A Proposal For Mandatory Preselection Screening for State Court Judges

Martin I. Kaminsky

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol51/iss3/2

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
A PROPOSAL FOR MANDATORY PRESELECTION SCREENING FOR STATE COURT JUDGES

MARTIN I. KAMINSKY*

The debate whether state court judges should be elected or appointed is no closer to resolution today than it has been at anytime during the past one hundred years.1 Recently, however, both

---

* A.B., Yale University, 1962; LL.B., Harvard University, 1965. Member of the New York Bar. The author wishes to thank Ms. JoAnn Cory for her invaluable assistance in the preparation of this article.


pro-election and pro-appointment advocates appear to have opened their eyes to a pragmatic compromise proposal: mandatory preselection screening of all judges, whether appointed or elected. This Article outlines the historical background and basic tenets of this proposal, explains why it currently appears to provide the most promising reform measure, and discusses detailed suggested legislation which would effectuate the screening proposal. Regardless of whether adoption takes the form of a legislative measure or a constitutional amendment, although the latter does not seem necessary, such preselection screening should be implemented as soon as possible.

THE HISTORICAL BACKGROUND OF PRESELECTION SCREENING

Included in various reform proposals over the past sixty-five years, mandatory preselection screening is not a new concept. Yet, reformers have only recently attempted to separate this aspect from the other more complex proposals and offer it as a reform in and of itself.

The most widely publicized proposal for judicial reform is the

---

2 The attempt to limit membership in the judiciary to well-qualified individuals has a long history. Indeed, the Magna Carta provided that the King would “appoint as justices . . . only such as know the law of the realm and mean to observe it well.” W. McKechnie, MAGNA CARTA 431 (2d ed. 1960). See Judicial Selection in the States, supra note 1, at 276. Similarly, at the time of the Revolutionary War, judges in New York were appointed by a Council of Appointment. See ASSN OF THE BAR OF THE CITY OF N.Y., REPORT OF THE SPECIAL COMM. ON THE CONSTITUTIONAL CONVENTION: SELECTION OF JUDGES, 2 (1967) [hereinafter cited as REPORT OF THE SPECIAL COMMITTEE].


4 The first such proposal appears to have been advanced in Hunting, Toward the Best Possible Judges, 15 RECORD OF N.Y.C.B.A. 400 (1960), where the following proposal was suggested:

The goal which is sought is to restrict elevation to the bench to a group of men who wish to be judges and who have high qualifications. This can be accomplished entirely without relation to method of selection by this requirement: No person's name shall be placed on a ballot for, nor shall any person be appointed to, judicial office, unless he shall have been found to be qualified to be a judge. Evidence of qualification shall be a “Certificate of Qualification” issued by a “State Board of Judicial Qualification,” to which any person who wished to be eligible for appointment or election to the bench could submit himself, with a request for a finding as to his qualification.

Id. at 405-06. In 1970 a major legislative effort for such screening was mounted, albeit unsuccessfully, by New York Assemblymen Stephen C. Hansen and Perry Duryea. For the history and details of the 1970 proposal, see Kaminsky, supra note 1, at 504-06; notes 19-21 and accompanying text infra.
so-called "merit system." First suggested by the American Judicature Society in 1918, the merit system was initially designed to select judges based on qualifications rather than political influence or party affiliation. The advocates of the merit system of selecting the judiciary have presented compelling arguments which do not require in-depth repetition here. A brief summary is useful, however, since they are also persuasive reasons for the adoption of a compromise reform such as mandatory preselection screening. The present method of selecting judges is a historical anachronism, a holdover from the Jacksonian rebellion against an unresponsive judiciary controlled by landowners. See Report of the Special Committee, supra note 2, at 2. The essential thesis of the Jacksonian approach, that the judiciary would be responsive to the citizenry under an elective system, was premised on the belief that through personal contact, judges could be effectively evaluated by the electorate. In the context of our modern, industrialized, and substantially urban society, and in view of the actual operation of the elective system, the public no longer has the ability to exercise any significant supervision and control over the judiciary. See Niles, supra note 3, at 529-31; Note, Judicial Selection and Tenure in Indiana: A Critical Analysis and Suggested Reform, 39 Ind. L. Rev. 364, 366-67 (1964). Available empirical evidence indicates that the public is almost completely unaware of the qualifications of judicial candidates and has tended to vote, if at all, along straight party lines or at random.

The sadly tarnished public image of the judiciary provides further proof of the inadequacies of the elective system. While this system has produced some very fine state judges, it is regrettable that knowledgeable observers consider many others undistinguished and mediocre. D. Jackson, Judges 189 (1974); see, e.g., Reath, In Support of Constitutional Revision to Provide for Merit Selection of All Judges, 45 Pa. B.A.Q. 406, 407 (1974); Seller, supra note 1, at 736-37. Mediocrity, in the context of the ever increasing burdens of judicial office, is simply insufficient. As the American Judicature Society has stated: "Judicial office today demands the best possible men, not those of merely average ability who are gray and undistinguished as lawyers and who will be just as drab as judges." American Judicature Society, Report to Philadelphia Justice Consortium on Philadelphia's Criminal Justice System (Dec. 19, 1970), quoted in Reath, supra, at 407.

The most serious deficiency in our present system is the absence of any effective mandatory preselection screening plan. The task has been largely assumed by local bar associations which have neither the funds nor the staff to conduct detailed, comprehensive studies of each judicial candidate's qualifications. Moreover, the bar associations themselves...
ture Society in 1913, the merit system has received the backing of the American Bar Association and other prestigious civic and professional groups including the Association of the Bar of the City of New York and the President’s Commission on Law Enforcement and the Administration of Justice. Under this system, judges are appointed by the state’s chief executive from a list of candidates proposed to the governor by a blue-ribbon nominating commission. Subsequently, the electorate is given the opportunity to decide whether to retain the appointed judge. If the electorate reaches a negative decision, the governor appoints a new judge from another candidate list. Obviously, preselection screening is a fundamental aspect of this system since certification by the nominating commission is a prerequisite to appointment. Nonetheless, of the approxi-

are not free of internal politics and bias. See Golomb, Selection of the Judiciary: For Election, 24 N.Y. COUNTY B. BULL. 215, 218 (1967). See also Atkins, Merit Selection of State Judges, 50 FLA. B.J. 203, 208 (1976) [hereinafter cited as Atkins]. It is clear that the stakes are simply too high to continue on this way. The work load of our courts is tremendous. Every time we select a judge who lacks qualifications, the temperament, or simply the diligence to be a superior judge, the whole system suffers. Other judges must take on more work. Most importantly, the substantial rights of a litigant or the very life and liberty of a criminal defendant are jeopardized each time an incompetent judge hands down a decision. Removal and judicial discipline are not adequate solutions to the problem. Eventual removal of a judge offers little solace and no redress to those who have already suffered as a result of his inadequacies. The more rational answer is to review judicial candidates before they are either appointed or elected to the bench.


9 See REPORT OF THE SPECIAL COMMITTEE, supra note 2. See also Kaminsky, supra note 1, at 503; Lindsay, The Selection of Judges, 21 RECORD OF N.Y.C.B.A. 514, 518 (1966).

10 TASK FORCE REPORT: THE COURTS, supra note 5, at 65-68.

11 Literally scores of articles have been written on the development, nature, and virtues of the merit system. One of the finest of these publications is Winters, A Better Way to Select Our Judges, 34 J. AM. JUD. SOC’Y 166 (1951). Also of particular assistance in understanding the development of the merit plan is Winters, The Merit Plan for Judicial Selection and Tenure—Its Historical Development, 7 DUQ. L. REV. 61 (1968). See also Nelson, Variations on a Theme—Selection and Tenure of Judges, 35 S. CAL. L. REV. 4 (1962). Although there are several different versions of the merit plan, most involve the following three-step process: (1) proposal to the executive of a list of names of persons found to be highly qualified by a nonpartisan nominating or screening committee; (2) appointment by the executive from such a list; (3) an uncontested retention referendum within a year to three years after appointment. See Alfini, Judicial Selection: Take Your Choice, TRIAL, Jan. 1976, at 11.

12 For a brief but incisive summary of the details of the merit plan and other selection methods, see Alfini, Judicial Selection: Take Your Choice, TRIAL, Jan. 1976, at 11. The nominating commission, which is the most important element of the merit plan, has been described as follows:

The true nature of the judicial nominating commission is a group of people of
mately twenty-five states which have adopted various aspects of the merit plan, only about a dozen require preselection screening.

Beginning in the 1960's, some reformers, sensing the practical difficulties involved in removing the selection process entirely from the political leaders, began pressing for mandatory preselection screening as a compromise position. Although a specific plan had not been formulated, these reformers realized that the implementation of mandatory screening could accomplish the central goal of all judicial reform proposals, viz. ensuring that every judge is highly qualified. Additionally, it was becoming clear that a screening program could be adopted without fighting the appointment versus election battle.

In 1967, a constitutional convention was convened in New York State. At the convention, a considerable amount of debate centered on the question whether judges should be elected or appointed. With several knowledgeable and prestigious voices advocating sweeping changes in the area of judicial selection, the reform most favored was a switch to merit selection. Perhaps as a reaction to the debate generated by the convention a number of local political leaders modified their position and indicated possible receptiveness to some form of preselection screening. Drawing upon the new tack which 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).


Some plans currently in effect involve only postselection confirmation or retention election. See authorities cited in note 12 supra.

See note 3 supra.

The chairman of the Judiciary Committee of the New York State Senate has emphasized that "any effort to bring about an across-the-board system for appointing all judges in the state without any expression of choice by the voters will face impossible odds." Gordon, Judicial Reform: A Legislative Viewpoint, 48 N.Y. St. B.J. 284, 286 (1976).

See, e.g., Report of the Special Committee, supra note 2. Nevertheless, the call for merit selection went unheeded, see N.Y. League of Women Voters, Seeds of Failure 54 (1973), and the final proposed judiciary article recommended by the constitutional convention provided for continued election of New York State judges. N.Y.S. Constitutional Convention, Proposed New Constitution 11-26 (1967). For an interesting insight into the deliberations of the convention on proposed amendments to the judiciary article calling for appointment of judges by the governor with the advice and consent of the legislature, see N.Y.S. Constitutional Convention, Proceedings of the N.Y.S. Constitutional Convention, Record, pt. 2, at 839-92 (1967).
those suggesting preselection screening alone had taken, two New
York County political leaders proposed a plan whereby a preselec-
tion committee would submit names to the political parties prior to
the nomination of judicial candidates. Under their proposal, how-
ever, the possible judicial nominees of the political parties would
not be limited to the submitted names. Instead, the screening panel
would be given the right to "contest the party's designations" in the
election process, by taking a position on the ballot and doing politi-
cal battle on the matter. Not surprisingly, this proposal garnered
little support among reformers.

The closest New York ever came to adopting the concept of
mandatory preselection screening was in 1970, when Assemblymen
Steven C. Hansen and Perry Duryea proposed a bill which would
have required all candidates for the state supreme court to be certi-
fied as "highly qualified" by a nonpartisan "judicial qualification
committee" before being permitted to run for office. At early press
conferences, the leaders of the New York State Senate pledged sup-
port for the Hansen-Duryea bill, but, at the last minute, they
balked at the concept of mandatory preselection screening and re-
neged on their pledge. Thus, the most promising judicial reform
effort in a century died a political death.

Prendergast & Costikyan, Judicial Selection—The Prendergast Plan, pt. 1, 157
id. pt. 3, 157 N.Y.L.J. 57, Mar. 24, 1967, at 4, col. 1. One of these two politicians had
previously written that judicial election was necessary to preserve our system of party politics.

The Association of the Bar of the City of New York concluded that this plan was not
feasible:

In the first place, the Special Committee doubts that political parties will in fact
accept the candidates of a nominating commission where such candidates do not
also enjoy substantial "political" acceptability. Recognition of this factor could
have the effect of causing a nominating commission to compromise its convictions
in favor of candidates known to be acceptable to their respective political parties.
Moreover, the Special Committee believes the plan is wholly unrealistic in that it
would be nearly impossible for even the most active kind of judicial nominating
commission to sponsor and promote an election campaign which would defeat party
organizations in primary or general elections.

REPORT OF THE SPECIAL COMMITTEE, supra note 2, at 16. This plan was also discussed in
Curtiss, Screening Judicial Candidates for Election, 59 Judicature 320 (1976) [hereinafter
cited as Curtiss].

For a summary of the bill and its legislative history, see N.Y. Leg. Rec. A 3195A, at A
296, 193d Sess. (1970); Kaminsky, supra note 1, at 504-06.


Id., Mar. 6, 1970, at 38, col. 2; id., June 23, 1970, at 20, col. 3. The Hansen-Duryea
bill was passed by the Assembly. It was, however, never reported out of the Senate Finance
The attempt to institute preselection screening in New York has not been entirely unsuccessful. In 1975, Governor Carey adopted such a program for those judicial positions which are filled by gubernatorial appointment. This is a laudable step, and one which provides further encouragement for proponents of reform, although its impact is, of course, far too limited to even begin to remedy the problem.

More than 7 years after the defeat of the Hansen-Duryea bill we still hear the same debate and the same refrains. Nonetheless, it is increasingly apparent that the idea of preselection screening as a compromise which might be acceptable to both sides in the election versus appointment debate is gaining wider appeal. The time may finally be ripe for this crucial reform.

See Exec. Order No. 5, 9A N.Y.C.R.R. 3.5 (1975), discussed in note 109 infra. New York City Mayors Wagner, Lindsay, and Beame have also utilized preselection screening. See note 112 infra. On the national level, President Carter has recently announced that his appointments to the Federal appellate courts would be drawn from the recommendations of judicial nominating commissions. See N.Y. Times, Feb. 18, 1977, § A, at 28, col. 1.

At a meeting of the New York County Lawyers' Association in June of 1976, the ever-present disagreement between members of the bar was illustrated by the statements of former Chief Judge Stanley J. Fuld and Justice Harold Stephens. Chief Judge Fuld declared:

"Some years ago, while I was Chief Judge, I said that the present elective system "is unsuited to the filling of judicial vacancies . . . and not geared to the objective of choosing the best qualified candidate." I recognize that the elective system has produced many qualified, even great judges, but I firmly believe—to cull again from a statement made when I was Chief Judge—"that it is impossible for the general public, particularly in the metropolitan areas, to know what candidates possess the necessary qualifications for judicial service."

N.Y. County Lawyers' Ass'n, Vesey Street Letter 1, 5 (June 1976). Justice Stephens stated:

"In my opinion, Supreme Court justices should be elected, not appointed. To place in the hands of one person, no matter who he might be, the power of appointment of trial judges, especially as it affects this city or other urban centers, is to vest too much power in a single person."

Id. at 5. Other distinguished jurists have similarly disagreed on this topic. Former Chief Judge Charles Desmond has been one of the leading proponents of election. See, e.g., Desmond, 'Merit Selection' Isn't Easy Answer to Choose Judges, 173 N.Y.L.J. 15, Jan. 22, 1975, at 25, col. 4; Desmond, 6 Good Judges—An Argument in Support of Elective Process, 171 N.Y.L.J. 17, Jan. 24, 1974, at 24, col. 1. The current chief judge of the court of appeals, Charles D. Breitel, has announced his support for the appointment of all judges in the court system. See 173 N.Y.L.J. 85, May 2, 1975, at 1, col. 3. At hearings before the Joint Legislative Committee on Court Reorganization in January 1975, Judge Richard J. Bartlett, the state's chief administrative judge, testified in favor of a merit plan of appointment, while Justice Owen McGivern spoke in favor of the present elective system. See N.Y. Times, Jan. 22, 1975, at 18, col. 1. The advantages of the election and appointment methods were again disputed at the 1976 hearings of the Select Task Force on Court Reorganization, the successor of the Joint Legislative Committee on Court Reorganization. See 175 N.Y.L.J. 34, Feb. 20, 1976, at 1, col. 2.

See, e.g., O'Connor, An Argument for the Election of Judges, 175 N.Y.L.J. 29, Feb. 11, 1976, at 1, col. 2; N.Y. Times, Feb. 12, 1975, at 38, col. 2 (editorial); Curtiss, supra note 18, at 320-23. Not everyone agrees, of course, that preselection screening by a small panel is
MANDATORY PRESELECTION SCREENING

The principal problem currently facing advocates of judicial reform is the need to develop a compromise proposal which will be effective and also have a reasonable chance of successful adoption. Senator Bernard Gordon and the Select Task Force on Court Reorganization have decided that the most feasible compromise is the use of the merit plan for the appointment of judges to the New York Court of Appeals only. Any further attempts to alter the present elective system would be submitted, by way of local referendums, to the voters of each county or city. Although certainly workable,

preferable. Judge Jacob Fuchsberg, in a 1975 interview concerning possible judicial reforms, stated:

"I believe candidates should be screened by a preliminary vote of the entire Bar, not by some small select committee in a particular jurisdiction when the judge is being selected . . . . The ultimate popular vote ought to be limited to selection from a small number who survive that process. The general election should be without a party endorsement . . . ."


The Select Task Force on Court Reorganization, chaired by Senator Bernard Gordon, a Republican from Peekskill, New York, is composed of members of the state legislature, lawyers, judges, and law school professors. The Select Task Force held hearings early in 1976 with a view toward reform of methods of selecting judges. 175 N.Y.L.J. 34, Feb. 20, 1976, at 1, col. 2.


This conclusion is in accord with a plan currently before the state legislature which provides for gubernatorial selection of court of appeals judges. See Gordon, Legislative View of a Better Judicial System, 177 N.Y.L.J. 42, Mar. 3, 1977, at 1, col. 2. The proposal is the result of compromise. Before Governor Carey assumed office in 1975, he appointed a Task Force on Judicial Selection and Court Reform, headed by Cyrus Vance, to formulate proposals on judicial reorganization. See 173 N.Y.L.J. 36, Feb. 24, 1975, at 1, col. 3. Some 15 months later, the Task Force recommended merit appointment of all New York State judges by the Governor with the consent of the Senate. 175 N.Y.L.J. 86, May 4, 1976, at 1, col. 2. In a politically pragmatic move, the Governor agreed to limit gubernatorial appointive powers to judges of the court of appeals. Nonetheless, the section of the amendment dealing with appointment of court of appeals judges was withdrawn when the amendment was passed for the second time in the state senate. See N.Y. Leg. Rec. S 1792C, at S 186, 200th Sess. (1977).


Senator Gordon proposed a "local option" plan for lower court judges. Under this proposal voters in each judicial district would decide if the judges in that district should be appointed or elected to the bench. Id.

In contrast, the Dominick Commission advocated continued election of court of appeals judges. See Philip, Nejelski & Press, supra note 5, at 104. Evidently, Judge Breitel does not agree with the concept of "local option" and local differences in our judicial system. In November 1976 he wrote:

Those who defend the status quo contend that the state's diversity requires regionalism in its courts and that it is "democracy" for the people to vote directly for their
this compromise does not appear to deal adequately with several aspects of the judicial selection problem.

For one thing, if there is any judicial office in which the public appears to have continued interest, it is the court of appeals. After the heated 1973 primary between now Judge Jacob Fuchsberg and Federal District Court Judge Jack Weinstein, and the ensuing pitched election campaign between Judge Fuchsberg and now Chief Judge Charles Breitel, a public opinion poll indicated that seventy-three percent of those surveyed felt that they "would have more confidence in the Chief Judge" if he were elected, and preferred the elective system for that position. Less than eight percent favored gubernatorial appointment of the court of appeals chief judge. Similarly, in 1974, the public indicated active interest in the election of the associate judges to the court of appeals. Thus, the Gordon proposal seems to be not only a very limited solution, but also one which attacks the problem in the judiciary from the wrong end. What is needed is a more basic and far-reaching compromise; one that will increase the quality of judges in all our courts. Mandatory screening is such a reform and appears to be workable and truly responsive to the problem.

As was noted previously, mandatory screening of judicial candidates prior to nomination is gaining wider acceptance among proponents of both appointment and election. For example, the assistant judges. The fact is that this regionalism produces the disorganized and inefficient pattern that must be one, although not the only, reason the courts strain under an impossible case load. As for the democratic selection of judges it is a delusion often hypocritically foisted on the gullible. It is a political commonplace that with rare and always notable exceptions the selection and advancement of judges is handled by political leaders largely only for political purposes. The people vote but only to ratify the choices made for them . . . .


20 Philip, Nelerski & Press, supra note 5, at 105.

21 Id. at 120. Interestingly, of those who voted in the 1973 general elections but did not vote in the judicial election, 72% gave as their reason that they "didn't know enough about the candidates." Only 18% said they "didn't care that much" who won or lost. Id. at 102.

22 See note 4 supra. In the words of one academician:
Perhaps any method of judicial selection has drawbacks. Election of judges, whether on a nonpartisan or "retention-in-office" ballot, is accomplished by an electorate largely unfamiliar with the candidate and his qualifications. . . .

Perhaps what is most needed in judicial selection is examination in public of a potential judge's qualifications and background . . . . Properly utilized, the process proposed should eliminate doubts as to a nominee's qualifications and resolve possible conflicts of interest . . . .

Lilly, Some Thoughts for Judicial Reform in Oklahoma, 10 Tulsa L.J. 91, 102 (1974).
Mandatory Preselection Screening

Director of the American Judicature Society, an open supporter of merit selection, wrote in early 1976: "The key to the success of [the merit plan] is the judicial nominating commission. At least theoretically, the nominating commission goes through a rigorous screening process for each of the judicial applicants."31 Similarly, Justice Frank D. O'Connor of the appellate division, second department, an outspoken advocate of our present elective system, recently stated:

[W]hat needs to be done is not to precipitously scrap a procedure that has in the main worked remarkably well for the past 130 years; that, with diligence and intelligence, every effort be made to improve that procedure; that bipartisan endorsements be barred for judicial candidates except when running for reelection; that mandatory screening committees be established to evaluate candidates prior to designation; that judicial elections, especially for superior courts, be kept separate and apart from general elections; that we embark upon a badly-needed high intensity educational program amongst the electorate and that we encourage young gifted Americans, lawyers and non-lawyers alike, to enter the public arena.32

More important than its relatively new popularity, mandatory screening provides an effective means of ensuring the competence of judges at both the trial and appellate levels. Detailed examination of the qualifications of those who will be judges strikes at the very heart of the present problems in the judiciary.33 Such screening offers a mechanism for generating pertinent facts about the candidates or designees, and thus enables the public or the executive to reach a decision in a well-informed manner. Additionally, when screening is mandatory, it appears more likely that those who nomi-

32 O'Connor, An Argument for the Election of Judges, 175 N.Y.L.J. 29, Feb. 11, 1976, at 2, col. 3 (emphasis added). The increased recognition of the desirability of preselection screening indicates that a proposal for a mandatory rather than a voluntary plan would have a realistic possibility of adoption. The distinction between voluntary and mandatory screening is what the leaders in the state senate cited as the primary cause of their unwillingness to support the 1970 Hansen-Duryea judicial reform bill. See N.Y. Times, Mar. 12, 1970, at 32, col. 8.
33 A Presidential Commission wrote in 1967:
The quality of the judiciary in large measure determines the quality of justice. It is the judge who tries disputed cases and who supervises and reviews negotiated dispositions . . . . Through the exercise of his administrative power over his court he determines its efficiency, fairness, and effectiveness. No procedural or administrative reforms will help the courts, and no reorganizational plan will avail unless the judges have the highest qualifications, are fully trained and competent, and have high standards of performance.

nate or appoint will not select or support unqualified candidates.

Admittedly, preselection screening will be neither a panacea nor a flawless solution. Proper tests must be designed to assess the candidates' competence and qualifications. Likewise, the screening panel itself must be established, rules governing its composition and procedures adopted, and some means of assuring impartiality and diligence devised. The problem of who will screen the screeners must be overcome. With careful drafting of the legislation creating the panels and public scrutiny of the panels' activities and performance, these obstacles can be surmounted and an effective, intelligent, and fair screening format developed. Surely, the difficulty of anticipating precise standards and developing a litmus test for judicial competence is not a ground for not attempting to do so at all.34

Of particular note in comparing the mandatory screening program to the Gordon proposal is the fact that the screening program will apply not only to appellate judges but also to virtually all lower court judges.35 Under the New York Constitution, all appellate division justices are former supreme court justices,36 and, as a practical matter, almost all of the judges on the court of appeals are former trial judges. The trial judge is the judicial officer with the most frequent and direct contact with the public. In any litigation, he performs the most powerful role in the judiciary's factfinding process and is responsible for the initial application of legal principles to the facts. Of necessity, he bears the primary duty to assess credibility and resolve conflicting evidence.37 The President's Commission on Law Enforcement and the Administration of Justice emphasized that "the trial judge exerts a far greater influence on the quality of justice" than his appellate brethren.38 Thus, it is extremely important that preselection screening take place at the trial as well as the appellate level.

The statute proposed by this Article would do that, and would also enable the screening groups to develop a working file on trial
judges prior to their ascension to higher courts. Through the adoption of this statewide proposal, the prospect of each court dispensing justice of uniformly high quality should be greatly enhanced. The achievement of this goal, which is fully consistent with our constitutional scheme, should, in turn, discourage forum shopping and help build public respect for our entire judicial system.

In short, mandatory preselection screening appears to be a compromise that is not only politically viable, but one that also should effect very significant improvements in the method of selection, the quality of our judges, and the public's confidence in the courts. It can alleviate, if not remove, some of the pro-appointment advocates' criticisms of our present system without necessitating a major upheaval in the selection process. At the same time, companion screening by civic bodies and bar associations can continue, local referendums on the election-appointment controversy can still be held, and other constructive changes in the selection process may be developed. Through the adoption of mandatory preselection screening the entire elective system may be significantly improved while the larger controversy continues to rage.

Format and Operation of a Statute for Mandatory Preselection Screening

A number of plans for creation of a mandatory preselection screening panel have been drawn, including specific statutes which have been unsuccessfully proposed to the New York State Legislature. One of these proposals will be used here as a model for discussion. The full text of the proposal which would add a new article 2-B to the Judiciary Law is set forth in the appendix to this Article.

---


30 See N.Y.A. 8934, N.Y.S. 6772, 199th Sess. (1976). The statute proposed in the appendix of this Article [hereinafter cited as Proposed Statute] was based upon this proposed legislation, which was submitted in the 1974-75 and 1975-76 legislative sessions. That proposed legislation was drafted by the author at the request of the Select Task Force following testimony by the author at hearings before the Select Task Force in January of 1975. A similar statute, also drafted in part by the author, was unsuccessfully submitted to the City Council of the City of New York in 1976 by the Association of the Bar of the City of New York.
Concept of the Statute

The principal features of the mandatory screening statute are: (1) the creation of impartial local screening committees which will conduct detailed studies of each candidate's or designee's qualifications for office; (2) the delineation of those characteristics believed to promise high quality in the judiciary; (3) the publication of the committee's decision and underlying rationale with respect to each investigation; and, most importantly, (4) the requirement that no person may become a judge unless found qualified by the appropriate screening committee.

Although these ideals may be easily stated, their implementation presents difficulties. Preventing a breakdown at the level of selection to the screening committee will be the real key to the successful operation of the proposed program. Accordingly, the statute regulates the general composition of the screening committees, grants them a certain amount of discretion in prescribing their own rules, and provides a mechanism for removal of incompetent, dishonest, or nonfunctioning members of the committees.

Nothing in the statute prohibits the political parties, or any other civic or bar group from also screening potential judges. Indeed, such additional screening should be encouraged so as to give private interest groups the opportunity to reach their own conclusions and thus present a public "check and balance" on the official screening committees. The more review and information generated before a judge is selected, the better off the public and anyone else making the selection will be.

By the same token, the nonofficial screeners can also aid the official panels in controlling other strong interest groups which may be involved in the selection process. For example, such additional screening might counter the somewhat exaggerated criticism by pro-electionists of the current role of bar associations in the selection process. For example, one recent commentator has opined:

---

41 Proposed Statute §§ 46-b to 46-f.
42 Id. §§ 46-g to 46-h.
43 Id. § 46-g.
44 Id. § 46-h(3).
45 Id. § 46-a.
46 See, e.g., VanOsdol, Politics and Judicial Selection, 28 ALA. LAW 167, 173 (1967).
47 Proposed Statute § 46-f.
48 Id. § 46-h(7).
49 Id. § 46-j.
50 See, e.g., Desmond, 'Merit Selection' Isn't Easy Answer to Choose Judges, 173 N.Y.L.J. 15, Jan. 22, 1975, at 34, col. 3.
In close judicial elections the public and the press often look to the bar associations as neutral sources of information and guidance. A bar association will, however, occasionally take an unusually strong position in a judicial contest. Although a stated preference is certainly ethical, it raises some vexing questions about the power of the bar. Most disturbing is the fact that such endorsements tend to come very late in a race, thereby severely limiting the opportunity for rebuttal. In any event, these endorsements stand virtually uncontradicted since there is no organization with the authority or reputation of the bar to counterbalance, much less rebut, the latter's more energetic advocacies. It is important that those who specialize in the law pass on their knowledge of the judiciary to the electorate, but unfortunately there is sometimes a thin line to be drawn between the offering of neutral opinions and voter manipulation.\(^{51}\)

The unofficial screening may also assist the panels in guaranteeing that political leaders not be kingmakers but rather act to improve the quality of the bench.\(^{52}\)

Perhaps the most important effect of additional screening will be an increase in the amount of public data on each judicial candidate. Even after the heated public debate over the 1973 election for chief judge of the court of appeals, according to an Institute of Judicial Administration study, forty-nine percent of those polled who knew of the race stated that they wanted more information.\(^{53}\)

\(^{51}\) Judicial Selection in the States, supra note 1, at 288. Actually, the various bar associations frequently disagree on candidates, see N.Y. Times, Jan. 3, 1974, at 27, col. 1. In fact, one commentator concluded that the 1973 and 1974 court of appeals elections demonstrated that "[t]he influence of the organized bar in judicial contests is at best marginal. . . . For better or for worse, the public does not readily accept guidance from lawyers about judges." McKay, Forward to Philip, Nevolski & Press, supra note 5, at iii.

\(^{52}\) Many political leaders insist that they do not have control over judicial nominations and that their actions are prompted by a desire to benefit the public. But see E. Costikyan, Behind Closed Doors 201-10 (1956); Spaeth, supra note 1, at 15-16. It would certainly be unfair to contend that all politicians do not sincerely believe that they exercise their power in the public interest. Unfortunately, the actions of political leaders often speak louder than their words. This writer participated in bar association screening of judicial candidates before the 1976 election. During the screening candidates openly professed that they were nominated for certain judicial offices simply because their local party leaders had determined that they were electable. One of those candidates bluntly described the basis for his selection by the party leaders as follows: "Let's face it. We're all political hacks." Another interesting example occurs when New York City Civil Court judges are tapped by the leaders for promotion to the supreme court. The political leaders, hoping to avoid primary fights for the seats of those judges, have had them resign their posts before their terms expired but after the dates for filing primary ballot petitions elapsed, thus assuring the leaders unfettered power to designate their successors. See generally N.Y. Times, Sept. 8, 1975, at 30, col. 1 (editorial).

\(^{53}\) Philip, Nevolski & Press, supra note 5, at 96.
Seventy-two percent of those who had not voted attributed their decision not to vote to a lack of knowledge about the candidates. These complaints may be substantially, if not entirely, alleviated by both requiring official preselection screening and encouraging non-official but responsible screening by civic and political organizations.

**Mandatory Nature of Screening**

The force of the program is supplied in the statute's opening section, which requires a certification of "qualified" from the appropriate screening committee prior to the appointment or election of any judge to any court other than a town or village court. Experience has shown that for preselection screening to be effective, it must be mandatory. Otherwise, the committee's findings may be and, in fact, have been disregarded when they conflict with the wishes of the political parties.

The primary reason for the exclusion of village and town courts is the belief that the screening process could become too cumbersome, costly, and localized if it sought to review this level of the judiciary. Additionally, it appears possible to stimulate public involvement and instill knowledge regarding the candidates for such local offices without an overseeing and information-gathering body.

**The Judicial Screening Committees**

The proposed legislation would create separate judicial screen-
MANDATORY PRESELECTION SCREENING

The committee for the court of appeals and court of claims would have to screen candidates for the seven justices of the court of appeals, as well as for the seventeen permanent court of claims judges. See N.Y. CT. CL. ACt § 2(2)(a) (McKinney Supp. 1976-1977).

Proposed Statute § 46-c(1), c(5).

It is generally recognized that staggering the terms of the judges on a particular court
be made alternately by the chief judge of the court of appeals, the
presiding justice of the appellate division department encompassing
that judicial district, and the administrative judge of the supreme
court for that judicial district. The judicial screening committees
for the four appellate division departments would each consist of ten
members, also serving staggered 5-year terms, with alternate
selections to be made by the chief judge of the court of appeals and
the presiding justice of the appellate division involved. Finally,
candidates or nominees for positions on the court of appeals and
court of claims would be screened by a committee consisting of ten
persons, four of whom would be selected by the chief judge of the
court of appeals, four of whom would be chosen by the presiding
justices of the appellate division departments, and two of whom
would be appointed by the governor. Their terms would also be
five years with two positions becoming vacant every year.

Obviously, no selection process is perfect. Nevertheless, the
statute attempts to use the method which appears most likely to
result in blue-ribbon committees. Essentially, this process is in-
tended to entrust the selection of a large proportion of each commit-
tee to the chief judicial official or officials responsible for the areas
involved, with the governor having a role in the choice of members
for the state-wide committee. Since the presiding and administra-
tive justices are charged with maintaining the efficiency of the prin-
cipal courts affected by this proposal, they have a direct interest in
ensuring that the justices are highly qualified. The governor is

is advantageous. See Lowe, Merit Selection in the Equality State, 59 JUDICATURE 328, 334-35
(1976). Employing the same system in the context of the nominating committees should
achieve similar desirable results.

44 Proposed Statute § 46-c(2).
45 Id. § 46-d(1).
46 Id. § 46-d(5).
47 Id. § 46-d(2).
48 Id. § 46-e(1).
49 Id.
50 Id. § 46-e(5).
51 "Blue Ribbon" does not mean elitist. As Dean Niles explained:
I would not like to see a commission in New York select candidates only from a
social or professional elite, but I do not think there is any chance of this happening.
So long as the executive officer is an elected official, I do not believe that there is
much danger in this day and age of any ethnic or religious minority being neglected.

Changing Politics, supra note 1, at 257.

52 In this respect, the proposed statute differs from most of the present merit plan propos-
als, see note 39 supra, and from Governor Carey's voluntary merit plan, see note 109 infra,
which, perhaps as a pragmatic concession to the political leaders, give the current majority
and minority party leaders of the senate and assembly a major role in selecting members of
judicial nominating committees. See also Spaeth, supra note 1, at 19-20.
answerable directly to the people, and unlike state or local legislators or party leaders, his selections should be subject to sufficient public scrutiny to induce him to act in a bona fide manner. Nevertheless, one cannot be naive about the possibility that politics might be a factor in these selections. Consequently, the proposal states that a majority of the committee members cannot be registered members of any one political party. Additionally, it provides that the screening committee members cannot simultaneously hold any judicial or other public or formal political office. These facets of the statute should significantly minimize the deleterious effect politics can have on the selection of the committees' personnel.

**Makeup of Judicial Screening Committees**

Each member of a judicial screening committee must be “selected so as to assure that [the committee] is politically non-partisan and . . . representative . . . .” In particular, the statute explicitly stipulates the maximum number of persons of each political party who may serve on any one committee, mandates that forty percent of the members of each committee be lay persons, and guarantees that both men and women will be appointed. Thus, the

---

73 Twenty-one of the twenty-three states which have judicial screening or nominating committees provide for selection of at least some committee members by the governor. Judicial Selection in the States, supra note 1, at 326-41. It must be recognized, however, that when a governor chooses committee members, the process may still be “subject to political rivalries.” Id. at 303. When one considers the desirability of removing the entire selection process from the political sphere, Governor Carey’s decision to give the majority and minority leaders of the senate and assembly a voice in choosing committee members, see Exec. Order No. 5, 9A N.Y.C.R.R. § 3.5(3) (1975), is indeed of questionable wisdom.

74 Even if the selections are politically motivated, the use of screening committees rather than nominating committees should decrease the effect of politics in the actual work of the screening group. One recognized authority on the subject explained regarding nominating committees:

The most politically-minded governor cannot ignore for long the attitudes of the bar and the judiciary towards his appointments to the bench. Nor can the most professionally-oriented lawyer or judicial member of the nominating commission consistently disregard the political acceptability of the various candidates to the governor.

Watson, Judging the Judges, in Selected Readings on Judicial Selection and Tenure 62 (G. Winters ed. 1974). This observation would not necessarily apply to the operations of screening committees since, unlike the nominating committees, it would not be the duty of the screening committees to propose judicial candidates. Their only function would be to review the qualifications of candidates presented to them. See also R. Watson & R. Downing, The Politics of the Bench and the Bar (1969).

75 Proposed Statute § 46-f(1).
76 Id. § 46-f(2).
77 Id. § 46-f(1).
78 Id.
proposed screening program draws on the arguments of the pro-electionists who insist that members of the judiciary reflect the people's wishes. Each committee, as a representative of the public, must be truly responsive to the community it serves. The broad requirement that these committees be politically nonpartisan and the specific qualifications on the power of appointment are an attempt to ensure that responsiveness.

The limitation on the number of positions held by each political party is intended to prevent the domination of any committee by a strong partisan organization. This limitation should serve to focus the committee's attention on each candidate's professional qualifications, which are the only legitimate subject of inquiry, and minimize any consideration of the candidate's political connections.

Aside from this restriction, the statute attempts to attack the representation problem in a positive manner by guaranteeing membership to a cross section of the community. The proposal's emphasis is not on satisfying established quotas; the use of quotas to achieve representation of individual racial and ethnic groups is, at best, of questionable effectiveness. It is submitted that the appointment of unprejudiced and community-oriented members is far more significant than the assignment of an arbitrary number of positions to selected groups. Religious and geographic representation also seems more likely to be achieved through careful individual appointments. Nevertheless, the public apparently does not entirely agree with this view, and, perhaps more importantly, there is no perfect test of one's being sincerely unprejudiced and responsive. The surest way to obtain such qualities, or at least their appearance, on the committees is to require diversity and broad representation to be built into the membership structure itself. At the same time, however, flexibility must be maintained. For example, numerical representation of all groups in a community the size of any of the boroughs in New York City would result in a large and unwieldy committee. Consequently, the statute requires that a cross section of the area involved be represented, but only "to the extent reasonably feasible."

This limitation on the duty to provide broad representation does not apply to the requirement that at least some of the members

---

79 See, e.g., Atkins, supra note 5, at 207.
80 See Proposed Statute § 46-f(1).
81 Id. Some flexibility here appears necessary so that the various committees reflect the great differences in ethnic and racial balance in different areas of the state. Such differences also exist within the judicial departments and districts.
be women. The number of women in law schools, in the bar, and on the bench is steadily increasing, and, of course, women constitute more than fifty percent of the populace. This readily identifiable and large group clearly is entitled to a direct and major role in the judicial process.

Perhaps the most controversial aspect of this section in the proposed statute is the requirement that a significant portion of the membership be laymen. It has been suggested that lay members on such a screening group are often unduly influenced by both the lawyers on the committee and those persons who have appointed them. The more prevalent view, however, is that the active participation of lay members makes the committee more reflective of the attitudes of the community and contributes an important human element to the screening process. As one commentator has recently written:

Those who criticize the participation of lay membership fail to realize that the mere presence of such individuals creates a confidence in the commission's actions and motives. In addition, the public voice in such selections cloaks the commission with an aura of public trust.

A 1973 report on screening state judges under the Massachusetts merit plan summarized the contributions and effects of lay membership as follows:

The interaction between lawyers and laymen on the Committee is of some interest. Except in one or two cases, most of the laymen had scant knowledge of the courts, the judiciary, or their recent problems. The laymen, however, soon realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While the laymen had to defer to lawyer opinions about legal experience, they held strong, independent

---

82 Proposed Statute § 46-f(1).
83 No specific standards are fixed for the number of women, see id., but it is assumed that mere tokenism will not characterize the role of women on the screening committees.
84 Id.
85 See, e.g., Changing Politics, supra note 1, at 249-50.
86 Judicial Selection in New York, supra note 1, at 630.
87 The Massachusetts plan involved a voluntary merit plan adopted by former Governor Francis W. Sargent in 1972. The plan was adopted to assist the Governor in appointing judges to fill vacancies created by a constitutional amendment which required state judges to retire at age 70. See Robertson & Gordon, Merit Screening of Judges in Massachusetts: The Experience of an Ad Hoc Committee, 58 Mass. L.Q. 131 (1973) [hereinafter cited as Robertson & Gordon].
views and were by no means dominated or manipulated by the lawyers.

Lawyer perceptions of the lay members confirm the capacity and desirability of lay participation. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the "chuminess" that tends to exist among lawyers.88

In addition to these qualifications on the composition of the committees, the statute addresses itself to the propriety of the individual member's political and governmental activities. In order to preserve the autonomy of the screening group members may not, during their tenure, "hold any elected or appointed public office or office in any political . . . organization . . . ."89 Since the party leaders will undoubtedly continue to designate and nominate most of the judicial candidates, elimination of these same leaders from the official screening process appears essential to the maintenance of the independence of the judicial screening committees.90

For similar reasons, the statute further provides that a person can be a member of only one judicial screening committee at a time.91 This limitation is designed to prevent any one person or small coterie of persons from amassing too much power in the judicial selection process. It should also prevent the overburdening of committee members and secure for each court the full attention of all members of the appropriate committee. Like their counterparts in most other states, the committee members, as opposed to the committees' staffs, will not be paid for their services.92 Thus, their screening duties, which will be somewhat sporadic and cyclical,


89 Proposed Statute § 46-f(2).

90 Many cases have emphasized that persons sitting in capacities analogous to judges must not only be impartial, but must also appear to be impartial. See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149-50 (1968). This same quality should also be required of those who would screen potential judges.

91 Proposed Statute § 46-f(3).

92 Id. § 46-f(5). Most states with screening committees do not pay the members. See, e.g., Robertson & Gordon, supra note 87, at 145. See also Wakeland, A Nonlawyer on a Judicial Discipline Commission, 59 JUDICATURE 468 (1976). Other current judicial reform proposals also do not provide for compensation for nominating or screening committee members but do allow for reimbursement of their expenses. See, e.g., N.Y.A. 1102 § 38(g), 198th Sess. (1975). Similarly, Governor Carey's voluntary merit plan only allows reimbursement of expenses. Exec. Order No. 5, 9A N.Y.C.R.R. § 3.5(5) (1975).
MANDATORY PRESELECTION SCREENING

usually intensifying just prior to election day, will have to compete with their other commitments, obligations, and interests. Limiting members to one committee at a time should enable them to give adequate attention to their screening responsibilities.

Finally, all committee members must reside in New York State and live or, in the case of practicing attorneys, maintain their principal law office in the geographic area covered by the screening committee upon which they sit. If the committee is to be responsive to the community it represents, it must have extensive first-hand knowledge of the characteristics of that community. Residence or law practice therein are neither a sine qua non nor a guarantee of such knowledge, but they are traits which should make such knowledge and community understanding more likely. The nonresident attorney provision seeks to acknowledge the reality that many lawyers commute to work from adjacent counties. The committee should not be denied the extensive experience and familiarity with the courts which a lawyer gains through active practice in a particular locale. Those selecting the committee members, however, should carefully examine the nonresident attorney’s knowledge of local affairs in an effort to ascertain the extent to which his law practice has attuned him to the peculiar needs and interests of the community.

Several merit plan statutes would also prohibit members of the nominating and screening committees from seeking or being appointed to judicial office for some specified period after serving on a committee. Where the committees actually propose and recommend a list of nominees to the governor, such a prohibition is deemed advisable to prevent the committee members from simply anointing each other. Since the committees here will serve only to screen candidates, such a prohibition does not appear necessary. Furthermore, since detailed written public reports must be provided, they should not be able to slip their members by the public.

---

93 Proposed Statute § 46-f(4). This provision is not included in the other currently proposed judicial reform bills, see, e.g., N.Y.S. 7402, sec. 5, § 15-a(c)(3), 199th Sess. (1976) (only city residents may be members of New York City nominating committees), and appears to be novel. It is recommended in order to enable our urban areas to utilize practitioners who are commuters. Such commuter practitioners have a direct interest in maintaining the quality of justice where they make their living as well as where they reside.

94 One of the more prominent examples of such a prohibition is contained in Governor Carey’s plan. See Exec. Order No. 5, 9A N.Y.C.R.R. § 3.5(5) (1975).

95 See generally Judicial Selection in the States, supra note 1, at 308. Hopefully, the committee members will be of such quality that they will not attempt to misuse their office to gain a judgeship. Nonetheless, it will not hurt to be wary of the possibility.

96 Proposed Statute § 46-h(3).
If such backslapping and quasi-nepotism does develop, however, the statute should be promptly amended to add such a prohibition.

**Qualities the Committee Should Consider**

The task of compiling a checklist of qualities or designing an empirical formula which will result in the selection of only highly competent judges is plainly impossible. Aside from the lack of agreement over just what is and is not a "good judge," personality and psychological factors must also be assessed. The difficulty of fixing precise standards, however, is no justification for simply not attempting to do so at all. It is certainly possible to develop a program which, like most other human endeavors, is not foolproof but nonetheless is capable of improving the judiciary.

Clearly, there are some minimum qualifications that any litigator knows judges must have. Additional necessary attributes are suggested by common sense and general experience in business and personal relationships. The proposed judicial screening statute draws on this knowledge and experience and indicates some such minimum requirements. It provides that

the judicial screening committee shall consider, among other things, the following characteristics of [each] candidate or nominee: legal ability and aptitude; ability to articulate verbally and in writing; litigation and other professional experience and published writings in the practice, administration or teaching of law; temperament and demeanor; industry and diligence; fairness and impartiality; knowledge of and readiness to adhere to the code of judicial conduct; honesty; freedom from conflict of interest; independence and decisiveness; integrity; moral and professional character; and physical and mental health. Without limiting the grounds for certifying or refusing to certify any candidate or nominee as "qualified", no candidate or nominee shall be certified as "qualified" if he is found to be lacking in the foregoing categories of qualifications.

---


98 It has been suggested that the assessment of a candidate's personality and mental stability should include the administration of a psychiatric examination. See Kuvin & Saxe, Psychiatric Examination for Judges, N.Y. Times, Dec. 21, 1975, § 4, at 13, col. 2. This proposal was strongly criticized. See Letter to the Editor from Gerald Stern, Administrator of the Temporary State Commission on Judicial Conduct, N.Y. Times, Jan. 13, 1976, at 32, col. 5. While such a proposal does appear unduly extreme, even Kafkaesque, the screening process would clearly be incomplete without an examination of a judicial designee's psychological background and stability.

99 Proposed Statute § 46-g (emphasis added).
To begin with, one should emphasize the words "among other things" and the prelude to the final sentence in this section. Both of these phrases are designed to allow and encourage the judicial screening committees to fashion standards they deem appropriate and to determine the relative weight to be given the various factors in each case. It should be noted, however, that the committee's broad authority in this area is not unchecked. Committee findings must be supported by a publicly reported written statement of reasons, and any member who is acting improperly may be removed. These two facets of the statute, together with the reasonable assumption that care and intelligence will be exercised in choosing each committeeperson, should prevent any screening group from becoming a "runaway committee."

Nevertheless, it is not only fair, but essential that one ask: What is the basis for the list of qualifications included in the statute? The answer is that the list was developed not simply from the common professional experience of lawyers and judges, but also from the openly expressed sentiments and observations of the public.

Many of the qualities emerge from the 1972 Report of the Temporary Commission on the New York State Court System [the Dominick Commission], which attempted to isolate the traits contributing to judicial incapacity and misconduct. The commission examined improper conduct both on the bench, such as laziness, impatience, rudeness, and arbitrariness; and off the bench, including political ties, immorality, concern for publicity, and neglect of judicial time and duties. It also considered general physical and mental disabilities, such as lack of stamina, psychological or drinking problems, physical infirmities, and mere indecisiveness.

---

100 Id. § 46-h(3).
101 Id. § 46-j.
102 2 TEMPORARY COMM'N ON THE NEW YORK COURT SYSTEM, REPORT 60-61 (1973) [hereinafter cited as TEMPORARY COMM'N']. This commission is frequently referred to as the Dominick Commission, after State Senator Clinton Dominick, its chairman. The commission was created by the legislature in 1970, see ch. 943 [1970] N.Y. Laws 2893, after the Hansen-Duryea bill was defeated, see notes 19-21 and accompanying text supra, to propose revisions in the court system. See N.Y. Times, Jan. 2, 1973, at 1, col. 1. Unfortunately, the report advocated the retention of the present elective system, TEMPORARY COMM'N, supra, at 53-55, and only suggested major changes in the disciplinary and removal procedures. Id. at 61-62. This was a major blow to the reform movement. Nonetheless, it is significant that the report also recommended abolition of the nominating convention, id. at 55, and the adoption of preselection screening for appointed judges, id. at 54. For a discussion of this report, see Klein & Witztum, Judicial Administration 1972-1973, in 1972-1973 ANNUAL SURVEY OF AMERICAN LAW 717, 718 (1973).
103 TEMPORARY COMM'N, supra note 102, at 60-61.
Several judges, including former Chief Judge Arthur Vanderbilt of the New Jersey Supreme Court, a recognized and respected advocate of judicial reform, have detailed some of the qualities to be sought. Twenty years ago Judge Vanderbilt listed the following criteria: "learned in the law . . . as applied in action in the courtroom, . . . versed in the mysteries of human nature and adept in the discovery of the truth . . . beholden to no man, independent and honest . . . ." He concluded that "[s]uch ideal judges can after a fashion make even an inadequate system of substantive law achieve justice; on the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable." Similar qualities were emphasized by 144 trial judges who responded to a questionnaire of the National College of State Trial Judges in 1965. The following characteristics, in order of importance, were ranked as most crucial: moral courage, decisiveness, reputation for fairness and uprightness, patience, good health, and consideration for others.

The public has also expressed its views on the indicia of judicial competence. For example, in 1975, 230 lay volunteers, under the direction of the League of Women Voters, monitored the activity in various city, suburban, and rural Illinois courts for five months. Their comments, as reported by the American Judicature Society, are consistent with those of the judges and others grappling with the problem. Some of their more revealing observations have been summarized as follows:

Judges who seemed easily angered or flippant or who tried to be funny were disappointing to court watchers. Plainly, citizens want and expect their judges to be father figures, dignified and sober. In hundreds of reports, there was not one criticism of a judge for being too stern, too firm or too serious. On the whole, judges were rated highly for their patience, attentiveness and courtesy. But sarcasm, flippancy, weakness or intemperance when they did appear were not highly regarded, nor was too much informality . . . .

Lawyers and learned commentators have also contributed their

---

opinions on the subject. Recently, a member of one of Governor Carey's nominating committees outlined the various traits examined by the committee he serves on. In order of importance, they are: intelligence, industry, integrity, judgment, and judicial temperament. Similar qualities were emphasized by the New York City Mayor's Advisory Committee on Judicial Selection established by Mayor Robert Wagner in 1962 when he instituted voluntary merit selection for the New York City criminal and family courts.

In a 1966 article, Professor Maurice Rosenberg, a former member of the Mayor's committee, listed personal qualities and characteristics, preparatory education and training, professional attainments and special experience, and political, ethnic, and other affiliations as the four general areas which that committee had exam-
ined. Under the first of these items, the committee probed the candidate's character, patience, humility, tolerance, zeal and capacity for work, common sense, and tact. The second encompassed not only education and years at the bar, but also "teaching, lecturing, or writing." Interestingly, although trial and courtroom experience was also considered, the committee "was explicit in declaring that trial experience is not a *sine qua non* for appointment, but only a 'plus factor.' " In the area of attainments and experience, the committee stressed civic and bar association activities and, surprisingly, political activity, which it viewed as "a mark in the prospect's favor." As Professor Rosenberg observed, political activity is a factor which the state trial judges who responded to the National College of State Trial Judges questionnaire listed as the *least* important quality contributing to judicial competence. With respect to the last category, the committee reviewed the candidate's political and ethnic affiliations in recognition of the need to achieve balanced and broad representation of all groups on the bench.

Such a need is indeed a factor in the selection process, but it is not a pertinent criteria in determining whether a particular judge is "qualified" to hold office.

The areas examined by the Mayor's committee are generally accepted as appropriate indicia of a candidate's suitability to hold judicial office. Disagreement arises, however, when these criteria are sought to be applied. The current debate centers on how to define these qualities, how to determine whether they are truly possessed,

---


115 Id. at 1076.


118 Id. at 1068-69.

119 Id. at 1076-77.
MANDATORY PRESELECTION SCREENING

and what relative importance to ascribe to them in the evaluation of a particular judicial designee. The disagreement that exists between the judges and the Mayor's committee regarding the value of political activity is merely one illustration. The differences of opinion are often less clearly defined. For instance, one experienced trial lawyer recently commented: "In our courts many superb judges have had no prior major courtroom experience before mounting the Bench. It may fairly be said of them, to their credit, that they became fine judges in spite of, and not because of their inexperience in trials and appeals." While no one would dispute the usefulness of trial and appellate experience, serious disagreement exists concerning the quantity and the type of experience that is most helpful. How does one define "major courtroom experience?" How does one rate a lawyer who has tried a number of one-day or two-day trials, but never an extended trial? What rating should be given to a trial lawyer who has spent virtually his entire day in court but has rarely, if ever, engaged in legal writing? What consideration should be given to the fact that a lawyer may have tried cases or argued appeals only in a limited number of the sundry areas of the law? These questions and others like them have led many learned practitioners and commentators to emphasize that although some courtroom or appellate experience is necessary, its importance will vary with each case.

Like the evaluation of trial experience, the screening program itself will be conducted to a large extent on an ad hoc basis since the process cannot be reduced to fixed formulas and provable theorems. Limited but firsthand experience in bar association screening persuades this writer that those involved in the screening process must thoroughly review all the factors each situation presents. Perhaps the best expression of the practical difficulty involved in screening judicial candidates is William James' oft-cited statement that "[t]here is very little difference between one man and another; but what little there is is very important."

The proposed statute attempts to identify those fundamental character and personality traits which are commonly recognized as essential to the successful fulfillment of judicial duties. These include, among others, temperament and demeanor, industry and

---

121 See note 116 supra.
diligence, and fairness and impartiality. In addition, the statute strives to ensure that each candidate possesses the requisite ability. Thus, "legal ability and aptitude," "ability to articulate verbally and in writing," and "litigation and other professional experience and published writings in the practice, administration or teaching of law" are all stressed in the proposed enactment.

The importance of these traits is readily apparent. The ability to articulate ideas clearly, both forensically and in written opinions, is an absolute necessity if a judge is to perform his duties effectively. Today's crowded dockets and ever-increasing litigation demand that our judges be able to work under constant time pressure without sacrificing justice. The statute, through the requirement of diligence and industry, seeks to satisfy this public need and procure judges who are both hard working and adept at reaching well reasoned, thorough decisions in a short period of time. Finally, implicit in the minimum qualities prescribed by the statute is freedom from not only the fact but also the appearance of bias or lack of high professional and personal character. If the public is to have faith in its judiciary, it must not have any doubts about the impartiality and honesty of those on the bench.

The presence or absence of such qualities in any one candidate should become evident after a thorough examination of the designee's background. Interviews with judges, lawyers, and even former clients when feasible, who have observed or worked with the candidate in his professional capacity, should be particularly valuable sources of information. In assessing the candidate's writing ability, the committee should seek to review samples of his written work. If personal conferences with the candidate are conducted, as they certainly should be, forensic and legal ability can be tested further by, at the very least, posing detailed and specific questions on the law.

It must be recognized, however, that, as the President's Commission found: "These factors are illustrative of the type of criteria which a nominating [or screening] commission should consider. But no way has been found to give a uniform meaning to [such] imprecise terms . . . ." TASK FORCE REPORT: THE COURTS, supra note 5, at 68.

Proposed Statute § 46-g.


Judicial impartiality and high professional and personal character are qualities which have been frequently stressed in judicial opinions. See, e.g., Texaco, Inc. v. Chandler, 354 F.2d 655, 656 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965). See also note 90 supra; Stern, The State's Commission System of Judging Judges, 173 N.Y.L.J. 89, May 8, 1975, at 1, col. 1.

Heavy emphasis should be placed on one's understanding of and ability to articulate
MANDATORY PRESELECTION SCREENING

Some advocates of in-depth screening recommend that the judicial designees be required to submit to a written test. Such tests are given in many civil law countries, where the judges are actually trained in college for their position and constitute almost a branch of the civil service. In contrast, the American judiciary draws on distinguished and experienced lawyers. The administration of a bar-type examination in our system would appear to be both demeaning and unnecessary. This is not to say that the committee cannot require the candidates to submit written answers to the committee's written questions. Such a procedure is expressly permitted and is contemplated by the statute. But this written questionnaire should not take the form of a bar or school examination. While it might test legal expertise and knowledge of court procedures to some extent, the questions generally should be more informational in nature.

The term "litigation" rather than merely "trial" experience was purposely used in the statute with respect to the screening group's review of the candidate's professional experience. The applicant should have participated as lead or co-counsel in some trials, including at least a few that have gone through to final judgment. Knowledge of the broader aspects of the litigation process, however, such as pleading, motion practice, pretrial discovery procedures, settlements, and appeals, in many instances would appear to be far more important than the amount of trial time logged. A judge must do more than rule on objections; he must charge juries and often render rulings on the merits of the case and on pretrial and trial motions. To a great extent, litigation experience gained through activity outside of the courtroom can be of greater assistance to a judge performing these functions than time actually spent in court.

the law clearly. This may be discernible from a discussion of legal issues and the candidate's legal philosophy at interviews, as well as from his published writings and other contributions to the development of the law.

At least one of the current proposed constitutional amendments, N.Y.A. 1102, § 39(b), 198th Sess. (1975), would require that a "state judicial merit exam" be taken and passed by all prospective judges.


Proposed Statute § 46-h(4).

See id. § 46-g.

See note 116 and accompanying text supra. Generally, a lawyer's qualifications for a judicial position may be questioned when he has not been actively involved in the litigation
Other professional experience and writings, either as a practicing attorney or teacher of law should also be given serious consideration, so long as it was related to the litigative process. The qualifications of Federal District Judge Jack Weinstein are illustrative. A professor of law at Columbia prior to his appointment, Judge Weinstein authored or coauthored many articles on a variety of legal issues as well as a multivolume treatise on civil procedure. Since his appointment he has coauthored a multivolume treatise on the Federal Rules of Evidence. With such credentials, even without consideration of any trial experience he may have had, it would be difficult indeed to raise any question concerning his legal ability to hold judicial office. Judge Weinstein is perhaps an extreme example. The point, however, is that nonlitigative aspects of one's legal career may also evidence an attorney's competence to hold a judgeship. The proposed judicial screening committees would have the latitude to weigh all aspects of the candidate's legal career, not merely trial experience, in determining whether a prospective nominee or appointee is "qualified" to be on the bench.

Procedures for the Judicial Screening Committees

The proposed statute provides a basic time schedule and some skeletal procedures for the screening process but leaves to each committee the formulation of more detailed "fair and reasonable procedures" which may be adopted by a majority vote. This local rulemaking power varies from the provisions of several other proposed screening or merit plans in which a statewide unit, such as
the committee for the court of appeals under the proposed statute, would be directed to promulgate rules for all other committees.\textsuperscript{133} Local variations in rules, however, appear to be advisable in New York, since many of the judicial districts and departments differ to a large extent in their population, number of judges, court congestion, and geographic size. Notwithstanding this need for flexibility, the legislature will be well advised to monitor the differences in local procedures so that it may act quickly in the event the local rulemaking authority proves counterproductive.

The statute also gives each committee the power to subpoena testimony and papers "reasonably related to the inquiries currently before it."\textsuperscript{146} Reimbursement for expenses incurred by witnesses is authorized to the same extent as that provided under the New York Civil Practice Law and Rules.\textsuperscript{141} The committee subpoenas would be subject to judicial review and entitled to judicial enforcement under the pertinent provisions of the Civil Practice Law and Rules.\textsuperscript{42} The subpoena authority appears necessary to assure that the screening groups are able to compile the requisite facts upon which their determinations should be based. At the same time, it is recognized that there exists a danger that this authority might be abused. Thus, judicial supervision is desirable to prevent both the flaunting of the committees' demands for appropriate information and the enforcement of unjustified subpoenas for material or testimony not reasonably relevant to the inquiry at hand. While the committees obviously are not intended to be Star Chambers, they must have the power to obtain pertinent information and, if necessary, to compel those in possession of this information to produce it.

Under the proposal, each candidate or nominee must submit to the committee's screening process at least 45 days prior to the election or appointment date.\textsuperscript{143} Upon refusal or failure to cooperate, the committee may decline to certify him for judicial office.\textsuperscript{144} The

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{133} See Exec. Order No. 5, 9A N.Y.C.R.R. § 3.5(2) (1975).
    \item \textsuperscript{146} Proposed Statute § 46-h(8). This provision is also contained in other reform proposals. See, e.g., N.Y.S. 7072, § 38, 197th Sess. (1974).
    \item \textsuperscript{141} See N.Y. Civ. Prac. Law § 2303 (McKinney 1974).
    \item \textsuperscript{143} Proposed Statute § 46-h(1).
\end{itemize}
\end{footnotesize}
screening process may involve any of the committee's properly adopted procedures, including a written questionnaire and personal interview, as well as those procedures specified by the statute. At least 15 days before the election or appointment date, the committee must issue a written report stating its conclusion and the reasons for its decision. This decision need not be unanimous. A majority vote will suffice, but the votes of each member must be included in the written report so as to make the degree of agreement within the committee a matter of record. Additionally, any committee member may add a concurring or dissenting opinion, which will be published with the report.

There are two reasons underlying the requirement that the report be in writing and published. First, the decision and rationale when circulated, will provide the general public with pertinent information regarding the qualifications of the candidates. Second, dissemination of the report will reveal the nature and bases for the committee's decision so that it can be "tested" in the crucible of public opinion and compared with the conclusions of others who know or screen the designee. One of the principal purposes of the screening process is the compilation of detailed information regarding potential judges so that those selecting them, either the electorate or the executive, will be able to make an informed and intelligent choice. What the committee has learned, together with the conclusions and rationale of the majority, concurring, and dissenting members, can be of invaluable assistance in the final election or appointment decision. Thus, the statute contemplates a de-
tailed and discursive report by the judicial screening committees, not merely a cryptic, generalized, and conclusory statement. A committee's certification should not end the screening process or be merely rubber-stamped by the public, the Governor, or the mayor. Instead, these officials or the electorate should further analyze the committee's decision. This analysis will only be possible if a thorough opinion prepared by the screening group is available.

Likewise, when the committee enters a decision not to certify a judicial candidate as qualified, both the candidate and the public are entitled to a complete explanation. By requiring that the report be detailed and that it be made public at least 15 days before the ultimate selection, the statute seeks to afford the designee a meaningful opportunity to muster support for and seek reconsideration of the matter. This is not to suggest that reconsideration should be readily granted. Nonetheless, the committees will not be infallible; when reconsideration is plainly warranted, it should not be refused. In view of the potentially serious detrimental effects of refusal to certify, reconsideration, while sparingly utilized, should always be available. A thorough published report hopefully will either justify the committee's decision or provide a basis for review when that decision is improper.

In this regard, the committees should seriously consider adopting procedures whereby a candidate or nominee is advised of the committee's decision prior to its release. Upon notification the designee may withdraw from the election or from consideration for appointment and thus moot the report and have it tabled. Such a procedure would be a humane way to handle a refusal to certify since it would minimize any future difficulties the disqualified judicial designee might encounter. As a result, any reluctance on the part of committee members to withhold certification should be reduced, and more lawyers should be willing to submit to the screening process. On the other hand, it can be argued that a truly qualified candidate has nothing to fear from the screening process and there is no harm in discouraging marginal candidates from submitting themselves for such an important post. Due to their

---

1 Proposed Statute § 46-h(9).

1 See generally Garwood, Democracy and the Popular Election of Judges: An Argument, 16 Sw. L. Rev. 216, 234 (1962); Lowe, Merit Selection in the Equality State, 59 Judicature 328, 332 (1976); Report of the Special Committee, supra note 2, at 8.

13 The pro-electionists similarly argue that persons with nothing to hide should have nothing to fear from the elective process. See Desmond, 'Merit Selection' Isn't Easy Answer
speculative nature, these conflicting policy arguments cannot be easily resolved at this time. Hence, the proposed statute leaves this matter to the individual committee to consider. If such a procedure is eventually adopted, it appears advisable for the committee's report to be prepared but filed under seal. Future committees would then have access to it in the event the designee resubmits his name for judicial office.153

Another important procedural matter which the proposed statute leaves to the discretion of the committees is whether their proceedings other than final reports should be kept confidential. It has been argued that “the members of the commission cannot effectively perform their functions unless they can speak candidly . . . . [S]omething may be said about some candidate that is not wholly complimentary.”154 But the problem is not that simple. One of the major aims of this program is the education of the public so that it will be better able to evaluate the proposed judges. This goal is clearly furthered by the increased amount of information which would be disclosed by public hearings on each candidate’s judicial qualifications. Moreover, excessive secrecy can breed suspicion. As one commentator, albeit in a slightly different context, has observed:

Confidentiality is a two-edged sword. Too often, as Edmund Burke reminds us, “Where mystery begins justice ends.” The most stringent set of ethical standards are of little consequence unless the public is convinced that the standards are uniformly and vigorously enforced. The interplay between the need for credibility and the need for confidentiality is one of those problems of balancing conflicting interests with which all lawyers and judges are familiar.155
Governor Carey's voluntary merit plan provides: "Except as may be necessary for the preparation of such reports, all information submitted to the committee shall . . . not be disclosed except to the Governor, unless required in connection with the performance of official duties or disciplinary proceedings." This limitation would have to be removed in elective situations. The committees' public reports should be detailed and complete if the public is to get the benefit of the committees' screening activities. The information in them should also be kept available for use by other or future screening committees.

There is obvious merit to the argument that confidentiality will aid the screening committees in gathering sufficient information to make an informed decision. At the same time, confidentiality may result in compromising other goals of the screening program. It appears advisable, therefore, to leave to the committees the task of striking the proper balance between these competing interests.

A major concern of those designing merit systems is the problem of balancing the need for public scrutiny of the commissions' proceedings against the need to keep certain of the commissions' investigation confidential. All nominating commissions strike this balance in favor of maintaining strict confidentiality concerning most information received on a candidate. The purpose of maintaining this confidentiality is to allow the commissions to work without overt public pressure that might impair their objectivity. Moreover, it appears reasonable for nominees to expect that their file will not be placed in the public domain and thus not make it distrustful for well qualified lawyers to have themselves available for judicial posts. Obviously, this is a different problem than that of making information concerning the actual nominees available to the public. There is considerable variation, however, among the states on the extent of confidentiality. Only three states—Alabama, Alaska, and Tennessee—require the commissions to release the names of all candidates under review. Missouri leaves this decision to the commission's discretion. Eleven states require that all nominees be made public, whereas Ohio, Colorado, and New York City, by contrast, require that only the name of the appointee be made public.

Atkins, supra note 5, at 207.

The New York City plan referred to is the Mayor's voluntary merit system for the criminal and family courts. See Rosenberg, The Qualities of Justices—Are They Strainable?, 44 Tex. L. Rev. 1063, 1073-77 (1966).


157 See Robertson & Gordon, supra note 87, at 146; Judicial Selection in the States, supra note 1, at 307. Apparently the recently enacted "sunshine" law, N.Y. Pub. Off. Law §§ 90-101 (McKinney 1976), will not require that the committees' deliberations be open to the public. Since the committees are examining qualifications for office, their meetings should fall within the provisions permitting discussions relating to employment and appointment to be held in executive session. Id. § 95(1)(a). Governor Carey's plan mandates that all information received by the nominating committee be kept confidential and disclosed only to the governor. Exec. Order No. 5, 9A N.Y.C.R.R. § 3.5(1) (1975). Committee meetings held pursuant to this plan should also qualify for treatment under the executive session exception.
The actual experience of the committees will give them the practical understanding of the problem necessary to construct a solution.

**Staffing and Funding**

The proposed statute directs the legislature, the executive department, the chief judge, the Office of Court Administration, and their staffs to promptly take the steps “necessary to adequately staff and fund each of the judicial screening committees” so as to enable them “to undertake and competently perform [their] functions” under the statute.\(^5\) No specific timetable or budget is prescribed, but the intent of the statute is that within a year after enactment the committees should be in operation and provided with at least a full-time administrative and secretarial staff and part-time investigative assistance.\(^5\)

The statute’s directive to aid the committees is addressed only to those officials and public bodies whose assistance appears indispensable. Hopefully, those unnamed officials and others, particularly the political leaders, whose cooperation would also assist the screening panel in operating effectively, will join in the effort rather than attempt to thwart implementation of the statutory scheme. Those charged with the responsibility of funding and staffing should do everything in their power to encourage full cooperation and to prevent frustration of the preselection screening program.

**Removal and Discipline of Committee Members**

There is no sure remedy for misconduct or incompetence on the part of committee members, any more than there is for the same problem in the judiciary.\(^6\) The committee itself by a two-thirds...
vote, or failing action by it, the appointing officials, if unanimous, have the authority under the proposed statute to remove a member who is "lacking in fairness, moral character, honesty, impartiality, diligence or responsibility." Hopefully, such drastic action will not be necessary; if it is, however, it must be taken lest the committee's functions and ideals be jeopardized by the indiscretions of its members.

The disciplinary provisions are general in nature and are not intended to be exclusive. More specific delineation of the conduct expected of committee members must await enactment of the program. Upon implementation, the committees may utilize their rule-making power to decree disciplinary regulations. As always, care must be exercised to avoid the abuse of this power, since it conceivably could turn the committees into autocratic and inflexible bodies. Notably, however, the statute adds the further final caveat that nothing in it "shall be construed to limit in any way the procedures otherwise set forth" for removal or other disciplinary action against the committee's members as public officials of the state.\footnote{Notably, however, the statute adds the further final caveat that nothing in it "shall be construed to limit in any way the procedures otherwise set forth" for removal or other disciplinary action against the committee's members as public officials of the state.}

\textbf{Constitutional Questions}

The proposed statute is not drafted as, and does not direct, a constitutional amendment, because it does not change the actual selection method. Neither the person or persons responsible for the selection nor the manner of that selection, be it election or appointment, are altered. Ultimately, the statute only seeks to create a mechanism for ensuring that those selected, regardless of how or by whom, are qualified to be judges. Nevertheless, the argument may be made that the statute is invalid under both the United States and New York Constitutions.\footnote{The Supreme Court historically viewed claimed abuses of state election procedures as within the realm of political questions not properly determined by the federal courts. See Snowden v. Hughes, 321 U.S. 1 (1944). After the Court's decision in Baker v. Carr, 369 U.S. 186 (1962), a new era of federal concern over the fair implementation of state electoral processes began. Since Baker the Court has acted to invalidate a wide variety of voting regulations. See, e.g., Lubin v. Panish, 415 U.S. 330 (1974) (filing fees as exclusive method of obtaining access to ballot invalidated as denying equal protection to indigents); Dunn v. Blumstein, 405 U.S. 330 (1972) (striking Tennessee's durational residency requirements for voting); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia's poll tax declared unconstitutional).}
At the outset of any analysis of possible federal constitutional problems, it should be noted that the statutory scheme envisioned by the preselection screening program differs markedly from those candidacy and voting requirements with which the Supreme Court has heretofore dealt.\textsuperscript{164} In particular, the program's classification is based upon each candidate's individual merit to hold office,\textsuperscript{165} not an assessment of the candidate's relative popularity or his compliance with technical requirements such as payment of filing fees or property ownership.\textsuperscript{166} Furthermore, the proposed statute would affect the selection of judges only. This particular office has retained its enigmatic qualities, and the public has repeatedly acknowledged that it lacks sufficient information to adequately examine and compare judicial candidates.\textsuperscript{167} Finally, mandatory preselection screening would apply equally to all nominees or designees for judicial office; it cannot be contended that the program would discriminate against minor party or independent candidates.' With these distinctive characteristics in mind, possible federal constitutional challenges based on either due process or equal protection grounds appear insubstantial.\textsuperscript{168}


\textsuperscript{165} Concurring in Williams v. Rhodes, 393 U.S. 23 (1968), Justice Harlan implied that classifications based on merit may be viewed more favorably than other restrictions. Speaking in reference to the Electoral College, he remarked: "If a State declares that an entire class of citizens is ineligible for the position of Elector, and that class is defined in a way in which individual merit plays no part, it strikes at the very basis of the College . . . ." Id. at 44.

\textsuperscript{166} Many of the Supreme Court's right to candidacy decisions deal with restrictions which tend to perpetuate the two-party system. Requirements for obtaining access to the ballot, such as those for filing petitions or obtaining a certain percentage of the vote in prior elections, militate against participation of minority parties or independent candidates in the political process. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968). These and other requirements are typically designed to promote administrative efficiency and avoid voter confusion. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (filing fees). For a survey of the litigation over candidacy requirements, see Jardine, \textit{Ballot Access Rights: The Constitutional Status of the Right to Run for Office}, 1974 Utah L. Rev. 290, 317-31.

\textsuperscript{167} See notes 5, 53-54 and accompanying text supra.

\textsuperscript{168} Candidate restrictions are often challenged on equal protection grounds as being discriminatory toward minority party and independent candidates. The Supreme Court has been reluctant, however, to invalidate such restrictions when they are applied uniformly to all candidates and do not have an inordinately discriminatory impact on independents or minority candidates. See, e.g., American Party v. White, 415 U.S. 767 (1974) (upholding plan requiring all parties to demonstrate significant support to obtain ballot position); Storer v. Brown, 415 U.S. 724 (1974) (finding constitutional a disaffiliation requirement applied to party candidates and independents alike).

\textsuperscript{169} There is considerable uncertainty as to the outcome of most constitutional challenges
Initially, it may be argued that the proposed statute constitutes a denial of due process by violating the right of association as guaranteed by the first and fourteenth amendments. The right of association includes the right to join together in political parties for sharing and advancing political ideas. A fundamental objective of such association is the nomination and election of candidates for public office. Consequently, a restriction on access to the ballot which effectively precludes a candidate from running for public office may be considered an invalid infringement of the right of association unless counterbalanced by a compelling state interest.

Although under the screening program some individuals will be excluded from candidacy for judicial office, the only candidates excluded will be those who are found to be incompetent and thus not qualified, be

> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. . . . Decision in this context, as in others, is very much a "matter of degree," . . . very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." . . . What the result of this process will be in any specific case may be very difficult to predict with great assurance.

Id. at 730, quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968) (citation omitted).


The right to associate in order to advance political beliefs was initially recognized in a nonelection context. See, e.g., NAACP v. Button, 371 U.S. 415 (1963). The first amendment guarantee was first used to invalidate ballot restrictions in Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). There, the Court, applying a strict scrutiny test, found that burdensome signature requirements were not justified by any compelling state interest. Of particular interest is Justice Harlan's concurring opinion analyzing the first amendment issue. Id. at 41-48 (Harlan, J., concurring).


See, e.g., Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973). The due process standard of review applied in Pontikes required the state to show that the restrictions both furthered a legitimate interest and did not "unnecessarily restrict constitutionally protected liberty." Id.

In Turner v. Fouche, 396 U.S. 346 (1970), the Court refused to invalidate as void on its face an intricate grand jury selection system which to a limited extent was similar to the judicial screening program. The procedure involved a process of random selection with provision for elimination of those citizens found not to be "intelligent." Id. at 348-54. Although the system granted officials a wide degree of discretion in excluding prospective jurors, the Court did not find the scheme inherently unfair and thus invalid, remarking that the plan was designed at least to result in the nondiscriminatory selection of "intelligent" jurors. Id. at 355. Since the proposed preselection screening would be based on substantially more
they major party, minor party, or independent candidates. The state interest in maintaining a highly qualified judiciary is obvious and compelling. Moreover, the current ineffectiveness, in terms of educating the public and policing the judiciary, of voluntary screening in judicial elections demonstrates that mandatory screening is necessary to promote the state’s concern in this area. In contrast to this clear interest, the right of political association appears to be particularly weak in the context of judicial elections. As the New York Court of Appeals has noted, the advancement of political ideology is not a valid consideration in the election of judges. To the contrary, the court has explicitly espoused the goal of depoliticizing judicial selection in New York. Thus, the rights of excluded candidates appear minimal and the state’s interest paramount.

It has been suggested that a screening statute may be subject to an equal protection challenge since its effect would be to deny to some the opportunity of holding judicial office. As noted previously, this classification does not disqualify minority candidates; rather, it disqualifies those persons who are unfit to serve the public as members of the judiciary. As a result, the statute, which is carefully delineated, would directly promote the state’s interest in ensuring competent judges. At the same time, “the interests of those who are disadvantaged by the classification,” unqualified candi-
dates or those desiring to vote for unqualified candidates, can at best be termed questionable. Finally, the screening program must be viewed as a response to the well-recognized difficulty in assessing the judicial suitability of particular candidates. In this regard, it is significant that the voters or the executive may still support persons of their own choosing, provided only that such persons display the ability necessary to fulfill the obligations of a judge. Representing a needed safeguard against judicial incompetency, the screening program furthers a compelling state interest while infringing only minimally, if at all, upon an individual’s right to run for office or to vote for a candidate of his choice.

Assuming that the proposed screening statute survives a federal constitutional challenge, its constitutionality may also be questioned under the New York State Constitution. In particular, it may be argued that section 20 of article 6 appears to bar implementation of the proposal. Section 20 authorizes the legislature to prescribe qualifications for judges of several enumerated courts. Noticeably absent from this list are most of the judicial offices which would be covered by the proposed screening committees. It has been suggested that such exclusion effectively bars the legislature from imposing restrictions on the election of judges who are not specifically mentioned in section 20. This absence of explicit authorization, however, does not necessarily render the screening committee concept unconstitutional. The rules of constitutional interpretation indicate the course a favorably disposed court may follow.

relevant considerations in assessing an equal protection challenge to a state’s statutory restrictions on access to the ballot as follows: “The facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” Id. (footnote omitted).

180 N.Y. Const. art VI, § 20(e) states in pertinent part: “Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York, other than such [minimum practice requirements] specifically set forth in subdivision a of this section, shall be prescribed by the legislature . . . .”

181 Most conspicuous by their absence from § 20(e) are the court of appeals, appellate divisions, supreme court, and the New York City civil and criminal courts.

182 See N.Y. Office of Court Administration, Memorandum from Michael Colodner to Michael R. Juviler (March 7, 1975). The memorandum also suggested that the screening committees are barred from any meaningful participation in the electoral process by the requirement that judges for most courts of statewide jurisdiction be “chosen by the electors.” See, e.g., N.Y. Const. art. VI, § 2 (court of appeals); id., § 6(c) (supreme court); id., § 13(a) (family court). The “chosen by the electors” language seems ambiguous at best when interpreted as a proscription of electoral regulations. In light of such ambiguity, a legislative enactment regulating selection of judges should not be declared unconstitutional unless it is clearly erroneous to construe the legislature’s power as encompassing the particular regulation. See N.Y. Const., Constitutional Interpretation § 5 (McKinney 1969).
in upholding the proposed statute's validity. Since the language of article 6 is by no means conclusive, the applicable provisions should be construed to effectuate the purpose of the judiciary article.\footnote{See N.Y. CONSTR., Constitutional Interpretation § 1 (McKinney 1969), which provides: It has been said that the constitution should receive a liberal construction, a broad and not a petty construction, a rational, sensible and practical construction, and must be construed from a common sense standpoint, and that a technical or strained construction should be avoided. In short, the constitution should receive a reasonable construction so as to effectuate, rather than to defeat, its purpose. Id. (footnotes omitted).} Considering the primary purpose of the article to be the establishment and maintenance of a competent judiciary, the goal of an effective preselection screening program is in perfect accord with the New York Constitution.\footnote{In other states the call for depoliticizing the judiciary has already resulted in adoption of selection plans in which nonpartisan nominating commissions play an integral role. See Note, Judicial Selection in North Dakota—Is Constitutional Revision Necessary?, 48 N.D.L. Rev. 327, 328-30 (1972). The screening statute proposed in this Article is similar to those plans, which have proven successful in focusing attention on the judiciary's professional qualifications and away from their political affiliations. Although the "precedents are not clear-cut," a favorable ruling on the constitutionality of the proposed screening commission appears to be part of "the leadership the court must provide if the courts are to become less politicized than they have been." Rosenthal v. Harwood, 35 N.Y.2d 469, 474, 323 N.E.2d 179, 182, 363 N.Y.S.2d 937, 941 (1974).} As Professor W. David Curtiss, a member of the 1972 Dominick Commission, commented:

Clearly, if the effectiveness of judicial nominating commissions in an elective setting is demonstrated, thereby establishing the relationship between their use and the objective of improving the quality of elected judges, it would constitute a strong argument that the procedure did not represent an unconstitutional restraint upon eligibility for elective office.\footnote{Curtiss, supra note 18, at 323.}

The courts, if presented with a constitutional challenge to the proposed screening statute, should concentrate upon the screening statute's purposes and likely effects.\footnote{See Jardine, Ballot Access Rights: The Constitutional Status of the Right to Run for Office, 1974 Utah L. Rev. 290 (1974), where it is suggested that a court faced with a constitutional challenge to a statute which imposes eligibility requirements on candidates should adopt a "balancing of the real state interests involved against the ballot access rights asserted." Id. at 332.} The attempt to improve the quality of the judiciary within the spirit of the state constitution should not be misconstrued as a threat to the selection processes prescribed by that constitution. Precious time would be lost if this obviously nonpartisan and reasonable method for obtaining preselection assurance of judicial competence is summarily struck...
down. The statutory scheme is too reasonable and the need for prompt steps to initiate judicial reform in New York too great and too long overdue to warrant such a restrictive and wooden view of the constitution.

Nevertheless, should a state constitutional challenge prove successful, the statute should then be promptly submitted to the people as a constitutional amendment. The redrafting necessary to convert the statute to an amendment would not be difficult and the end result, although seriously delayed, will be at least as positive.

**CONCLUSION**

We must recognize that there is presently little practical chance that a switch to merit selection of all judges will come to fruition. Serious and sincere disagreement still exists over the advisability of effecting such a sweeping change in our method of selecting state judges.

It may be possible, however, to adopt a system of mandatory preselection screening for all judicial candidates and nominees without changing the present system of selection. Such screening may be able to assure, and will at least improve significantly the likelihood, that only persons who are qualified for judicial office actually attain that position, regardless of whether they are elected or appointed. Such an assurance is the real core of the merit plan for judicial reform and is fully consonant with the elective system. Even the most vocal pro-election advocates recognize that preselection screening would significantly improve our present system.

Everything possible should be done to take advantage of the receptiveness which presently appears to exist among the politicians and the interest which currently is being exhibited by the public for the type of compromise judicial reform proposal here advocated: mandatory preselection screening. This reform can improve the quality of our judges now while we continue to debate the harder questions of judicial reform, particularly the merit appointment—partisan election controversy. Mandatory preselection screening is a long overdue first step towards ensuring the high level of judicial competence and quality which the public is entitled to expect and have.
The following is the author's proposed statute to institute preselection screening in New York.

The judiciary law is hereby amended by adding thereto a new article, to be article two-B, to read as follows:

**ARTICLE 2-B**

**JUDICIAL PRE-SELECTION SCREENING OF JUDGES**

Section 46-a. Mandatory pre-selection screening of all judges and justices.

46-b. Judicial screening committees.

46-c. Selection and composition of the judicial screening committees for the judicial districts.

46-d. Selection and composition of judicial screening committees for the appellate division judicial departments.

46-e. Selection and composition of judicial screening committees for the court of appeals.


46-g. Qualifications of candidates and nominees for judicial office.

46-h. Reports and procedures of the judicial screening committee.

46-i. Staffing and funding of judicial screening committees.

46-j. Removal.

§ 46-a. Mandatory pre-selection screening of all judges and justices. No judge or justice of any court other than justices of any town or village court, shall be appointed, elected, reappointed or reelected to such office unless and until such person shall have been certified by a judicial screening committee for such court as "qualified" for such office as provided in this article.

§ 46-b. Judicial screening committees. A separate judicial screening committee shall be created, maintained, staffed and funded for each judicial district of the state to screen prospective judicial nominees or appointees for all courts subject to pre-selection screening as provided in section forty-six-a of this article sitting in such judicial district, except that separate judicial screening committees shall be created, maintained, staffed and funded for each appellate division of the supreme court and for the court of appeals of the state. The judicial screening committee for the court of appeals shall also screen judges and prospective judges of the court of claims of the state.

§ 46-c. Selection and composition of the judicial screening committees for the judicial districts. 1. Each judicial screening committee for each judicial district of the state shall consist of fifteen members, five of whom shall be selected by the chief judge of the court of appeals, five of whom shall be selected by the presiding justice of the appellate division in whose department the particular judicial district is located, and five of whom shall be selected by the administrative justice of the supreme court for that particular judicial district.

2. Selections to the judicial screening committee for each judicial district shall be made alternately by the three selecting officials as vacancies occur on the judicial screening committee for that district, with the chief judge of the court of appeals making the first such selection, the presiding justice of the appellate division for that district making the next such selection and the administrative justice of the supreme court for that district making the next such selection.

3. Interim vacancies on the judicial screening committee of each judicial district shall be filled in the manner prescribed in subdivision two of this section, with the chief judge of the court of appeals selecting a member to fill the first vacancy, the presiding justice of the appellate division for that district selecting a member to the next vacancy (not necessarily in the same year), and the administrative justice of the supreme court for that district selecting a member to fill the next vacancy (not necessarily in the same year).

4. In making each selection to the judicial screening committee for each judicial district, the selecting official shall attempt to satisfy the requirements of forty-six-f of this article.
MANDATORY PRESELECTION SCREENING

5. Each member of each judicial screening committee for each judicial district shall be selected to serve a single term of five years, except that the initial selections to the judicial screening committee shall include three persons selected to serve for five years, three persons selected to serve for only four years, three persons selected to serve for only three years, three persons selected to serve for only two years and three persons selected to serve for only one year; so that thereafter the terms of three members shall expire each year.

§ 46-d. Selection and composition of judicial screening committees for the appellate division judicial departments.

1. Each judicial screening committee for each judicial department of the appellate division of the supreme court shall consist of ten persons, five of whom shall be selected by the chief judge of the court of appeals and five of whom shall be selected by the then presiding justice of the appellate division for that judicial department.

2. Selections to the judicial screening committee for each appellate division judicial department shall be made alternately by the two selecting officials as vacancies occur on the judicial screening committee for that judicial department with the chief judge of the court of appeals making the first such selection and the presiding justice of the appellate division for that judicial department making the next such selection.

3. Interim vacancies on the judicial screening committee for each appellate division judicial department shall be filled in the manner prescribed in subdivision two of this section, with the chief judge of the court of appeals selecting a member to fill the first vacancy and the presiding justice of the appellate division for that judicial department selecting a member to the next vacancy (not necessarily in the same year).

4. In making each selection to the judicial screening committee for each appellate division judicial department, the selecting official shall attempt to satisfy the requirements of section forty-six-f of this article in the light of the then present make-up of the judicial screening committee for that judicial department.

5. Each member of each judicial screening committee for each appellate division judicial department shall be selected to serve a single term of five years except that the initial selections to the judicial screening committee shall include two persons selected to serve for five years, two persons selected to serve for only four years, two persons selected to serve for only three years, two persons selected to serve for only two years and two persons selected to serve for only one year, so that thereafter the terms of two members shall expire each year.

§ 46-e. Selection and composition of judicial screening committee for the court of appeals.

1. The judicial screening committee for the court of appeals and the court of claims shall consist of ten persons, four of whom shall be selected by the chief judge of the court of appeals, one of whom shall be selected by the presiding justice of the appellate division for each judicial department, and two of whom shall be selected by the governor of the state.

2. Selections to the judicial screening committee for the court of appeals shall be made alternately by the selecting officials as vacancies occur on the judicial screening committee for that judicial department with the chief judge of the court of appeals making the first such selection, the presiding justice of the appellate division for the first judicial department making the next such selection, the chief judge of the court of appeals making the next selection, the presiding justice of the appellate division for the second judicial department making the next selection, the governor making the next selection, the chief judge of the court of appeals making the next selection, the presiding justice of the appellate division for the third judicial department making the next selection, the chief judge of the court of appeals making the next selection, the presiding justice of the appellate division for the fourth judicial department making the next selection, and the governor making the last selection.

3. Interim vacancies on the judicial screening committee for the court of appeals shall be filled in the manner and order prescribed in subdivision two of this section, with the chief judge of the court of appeals selecting a member to fill the first vacancy and the presiding justices of the appellate division and the governor selecting members to the next vacancies (not necessarily in the same year) as they occur.
4. In making each selection to the judicial screening committee for the court of appeals, the selecting official shall attempt to satisfy the requirements of section forty-six-f of this article in the light of the then present make-up of the judicial screening committee for that judicial department.

5. Each member of each judicial screening committee for the court of appeals shall be selected to serve a single term of five years except that of the initial selections to the judicial screening committee, the first two persons selected shall serve for only one year, the next two persons selected shall serve for only two years, the next two persons selected shall serve for only three years, the next two persons selected shall serve for only four years and the last two persons selected shall serve for five years, so that thereafter the terms of two members shall expire each year.

§ 46-f. Nature of judicial screening committees. 1. The members of each judicial screening committee provided for in this article shall be selected so as to assure that it is politically non-partisan and so as to attempt to make it representative, to the extent reasonably feasible, of the judicial district or judicial department or other area for which it serves in terms of the racial, religious, geographic, political and ethnic make-up thereof. In this regard, no more than seven persons from any fifteen member committee and no more than four persons from any ten person committee may be a registered member of any one political party; and at least forty percent of each committee shall consist of persons who are not members of the bar; and the membership of each committee shall include both men and women.

2. No member of any judicial screening committee shall hold any elected or appointed public office or office in any political party or other political organization during his or her tenure on the committee.

3. No person shall be a member of more than one judicial screening committee at any one time.

4. All members of each judicial screening committee shall be residents of the judicial district or judicial department or other area for which it serves, except that a practicing member of the bar of this state who is also a resident of this state may be a member of a judicial screening committee for the judicial district or judicial department or other area in which he or she maintains his or her principal law office even if he or she is not a resident thereof.

5. Members of the judicial screening committees shall not receive any compensation for such service but shall be reimbursed for any necessary expenses incurred by them in the performance of their duties on the judicial screening committees.

§ 46-g. Qualifications of candidates and nominees for judicial office. In determining whether a candidate or nominee for judicial office is "qualified" for purposes of this article, the judicial screening committees shall consider, among other things, the following characteristics of such candidate or nominee: legal ability and aptitude; ability to articulate verbally and in writing; litigation and other professional experience and published writings in the practice, administration or teaching of law; temperament and demeanor; industry and diligence; fairness and impartiality; knowledge of and readiness to adhere to the code of judicial conduct; honesty; freedom from conflict of interest; independence and decisiveness; integrity; moral and professional character; and physical and mental health. Without limiting the grounds for certifying or refusing to certify any candidate or nominee as "qualified", no candidate or nominee shall be certified as "qualified" if he is found to be lacking in the foregoing categories of qualifications.

§ 46-h. Reports and procedures of the judicial screening committee. 1. All candidates or nominees for judicial office on any court subject to the provisions of this article shall submit to pre-selection screening by the judicial screening committee responsible for that court as provided in this article at least forty-five days prior to the judicial election or appointment in question.

2. The failure of any candidate or nominee for judicial office to submit to the procedures of the judicial screening committee or to cooperate therewith shall be a sufficient ground for refusing to certify such candidate as "qualified" for such office for purposes of this article.
3. At least fifteen days prior to any such judicial election or appointment, the judicial screening committee involved shall release to the public a written report stating which candidates or nominees therefor it certifies as "qualified" together with a detailed explanation of the grounds and reasons for its decision to certify or not to certify each such candidate or nominee; any other member of the judicial screening committee may (but shall not be required to) add as part of the published report his own concurring or dissenting opinion with respect to any aspect thereof.

4. In conducting its investigation into the qualifications of any candidate or nominee for judicial office the judicial screening committees shall have the right, in their discretion, to ask the candidate or nominee to submit written answers to questions, reasonably related to the inquiry involved, and to require that the candidate or nominee submit to a personal interview before the members of the judicial screening committee.

5. Any candidate or nominee for judicial office may insist that the judicial screening committee grant him a personal interview prior to releasing its report with regard to his prospective election or appointment and shall be granted such a personal interview if he or she so desires.

6. In determining whether a candidate or nominee for judicial office is "qualified", a majority vote of the members of the judicial screening committee involved shall control; the votes of each member of the committee shall be recorded in the written report issued by the committee with respect to each such candidate or nominee.

7. Each judicial screening committee shall have the right to adopt, by majority vote thereof, for itself such additional fair and reasonable procedures as it deems prudent and appropriate for the fulfillment of its duties and responsibilities under this article.

8. Each judicial screening committee shall have the power to subpoena witnesses to appear to testify before it and produce any records reasonably related to the inquiries currently before it, provided that it provides reimbursement for the reasonable costs necessitated by compliance at the same rate as that provided by the Civil Practice Law and Rules for trial witnesses. Such subpoenas shall be enforced or reviewed by the courts, if necessary, in the same manner and to the same degree as nonjudicial subpoenas issued under the Civil Practice Law and Rules.

§ 46-i. Staffing and funding of judicial screening committees. The New York State Assembly and New York State Senate shall take such steps, promptly after enactment of this article, with the cooperation of the governor and his staff, the chief judge of the court of appeals, and the office of court administration and its staff, as are necessary to adequately staff and fund each of the judicial screening committees, so that it is sufficiently able to undertake and competently perform the functions intended for it as provided in this article.

§ 46-j. Removal. 1. Any member of any judicial screening committee who is found to be lacking in fairness, moral character, honesty, impartiality, diligence or responsibility may be removed from such committee either by a two-thirds vote of such committee or by unanimous agreement among the officials charged, at the time of such removal, with selection of members to such judicial screening committee. 2. Nothing in this article is intended or shall be construed to limit in any way the procedures otherwise set forth in the laws of this state for removal of or other disciplinary action with respect to sitting judges or justices or other public officials.