

\(^{13}\) Atkins, Merit Selection of State Judges, 50 Fla. B.J. 203, 207 (1976); Carbon, supra
note 44, at 245; Greenberg, The Task of Judging the Judges, 59 JUDICATURE 458, 463 (1976);

The interests involved in the confidentiality question are aptly summarized by one
commentator as follows:

On the one hand is the right of the public to know as much as possible about a
commission's activities and particularly the candidates up for consideration. On
the other hand is the right of the applicant to be assured some anonymity and
spared the embarrassment of rejection. Also, its business in an atmosphere free of
external pressures and influences from political organizations and other special
interest groups.

\(^{14}\) One of the procedural issues that probably should be resolved at the outset is whether
there should be a procedure for appeal from or review of a determination by the screening
committees. An appeal mechanism built into the plan itself would seem unnecessarily costly
and complex. The courts, however, could provide a forum for appeal and protection from
arbitrary and abusive decisions via Article 78-type proceedings. New York's Civil Practice
Law & Rules (CPLR) § 7803 provides for review of administrative determinations as follows:

The only questions that may be raised in a proceeding under this article are:

3. whether a determination was made in violation of lawful procedure, was af-
tected by an error of law or was arbitrary and capricious or an abuse of discretion,
including abuse of discretion as to the measure or mode of penalty or discipline
imposed; or

4. whether a determination made as a result of a hearing held, and at which
evidence was taken, pursuant to direction by law is, on the entire record, supported
by substantial evidence.


\(^{15}\) Studies of various federal and state merit plan nominating commissions show signifi-
cant differences of approach to the confidentiality question. Almost all conduct their deliber-
ations in confidence, but not all keep their results confidential after their deliberations are
over. See, e.g., Atkins, supra note 54, at 207.

\(^{16}\) See, e.g., D. Kelley, Colorado's Merit Selection Plan, at 7 (Am. Jud. Soc'y 1969). It is
out and be able to obtain both favorable and unfavorable information. On the other hand, an important function of screening is to generate, and make public, important information about the candidate to help the voters or appointing executive become knowledgeable about his or her qualifications relative to those of other potential candidates. Indeed, in an election situation, failure to make the details of the committee’s findings public would deflate one of the primary purposes for its being, namely, to help overcome the lack of knowledge about the candidates. In addition, public confidence in the screening process can best be stimulated by openness.

One possible way to resolve the debate over confidentiality might be to conduct the preselection screening on a confidential basis up to the point of issuance of the committee’s report. Shortly before the report is to be made public, the committee would show it to the candidate and give him or her an opportunity to withdraw his or her name from consideration. If the candidate withdraws, the report would then be kept confidential and not be made public. Such a procedure might strike a reasonable balance between the two contradictory views on the issue of confidentiality. But it would not be foolproof. Some of the most obvious problems still to be resolved would be: What use should be made of the report if the candidate runs or is to be appointed for office in the future? How can the committees protect against leaks? Should there be any public statement of the candidate’s withdrawal? Should there be any public statement of the candidate’s withdrawal and, if so, in what form and by

also argued that confidentiality is necessary to insulate the screeners from public pressure and attempts to influence their findings. See In re Baumgarten (Koch), N.Y.L.J., Oct. 27, 1978, at 55, col. 2, a recent decision where the Supreme Court, New York County held that an unsuccessful candidate for appointment to the New York City Criminal Court could not obtain access to the Mayor’s Committee’s files on his candidacy. The court stated: “It seems almost beyond question that if the files of the Mayor’s committee were subject to disclosure, the free flow of information to the committee and particularly adverse comments would slow to a trickle or dry up completely.” Id. at col. 4; ASHMAN & ALFINI, supra note 41, at 55.

See Carbon, supra note 44, at 245.

See Judicial Selection, supra note 1, at 307.

See ASHMAN & ALFINI, supra note 41, at 57. In one recent study of a merit system nominating commission in North Carolina, one author concluded: “As confidentiality cloaked panel proceedings, slings and arrows of criticism necessarily targeted on a stage directly involving the candidates as participants.” Fish, supra note 51, at 11.

See Kaminsky II, supra note 42, at 549. See also Lowe, Merit Selection in the Equality State, 59 JUDICATURE 328, 332 (1976).

At least one of Governor Carey’s voluntary merit plan commissions requires that its findings on persons not recommended to the Governor for appointment be made “unavailable for further consideration after the Governor has filled the position,” so that the Committee will “make a fresh appraisal” of all candidates when a new vacancy is created. Rubin, Judicial Screening by Governor’s Committee, N.Y.L.J., July 27, 1976, at 1, col. 2, at 5, col. 4. See also Rejected Bench Candidate Blocked From Seeing Judicial Panel’s Files, N.Y.L.J., Oct. 27, 1978, at 1, col. 3.
whom? The presence of these and other potential problems should not, however, bar an attempt at institution of such a compromise. The problems and open questions are not insurmountable, and the beneficial end results still appear to far outweigh leaving things in status quo under the present selection system.

Indeed, mandatory preselection screening would produce many benefits in comparison to the present system. Foremost of these would be greater education of the public regarding judicial candidates and their qualifications. Voter knowledge of judicial candidates is one of the few areas where there is a fair amount of statistical information. Several studies of voter knowledge and interest have been done in the past two decades; all have produced roughly the same findings. Voters feel that they do not know enough about judicial candidates to cast meaningful votes. As a result, they tend either to ignore judicial elections altogether or to vote by blind or random choice. Given public circulation, the screening report could help to reduce significantly this voter apathy and to produce more informed voting.

In one study, three political science professors at Texas Tech University questioned and interviewed voters in Lubbock, Texas regarding their experience in the November 1976 election of state court judges there. Only 15.4% could name an appellate court judge for whom they voted. The principal reason given by the voters for their problems with voting in judicial elections was "the inadequacy of information provided them before the judicial elections." The study therefore concluded:

[W]e think this situation could be remedied if such groups as the state bar, the League of Women Voters, political parties, and other sources assumed a more active role in informing the public about judicial elections and more widely disseminated information about those who aspire to judicial office. Without such efforts, it is unlikely that judicial elections will fulfill their democratic purposes.

McKnight, Schaefer & Johnson, Choosing Judges: Do the Voters Know What They're Doing?, 62 JUDICATURE at 99 (1978). See generally Bechem, Can Judicial Elections Express People's Choice, 57 JUDICATURE 242, 244-45 (1974); Haggart, The Case for the Nebraska Merit Plan, 41 Neb. L. REV. 723, 733 (1962); Klots, How Much Do Voters Know or Care About Judicial Candidates?, 38 JUDICATURE 141 (1955); Klots, The Selection of Judges and the Short Ballot, 10 Rec. of N.Y.C.B.A. 103 (1955); Van Osdol, Politics and Judicial Selection, 28 Ala. Law. 167, 168-70 (1967); Judicial Selection, supra note 1, at 295-94. In New York, for example, following the 1973-1974 races for court of appeals judgeships, the Institute for Judicial Administration polled voters on several questions ranging from whether they preferred election to appointment of judges to why they did not vote (if they had not) in the judicial election. In response to the latter question, 72% of the persons polled said they had not known enough about the candidates; only 18% said they had not cared enough about the outcome to vote. C. Philip, P. Nejlska & A. Press, Where Do Judges Come From? 103 (Inst. of Jud. Ad. 1976). Other studies in the 1950's and 1960's of voter participation in New York are detailed and discussed in Kaminsky, supra note 1 at 512.

In appointment situations, the screening process can also create increased visibility and thus stimulate better appointments. The resulting detailed knowledge about the potential nominees should assist the appointing executive to make more informed appointment decisions. It can also act as a deterrent to appointments for reasons other than merit, since the appointing executive will know that the public or legislators to whom the executive is himself responsible and answerable have the same information about his appointees as the executive himself.

The mandatory preselection screening process, while undoubtedly discouraging some persons who shun public scrutiny, should nevertheless help to stimulate more able persons to apply for or allow themselves to be proposed for judgeships. If the screeners perform as contemplated, public confidence in the judiciary should increase markedly. More able persons may come forward if the political stigma attached to state judgeships is removed, or even merely lessened. Studies in other states have shown this to be a serious problem under the elective system.

One criticism sometimes raised to the mandatory screening concept is that it is unnecessary because local bar associations and political organizations already do screening on a voluntary basis.

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65 Glen R. Winters, former Executive Director of the American Judicature Society, which was organized as a non-profit body in 1913 for the specific purpose of improving the quality of the judiciary, has described the role of merit plan nominating commissions as follows: The true nature of the judicial nominating commission is a group of people of intelligence and responsibility unconnected with government and politics who can relieve the governor of some of the labor of making appointments and supply a non-partisan objectivity that will make for higher grade judicial personnel. Winters, One-Man Judicial Selection, 45 J. Am. Jud. Soc'y 198, 202 (1962), reprinted in Selected Readings on Judicial Selection and Tenure, at 88 (G. Winters ed. 1973).


68 Indeed, the screening plan does not require or contemplate that the politicians will be the only proposers of potential judicial candidates or appointees; there is no reason why persons could not submit their own names or those of colleagues to the screening committees. This procedure is followed by the nominating committees which suggest appointments to Governor Carey under the voluntary merit system instituted when he took office. See Rubin, supra note 43, at 5, col. 4.

69 See Henderson & Sinclair, supra note 67, at 459.

Bar associations, however, do not and cannot provide sufficient protections.\textsuperscript{71} Bar associations have only limited funds, personnel and time to do judicial screening. As a result, they rarely do more than interview the candidates, review their written summaries of past experience and ask a few questions of references listed in those summaries.\textsuperscript{72} Screening by the political parties is not materially different. This process is also suspect since the parties’ screeners do not reveal who they reject as unqualified and since they are open to charges of bias.\textsuperscript{73} They rarely screen persons other than active party members or their personal choices for judgeships.\textsuperscript{74} Mandatory preselection screening under a formalized, well-staffed and well-financed system should greatly improve upon the present screening efforts in terms of results and public acceptability of the screeners’ conclusions. This is not to say that bar association screening and screening by the political parties should be ended by the adoption of official screening committees; the voluntary programs can and still should continue as a supplement to and potential check upon the official screeners.\textsuperscript{75}


\textsuperscript{72} See Levine, supra note 70; see generally Philip, How Bar Associations Evaluate Sitting Judges (Inst. of Jud. Ad. 1976); Reath, Judicial Evaluation—The Counterpart of Merit Selection, 60 A.B.A.J. 1246 (1974). The experience of those participating in President Carter’s federal merit selection plan has indicated that even they feel that they have had insufficient time and staff to do their screening work. Slotneck, What Panelists are Saying about the Circuit Judge Nominating Commission, 62 JUDICATURE 320, 323 (1979).

\textsuperscript{73} This problem has been claimed to exist on some of the merit nominating committees which President Carter has used to screen candidates for federal appellate appointments. See Fish, supra note 51, at 11.

\textsuperscript{74} The acceptability and integrity of the results of bar and political screening committees of one bar association often disagree with those of other bar associations and with those of the political parties. Yet, they rarely elaborate upon or even make public their reasoning and specific findings about the candidates. See, e.g., Hochberger, City Bar Defends Its Rating All Court Candidates in City, N.Y.L.J., Nov. 6, 1978, at 1, col. 2; Hochberger, City Bar Rating of Candidates Revives Inter-County Dispute, N.Y.L.J., Nov. 3, 1978, at 1, col. 2; Three Bar Groups Rate Candidates For Judgeships, N.Y.L.J., Nov. 6, 1978, at 1, col. 2; Bar Committees Rate Candidates for Court Seats, N.Y.L.J., Oct. 27, 1978, at 1, col. 2.

\textsuperscript{75} In contrast Judge Jacob Fuchsberg, of the New York Court of Appeals, whose campaigns for chief judge and associate judge of that court provoked heated controversy, wrote in a 1973 letter to New York Law Journal:

\textbf{... Rating of statewide candidates should be done jointly by all the dozens of bar associations in our state instead of each pursuing its own predilections. It is unseemly for associations to be vying with one another for jurisdiction and local associations to be preempted on local judgeships. The rating body should be broad-based. It should have objective standards. It should stay out of politics. It should}
The most serious and substantial doubts raised about the mandatory screening concept relate to the selection of the screeners. Obviously, the screening process will only be as good as the people who do it. Who will screen the screeners? How will they be selected? What checks will there be on their conduct? Will we be merely substituting the foibles and problems of dealing with their personal qualities for those of the judicial candidates? The uncertainty of answers to these questions, however, does not provide a sufficient rationale for rejecting the screening process. Mandatory screening will significantly improve the present system, and there are suitable if imperfect answers to the above problems.

For example, a system could be provided whereby selection is done by a mixed group of persons, including the presiding justices of the appellate division and judicial districts, the state's chief judge, and the Governor or local chief executive. Since a primary responsibility of the presiding and administrative judges is the proper and efficient functioning of the courts under their supervision, they have a direct interest in seeking committee members who will insure high quality on their courts. Any selections by executive and legislative leaders will be subject to public scrutiny, and they can be held accountable for the activities of their appointees. Thus, they too have an incentive to appoint highly competent members to the screening committees. If the appointive method proves faulty or

pursue due process. It should refrain from public announcements containing language which is misleading and which pretends to a degree of authoritative judgment which it cannot truly make. It should not allow the impression of unanimity when it does not exist nor fail to indicate that the judgment is that of a small committee and not a mass of members.  


See Goldstein, Voters to Decide on Appointment of Judges, N.Y. Times, Oct. 20, 1977, § B3, col. 3; O'Connor, Should State's Top Judges Be Appointed? No, Newsday, Nov. 3, 1977, at 94, cols. 3-4; A Need for Change, supra note 6, at 629. For example, a recent study of the merit selection nominating commissions appointed by President Carter reveals that 87% of the members were Democrats and that a high percentage had been early participants in the President's campaign. Slotneck, note 72 supra. See also Tolchin, Testing the Merit of Carter's Merit Selection, N.Y. Times, Dec. 13, 1978, § 4, at 14, cols. 1-3.

See, e.g., Kaminsky II, supra note 42, at 531-32.


unsatisfactory then a partially appointive and partially elective method may be worth trying.

By requiring that the committees be nonpartisan and be made up of laymen as well as lawyers, and by providing for tenure of moderate duration and staggering the terms of the committee members, the process can further guard against domination by any particular group or person. The knowledge that their reports on the candidates will be made public may also stimulate care and diligence among the screeners. Finally, procedures can be provided for

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Rec. of N.Y.C.B.A. 242, 257 (1967) (elected official as executive officer of judicial screening commission will prevent nomination of social, religious, ethnic, or racial elite).

See Ashman & Alfini, supra note 41, at 38-39; Fish, supra note 51, at 10; Robertson & Gordon, Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee, 58 Mass. L.Q. 131, 132 (1973).

Staggered terms would insure that the majority of each committee consists of experienced members.

Some critics of merit selection have contended that the screening committees would themselves become politicized. See Goldstein, Voters to Decide on Appointment of Judges, N.Y. Times, Oct. 20, 1977, § B3, col. 3. Restrictions on the membership of the screening committee, e.g., that they can hold no other political or governmental office at the same time and that they cannot themselves seek judicial office for a moderate period after serving on the screening committee, may help to insure that the interest of the screeners be confined to their search for high quality judges.

Another difficult but important question is whether the screeners will really be able to discern what makes a good judge. Much has been written on this problem, but it is far from being resolved. See, e.g., Fenoglio, Citizens Size Up Their Judges, 59 Judicature 472, 476 (1976); Fish, supra note 46; Rosenberg, The Qualities of Justices—Are They Strainable?, 44 Tex. L. Rev. 1063 (1966); Rubin, supra note 62; Sheldon, supra note 41; Van Osdol, Politics and Judicial Selection, 28 Ala. Law. 167, 174 (1967). Defining the qualities of “the bad judge” is not too difficult. Aside from such obvious general qualities such as integrity, experience and honesty, however, no one has been able to provide a suitable definition of “the good judge.”

Interestingly, several commentators on this subject are receptive to the “I know what it is if I see it” approach. The same personal trait may be a positive or a negative in two different people, depending on its mix with other qualities and the degree to which it is possessed. Since all people are different, with their own individual qualities, the ultimate test in screening must be an ad hoc one.

Professor Rosenberg cautioned, in what remains the leading article on this subject:

Necessarily, the criteria that can be marked out will not apply to every judge or every court, for judges' functions are enormously diverse. Judicial behavior that is deemed exemplary in one court may be unacceptable in another, depending on whether the case at hand is civil or criminal, on trial or appeal, substantial or petty, jury or nonjury, and so on.

Rosenberg, supra, at 1064.


Perhaps most difficult, it is almost impossible to predict what changes will occur in a person when he or she ascends to the bench. See, e.g., Alpert, Atkins & Zieler, Becoming a Judge: The Transition from Advocate to Arbiter, 62 Judicature 325 (1979).
the possible removal of committee members who are derelict in their
duties, such as removal by majority or two thirds vote of either their
fellow committee members or those governmental and judicial offi-
cials with appointing responsibility under the screening plan.84

How efficiently and effectively the screening committees would
be able to handle their workloads, how much financing they would
need, and what procedures they would adopt are matters that will
depend to a great extent on the sincerity of the legislators who will
be enacting the screening system and voting on its powers and its
budget requests and constraints.85 If a mandatory preselection
screening plan is adopted, legislative cooperation and support will
be essential before any improvement in the present system can be
accomplished.86

B. Alteration of the Nominating Process

Another line of constructive compromise proposals focuses on
the manner in which judicial candidates are nominated for election.
The theory is simple: improve the nomination process and the qual-
ity of the nominees, and the quality of those elected will improve.87

Before exploring those proposals, a brief review of the current nomi-
nating process and its pitfalls is in order. Surprisingly little is gener-

84 See Kaminsky II, supra note 42, at 552-53.

85 Several legislative “problems” surfaced during the 1978 legislative session in connection
with the legislation proposed to implement the 1977 constitutional amendment for merit
appointment of court of appeals judges. The principal dispute involved the number of names
which would be submitted to the Governor for each appointment. The Governor wanted and
received a large number of candidates for each vacancy. The reformers, however, sought to
limit the number to between three and five, so that the Governor could not merely wait for
“a name, pre-selected for political or other reasons.” They argued that “the longer the list
becomes, the more likely it is that choices will be made for considerations—especially politi-
cal—other than merit.” N.Y. Times, Apr. 25, 1978, at 36, col. 3 (Letter to Editor from Schair
& Sperling). See also Schair, Court Reform: Looking Ahead at Plans, Priorities For This Year,
N.Y.L.J., Jan. 19, 1978, at 23, col. 5, at 34, col. 2; Hochberger, Carey, Breitel Split on Issue
of Naming High Court’s Judges, N.Y.L.J., Apr. 7, 1978, at 1, col. 2. For a detailed discussion
of the specific provisions of the implementing legislation, see Commission on the State Courts
of Superior Jurisdiction, Legislation Implementing the Court Reform Amendments, 33
Record 525 (1978).

86 Serious questions have been raised about the constitutionality of a mandatory screen-
ing plan adopted by mere legislative statute. See generally Jardine, Ballot Access Rights: The
Constitutional Status of the Right to Run for Office, 1974 Utah L. Rev. 290, 317-31; Com-
ment, A New Dimension to Equal Protection and Access to the Ballot: American Party v.
White and Storer v. Brown, 24 Am. U.L. Rev. 1293 (1975); Developments in the
Law—Elections, 88 Harv. L. Rev. 1111, 1134-36 (1975). The more persuasive view appears to
be that, since the underlying purpose of the plan is to create and maintain a highly qualified
judiciary rather than restrict access to the ballot or the bench, a statutory plan would be
constitutional. See Curtiss, supra note 45, at 322-23.

87 See notes 43 supra and 203 infra.
ally known or written about this aspect of judicial selection.

Article 6 of the New York State Constitution specifies that justices of the supreme court and judges of the county courts, the Civil Court of the City of New York and the Nassau County District Court be elected by the voters at general election. The constitution does not, however, specify how candidates for election to judicial office become nominated. Similarly, while article 6, section 20 of the constitution prescribes certain requirements for election to judicial office, none of those provisions relate specifically to the nominating process. The legislature has specified the method for nomination of supreme court justices in Election Law § 6-106, which provides for nomination by political party judicial nominating conventions in each judicial district.

Election Law § 6-124 provides the procedure for constituting the judicial conventions. Each party is to hold a separate judicial convention for each judicial election district. Due to the constitutional requirement that all voters have proportionate representation, the districts are drawn on lines related to population size rather than county lines. Delegates to the judicial conventions are elected by the public at the primary election immediately preceding the general election involved. The number of delegates is computed by a formula based on the number of votes cast in the district for the party’s candidate in the last gubernatorial election,

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\[\text{\textsuperscript{48}}\text{ N.Y. Const. art. VI, §§ 6, 10, 12, 13 & 16.}\]

\[\text{\textsuperscript{49}}\text{ N.Y. Const. art. VI, § 20(a) requires supreme court justices and court of claims judges to be “admitted to practice law in this state [for] at least ten years” and lower court judges to be lawyers for at least 5 years. Furthermore, subdivision (b) provides that no judge or justice may hold any other public or political office or engage in the practice of law while on the bench.}\]

\[\text{\textsuperscript{50}}\text{ The New York Election Law provides that “[p]arty nominations for the office of justice of the supreme court shall be made by judicial district convention.” N.Y. Elec. Law. § 6-106 (McKinney 1978).}\]

\[\text{\textsuperscript{51}}\text{ The New York Election Law § 6-124 provides in part:}\]

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules.

\[\text{\textsuperscript{52}}\text{ N.Y. Elec. Law § 6-124 (McKinney 1978).}\]

\[\text{\textsuperscript{53}}\text{ The New Constitution divides the state into eleven judicial districts. See N.Y. Const. art. VI, §§ 4(a) & 6(a).}\]


subject to the party's rules regarding the total number of candidates involved. The rules for the time, place and procedure of the conventions are left by Election Law § 6-126 to "a committee appointed pursuant to the rules of the [party's] state committee." Provision is made for the designation of a temporary convention chairperson to be selected by roll call and for official minutes of the convention to be kept and filed with the state board of elections or, in the case of conventions in New York City, the board of elections of that city. The statute requires that a quorum be present and the cases have made clear that only delegates selected strictly in accordance with the statutory procedure can constitute a quorum. In the absence of a properly constituted quorum, the convention and its nominations will be nullified by the courts.

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96 N.Y. ELEC. LAW § 6-126(2) (McKinney 1978). Early decisions clearly indicated that the failure to have a roll call for temporary chairperson would be fatal to the legality of the convention. See, e.g., French v. Roosevelt, 18 Misc. 307, 41 N.Y.S. 1080 (Sup. Ct. N.Y. County 1896):

The necessity for such preliminary roll in such cases is plain; otherwise the officer or person calling the convention to order and presiding over its action, in the selection of the temporary chairman, is absolutely without proper evidence before him of the right of those voting to take part in the proceedings of the convention. . . . The danger of taking a vote *viva voce* under such circumstances is manifest, as no opportunity is presented for an objection to the reception of a vote, and the chairman, even presuming that he had personal knowledge with respect to the authority of any of the delegates, would be utterly unable to determine in the unison of voices whether all of those who participated were entitled to do so.

Id. at 309, 41 N.Y.S. at 1082. The current statute permits a vote *viva voce* where only one candidate is nominated for the position. N.Y. ELEC. LAW § 6-126(2) (McKinney 1978).

97 N.Y. ELEC. LAW § 6-126(3) (McKinney 1978).


99 See Wager v. New York State Bd. of Elections, 59 App. Div. 2d 729, 398 N.Y.S.2d 551 (2d Dep't), aff'd, 42 N.Y.2d 1100, 369 N.E.2d 1192, 399 N.Y.S.2d 659 (1977). In Wager, the Conservative Party of Suffolk County failed to file timely designating petitions for its delegates to the Tenth Judicial District Nominating Convention. In an attempt to cure that oversight, the party persuaded the Suffolk County Board of Elections to accept its state executive director's designations by letter after the filing date and had its convention with those delegates helping to create a quorum. A candidate of another party objected to the nominations. The court held that all nominations at the convention were invalid, stating:

We find no authority, nor is there any supplied by the respondents, to convince us that certification by the Suffolk County Board of Elections of the approved nominees for delegates by the executive director of the New York State Conservative Party would be a valid alternative [to the statutory procedure] for acquiring delegates . . . . The Conservative Party Judicial Convention for the Tenth Judicial District consisted of only duly elected delegates from Nassau County. This is insufficient to constitute a quorum . . . . Without a quorum the action of the conven-
There are virtually no other legislative requirements or restrictions on the conduct of the conventions. Indeed, several of the restrictions which the statute provides for other political nominating conventions are expressly excluded for judicial nominating conventions. Most important of these is the requirement that the nominee be an enrolled member of the party. The legislature’s waiver of this requirement permits and has resulted in bipartisan endorsement of judicial candidates in many elections, thereby rendering their election a virtual *fait accompli* before the voters even enter the voting booth.

If one of the principal purposes of the convention system is to preserve the party leaders’ control over the nominating process, the present judicial convention system certainly fulfills that purpose. The overwhelming consensus of observers has been that the party leaders dominate the selection of delegates to the nominating conventions and, consequently, the conventions themselves. A variety of reform proposals have been suggested to correct this situation and convert the nominating stage into a positive element of the judicial selection process.

The most far-reaching proposal of this type is to disband entirely the judicial convention procedure. The foremost advocate of

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106 See, e.g., N.Y. ELEC. LAW § 6-120(4) (McKinney 1978). Section 6-120(4) allows candidates for judicial office an exception from the usual requirements that candidates be enrolled members of the party on whose tickets they run.

107 See, e.g., Wager, *Required, But Not Permitted*, N.Y. Times, Nov. 20, 1977, § 21 (L.I.), at 24, col. 3; Rosenman, *A Better Way to Select Judges*, 48 JUDICATURE 86, 88 (1964). The bipartisan endorsement is one of the most controversial aspects of judicial nominations. On the one hand, it permits both parties to rally behind obviously superior candidates in order to assure their election. This occurs particularly when candidates run for reelection. On the other hand, it deprives the voters of any meaningful choice, thereby transferring the selection process from the public to the party leaders who dominate the judicial conventions.

108 See note 154 infra. The Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York recently concluded: “Under the present system, delegates to the judicial conventions generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial selection process.” Committee on State Courts of Superior Jurisdiction, *A Proposal to Restructure the Judicial District Nominating Convention System*, 32 REC. OR N.Y.C.B.A. 615 (1977). [hereinafter cited as Committee Report]. A similar conclusion was reached in a recent newspaper exposé of the 1977 Democratic judicial convention in the Bronx, which is one of the few areas where vying intra-party factors still actively battle over control of the convention. The article indicated that the leaders control the selection of delegates and, through them, the nominating process. Fowler, *The ‘Making’ of Judges in New York*, N.Y. Times, Oct. 10, 1977, at 1, col. 4.
such reform was the Dominick Commission, which concluded in 1973:

This method of selecting nominees is subject to two major failings. First, the method of allocating the number of delegates to the convention from each county, the selection of these delegates and indeed the very proceedings of the conventions are not well publicized and therefore generally not visible to the electorate. Second, since the number of delegates to the convention is geared to population, the more populous counties have been able to control the nominating convention and have tended to nominate supreme court justices from the residents of these counties . . . . For these reasons, the Commission recommends the abolition of the judicial district convention. The Commission recognizes that partisan politics cannot be eliminated as a basis for judicial selection even if the size of the electoral unit is reduced from the judicial district to the county. The abolition of the district convention system will, however, eliminate the almost invisible nature of the proceedings and will permit the voters to become better informed of the proceedings.\textsuperscript{103}

The principal difficulty with proposals calling for elimination of the judicial conventions is their lack of support in the legislature.\textsuperscript{104} In addition, elimination alone will not suffice to effect the desired improvement. If the conventions are to be eliminated, a viable alternative nominating process must be enacted. While to do that is possible, it appears to be more practical to propose reforms to the convention process itself. For example, to simply replace the conventions with nominating petitions and primaries could exacerbate some of the problems which already plague the election process.

One proposal would be to create a merit selection committee within each party for each of the conventions. The committee would screen and propose a list of highly qualified candidates to the convention, which would then be required to choose its candidates from the list. This proposal would of course face the same potential problems as the mandatory preselection screening proposal and the proposal for conversion to merit selection appointment of judges.\textsuperscript{105} The


\textsuperscript{104} Committee Report, supra note 102, at 617. No such proposal has even come close to passage in the 5 years since the Dominick Commission proposed abolition of the judicial nominating conventions.

\textsuperscript{105} See note 76-79 and accompanying text supra.
legislature, however, will probably be no more receptive to it than other merit selection plans that have been proposed in the past, particularly if it is mandatory rather than merely voluntary.

A more practical alternative has been suggested by the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York. Its proposal would reduce the number of delegates to one per assembly district to make conventions "more deliberative" and would bar the delegates from holding other political office. The Committee proposal would also provide a term of office for delegates of at least two years to enable them to develop a working relationship and possibly hold earlier conventions and thus gain time to evaluate potential candidates. By also equipping the conventions with screening facilities, a permanent staff and adequate funding to compensate the delegates, the conventions and their delegates could gain time and the resources to give more attention to their duties. The most important aspect of the Committee's proposal is the attempt to reduce the size of the conventions. The Committee explained that "the smallness of the conventions would permit actual deliberations, and might make it more difficult for the delegates to vote automatically as they are instructed by their district or county leaders." Another improvement which reduction of the size of the conventions might effect would be to give the proceedings greater visibility and encourage more careful monitoring of the conventions by the media and concerned civic organizations.11

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106 Committee Report, note 102 supra, at 615. The Committee’s proposal was pragmatically inspired:

The Committee . . . has concluded that final enactment of merit appointment for Supreme Court justices may be so distant in time that this interim improvement in the judicial district convention system should be strongly advocated at this time.

Id. at 618.

107 Id. at 616.

108 Id. at 616-17.

109 Id. at 616.


The Committee’s proposal appears to offer a sensible and workable compromise reform. If combined with other reforms, such as mandatory prenomination screening and a prohibition against bipartisan endorsements, the proposal could enhance significantly the quality of judicial nominees.

C. Nonpartisan Election

The first question that generally comes to mind when one discusses the problem of political control over judicial elections is: why not simply make the elections nonpartisan? If we do not allow the political parties to play a role, and indeed do not even reveal the candidates’ party affiliations, would that not focus attention on the candidates’ relative qualifications? Although it is not easy to explain why, there is almost unanimity among informed commentators that nonpartisan election simply will not work and, in fact, represents a step backward.

As discussed below, however, nonpartisan election, coupled with other compromise reforms, can play a constructive role in the reform effort.

A case in point may serve to demonstrate that nonpartisan election, in and of itself, is not an acceptable alternative. In 1973 a nonpartisan civic group called “Good Judges for Philadelphia” mounted a campaign to fill thirty-nine judgeships on the Philadelphia Court of Common Pleas. Over 250 candidates were on the ballot. Despite much publicity, only twenty per cent of the electorate voted; only those “Good Judges” who had political party endorsement were elected.

The “Good Judges” incident demonstrates two problems that have plagued the concept of nonpartisan election since it was originally proposed one hundred years ago: voter apathy and lack of voter knowledge about the candidates.

Other similar cases are not difficult to find. For example, in 1972 Florida shifted from 90 years of partisan election, dominated by the Democratic party, to nonpartisan election. Five years later

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114 Id. at col. 3.

115 See generally Barber, Ohio Judicial Elections—Nonpartisan Premises with Partisan Results, 32 Ohio St. L.J. 762, 773-74 (1971).

116 Karl, supra note 10, at 290.
a commentator reviewed the results of the 1976 elections for the Florida Supreme Court and concluded:

Though the non-partisan system did much to remove judicial elections from the control of any political party, it did little to improve the turnout of voters, who are so often apathetic in judicial contests . . . . [O]nly 21 percent of the electorate voted in the primary, and . . . only 18 per cent of the voters turned out for the runoff.\footnote{Id. at 291.}

Significantly, the Florida study concluded that a primary reason for this poor turnout was the public's lack of knowledge about the candidates.\footnote{Id. at 291-92. The same conclusion has been reached in studies of partisan elections. See, e.g., Beechem, Can Judicial Elections Express the People's Choice?, 57 JUDICATURE 242 (1974); Klots, How Much Do Voters Know or Care About Judicial Candidates?, 38 JUDICATURE 141 (1955); McKnight, Schaefer & Johnson, Choosing Judges: Do the Voters Know What They're Doing?, 62 JUDICATURE 94 (1978); Van Osdal, Politics and Judicial Selection, 28 ALA. LAW. 167, 168-70 (1967).}

While voter ignorance is surely not the only cause of the voter indifference in judicial elections, it is surely one of the primary causes. In the highly charged and publicized 1974 campaign\footnote{For example, some of the campaign advertising featured candidates for judgeships closing jail doors and making other promises about toughness on crime. The same type of tactics were employed in the 1972 election between Judge Charles Breitel and Jacob D. Fuchsberg for chief judge of the court of appeals. After that election, the Institute of Judicial Administration concluded that "the Breitel-Fuchsberg contest raised significantly voter consciousness of the importance of chief judge." Quoted in Goldstein, Voters to Decide on Appointment of Judges, N.Y. Times, Oct. 20, 1977, § B, at 3, col. 3.} for judgeships on the New York Court of Appeals, over 4.6 million votes were cast for each of the two seats involved, compared with 5.2 million cast in the gubernatorial election that same day.\footnote{C. Philip, P. Nejelski & A. Press, Where Do Judges Come From? 119-20 (Inst. of Jud. Ad. 1976).} Thus, it is safe to say that, where the voters have been treated to some knowledge about the candidates, they have shown themselves to be more interested and more likely to take part in judicial elections.\footnote{See note 120 supra.}

The "voter ignorance-indifference" syndrome has plagued non-partisan elections for years.\footnote{See Note, Judicial Selection and Tenure—the Merit Plan in Ohio, 42 U. CIN. L. REV. 255, 265-67 [hereinafter cited as Merit in Ohio]; cf. Judicial Selection, supra note 1, at 292-95 (partisan and nonpartisan judicial elections plagued by lack of voter knowledge).} Thus, the American Judicature Society has refused to support it because offering the voters only a name and an appearance breeds what the Society calls the "dictatorship of irrelevancy."\footnote{The Dictatorship of Irrelevancy, 48 JUDICATURE 124 (1964).}
election has been in effect for several years show that, if voters participate in such judicial elections at all, they tend to be influenced by the ballot position or name of the candidate and, paradoxically, party affiliation.\textsuperscript{124}

In light of these criticisms, it is not surprising that nonpartisan election is regarded so poorly by judicial election scholars.\textsuperscript{125} These failings of nonpartisan election as a reform do not necessarily mean that there is no place for it in our judicial selection system.\textsuperscript{126} If assisted by, or implemented as a corollary to, other reforms, nonpar-

\textsuperscript{124} In Ohio, one detailed review of the nonpartisan election system concluded:

\textit{The non-partisan elective method forces the voter to choose among judicial candidates on the basis of the politics of irrelevancy. Without the ambition or the ability to obtain enough information to make a meaningful choice, the voter often responds in his dilemma by seizing upon any circumstance, irrelevant though it may be, in an attempt to make his vote not totally meaningless. Thus, a candidate's prime qualification may be a familiar name, a proper place on the ballot, or the equally irrelevant factor of political party affiliation, even though the ballot is non-partisan.\textsuperscript{122} Merit in Ohio, supra note 122, at 267 (citations omitted).}

Another commentator, in discussing the failings of nonpartisan election, has concluded:

\textit{[The] evidence suggests that where the nonpartisan method is utilized, a candidate's character, legal ability, experience, and judicial temperament are of little importance. The public is simply unknowledgeable about these factors. On the other hand, the size of a candidate's campaign chest, his television image, or his position on the ballot are particularly crucial. Large sums of money purchase 'needed exposure and thus enable the physically attractive candidate to gain popular support. Further, political science research suggests that a candidate benefits if his family name is widely recognized and if his name is placed at the top of the ballot. Berkson, supra note 112, at 7.}

Although the election is supposed to be nonpartisan, most candidates are nominated through partisan political activities, and the political parties continue to campaign for candidates of their choice and circulate lists of the nominees and their party affiliations. \textit{See e.g., Merit in Ohio, supra note 122, at 268; Barber, supra note 115, at 766. See also S. Escovitz, Judicial Selection and Tenure 7 (Am. Jud. Soc'y 1975).}

\textsuperscript{125} Interestingly, early critics of nonpartisan election argued that its principal drawback is its elimination of the parties' selection process. For example, former President and Chief Justice William H. Taft criticized nonpartisan judicial elections in a speech before the American Bar Association in 1913 because it “permitted unqualified persons who could not even muster political support to get elected to the bench through vigorous campaigns.” Taft, \textit{The Selection and Tenure of Judges}, 38 A.B.A. Rep. 418 (1913). Cf. Harding, \textit{The Case for Partisan Election of Judges}, 55 A.B.A.J. 1162 (1969) (partisan election of judges promotes the expression of the will of the electorate in judicial policy decisions). \textit{See also Escovitz, supra note 124, at 8.}

\textsuperscript{126} Another weakness of nonpartisan elections is the lack of control over the size of the ballot. Vote splitting can be so great that the results fail to represent actual voter sympathies. To draft arbitrary size limitations or other ballot restrictions to cure this problem may raise serious federal and state constitutional problems, unless such restrictions are specifically linked to improving the quality of the bench. \textit{See, e.g., Curtiss, Screening Judicial Candidates for Election, 59 Judicature 320 (1976).}
tisan election can play a constructive role in our reform efforts. For example, it is worth exploring the use of nonpartisan election coupled with either mandatory screening or public campaign financing. The gains that may be achieved by taking politics out of the judicial selection process as much as possible make it worth while to study and explore further such possible hybrid proposals which include nonpartisan election as one of their elements.

D. Local Option

One compromise which has received considerable attention in recent years is the so-called “local option.” Under this proposal, the issue whether supreme court and local judges should be appointed or elected would be submitted to the voters of different areas in the state by a series of local referenda. The principal proponent of this compromise, the late Senator Gordon, was of the view that people in different areas of the state have different views regarding the proper method of selecting their judges, and that any across-the-board judicial reform proposal would not succeed in the state legislature. Senator Gordon’s views cannot be disregarded lightly. As Chairman of the Joint Task Force on Court Reorganization and the Senate Judiciary Committee, he spent several years holding and attending hearings all over the State upon virtually every conceivable judicial selection proposal raised in recent years.

Underlying the local option proposal is the assumption that the stimulus and need for the merit plan varies from one locality to the next. Senator Gordon observed that the loudest proponents of merit selection were from New York City and, to a lesser extent, Buffalo. His own experience in Westchester and the predominance of views from other nonurban areas appeared to indicate a strong preference for and confidence in the elective system. The judicial system, it
is reasoned, not only can but should take cognizance of and accommodate these differences throughout the state.\textsuperscript{131}

Local option is not, however, without its critics and its own inherent defects or problems. Former Chief Judge Breitel, for example, has criticized the proposal on the ground that it will foster fractionalism and undermine the type of unanimity required of the courts on a statewide basis.\textsuperscript{132} Moreover, critics ask: which local units should be permitted to select their own mode of selection? Should it be on a county basis, a judicial district basis or some other basis? If done on either a county or district basis, what happens where portions of one county fall within two or more different judicial districts?\textsuperscript{133} Does it make a difference that appellate division justices will be selected from among the ranks of appointed and elected judges? Who should fund the costs of a local merit selection system?

None of these questions appears to present an insurmountable barrier to adoption of the local option. How judges are selected need not affect their decisions or the unanimity of decisions by the supreme court. If appellate division justices are all selected in the same way, it should make little difference how they reached the trial courts. Indeed, since, under the current system, the majority of judges are appointed to fill vacancies or new posts, appellate division justices are already drawn from "mixed ranks." Moreover, the costs of financing the system can be handled in a manner similar to the way that the costs of elections and local court administration are currently handled.

The local option proposal has much surface appeal. If a particu-

\textsuperscript{131} See Gordon, supra note 127. A number of states, including Missouri, Kansas, Indiana and Arizona, have adopted local option systems. Id. at 286.


\textsuperscript{133} Where a county is split between judicial districts one obvious answer is to vote on the options on the basis of judicial, assembly, or election districts. This solution, however, may involve inequities of its own which should be carefully considered. Gerrymandering has resulted in several strangely drawn election and assembly districts, with small pieces of some localities tacked on to other areas. Thus, much of the electorate may be disenfranchised on this important community issue if the voting is done on such a basis. On the other hand, voting by judicial district may not, in some localities, accurately reflect local sentiment, due to the size of the districts. Additionally, much of local government, including the executive, and in many areas the county legislature, is organized by county. Thus, voting on this local issue on any basis other than by county may give the local judiciary an undesirably anomalous character when compared with other arms of local government.
lar community wants a particular system, why not allow it to so elect? Moreover, since the trial courts serve a local area, it seems logical to make them particularly responsive to local wishes. Thus, except for a possible philosophical aversion to having a mixture of selection systems rather than a unified system, the local option proposal appears worthy of continued consideration.

E. Public Sponsorship of Judicial Campaigns

Two recurrent drawbacks of judicial election campaigns are the often staggering costs and the difficulty that the candidates face in attempting to establish a campaign identity.134 Broadening the nominating process to provide for more primary contests will obviously escalate the costs. The difficulty of developing a public identity results not only from this cost, but also from the restrictions placed upon the things judicial candidates are permitted to say in their campaign speeches and literature.135 Campaign statements must be so bland that it is impossible to generate significant media interest. The result has been that voters learn very little about the candidates and thus are discouraged from taking an active role in judicial elections.136

One way that has been suggested to deal with the financial aspect of the problem is to have the state finance and oversee judicial campaigns. A nonpartisan, state-funded judicial elections commission could be established which would print and circulate appropriate campaign literature and even help finance responsible campaign advertising in the public media. By providing tax or other financial incentives for coverage of judicial elections, the state might also stimulate newspapers and broadcast media to cover the


135 See notes 147-52 and accompanying text infra. As noted by one commentator: [T]he advantages which the public has been led to expect from judicial electioneering are greatly restricted by the ethical regulations of both the bar and the courts. Indeed, unless a candidate had been guilty of some gross professional or judicial abuse, there are very few issues which may be openly aired for the benefit of the voting public. Judicial campaigns are therefore principally ceremonial with minimal give and take between prospective judges and their electorate. Judicial Selection, supra note 1, at 290-91.

136 This problem is readily apparent to the candidates themselves and is by no means limited to New York. In a revealing and candid article, one judge of the Pennsylvania Superior Court, while campaigning for that state's equivalent of New York's appellate division, found that many people "did not know there was a Superior Court, and of those who did know, many thought it was a trial court." Spaeth, Reflections on a Judicial Campaign, 60 JUDICATURE 10, 11 (1976).
elections. Public funding for these campaigns could also enable the state to impose reasonable ceilings on campaign spending to prevent candidates from "buying" elections.\footnote{137}

Another type of public campaign funding plan was adopted by the Dade County Bar Association of Florida in the 1970's.\footnote{138} Under that plan, a "judicial trust fund" was established, made up of contributions from lawyers in Dade County. The lawyers were asked further to pledge that they would not make any other campaign contributions. Candidates who were found "qualified" by a screening panel and who pledged not to accept other contributions from lawyers received pro rata distributions from the fund for use in their campaigns for election or retention election, the largest amounts going to judges running in contested elections. The balance of the fund was used to print and publicize the biographical and background information on the candidates.\footnote{139}

The Dade County plan proved to be a success and met with public and bar approval. Some criticized it, however, for not addressing the real problem, i.e., the method of selection.\footnote{140} Others complained that it deprived lawyers of their right to support individual candidates and even compelled them indirectly to support candidates whom they might disfavor.\footnote{141} But, in general, the plan appears to have been greeted as a novel and constructive method for easing some of the principal drawbacks of privately financed campaigns. The plan's virtues and potential virtues can be summarized as follows: It helped remove the necessity for the candidate to

\footnote{137}{In the 1973 campaign for chief judge of the court of appeals, Jacob Fuchsberg reportedly spent between $700,000 and $800,000 and Charles Breitel almost $500,000. C. Philip, P. NeJelski & A. Press, Where Do Judges Come From? ii, 85-86 (Inst. of Jud. Ad. 1976). This problem is not limited to New York. Another recent study indicated that candidates for trial judgeships in Los Angeles spend in excess of $50,000 on their election campaigns. Beechem, Can Judicial Elections Express the People's Choice?, 57 Judicature 242, 245 (1974). See also A Need for Change, supra note 6, at 618-19 n.70.}

\footnote{138}{See White, New Approach to Financing Judicial Campaigns, 59 A.B.A.J. 1429 (1973).}

\footnote{139}{The attempt to educate the voters is the most important aspect of the proposal for public sponsorship of judicial campaigns. The public's lack of knowledge about judicial candidates is the most emphasized and indisputable flaw in the elective system. See note 118 supra.}

\footnote{140}{White, supra note 138, at 1430. The President of the ABA, however, has praised the plan: While it is regrettable that the tremendous expense of judicial campaigns necessitates outside campaign contributions, your proposal seems to me the most practical way of control which I have yet seen proposed. Additionally, it conforms to the highest ethical procedures for both sitting judges and judicial candidates, and it is fully in accord with the proposed new code of judicial conduct. . . .}

\footnote{141}{Id.}
solicit contributions from those who might appear before him or her in the courtroom. It also removed the pressure that many lawyers felt to contribute to the campaigns of certain judges out of fear of reprisal. In addition, the plan appeared likely to encourage more candidates to offer themselves for office.

The Dade plan’s principal drawbacks appear to be its limited scope and voluntary nature. A broader fund, not limited to lawyers’ contributions and not circumventable by the candidates’ merely declining to participate, appears desirable. More confidence in the plan might also be generated by not limiting it to contributions from attorneys; that would also remove the potential stigma that it is “bar-controlled.”

The cost of judicial campaigns, of course, varies with the election. Where a candidate has bipartisan endorsement or is running as the party candidate in a “safe district,” very little expense is incurred. In such a situation, virtually no campaigning even takes place. Contested elections, however, may cost the campaigners tens or hundreds of thousands of dollars. Whether the accurate cost estimate for trial level campaigns is $50,000 or $200,000, it is clear that such expenses seriously tax a candidate’s resources and inhibits the ability or desire of many to run. If the candidate turns to the party for this financing, the result is to “cast a shadow upon the dignity of the judiciary.”

Public financing of judicial campaigns could help remove this deterrent to active judicial campaigns. The specter of judges being saddled with monetary and nonmonetary campaign debts would be lifted. Adequate funding for more detailed

142 While it would appear that such a proposal could be made compulsory for the candidates, it is questionable whether the legislature can compel all members of the Bar to contribute to a single judicial election fund and to that fund only.

143 Another difficulty with privately financed judicial campaigns is the continuing financial burden they often create for the judge, both in terms of campaign deficits and reelection expenses. Most of the normal political methods for paying off such deficits, such as post-election fund raisers, are not available for judges. Judicial candidates are prohibited to know the names of those who contribute to their campaign, since the contributors may appear before them in court. Mrs. Lambert Draws Criticism Over Fund-Raising Party for Her, N.Y. Times, Dec. 5, 1977, at 41, col. 3.

144 See notes 134 and 137 supra. The ramifications of the high cost of campaign for judicial office was aptly summarized by one commentator:

When a judge must pay one hundred and fifty thousand dollars in campaign expenses to obtain a judicial post which pays a salary of thirty-five to fifty thousand dollars a year, we are obviously saying that no one shall be allowed to be a judge unless he is a rich man; or else we are saying that judges must indebted and obligate themselves to persons to whom they will owe fulfillment of obligations after they attain the bench.


145 A Need for Change, supra note 6, at 619.
and better publicized debate could also be assured. \(^{146}\)

Effective campaign debate in judicial elections requires more than money however. Methods must be found to stimulate media and public interest in the candidates and their positions. Foremost in this regard is to remove some of the restrictions on responsible but lively campaign debate. At present, judicial candidates are prohibited from discussing many of the legal issues which are of particular interest to the public. \(^{147}\) As former New York supreme court Justice Eli Wager recently commented:

Judicial campaigns are farcical in that, unlike campaigns for political office, they seem to be designed to keep the public uninformed about the candidates and the issues. The Canons of Judicial Ethics prevent candidates for judicial office from discussing their opponents' qualifications, reputations for legal experience and proficiency or, indeed, anything other than the candidate himself, his own background and experience. \(^{148}\)

Similar "ethical" restrictions virtually prohibit judicial candidates from even discussing the issues. For example, a rules booklet prepared by the Bar Association of Greater Cleveland, entitled "Campaigning For Judicial Office," warns judicial candidates:

A candidate for judicial office also should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality, or improper discrimination. Thus, although he may campaign in his own behalf, a candidate must not make pledges or promises of conduct in office, other than the faithful and impartial performance of the duties of the office . . . . \(^{149}\)

\(^{146}\) See notes 137-39 and accompanying text supra.

\(^{147}\) See notes 148-49 and accompanying text infra.

\(^{148}\) Wager, Required, But Not Permitted, N.Y. Times, Nov. 20, 1977, § 21 (L.I.) at 24, col. 3. Local bar association rules for judicial campaigns and the Code of Judicial Conduct also prohibit judicial candidates from actively supporting any other candidates for judicial office. Canon 30 of the ABA Canons of Judicial Ethics further provides: [I]f a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

ABA CANONS OF JUDICIAL ETHICS, Canon 30 (1958).

Such campaign restrictions create a serious philosophical dilemma regarding judicial campaigns. On the one hand, they preserve the dignity of judicial office and prevent against scare campaigns on isolated or emotional issues.\(^{150}\) In the words of Judge Richard Bartlett, former New York State Court Administrator, the candidates "are running for the job of professional neutral."\(^{181}\) On the other hand, these prohibitions virtually strip the election campaign of its meaning. If a principal purpose of electing judges is to make them accountable to the people,\(^{182}\) the people should know what the candidates stand for. It can be argued that the public has a right to know, for example, if a potential judge believes in strict prison sentences or the death penalty and what his views are on other issues of public concern.

It should be possible to accommodate both of these competing views by permitting the candidates to release unemotional statements about their positions on the issues, but prohibiting them from making statements about other candidates or about pending cases, from debating with each other about the issues, and from making campaign promises. Additional protection against irresponsible statements may be provided by requiring that the statements first

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is derived from Canon 7(B)(1) of the Ohio Code of Judicial Conduct which provides:

A candidate, including an incumbent judge for a judicial office: (a) should maintain the dignity appropriate to judicial office; (b) should prohibit public officials, appointees or employees subject to his direction or control from soliciting or accepting campaign fund contributions for him; (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.


\(^{150}\) Restrictions placed on what the candidates can say also serve to downplay the political atmosphere that otherwise might pervade the election process. See, e.g., Seiler, Judicial Selection in New Jersey, 5 SERON HALL L. REV. 721 (1974), wherein the author concluded: The issue, therefore, is not whether judicial selection can be removed from politics. Because courts form an important link in the network of governmental power, their chief officers do fulfill a political role. Rather, the issue is how the public's interest in obtaining the most competent, disinterested, and independent judges can be best protected.

Id. at 725.


\(^{182}\) It is thus sometimes argued that the prime consideration that led "reformers" in the Jacksonian era to call for the direct election rather than appointment of judges was their belief that "elected judges were more likely to adjudicate disputes according to the popular will and opinion of the people." Hunter, Some Thoughts About Judicial Reform, 19 De Paul L. REV. 457, 459 (1970). See generally Hays, Selection of Judges in Oklahoma, 2 TULSA L. REV. 127, 127-28 (1966); Niles, The Popular Election of Judges in Historical Perspective, 21 REC. OF N.Y.C.B.A. 523 (1969).
be submitted to and approved by the local bar association, judicial disciplinary body or screening committee, provided that unreasonable censorship is not exercised by them.

F. Stimulation of Bipartisan Representation

One of the most common criticisms of the current mode of election is the prevalence of cross-endorsement of the candidates by the major and even minor parties. The result is that there often are not even enough names on the ballot for voters to make a choice. Political leaders themselves have criticized this practice of "trade-offs of court seats" among the parties.

While no one has ever isolated the factors that govern how the party leaders choose which persons they will back, several participants in the process have identified at least some of them: party service, "retirement" from other political positions and party contributions. Complicating the problem further is the current election law, which makes it virtually impossible for candidates to run as independents or challenge the major party choices in the primaries. Since one may become a candidate only if nominated at a judicial nominating convention, as a practical matter, one must have a party first and can only be nominated through the mechanism of a party convention. This fact has caused some persons to question the constitutionality of the nominating process itself, since it may unjustifiably restrict ballot eligibility by preventing candi-

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133 The late Samuel Rosenman, himself an elected New York supreme court justice, frequently criticized the current system of judicial selection in New York on the grounds that "even in doubtful districts, interparty political deals often deprive the voters of any real choice." Rosenman, A Better Way to Select Judges, 48 JUDICATURE 86, 88 (1964); accord, Parsons, The Selection and Tenure of Florida Supreme Court Justices, 9 MIAMI L.Q. 271, 276 (1965); Remarks of Former New York City Mayor John V. Lindsay, quoted in Lindsay Charges "Machine" Rule of State Bench, N.Y. Times, Oct. 4, 1972, at 1, col. 8. Similarly, one former supreme court justice has written:

The outcome of probably 95 percent of judicial elections is predetermined by political party leaders, cross-endorsement of major parties and acquisition of minority endorsements, by whatever means and for whatever consideration they are given. The public's real choices are pitifully few.

Wager, Required, but Not Permitted, N.Y. Times, Nov. 20, 1977, § 21 (L.I.) at 24, col. 3.


dacy without providing for improvement of the quality of the bench. But nothing has come of that constitutional challenge to this facet of the nominating process; the convention system remains intact.

The cross-endorsement problem is neither new or confined to New York. The President’s Commission on Law Enforcement and Administration reached a similar conclusion in 1967. In its report, “The Courts,” it found that throughout the country judges were being selected by an “intricate bargaining process” among political leaders. Indeed, so much criticism of this practice has been written and aired that it is difficult to understand why it has not been curbed.

It is suggested that the easiest and probably best way to eliminate this problem is to simply outlaw it via legislation. Like all simplistic solutions, this might also work some negative results. In particular, such legislation could deprive us of the ability to assure election or reelection of many undoubtedly able and superior jurists. This does not mean, however, that the drawbacks of such legislation outweigh its benefits, particularly if combined with other corollary reforms. For example, if a procedure allowing independent candidates to run is also adopted, the problem of “uncontested” elections may be minimized. If independent screening is coupled with the removal of cross-endorsements, superior candidates for election should be readily recognized as such by the public.

Another potential reform which has been suggested would be to mandate that the bench in each judicial district be bipartisan or multipartisan by setting a minimum quota for each political party. The legislature might require that members of each major political party occupy at least one-third of the judgeships, leaving one-third for contest between them, minor parties and independents. Such a quota system might bring balance and create a structure of internal checks on the court. A quota system, however, might

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160 Studies of appointment under the merit system and the federal system indicate that merely switching to them will not achieve a bipartisan or multipartisan result. Under either system, the vast majority of those appointed to the bench come from the same political party as the appointing executive. See, e.g., Goldman, A Profile of Carter’s Judicial Nominees, 82 Judicature 246, 248, 251 (1976); Roberts, Twenty-Five Years Under the Missouri Plan, 3 Ga. St. B.J. 185, 192 (1956).
also over emphasize politics in the judiciary. The constitutionality of a system which favors only two of the political parties would also be suspect, since it would arbitrarily restrict the voters’ choice of candidates. Thus, even a quota system would not guarantee that the quality of the bench will improve.

G. Retention Review and Election

Even the most optimistic reformer will concede that no reform proposal is foolproof. None can assure that all judges selected will be worthy of the post or that they will perform at the desired level of competence. For this reason, we cannot ignore the need for having checks upon sitting justices and judges and a fair procedure for the thoughtful review of the performance of the courts. Regardless of the method of selection, careful and diligent disciplinary efforts should be maintained, both to assure that the judges know they will be held responsible for their behavior and to enhance public confidence in the judicial system itself.

The State Commission on Judicial Conduct, formally established in 1976 as a result of a 1975 constitutional amendment, has

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161 New York County Supreme Court Justice James Leff explained the political aspects of judicial elections in a confidential report he delivered to State Administrative Judge Richard Bartlett in 1974. The Village Voice obtained a copy of the report which read:

Of the nominations to be made in 1968, the New York Times observed, in an editorial: “The biggest judicial pie in almost half a century is about to be cut... there are strong indications that the pie will be mainly one flavor—plum.

(The terms in which the discussions on allocation were conducted were, according to reports and gossip, “Albano gets two, Fino gets one for himself, Lindsay has so many, Alex Rose gets one, etc.” The implications clearly were that the designations were personal and would be made by an individual who had arrogated the right to choose for himself without any statutory or constitutional basis on which to legitimize the selection.)

I never learned the specifics that ordained who the 16 first-time nominees, other than me, were to be. As to my own selection, I had, in 1962, become counsel to the Conservative Party, and indulging in the fiction that “recognition” in allotting judgeships would be accorded to the Liberal and Conservative Parties, one Supreme Court Judgeship was committed to the Conservatives and by them to me.

Village Voice, Aug. 22, 1974, at 12, cols. 4-5.

162 See note 158 and accompanying text supra.

163 As two leading commentators recently wrote:

[T]he Founding Fathers also realized that, no matter what system of selection they devised, not every judge would meet the high standards associated with judicial office. Even highly qualified individuals might become involved in illegal activity and thus bring the office into disrepute.


164 N.Y. CONST. art. VI, § 22. For a discussion of judicial disciplinary procedures in
the potential to achieve many of the desired results.\textsuperscript{165} Since its jurisdiction is restricted to cases of misconduct,\textsuperscript{169} however, it can be only a partial check on the performance of judges, and is thus only a partial solution to the retention issue.\textsuperscript{167} The New York State constitution also provides possible removal by concurrent resolution of two-thirds of both houses of the legislature;\textsuperscript{168} but these checks deal only with cases of serious misconduct.

There is need for a corollary check against judicial incompetence, and even mediocrity, as well as lesser malfeasance and indignities which will not gain the Commission's attention. Many reformers believe that this check can be provided by a form of retention review after a judge has actually served on the bench for a stated period.\textsuperscript{169}

The most common retention review proposal is to require a

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\textsuperscript{165} The Commission still does not have a formal administrator. Gerald Stern has acted as the administrator, by merely continuing his prior duties as executive director of the former temporary commission. See Commission on Judicial Conduct Filled by New Appointments, N.Y.L.J., April 14, 1978, at 1, col. 2.

\textsuperscript{166} N.Y. CONsT. art. VI, § 22(a) provides: "The commission . . . shall receive [and] investigate . . . complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice . . . ." The same subsection provides that the commission "may determine that a judge or justice be . . . censured, . . . removed . . . or retired . . . ." The Commission considers its jurisdiction "limited to judicial misconduct." See [1978] ANNUAL REPORT OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT 4, 8 [hereinafter cited as JUDICIAL REPORT].

\textsuperscript{167} In 1978 the Commission reported that during the first 16 months of its operations, 30 judges resigned while under investigation or after the initiation of removal proceedings by the Commission. During the 2 years prior thereto, when the Temporary State Commission on Judicial Conduct was in operation, 35 judges had resigned under such circumstances. JUDICIAL REPORT, supra note 166, at 11. The Commission's position on this situation is as follows:

Since the Commission's jurisdiction is limited to incumbent judges, its inquiries are terminated when a judge under investigation resigns from office. If the alleged misconduct in such an instance falls properly within the jurisdiction of another agency, such as a district attorney's office, the Commission will communicate its recommendation that the matter be pursued. Often, however, in the absence of criminal conduct, the Commission concludes that the voluntary withdrawal from office is sufficient, since such an act is nearly tantamount to the severest remedy the Commission itself can pursue, which is involuntary removal from office.

\textit{Id.} at 11-12.

\textsuperscript{168} N.Y. CONsT. art. VI, § 23(c). Section 23(c) provides:

No judge or justice shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

\textit{Id.}

sitting judge to simply stand for public reelection or retention election shortly after ascending to the bench. It is generally suggested that such retention election be nonpartisan and unopposed. The voters would simply vote “yes” or “no” to the question whether Judge X should be retained on the court. The election would be held approximately 2 or 3 years after the judge ascends to the bench and, thus, would presumably allow for a review of the judge’s record.

The retention election proposal stems from and is an integral part of the so-called “merit plan” of appointment of judges. As proposed by the American Judicature Society and sponsored by the American Bar Association, the merit plan provides for gubernatorial appointment of judges from a list of highly qualified candidates proposed by a nonpartisan nominating commission. Two years after appointment, the judge stands for retention election to give the public an opportunity to approve or disapprove of his selection based upon the judge’s initial performance on the bench. Only about half of the states which have adopted a merit selection plan have adopted the retention facet of the plan. Interestingly, some states which have thus far declined to adopt merit selection, have adopted retention election. Those states which have adopted merit selection plans have adopted a wide variety of retention review techniques, such as post-selection review by the nominating committee or approval by the legislature, instead of retention election.

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117 In several states where retention election is utilized, the state bar associations regularly study and evaluate the judge’s performance. See, e.g., Reath, supra note 169 at 1246-47; Sheldon, Searching for Judges in Oregon: Where Would the Bar Look for Help?, 61 JUDICATURE 376, 381 (1978). But see note 182 infra.


119 The original text of the plan is published in 7 BULL. Am. Judicature Soc’y 61, 84 (1914). See also Text of the Model State Judicial Article, 47 JUDICATURE 8 (1963); Kales, Methods of Selecting and Retiring Judges, 3 JUDICATURE 165, 171-75 (1920).

120 See S. Escovitz, supra note 170, at 17-42; Judicial Selection, supra note 1, at 321-53.

121 S. Escovitz, supra note 170, at 23; see note 174 supra.

122 See note 174 supra. In New York, judges can be removed by vote of two-thirds of the Legislature on recommendation of the Governor. N.Y. CONST. art. VI, § 23. The fact that few people even know of the existence of this review procedure, and the history of its non-use perhaps best attests to its effectiveness. It is not surprising that this remedy is infrequently
The retention election procedure, while expensive, is relatively easy to put into effect, being somewhat analogous to the referendum held upon proper filing of a recall petition. Here, however, the election would be automatic. Indeed, one variant of the retention election proposal would be simply to provide for possible recall election upon petition by the public. Such a procedure would spare the expense and other burdens of an election except where necessary. The principal criticism of recall is that, while still affording a prompt public voice on the newly selected jurists, the procedure is difficult and can become sidetracked on emotional issues.\textsuperscript{177}

Virtually all of the retention/review proposals are questioned and criticized on the ground that they may adversely affect the judge's independence and influence his decisions in critical and controversial cases.\textsuperscript{178} Unfavorable results in a retention election, like recall, might be likely to result from unpopular decisions. Even more important, since the judges might hesitate to render unpopular but legally proper decisions for fear of recall, there is a danger that we will be deprived of the important "checks and balances" which the framers of the Constitution envisioned in creating a separate and independent judiciary.\textsuperscript{179} The threat of such a recall or removal, and the public embarrassment associated with it, might also discourage potentially able jurists from agreeing to run for judgeships.\textsuperscript{180}
Unfortunately, past experience has shown that retention election does not serve its intended function, and will not unless it is combined with some means of stimulating voter interest and a mechanism to assure that the public is given the necessary information to cast informed votes in the election.\(^{181}\) There is no easy solution to this facet of the problem. For example, in 1976, the Alaska Judicial Council conducted a detailed poll of attorneys, peace officers and jurors regarding nine trial judges up for retention election that year. Eight of the nine judges were recommended for retention. One was not recommended for such retention, largely on the basis of criticism that he did not conduct himself impartially. In the election, the latter judge outpolled the other eight; all were retained by the voters.\(^{182}\)

The Alaska episode raises obvious and disturbing questions about whether and how the public can actually be educated regarding judges. One possible explanation is that the public and the media simply place little stock in the conclusions of the organized bar.\(^{183}\) Perhaps a more official screening process will generate more media interest and public acceptability for its review of the judge's performance. Some critics of bar polls, for example, have proposed replacing them with officially sponsored courtroom monitoring and screening studies, with detailed public reports of their findings.\(^{184}\) Whichever form of evaluation review is proposed, however, it is reasonable to conclude that, unless news media support can be attracted for its findings, there is little likelihood that the public will pay much attention to such polls or performance evaluation reports.\(^{185}\)

Another retention/review proposal was suggested by the 1970-1973 Dominick Commission. The commission placed heavy reliance on the evaluation and discipline of sitting judges as the principal means of improving the quality of the bench. While it declined to recommend a switch to merit appointment, the commission recommended the adoption of a merit procedure for retention of judges.


\(^{183}\) See Jenkins, supra note 181, at 85-86.

\(^{184}\) Cf. Anonymous Smears, 61 Judicature 100 (1977) (Letter of M. Miller) (state Judicial Council poll on judicial candidates should be replaced by official monitoring).

Under the proposal, the governor (or, in New York City, the mayor) would be authorized to reappoint a judge whose term has expired. In this manner, the Dominick Commission hoped to assure that judges who have demonstrated high ability on the bench will remain on the bench and will be spared having to stand for reelection.

A possible variant of the Dominick Commission proposal would have the applicable executive authority review the performance of the judges in his or her county or other district within a year or two of their becoming judges, with the power to remove unfit judges. This same retention/review power could be reposed, alternatively, with the Commission on Judicial Conduct, the local screening or nominating commission, or with a series of separate, newly created judicial Retention Review Commissions.

These executive or committee review proposals represent the converse of the American Judicature Society’s “merit plan.” Instead of first appointing the judge and then holding an election to decide if he will remain on the bench, these proposals would elect the judge first and then use a merit system to determine whether he or she should be retained. Indeed, the Dominick Commission proposal itself might fairly be termed “merit reappointment.”

The Dominick Commission proposal and its possible variants have their own drawbacks and inadequacies. First, in the case of the Dominick Commission proposal, to wait until the end of a judge’s term of office may be too long; supreme court justices, for example, are elected for 14 years. The commission and its variant proposals for executive retention review might also place extraordinary power in the executive.

The implications of this executive power can be

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186 Under N.Y. Const. art. 6, § 21(a), the executive already has the power to fill vacancies on the supreme court by appointment.

187 Dominick Commission Report, note 103 supra, reported in Klein & Witztum, supra note 103, at 719. The Dominick Commission, however, recommended that the current system of initial election of supreme court justices be continued. Id. at 53, reported in Klein & Witztum, supra note 103, at 718.

188 Following the lead of California and Colorado, several states have recently adopted judicial review of judicial qualifications commissions. See Schulte & Hoelzel, Court Reform: The Unheralded Winner of the 1976 Elections, 60 Judicature 281 (1977).

189 The belief that the executive is also subject to political bias is the principal argument raised against the merit plan by election advocates. Some commentators insist that politics either cannot or should not be removed from the matter of judicial selection. See, e.g., Golumb, Selection of the Judiciary: For Election, 24 N.Y. County B. Bull. 215, 217-18 (1967); Harding, The Case For Partisan Election of Judges, 55 A.B.A.J. 1162, 1164 (1969); Wormuth & Rich, Politics, the Bar and the Selection of Judges, 3 Utah L. Rev. 459, 461 (1953). An appropriate answer for this argument was provided by the Associate Director of the Bar Institute and Law Center of New Jersey:

The issue, therefore, is not whether judicial selection can be removed from politics. Because courts form an important link in the network of governmental
particularly extreme if there is no screening mechanism attached to the executive's decision, if its findings are not made public, or if there is no means to appeal or challenge the executive's decision. This facet of the problem may, however, be alleviated by simply allowing a rejected judge to stand for election or reelection in the general election. Finally, these proposals implicitly assume that there is something negative about judges standing for reelection; they are therefore likely to face severe opposition from the pro-election advocates for the same reasons that these advocates oppose appointment in the first instance.

It is also important to note that there exists an entirely different view to the retention review question. The federal system, for example, is based upon the concept of life tenure, on the theory that that is essential to preserve the independence of the courts and protect judges from political or emotional reaction to their decisions. This insistence on independence has its roots in the colonial experience of the 1600's and 1700's, leading the framers of the Constitution to give particular attention to the problem of judicial independence in the 1780's. Yet this aspect of the federal judiciary has never been free of controversy. Particularly in recent years, several leading students of the federal judiciary have criticized not only the inability to remove or censure jurists, but also the philosophical basis of the

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power, their chief officers do fulfill a political role. Rather, the issue is how the public's interest in obtaining the most competent, disinterested, and independent judges can be best protected.


10 See, e.g., Berkson & Tesitor, Holding Federal Judges Accountable, 61 JUDICATURE 442 (1978). "The Framers of the Constitution recognized the compelling need to isolate judges from the political process. Indeed, they believed judicial independence to be one of the cornerstones of American democracy." Id. at 443; accord, Wallace, The Nunn Bill: An Unneeded Compromise of Judicial Independence, 61 JUDICATURE 476, 479 (1978). Given the power that United States Senators have had in the past to veto federal judicial nominations for their states, whether this belief translated into reality is subject to question. This power now appears to be coming to an end under Senator Kennedy's chairmanship of the Senate Judiciary Committee. See Kennedy to End Veto of Judges by Home-State Senators, N.Y. Times, Jan. 26, 1979, at A-9, cols. 5-6.


life tenure system itself. These critics argue that public accountability of judges is preferable to complete judicial independence or that, as a minimum, a system that accommodates both of these aims is desirable. Legislation, endorsed in principal by the American Judicature Society, has been introduced and supported by prominent members of the Senate to provide an easier vehicle than impeachment to discipline federal judges who are found guilty of various forms and degrees of misconduct. That legislation is far less broad than the retention review proposals discussed above, but the fact that it is proposed and has gained backing among judges, legislators and scholars of the judicial system indicates an increasing sense of public frustration over the inability to maintain review over those who man the courts.

Several forms of retention review have been proposed. None is a complete answer to the problem, and each has its own drawbacks and failings. Indeed, retention election has been severely criticized as ineffectual and merely a rubber-stamp procedure. For example, of the more than 350 trial and appellate judges up for retention election in thirteen states in 1976, only three lost. These findings undeniably indicate that retention election is not an effective means

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19 Discussing the desirability of various methods of accountability, Senior Judge Edward Lumbard of the United States Court of Appeals of the Second Circuit recently wrote that "independence to decide cases and make judicial rulings is one thing; independence to behave any way the judge pleases, without consideration for what is proper, is another." Lumbard, supra note 192, at 482-83. See also Kaufman, Keeping the Judiciary Independent, N.Y. Times, Jan. 16, 1979, at A-15, cols. 2-6.

Others argue that to create a federal judicial disciplinary commission which can censure judges without impeaching and necessarily removing them will help insure judicial quality without impairing judicial independence. See Fox, An Alternative to Impeaching U.S. Judges, N.Y.L.J., Nov. 30, 1978, at 1, col. 1:

A classic example raised involved the allegations against former Justice William O. Douglas of the Supreme Court who was accused of questionable judicial conduct concerning off-the-bench writings. Efforts—obviously politically inspired—to impeach him failed, but the justice nevertheless found himself for some time under a cloud of suspicion. Were there an independent agency for evaluating complaints, Nunn bill advocates argue that the entire episode would have been readily concluded.

Id. at 32, col. 2.

20 This is the so-called "Nunn Bill" or "Judicial Tenure Act," S. 1423, 95th Cong., 2d Sess. (1978). The bill passed the Senate on Sept. 7, 1978, but has been blocked in the House of Representatives. See N.Y.L.J., Nov. 30, 1978, at 1, col. 1.

21 See, e.g., Jenkins, supra note 181, at 80.

22 Id. at 82. The Jenkins Study concluded that "[t]here . . . seem[s] to be some validity to the charge that a judge must commit a crime or a flagrant moral offense to be removed from office in a merit retention vote." Id. at 85.
of evaluating sitting judges. There are, however, other possible types of retention review, and it appears proper to conclude that, like nonpartisan election proposals, retention review proposals may have merit when combined with other compromise reforms. They thus warrant further review and consideration.

H. Confirmation of Judges

Borrowing from the federal system, some reformers suggest that judicial appointees and even judges-elect be required to be confirmed after selection, by the state senate or by a judicial qualifications committee. Such a system has been adopted for appointees in a number of other states and has been backed by former Chief Judge Breitel of the New York Court of Appeals. As yet, it has not been adopted for electees.

Giving the legislature or a special committee a veto power over appointees is easier to understand than giving them one over elected judges. Where the local voters have spoken on their preferences, it is difficult to see why statewide representatives should be able to override those choices. Confirmation, however, might still be feasible if adopted on a limited basis, e.g., only for elected or appointed judges, or for specified courts. As has often occurred in the case of federal judges, the confirmation process could reveal important facts about potential judges and check against unfit designations by local party leaders. Most of the work burden would be absorbed

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198 One commentator has stated:

The emphasis of the Missouri Plan, however, is not on removing poor judges, but on keeping them off the bench in the first place. Dean Roscoe Pound in discussing this problem said, "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on."


200 The legislature appears receptive to having confirmation responsibility, as indicated by its inclusion in the legislation leading to the constitutional amendment adopted in 1977 to create merit selection for court of appeals judgeships. Fitzhugh, 'First Step' In State Court Reform Hailed, N.Y.L.J., Aug. 6, 1976, at 1, col. 2.

201 The federal process, however, has rejected very few appointees. When rejections occur, they generally take place in the more publicized appointments, such as those for the Supreme Court. Two particularly significant instances occurred during the Nixon years when two United States Court of Appeals judges whom the President nominated to the Supreme Court were rejected by the Senate. The recent movement for expanding the ability of Congress to censure and remove federal judges may indicate that a substantial body of knowledgeable
by the Judiciary Committee, so that legislative disruption might not be as serious as the number of judicial posts might indicate. Moreover, if combined with other corollary reforms, confirmation and postselection review could be reduced to manageable proportions. Nevertheless, confirmation appears to pose serious potential political problems, particularly if required for elected judges. Such a reform would also undoubtedly require a constitutional amendment and, thus, is less attractive as a compromise reform than several others proposed and discussed here. But it is worthy of further exploration if other compromises do not garner a sufficient following.

I. Attracting Better Judges: Salary and Staffing

The quality of judges can also be improved by attracting better candidates in the first place. Two uncomplicated steps which have been suggested to achieve that aim are to raise the salaries of judges and to improve the judges' support staffs and court facilities. To some observers, the cry of monetary hardship is unbecoming and ill-deserved. They point out that the salaries of New York justices and judges, according to a 1978 Study by the National Center for State Courts, are the second highest in the country. These critics, however, improperly ignore the realities involved. Successful and able lawyers can and do earn much more than the salaries currently given our judges. The inability of judges to have persons do not believe that the confirmation process is sufficient to insure the high quality of the federal bench. See notes 192-195 and accompanying text supra.

225 Kaminsky, supra note 1, at 521; Finkelstein, Salary Increases for Local Judges, N.Y.L.J., Jan. 18, 1973, at 1, col. 3. The problem of salary is not unique to New York or the other state court systems. Senator Charles Percy of Illinois thus wrote:

Attracting first-rate attorneys to federal judicial service at current salary levels is a serious problem. During the past seven years, many individuals who were among my first choices as judicial candidates decided that they could not accept such positions because of salary considerations.

Percy, No Royal Road to Justice, 60 JUDICATURE 184, 185 (1975).


227 Survey of Judicial Salaries in States' 3 Highest Courts, N.Y.L.J., Aug. 28, 1978, at 2, col. 3. Court of Appeals judges are paid $60,575, appellate division justices $51,627 and supreme court justices $48,998 per year. Only the federal system and California exceed these levels. In Texas, for example, the figures were $49,800, $43,900 and $34,500, respectively. In Rhode Island, they were $36,300 for appellate judges and $34,100 for trial level judges. Id.

The newly impaneled State Commission on Legislative and Judicial Salaries recently recommended to Governor Carey that New York state judges receive a 25% salary increase and that travel expenses be reimbursed when the judges sit in counties other than that of their residence. Panel Proposes State Increase Judges' Salaries, N.Y.L.J., Nov. 27, 1978, at 1, col. 4. This would make New York judges the highest paid state judges in the nation.

228 Utter, Selection and Retention—A Judge's Perspective, 48 WASH. L. REV. 839, 843-44
outside earnings must also be kept in mind, since supplementing their income raises ethical questions.\(^{208}\) Inflation must also be considered. New York last raised judicial salaries in 1974.\(^{207}\) Every other state except Mississippi has granted raises to judges since then, and several other states have adopted automatic cost-of-living raises for their judicial officers.\(^{209}\) A substantial raise of judicial compensation, therefore, appears to be the minimum next step we should take in the area of judicial reform.

Another important inducement to better qualified lawyers to seek judgeships is to give them an assurance of support when they are on the bench. Successful lawyers have such support staffs and facilities in private practice and are loathe to give them up, especially with the heavy workloads they would face on the bench. Judges must be assured that they will have the backup support to function effectively. Adequate support staffs will free the judges to give more attention to the more complex aspects of their judicial duties.

\(\text{(1973); Walsh, supra note 203, at 16. Judge Stanley Gartenstein, President of the City Family Court Judges Association, gave the following testimony at a joint meeting of the New York State Assembly:}\\

I don't think anyone in this room can really believe that judges are being paid anywhere near what they can earn on the outside, or that the salaries we receive are anywhere commensurate with the responsibilities we bear . . . .\\

I can tell you that as of this moment, we are simply not making it financially (on a salary of $42,251). We need not remind you that added sources of income are just about nill—that ethical considerations prevent us from taking on supplemental gainful employment . . . .\\

We have climbed to the very top of this profession only to find that it is economically impossible to stay here. It has been said that only the very rich can afford to run for executive or legislative office. The day is coming when this may be true of the judiciary as well. If and when that comes, we will have only ourselves to blame.}{Judges Tell Panels in Albany of Need of Salary Raises, N.Y.L.J., Mar. 17, 1977, at 1, col. 3, at 4, col. 4.}\n
\(^{208}\) Id.\n
\(^{207}\) Survey of Judicial Salaries in States' 3 Highest Courts, supra note 204. The New York Constitution merely provides that judicial compensation "shall be established by law and shall not be diminished during the term of office for which [the judge] was elected or appointed. N.Y. Const. art. VI, § 25(a). Thus, judicial salaries are a matter for legislative action, and do not require a constitutional amendment. [Editor's Note: As this article goes to press, the New York legislature has voted a further salary increase of 3.5% for all judges, Dionne, Pay Increases Voted for Legislators and Judges, N.Y. Times, April 4, 1979, at A-1, cols. 3-5, only partially accepting the recommendation of an ad hoc committee appointed by Governor Carey to study the situation. See Hochberger, 18% Salary Raise Proposed For 1040 Judges in State, N.Y.L.J., March 19, 1979, at 1, col. 2].}{\n
\(^{209}\) New York and Mississippi are the states with the longest pending salary rates; neither state has adjusted judicial salaries since 1974. The last increase in the federal system was in March 1977 when salaries were raised to $54,500 for trial judges, $57,500 for intermediate appellate judges, and $72,000 for Supreme Court Justices. See Survey of Judicial Salaries in States' 3 Highest Courts, N.Y.L.J., Aug. 28, 1978, at 2, col. 3.
J. Specialization and Judicial Education

One of the most intriguing judicial reform proposals is to seek to take advantage of the increasing specialization of practicing lawyers by instituting specialization in the courts. Such proposals have generally focused on the federal courts, but the same logic applies with equal force to the state courts.

Chief Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit has explained the rationale for specialization as follows:

A judge's expertise and familiarity with today's increasingly complex legal system cannot be achieved solely through improvements in selection and training. Even the most talented and best educated scientist is not expected to be equally adept in nuclear physics, neurosurgery and engineering. But judges pride themselves on being generalists able to master quickly any area of law involved in the case before them. Nevertheless even the most blithely self-assured judge will occasionally admit to uneasiness when confronted with a case involving the most arcane and technical areas of the law.

These considerations do not mean that all courts and judges could be specialized; rather, they suggest that some be. For exam-
ple, tax, real estate, zoning condemnation and matrimonial matters can readily be segregated from other matters and handled by specialized parts and judges.

It should be noted that some specialization already exists in the supreme courts and in the lower courts. For example, many supreme courts have a matrimonial part, and New York City has a separate civil and criminal court. At present, supreme court justices generally rotate among specialized parts in that court. It would be a modest step to provide for permanent specialized parts for those matters and to select specialized judges to sit in those parts permanently. The same would be done for new specialized areas which might be designated.

The principal potential drawback of such specialization would be the creation of legal fiefdoms for some of the specialized judges. This problem, however, may be controlled by careful appellate review, provided that excess deference is not accorded to the specialists by the appellate courts. If that problem does appear to become a reality, it may be necessary to create separate specialized appellate courts with their own specialized judges to deal with it. Another potential difficulty could be a shortage of specialized judges or staff aides for the specialized parts. But it may be possible to resolve that

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11 N.Y. CONST. art. VI, § 15; N.Y. CITY CIVIL CT. ACT (McKinney 1963 & Supp. 1978-1979); N.Y. CITY CRIMINAL CT. ACT (McKinney 1963 & Supp. 1978-1979). Section 15(a) of Article 6 of the New York Constitution provides for the selection of judges for these courts as follows:

The judges of the court of city-wide civil jurisdiction shall be residents of such city and shall be chosen for terms of ten years by the lectors of the counties included within the city of New York from districts within such counties established by law.

The judges of the court of city-wide criminal jurisdiction shall be residents of such city and shall be appointed for terms of ten years by the mayor of the city of New York.

N.Y. CONST. art. 6, § 15(a).

14 In administrative review proceedings, the courts have held that "a determination by an administrative agency is presumed to be correct" and that, in view of the agency's general expertise in the area, the reviewing body will not set aside the agency's determinations "unless it clearly appears to be arbitrary or contrary to law." City of Syracuse v. Hueber, 52 App. Div. 2d 341, 344, 383 N.Y.S.2d 774, 776 (4th Dep't 1976); see Lezette v. Board of Educ., 35 N.Y.2d 272, 281, 319 N.E.2d 189, 194, 360 N.Y.S.2d 869, 976 (1974); Fiore v. Zoning Bd. of Appeals, 21 N.Y.2d 393, 396, 235 N.E.2d 121, 123, 288 N.Y.S.2d 62, 64 (1968); People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 282 N.Y. 400, 405, 26 N.E.2d 955, 954 (1940). Such a test would appear to be too narrow for specialized courts. The appellate court should review both the facts and the law and give deference to a specialized trial part only on matters directly related to and squarely within its expertise.
problem by having one specialized part per district or for large parts of each judicial district or by having specialized judges, in effect, "ride circuit."\footnote{15}

Additionally, efforts can and should be made to increase and improve continuing judicial education.\footnote{16} Seminars and other judicial education programs have been established and administered by such organizations as the Institute of Judicial Administration, the Federal Judicial Center, the National College of Trial Judges, the National College of the State Judiciary and the American Academy of Judicial Education.\footnote{17} More and more of these programs are being proposed and adopted each year. They vary from orientation courses for new judges to "refresher" courses and specialized training in complex and technical areas of the law. At least three states have already made refresher courses mandatory for judges and several others have required lower court judges to attend an annual conference where continuing judicial education is provided.\footnote{18}

The principal benefits of judicial education programs were summarized by the former director of the Institute of Judicial Administration as follows:

The value of these various programs of judicial education is obvious: they improve the quality of the judiciary by increasing the technical proficiency of the judges. Hardly less important is the strengthening of their morale and esprit de corps by putting them into contact with other judges whom they might not otherwise

\footnote{15} Shapiro, Can We Match Skills of Our Judges to the Needs of Our Courts?, 62 JUDICATURE 164, 164-65 (1978). One federal judge has suggested a procedure whereby, in complex technological cases, the courts could require the litigants to provide specialized help of whatever nature the judge feels necessary. Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. PA. L. REV. 509 (1974).


\footnote{18} Shetreet, supra note 217, at 340-41; see Hansen, The Continuing Education Program of the Wisconsin Judiciary, 52 MARQ. L. REV. 240 (1968). As Chief Judge Kaufman of the United States court of appeals explained in a bi-centennial address: "Education of judges should, moreover, be a continuing process. Twenty years ago, the idea of judges going back to school 'would have seemed ludicrous to most members of the profession,' but considerable progress in instituting such programs has been made in the interim." Kaufman, supra note 216, at 25.
know and showing them their problems are not unique or personal, but common to all judges. There are subsidiary advantages that are less apparent. One is that they may have some influence upon the selection of judges. If lawyers know that they are expected to go back to school if they become judges, men who are lazy or arrogant or who look upon judicial service as a species of retirement may be dissuaded from seeking judicial office.\textsuperscript{219}

These perceptions have gained wide acceptance, both in the United States and in England.\textsuperscript{220} Given the obvious benefits to be obtained, compulsory, continuing judicial education programs can and should be increased and given public support.\textsuperscript{221}

\textbf{IV. Conclusion}

The conflict between those who favor merit selection appointment and those who favor election of judges is likely to continue in the foreseeable future. Several compromise reforms are available to improve the quality of the judiciary in the interim. Some of these compromise proposals have substantial merit and can greatly enhance the judiciary while the appointment versus election debate continues, particularly if they are enacted in conjunction with other compromise reforms. The need for public confidence in the courts and the integrity of the judiciary requires that we not forebear any further from adopting compromise reforms. The fears of some that to do so will undermine their underlying positions in the appointment versus election debate are unfounded and, in any event, are not a sufficient justification for further delaying improvement of our current judicial selection system.

\textsuperscript{219} Karlen, \textit{Judicial Education}, 52 A.B.A.J. 1049, 1054 (1966). Paul Nejelski, Deputy Assistant Attorney General in the Office for Improvement in the Administration of Justice in the United States Department of Justice recently suggested that “[e]very 'high' court judge should, on a regular basis, hear some 'low' court cases. In the federal system, some judges from the U.S. Court of Appeals might sit on trial from time to time. State supreme court justices might sit in small claims or family relations court.” Nejelski, \textit{Do Minor Disputes Deserve Second-Class Justice}, 61 \textit{Judicature} 102, 103 (1977).

\textsuperscript{220} See generally Shetreet, supra note 217, at 339-41.