Judicial Selection: Alternatives to the Status Quo in Selection of State Court Judges

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JUDICIAL SELECTION: ALTERNATIVES TO THE STATUS QUO IN THE SELECTION OF STATE COURT JUDGES

MARTIN I. KAMINSKY

Former United States Solicitor General and Harvard Law School Dean Erwin N. Griswold once concluded: "[O]n the experience of more than a century... one of the worst ways for choosing judges is through popular election... despite the fact that occasionally a great judge is chosen by the people."

For over 100 years the New York Legislature has been either unable or unwilling to change our elective system of selecting state judges, in spite of consistent criticism and the efforts of numerous reform movements supported by leading politicians, jurists and legal scholars throughout the state. For nearly a century, the shrewdest and most able politicians and reformers have been baffled by the reasons for this inaction and have struggled to fashion a solution. Yet the necessity for reform is beyond dispute, and several workable alternatives are indisputably available.

This article will attempt to probe those alternatives, as well as the historical background and the relative pros and cons of the different methods of judicial selection which are presently in effect in this country and abroad, in the hope of encouraging at least a temporary minimum solution—mandatory screening of all potential judges, whether elected or appointed, by a bipartisan panel focusing on the merit and ability of the candidates.

I. THE PROBLEM AND THE ALTERNATIVES

The adage, "One rotten apple spoils the bunch," aptly describes our judicial system. When a sitting judge abuses or suppresses justice, our entire system of justice suffers, with far-reaching ramifications on...
the public's confidence in the system as a whole. In a very real sense, the system is judged by the man.3

Under our present system state judges are first nominated as candidates for judicial office at politically-oriented judicial conventions. The conventions are not well publicized and, indeed, a large portion of the populace does not even know they exist. Even those who participate in these conventions have dubbed them "boss-controlled."4 Thereafter, the candidates go before the public on Election Day just like candidates for the Assembly, Senate and Congress. Frequently, by agreement of the political leaders of the major parties, the same candidates are assured, before the conventions, of receiving both nomination and multi-party endorsement.5

A surprisingly large number of our most distinguished legal minds have spoken out against the system in extremely blunt terms.6 New

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3 The problem is not, of course, entirely with the judges. When a litigant or a lawyer loses a case, it is all too easy to blame the court rather than look realistically to the merits or one's own presentation of the case. So long as people differ sharply enough to take their disputes through a court proceeding, someone will always be disappointed in the result. In that sense the judge's plight is surely a thankless one. Cf. Golomb, For Election, 24 N.Y. Co. B. Bull., 215, 216 (1967) [hereinafter cited as Golomb]. However, there are judges who are not qualified and cases which are wrongly decided. No one can seriously dispute that this flaw in the system can be substantially alleviated if we improve the way we select the judges.

In fairness to all our judges, it must also be remembered that they are forced to operate under severe time pressures and over-crowded dockets. Justice Botein, who had been one of the most constant advocates for reform of our present system, recently reemphasized this problem at the 1973 Annual Meeting of the New York State Bar Association:

Our judges have become caught up in a frenetic campaign against a voracious calendar. ... In the old days, even a bad judge, ponderously lumbering through a world of law he did not make and could not understand, looked good because he had plenty of time to cloak himself with the armour of spurious dignity and remoteness. ... How can a judge maintain his dignity, give careful deliberation to the case before him, when the next cases in line are pushing and clamoring for attention?


5 Thus the authors remarked in Klein & Wittzum Judicial Administration 1972-73, 1972-73 Annual Survey of American Law 717, 718 (Inst. of Judicial Admin. 1973) [hereinafter cited as Judicial Administration 1972-73]:

Perhaps Boss Tweed's immortal words, "You can vote for any candidate you choose so long as you let me choose him" best describe the selection system of candidates for the election of judges for the New York State Supreme Court ....

6 When the 1967 New York State Constitutional Convention met, a blue-ribbon Special Committee of the Association of the Bar of the City of New York commented:

The present New York system of popular election of judges is inherently incapable
Yorkers, of course, do not have to settle for the present system — but if it is to be changed, something of a political "uprising" will be necessary. Those in power show little willingness or ability to bring about the change alone. For example, at least three different reform proposals (one proposed by the Governor, one by the Mayor of the City of New York and another by one of the leading candidates for the post of Chief Judge of the Court of Appeals) were introduced in the 1972-73 New York State legislative session. But despite unanimous support for reform in the press and among civic and bar associations, the question never even reached the floor of the Legislature for a vote. This experience has not dulled the ambition of the reformers, who plan an even bolder proposal for the 1974 legislative session. The past 100 years have shown that the necessary reformers are present, but there is lacking the necessary legislative votes to adopt their reforms.

The available alternatives, each of which is discussed at length below, include:

1. Mandatory screening of all candidates prior to either election or appointment;
2. Appointment rather than election;
3. Election on a non-partisan basis;

of performing the function it should now serve — that of bringing to the bench not haphazardly or occasionally but consistently and routinely as possible, the very best talent available and willing to serve.

Ass'n of the Bar of the City of N.Y., Report of the Special Committee on the Constitutional Convention, Selection of Judges, at 1 (1967) [hereinafter cited as Selection of Judges]. One need not agree completely with these admittedly partisan assessments to join in the call for reform or to recognize that it represents an important negative assessment from some of the leading lawyers who actually practice in our courts.


See id., Dec. 28, 1972, at 28, col. 1; id., Oct. 4, 1972, at 1, col. 8. See also Lindsay, The Selection of Judges, 21 Record of N.Y.C.B.A. 514 (1966) [hereinafter cited as Lindsay].

See notes 1-3 supra. See also 169 N.Y.L.J. 48, Mar. 12, 1973, at 1, col. 6, where the New York State Bar Association called for abolition of our present method of selection and a switch to the "merit plan," discussed below.

See S. 7072, 197th Reg. Sess. (1974). Governor Wilson, however, has announced his opposition to appointment of judges, with the possible exception of the Court of Appeals. See N.Y. Times, Mar. 14, 1974, at 74, col. 6.

See notes 46-50 and accompanying text infra; notes 100-03 and accompanying text infra.

Very little enthusiasm for non-partisan election appears to exist. Indeed, in many states which have such a system at present, the judges elected under that system themselves call for a change. See, e.g., Hunter, Some Thoughts About Judicial Reform, 19 De Paul L. Rev. 457 (1970) [hereinafter cited as Hunter]; Utter, supra note 2.

Those favoring partisan election have long opposed non-partisan election on the
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(4) Adoption of new procedures for review of judicial performance and removal of unfit judges; 15
(5) Adoption of a professional or career judiciary with prospective judges specially schooled and trained for their posts. 16

None of these alternatives is new. Some, such as appointment and mandatory screening, have previously been proposed (unsuccessfully) by various state and local bar associations, most notably when the State Constitution was amended in 1967, 12 and when the highly-regarded 1970 Hansen-Duryea Judicial Reform Bill 18 actually emerged from a legislative committee, only to die on the floor of the Assembly. Some of the alternatives are already in practice in other states. And the "professional judiciary" has been in effect in many European and other countries for decades. Yet none has been adopted or even tested in New York.

Before touching on the alternatives in greater detail, a consideration of the historical context out of which our present elective system grew may aid in understanding the problem.

II. THE HISTORICAL PERSPECTIVE

The method for selection of our state judges has been a hot political potato since before the Revolutionary War, first as an offshoot of the virtually feudal colonization of New York and then as an overreaction to that system. New York was originally settled pursuant to huge royal land grants to the early Dutch patroons and overlord friends of the British crown. 19 Sections of these baronies were then rented by the manorial lords to tenant farmers at high rents and subject to the often oppressive control of the overlord. In this fashion the Van Rensselaer ground that it removes all possible screening (i.e., the party's screening) of candidates and deprives the public of key information about them. One of the early proponents of this view was former President and United States Supreme Court Chief Justice William Howard Taft. See Taft, The Selection and Tenure of Judges, 38 A.B.A. REP. 418 (1913). See also Harding, The Case for Partisan Election of Judges, 55 A.B.A.J. 1162 (1969) [hereinafter cited as Harding].

The prestigious and knowledgeable American Judicature Society has called the non-partisan election system "the dictatorship of irrelevancy" since it gives the voters nothing but a name and gut reaction to base their choice upon. Editorial, 48 J. AM. JUD. Soc'y 124, 125 (1964).

15See notes 58-60 and accompanying text infra.
16See notes 112-16 and accompanying text infra.
17See Selection of Judges, supra note 6.
18See notes 46-54 and accompanying text infra.
family dominated over one million acres and the Livingstons half a million.  

Concomitant with ownership and control over the land, the manorial barons had full control over the colonial "legislature," since only landowners could vote, and over the judicial and legal machinery which governed the tenants. The courts, which were appointed and financed by the overlord, were naturally but inexcusably prejudiced in his favor, especially when confronted with issues regarding his oppressive leases.  

Shortly before the Revolution, the tenants' patience and deference to the landlords' courts and the corruption which seemed to pervade the whole judicial system began to run out. Outright tenant revolts erupted, culminating in the Great Rebellion of 1766, when open warfare between the tenants and the landlords broke out in upper Westchester and Dutchess Counties. The landlords won the war; the judges, acting almost as pawns of the landlords, faithfully meted out stiff criminal penalties and ejectment decisions against the rioting and striking tenants. The tenants' leader, Prendergast, was convicted and sentenced to be hanged, drawn and quartered in public, despite a reputedly brilliant defense led by his wife. As Irving Mark, one of the leading scholars on the period, has observed:

In the face of the political dominance of the landlord, the small farmer had neither the power to shape the laws nor the wealth to sustain the expense of judicial redress.

Although some historians (most notably Charles Beard) have sought to describe the American Revolution as a socio-economic uprising, the manorial system in New York seems evidence in itself that this was not so. The chief beneficiaries of the break-up of the manors of the loyalist overlords were not the public, but rather those overlords who had supported the Revolution and had the necessary funds to bid successfully at the public auctions of those lands.

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20 See Mark, supra note 19, chs. II, III. As Mark further notes, many of the manors were built through outright corruption and shady deals that swindled the Indians, especially during the regimes of Governors Fletcher, Bellomont, and Cornbury over the twenty year period 1690-1710. Id. See also Niles, supra note 19, at 528.

21 Id. at 523-24.

22 Id. at 524. Indeed, it was not until 1859 that the feudal manor system in New York was declared invalid in the landmark case of Van Rensselaer v. Hays, 19 N.Y. 68 (1859).

23 Mark, supra note 19, ch. V.

24 Id.

25 Id.

26 C. BEARD & E. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913); A. FLECK, LOYALISM IN NEW YORK IN THE AMERICAN REVOLUTION (1901); J. JAMESON, THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT (1926).

27 E. SPAULDING, NEW YORK IN THE CRITICAL PERIOD, ch. III, IV (1932) [hereinafter cited
While the State Constitution of 1777 did reduce somewhat the enormous manorial power over the government, it left the land system basically intact. The constitution created a Council of Appointment which made all judicial appointments. The Council was composed of one senator from each defined district. Needless to add, the landlords continued in direct and indirect control of the Council and the state legislature which it served. While New York's manorial system had many unique qualities, the appointive system for judicial selection was not one of them. Indeed, immediately after the Revolution seven of the newly independent states vested selection of their judges in their state legislatures.

The adoption of the Federal Constitution in 1787 brought little, if any, change. Indeed, while in New York the major opposition to the new federal system came from those areas which contained the large manors, it came from the tenants and not the landlords. The second New York State Constitution in 1821, however, did seek to effect some reform, transferring the power of judicial selection to the Governor, with confirmation by the Senate.

The matter might conceivably have rested there were it not for the advent of "Jacksonian democracy" throughout the country. The importance to the judicial systems of every state of this national movement — and it was national — cannot be underestimated. As Chief Justice Donald H. Hunter of the Indiana Supreme Court has accurately described the movement:

The Jacksonians believed that American judges were invested with legislative functions . . . . In the eyes of some, the courts were beginning to act and legislate according to the common law, without responsibility to any controlling authority. So strong was this feeling that New Jersey and Kentucky actually passed statutes prohibiting the citation of common law authority. The end result was a popular clamor for judges to be placed under the direct control of the electorate. The rationalization for such a system was the belief that the elected judges were more likely to adjudicate disputes according to the popular will and opinion of the people.
New York was no different. For twenty years the tenants' power and appetites grew, gradually evolving from "passive resistance . . . to active interference with legal process." Historians record that, by 1845, the situation was so critical that the landlords felt it unsafe to travel through the countryside, even in daylight.

The change in New York finally came with the Constitutional Convention of 1846, the first New York Constitutional Convention actually dominated by "the people" and not the landed gentry. The new constitution abolished the old appointive system and ushered into being a national era of election of judges. In the words of former Dean Russell Niles:

The consequences of the decision in New York to abandon the appointive system in all courts of superior jurisdiction had an immediate profound influence in many other states. In 1846, only a few states had experimented with the elective system in their inferior courts. Mississippi alone had adopted an elective system for all judges. By 1856, however, 15 of the 29 states had swung over to popular election of judges—seven in the year 1850. Thereafter, as new states were admitted to the Union, all accepted the popular election of some or all of their judges up until the admission of Alaska.

For a time the new system worked. By the 1860's, a steady series of new decisions had effectively removed the landlords' yoke over the populace. But all was not roses. Judgeships had already become political plums within the control of powerful local political leaders, as the two-party system, as we know it today, gradually took hold throughout the country. By the time of the 1867 Constitutional Convention, during which the term of our judges was expanded from 8 to 14 years, the matter was already the subject of angry debate.


33 Id. at 524. See Niven, A Chapter of Anti-Rent History, 24 Albany L.J. 125 (1881).
34 Niles, supra note 19, at 524.
36 Niles, supra note 19, at 527.
By 1873 the issue was severe enough to be put to the voters by referendum. Many loud voices, such as the prestigious Association of the Bar of the City of New York, called sharply for a return to the appointive system, arguing that election "has neither inspired nor strengthened anything good among the people" but rather "has lowered the dignity of the bench, weakened the force of law, [and] impaired public confidence in the administration of justice." But the public, by narrow vote, chose to retain the system. That was 100 years ago. The 1967 proposed state constitution, which was rejected by the electorate, contained a new judiciary article which, inter alia, reform the method of selecting judges, but not since 1873 have the voters faced squarely a choice on this issue.

For the next ninety-seven years, aside from some modifications made by the Constitutional Convention of 1894, which ceded to the Mayor of the City of New York the power to appoint city criminal court judges, no significant steps were taken to accomplish a change. Pitted against this inaction was the consistent clamoring of the New York City Bar Association (at constitutional conventions and otherwise in 1915, 1932, 1938, 1952 and 1967), among others, for reform either by appointment or election from a list which would not show the party affiliation of the candidates.

All of these proposals were ignored and, as the power of local political leaders grew, actively suppressed by both political parties. Rather, a tradition of political appointment-swapping and collaboration between the two major parties followed. All too often we were told of judgeships being used for political pay-offs and otherwise as currency in smoke-filled back rooms.

Curiously, the most vocal and eloquent critics of the elective system have been some of the judges themselves. Former Justice Samuel Rosenman has commented:

Sometimes the [judicial] districts are so overwhelmingly dominated by one political party that the nomination by these leaders must result in election; even in doubtful districts, interparty political deals often deprive the voters of any real choice.

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39 Selection of Judges, supra note 6, at 3. See also I Reports of the N.Y.C. Bar Ass'n (1870-1876).
40 Selection of Judges, supra note 6, at 1 n.4.
41 Id. at 3.
42 Selection of Judges, supra note 6, at 1 n.4; Lindsay, supra note 8, at 516; Niles, supra note 19, at 536 n.49.
44 Rosenman, supra note 4, at 88.
Perhaps worst of all, virtually no one even bothers to campaign actively any more, so that the public goes to the ballot box totally uninformed as to who the nominees are, why they were nominated, and what qualifications they would bring to the post.\footnote{That judicial nominees have adopted a “low profile” is fully understandable and not necessarily a bad thing. Rufus Choate, a distinguished delegate to the 1853 Massachusetts Constitutional Convention eloquently argued in opposition to the adoption of an elective system of judicial selections: So nominated, the candidate is put through a violent election; abused by the press, abused on the stump, charged ten thousand times over with being very little of a lawyer, and a good deal of a knave or boor; and after being tossed on this kind of blanket for some uneasy months is chosen by a majority of ten votes out of a hundred thousand, and comes into it breathless, terrified, with perspiration in drops on his brow, wondering how he ever got there, to take his seat on the bench. And in the very first cause he tries he sees on one side the counsel who procured his nomination in caucus, and has defended him by pen and tongue before the people, and on the other, the most prominent of his assailants; one who has been denying his talents, denying his learning, denying his integrity, denying him every judicial quality, and every quality that may define a good man, before half the counties in the state. Niles, supra note 19, at 584 n.29.} Except for a few isolated instances involving the highest or special courts (such as the Breitel-Fuchsberg Court of Appeals contest and the Silverman-Klein surrogate’s court election), campaigning is virtually nonexistent, and the ballot consists of a list of unknown names with multiparty endorsement. In this sense, a switch to so-called nonpartisan election, i.e., election from a list of names without a listing of party affiliation, will improve the system only marginally, if at all.

III. The Proposal for Mandatory Screening: The Judicial Reform Bill and Its Aftermath

In 1970, the New York Legislature confronted the first well-organized and potentially successful piece of legislation in the area of judicial selection to be raised in almost one hundred years. After careful consultation with the Republican floor and Judiciary Committee leaders in both the State Assembly and Senate, the Hansen-Duryea Judicial Reform Bill of 1970 was drafted, filed for consideration, and announced to the public in a news conference on January 30, 1970.\footnote{The sponsors of the bill and spokesmen at the news conference were Assembly Speaker Perry B. Duryea, Jr. and then-Manhattan Assemblyman Stephen C. Hansen (later a high ranking official in the Federal Department of Housing and Urban Development). They announced that the bill had already been reviewed and approved by Earl W. Brydges, Senate Majority Leader, John G. Hughes, Chairman of the Senate Judiciary Committee, Edward F. Crawford, Chairman of the Assembly Judiciary Committee and Republican-Liberal Senator Roy M. Goodman. As noted below, this broad support soon withered away, at least in the State Senate.}

The new bill represented a thoughtful attempt to reform our method of judicial selection without falling into the same pitfall which
for so long had stopped reform proposals in their inception—that is, the attempt to switch to a completely appointive system. On a one year trial basis, all candidates for election to the state supreme court, New York's court of first instance, would have to be certified "highly qualified" by a specially appointed "judicial qualifications committee" before being permitted to run for office. The committee would screen the candidates on the basis of "age, judicial temperament, legal experience, standing in the community and such other factors as it feels are necessary for the proper conduct of the office." Since all judges of the four appellate divisions (the courts of first appeal) are and by law must be appointed from among the justices currently sitting in the supreme court, this would assure highly qualified judges in both the trial and first appellate court. Anyone could suggest that any name (including his own) be placed in nomination, but only those who passed the mandatory screening process would actually be permitted on the ballot.

Each of the eleven districts in the state would have its own judicial qualification committee. Each screening committee would be composed of twelve persons, four of whom would be selected by the Governor, four by the presiding justice of the local appellate division, and four by the administrative justice of the local supreme court, thus insuring that the executive branch would not exercise domination over the judicial branch of our state government.

The concept of "screening" of judicial candidates itself was not new. Similar proposals had often been made in the past and screening for appointive judicial office was already in practice in several states, the most notable being Missouri which had pioneered the process thirty years earlier. Likewise, even in New York, various local bar associa-

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47 That the mandatory screening process was to be instituted for one year on a trial basis only was a cardinal aspect of the bill. After a year, the Legislature would again review the matter and iron out any bugs or flaws which had emerged. In this way, it was hoped that any minor imperfections in the craftsmanship of the bill would not doom it in the Legislature and that it could be enacted without either extensive redrafting or the criticism that it would commit the state to a new program sight unseen.


tions were screening many of the candidates on a voluntary basis. What was new was that the screening under the Hansen-Duryea bill was of candidates for election to judicial office, that it provided for mandatory and not merely voluntary screening, and that it stood a genuine chance of adoption.

The bill was hailed by bar associations, the media, civic groups and prominent members of the judiciary, but the local party leaders were not to be so easily deprived of one of their most valued political plums. Heavy behind-the-scenes politicking was reported. Legislators up for reelection in both parties were reportedly threatened with expensive primaries and a shut-off of financial contributions from their local party organizations if they backed the bill. Floor support disappeared and the bill went down to defeat. A number of apologies and promises followed the defeat, but, of course, nothing has happened. The power of the political leaders still looms large.

IV. THE 1970-73 TEMPORARY COMMISSION ON THE COURTS

The 1970 adventure was not, however, to be totally abortive. At least as a partial result thereof, a Temporary Commission on the New York State Court System was created. Assemblymen Hansen and

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51 The New York Times endorsed the bill, reporting:

Good government groups have long advocated reform of the judicial selection process. They argue that the party judicial conventions at which nominations are made are “boss-controlled” and that nominations are “payoffs” for services to the party.


53 By the time the bill had been reported out of committee in the Assembly in late February and early March, the Senate Majority Leader had withdrawn his support, claiming to have “misread” the bill before the January 30 news conference and asserting that he favored only “advisory” screening whereby a candidate would be allowed to stand for office regardless of the judgment of the screening committee as to his qualifications. N.Y. Times, Mar. 12, 1970, at 32, col. 3. Others who had been counted upon to sponsor the bill in the State Senate followed suit, offering only “protocol problems” as a reason for their change of position. N.Y. Times, Mar. 5, 1970, at 28, col. 2.

But the most disappointing performance came when the bill actually went to the floor of the Assembly. A near bloc vote by Democrats and by a handful of Republicans with Conservative Party endorsement brought the bill to a narrow defeat. Only one Democrat, Oliver Koppell of the Bronx, spoke out for the bill. N.Y. Times, Mar. 17, 1970, at 31, col. 1.

64 Some of the legislators declared that they would be offering their own bills which would require selection by appointment. Assembly Minority Leader Albert Blumenthal said that, although he had led the floor debate against the bill for his fellow Democrats, he favored reform “in principle.” N.Y. Times, Mar. 17, 1970 at 31, col. 1; id., Mar. 5, 1970, at 28, col. 2.

Crawford who had sponsored and labored for the unsuccessful 1970 reform bill were both designated charter members of the Commission.

In 1973, the Temporary Commission announced the results of its three-year study of the state court system, with far-reaching proposals on virtually every aspect of the judiciary except selection of judges. By an apparent split vote, the twelve-man bipartisan commission rejected the idea of doing away with election and moving to appointment of all judges. And while the Commission suggested that all appointed judges (such as those of the court of claims) face mandatory screening, no such screening was suggested for those judges (the vast majority) who were to be elected.\(^5\)

Although it did recommend that the anachronistic politically-controlled judicial nominating conventions be abolished,\(^6\) the focus of the Commission’s remarks was directed at curing selection errors after the fact rather than prevention of those errors before the fact. For example, it recommended that a fully staffed permanent Commission on Judicial Conduct (to be composed of judges, lawyers and laymen) be created to investigate complaints about and review the performance of both elected and appointed judges on a continuing basis.\(^7\) This disciplinary body would have the power to censure judges and, in severe cases, initiate proceedings before the Court on the Judiciary, which has the power to discipline and even remove any of our judges from office. Such judicial overseeing bodies have recently been proposed and adopted in some of our sister states, such as California and Colorado.\(^8\)

A more systematic scrutiny over sitting judges would be a step forward in insuring a high level of performance on the courts, provided that the review power is seriously and sensibly exercised. Some periodic

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\(^5\) See Judicial Administration 1972-73, supra note 5, at 718-19.

\(^6\) The Temporary Commission described the nominating conventions as follows: This method of selecting nominees is subject to two major failings. First, the method of allocating the number of delegates to the convention from each county, the selection of these delegates and indeed the very proceedings of the conventions are not well publicized and therefore generally not visible to the electorate. Second, since the number of delegates to the convention is geared to population, the more populous counties have been able to control the nominating convention and have tended to nominate supreme court justices from the residents of these counties. . . . For these reasons, the Commission recommends the abolition of the judicial district convention. The Commission recognizes that partisan politics cannot be eliminated as a basis for judicial selection even if the size of the electoral unit is reduced from the judicial district to the county. The abolition of the district convention system will, however, eliminate the almost invisible nature of the proceedings and will permit the voters to become better informed of the proceedings.

\(^7\) See Id.

day-to-day observance of the judge while he is on the bench would seem essential. The disciplinary commission would clearly have to guard against being misled by or becoming bogged down in crank complaints and criticisms related not to the qualifications of the man but rather to the popularity of his decisions.

But such a disciplinary body need not and should not be our exclusive safeguard. We should try to avoid mistakes beforehand, by carefully screening all candidates, before either appointment or election, so as to insure that they are highly qualified for the office of judge before they ever ascend to that office.60

V. APPOINTMENT OR ELECTION?

The threshold question, "Should we appoint rather than elect our state judges?", has provoked constant and bitter argument for over a century. The dispute focuses primarily on the following issues.

The Intrusion of Politics into the Selection Process

The most basic and heated criticism of the elective system is that it is subject to the political machinations of local party leaders, who are accused of using judgeships as political currency to repay party regulars for political loyalty.

Former United States Attorney General Herbert Brownell wrote in a frank article in 1964:

As a matter of hard fact, judges are in most instances picked by political leaders. This is quite obvious in the case of elected judges. The party conventions and primaries that nominate judges are managed by professional politicians. This is what politicians are for. Sometimes they have good candidates nominated, but most often their favor... shines on mediocre candidates.61

Similar indictments of the judiciary have come from leading politicians, lawyers, newspapers and the judges themselves.62 The local party lead-

60 As Dean Roscoe Pound aptly stated, "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on." Pound, Introduction to E. Haynes, Selection and Tenure of Judges at xiv, quoted in Dunn, supra note 32, at 303.

61 Saturday Evening Post, Apr. 18, 1964, quoted in Allard, supra note 32, at 383.

62 The President's Commission on Law Enforcement and Administration, appointed by President Johnson, which was chaired by former Attorney General Katzenbach and included such dignitaries as current Supreme Court Justice Lewis F. Powell, Jr., Whitney M. Young, Jr., New York Court of Appeals (now Chief) Judge Charles D. Breitel and Yale President Kingman Brewster, and which was ably staffed under Harvard Law School Professor James Vorenberg, found in its official report on "The Courts" in 1967:

The true judgemakers are the leaders of the dominant party who select its candidates. The process of selection is apt to be carried on in private meetings. Intricate bargaining patterns may evolve in which certain political leaders will assert
ers naturally protest this assessment, claiming that they act diligently and with the public’s interest at hand and pointing out that many superior judges have sat and continue to sit on our state benches. This argument has been strongly disputed.

Others who support the elective system argue that no system of judicial selection will remove politics from the process. They claim that appointment will merely result in the selection of judges by executive politics and by those close to the governor, rather than by the county leaders. This argument, of course, is no answer to the criticism.


Other advocates of election, such as former New York County Democratic Leader Edward N. Costikyan, openly acknowledge the “deals” that New York City Democratic and Republican leaders jointly work out under the present system, but argue that the system of partisan election should be retained but improved so as to bolster the two-party system, which they deem essential to our democracy. See Costikyan, supra note 62. See also N.Y. Times, June 23, 1970, at 32, col. 3; Judicial Selection in New York—What Improvements Are Needed?, Discussion Symposium at Ass’n of Bar of City of New York, Jan. 30, 1973. This argument appears to be the epitome of what lawyers call a “bootstrap argument.” It bears little relation to the issue at hand, somehow seeking to laud the most unfortunate aspect of the present system (i.e., the political influence underlying it) by simply ignoring its evils.

Former Justice Samuel Rosenman has replied thusly:

[A]ny system of judicial selection, no matter how bad, will, from time to time, produce many qualified judges—and even some outstanding judges. This has certainly been true of my own State of New York, which still uses the political, elective system. However, the election of some excellent judges does not prove that the best—or even that a good—method of selecting them is in operation.

Rosenman, supra note 4, at 86.

According to New Jersey Assemblyman Charles E. Reid, selection by appointment in
that our present system is a system of political pay-offs rather than one
designed to find the most qualified candidates. But it does indicate
that merely switching to an appointive system may not be enough. The
lesson here appears to be that some form of mandatory screening of all
candidates, whether appointed or elected, is essential if we are to insure
that only truly qualified jurists are selected.

One must take note of what the criticism leveled against our
present system says about the elective process itself. If, as the com-
mentators charge, the nominations are the result of political deals
carrying with them the promise of bipartisan support at election time,
then the nomination and election process itself is a mere charade.

Political influence does not stop upon election either. Several
critics have noted that, although elected to comparatively long terms
(14 years), our judges must still face reelection and thus are compelled
to maintain their old political ties if they wish to keep their jobs. New Jersey has merely meant that gubernatorial politics have replaced local politics:

It is not uncommon for political leaders of either party to press upon the office
of the governor suggestions for judicial appointments of lawyers only modestly
qualified by background and experience for the bench, thereby imposing upon the
governor's office the duty of rejecting such appointees. Often such rejection results
in a compromise... Thus, a process which should be characterized by a search
for excellence ends up in a compromise in which the public may be the loser.

Reid, How to Select Judges on Merit, Bergen Record, Jan. 29, 1973, at A-20. Cf. Monaghan,

Former Mayor John V. Lindsay, himself a lawyer, charged in a recent public state-
ment that, as a result of "backroom deals" and the dominance exercised over nominating
conventions by political leaders, only one slate of judges actually emerges so that the elec-
torate is deprived of any true choice: "[I]n a trade-off of court seats, the two major parties
usually nominate the same candidate, thus assuring his election." N.Y. Times, Oct. 4, 1972,
at 1, col. 8.

A good example occurred this past year when New York City political party leaders ex-
tracted a promise of pre-election resignation from a group of civil court judges whom they
planned to promote to the state supreme court, thus enabling the leaders (rather than the
Mayor) to pick their successors on the civil court and making a primary for those posts
an impossibility. The Editorial Board of the New York Times, among others protested
in futility:

The judicial conventions being held today by political parties in New York City
make a mockery of the law. They expose again, if further exposure were needed,
the evils of leaving the judicial selection process to the backroom wheeling and
dealing of partisan leaders who dispense patronage at the expense of justice.
Judgeships become pawns in a seedy game plan for expanding power.


Tammany Leader Richard Croker, as a justification for his refusal to permit re-
nomination of New York Supreme Court Justice Joseph E. Daly, who sought to act in-
dependently on the bench, reportedly remarked in 1899: "Justice Daly was elected by Tammany Hall after he was discovered by Tammany Hall, and Tammany Hall has a right
to expect proper consideration at his hands." Conboy, The Selection of Judges, 2 N.Y.U.L.
REV. 27, 29-30 (1925). See also Allard, supra note 32, at 385-87; Daniel, Lawyers Should Lead
in Judicial Tenure Reforms, 49 J. AM. JUD. SOC'Y 109, 110 (1965); Lyman, Connecticut and
the Missouri Plan, 30 CONN. ST. B.J. 390, 391 (1956) [hereinafter cited as Lyman]. Former
Texas Governor Price Daniel correctly noted:

No judge can devote the full, and complete time necessary for the maximum exer-
cise of his judicial ability when he is having to prepare for, and keep his eye on
The Public's Lack of Knowledge About the Candidate

The Jacksonians conceived of the elective system as a method of assuring that the judiciary would be responsible and answerable to the people. But one can fairly ask: In today's society does an election for judicial office really serve that function? Even before the urbanization of our society, the growth and dispersal of our population and government had caused the public's contact with its elected officials to become remote at best. Urbanization has, of course, increased this phenomenon.

Even in state legislative campaigns, where a fair amount of local advertising and canvassing is done by the candidates, the populace knows very little about the nominees between whom they must choose. Party line voting for such candidates still continues, while cross-over voting seems more and more common in elections involving our more visible and better publicized candidates for the United States Senate, state governorships and the Presidency.

Candidates for judicial office do little, if any, campaigning for their posts. And many segments of the public openly frown upon vigorous campaigning; in the last two Court of Appeals elections, much criticism was heard regarding the quality and dignity of some of the candidates' advertising, not to mention the amount of money expended. At the supreme court and local level, the candidates rarely do more than slip a postcard listing the barest information into a mailbox or under a door. Very little is written in the press regarding the courts, except in the most sensational cases. No public watchdog over the day-to-day operation of the courts exists. How then is the public supposed to learn anything about the candidates from whom it must choose? And if it doesn't know, how can it select the best man?

This problem is exacerbated by the question of what standards or guidelines the public should bring to bear on its choice. Can the public really know what factors (other than the obvious ones such as honesty and the like) will make a good judge? Can the lay public evaluate a judge's legal ability? Serious doubt exists as to whether the public has the ability to exercise the function envisioned for it by the Jacksonian advocates. The scant empirical data available seems to indicate not.

possible opponents or worry about the effect his decisions may have on the next election.

49 J. Am. Jud. Soc'y at 110. Of course, in New York, the lengthy 14 year terms of our judges help to somewhat alleviate this problem.

68 See note 32 supra.

69 The New York Times touched on the problem in an editorial calling for mandatory screening of all judicial candidates by an impartial blue-ribbon panel prior to nomination and election:

The case for the appointment, rather than the election, of judges seems to us to
Two studies conducted in the 1950's and 1960's are regrettably illustrative. Following the 1966 election, Elmo Roper & Associates asked one cross section of voters (a) if they had actually voted for any judicial candidate, and (b) if they could remember the name of any judge for whom they voted. Only 55 percent answered in the affirmative to the first question and just 42 percent did for the second.10 Twelve years earlier, a poll by the New York City Bar Association, conducted in New York City, Buffalo, and Cayuga County, showed that a bare 19 percent in New York City, 30 percent in Buffalo and 4 percent in Cayuga could name a single judicial candidate in the then-recently completed 1954 election. Sixty-one percent, 48 percent, and 75 percent, respectively, admitted that they had paid no attention whatsoever to the judiciary candidates in their voting.71

be persuasive. Voters stumbling through crowded ballots cannot hope to know the qualifications or lack of them of most of the candidates for judicial posts, who normally owe their nominations to entrenched party organizations. Judicial posts are part of their dispensable patronage, and too often the test applied is less genuine merit than long-term service in partisan causes. N.Y. Times, July 20, 1972, at 32, col. 2. As Robert E. Allard said while Director of Special Projects of the American Judicature Society: “The little empirical evidence available suggests that, in such elections, voters have neither ability, information, nor inclination to assess the qualifications of a long list of judicial candidates.” Allard, supra note 32, at 385. Many commentators and judges note that voters tend to vote a straight party ticket. See, e.g., Hall, Merit Selection and Merit Election of Judges, 4 GA. ST. B.J. 169, 170 (1967); Lyman, supra note 67, at 391. Others emphasize that in many areas only one political party is in control, so that no real election is held or can realistically be expected. See, e.g., Garwood, supra note 62, at 220; Parsons, supra note 62, at 276. An incisive explanation is provided in Judicial Selection in Indiana, supra note 62, at 366-67:

For many years there appears to have been little dissatisfaction with the election method. In the rural agricultural society of the last century lawyers made frequent appearances in the courts. Because the voters had their turn as jurors and the farmers frequently attended terms of the local court as spectators, the leaders of the bar were well known to many of the electorate who therefore could make a reasonable choice among the relatively small number of “qualified” lawyers who sought judicial office. In contrast, the choice among judicial candidates in present day elections is seldom based upon first hand knowledge or reliable information, let alone upon the impression of personal observation in the courtroom or elsewhere. Only a small segment of the electorate is ever involved as parties, witnesses or jurors at a trial, and the news media generally focus upon the trial’s sensational aspects rather than upon the judge or counsel. While a great number of the electorate have many contacts with attorneys in the course of their business or personal affairs, a statewide candidate’s qualifications for judicial office can be known only by an infinitesimal percent of the total electorate. As to candidates elected in the state at large or in the major cities, it may be speculated that in many instances most of their names are first noticed when the ballot is seen in the voting booth.

10 N.Y. Times, Jan. 29, 1967, at 46, col. 2. See also Selection of Judges, supra note 6, at 7 n.32. The League of Women Voters conducted a survey and found that 88% of those polled had cast their votes for some of the judicial candidates but only half of them could remember the name of any judge they had voted for; most said they had either voted a straight party ticket or merely picked a name that sounded familiar. VanOsdol, Politics and Judicial Selection, 28 ALA. LAW. 167, 169 (1967).

71 Note, How Much Do Voters Know or Care about Judicial Candidates?, 38 J. AM. JUD. SOC’y 141 (1955). See also Allard, supra note 32, at 385; Haggert, The Case of the Nebraska Merit Plan, 41 Neb. L. REV. 723, 733 (1962); Hays, supra note 62, at 128.
The Public Image of the Judiciary

Many able lawyers will not consider state judgeships because they view the elective process professionally demeaning and costly. Frequently, it appears, their attitude would not be the same if state judges were appointed. The answer sometimes offered by the proponents of election is that any man who is not willing to undergo the scrutiny of an election should not be permitted to sit on the bench in any event. Advocates on both sides of this controversy recognize that it goes to the heart of our constitutional system of the “separation of powers” among the three branches of government. Pro-election spokesmen, conveniently ignoring the federal mold which is the basis for the “separation” doctrine, argue that a shift to appointment by the Governor or the Legislature will deprive the judiciary of its separateness. Those who favor appointment contend that, to preserve the separateness of the Judiciary, a method of selection which is separate and different from that of the Legislature and executive is what is needed. Additionally, the latter group asks, What does standing for election really show about the qualifications of our candidates? Many lawyers feel that, if there is no serious in-depth campaigning and political debate, the election process is really something of a farce in which they

Similarly, in the 1962 election in Los Angeles County, only 50% of those who voted on legislative matters at the polls cast votes in the judicial election. Figuring in the amount of absenteeism in the election, altogether only about 30% of the eligible voters participated in the judicial election. See Nelson, Variations on a Theme—Selection and Tenure of Judges, 36 S. Calif. L. Rev. 4 (1962). Only this past year in Philadelphia, despite a well organized campaign by a nonpartisan civic group called “Good Judges for Philadelphia,” just 20% of the electorate voted in the judicial election for 39 Court of Common Pleas judgeships. Two hundred and fifty-five candidates were on the ballot. A prominent judge publicly called the election “the ultimate in absurdity.” N.Y. Times, May 21, 1973, at 29, col. 2. But see Desmond, supra note 62, pointing out the surprising incidence of cross-over voting in Erie County in the 1973 contest for Chief Judge.


See, e.g., Golomb, supra note 3, at 217; Roth, supra note 62.


See note 67 supra. The Association of the Bar of the City of New York has observed:

The effects of selection of judges by political leaders rarely end with a judge’s election. He may feel indebted to his party and hence feel an obligation to repay party workers with judicial patronage, e.g., guardianships or refereeships. Moreover, since he must run for re-election, he has to keep up his political connections and build political goodwill during his tenure in judicial office. Even where it has been the practice not to nominate a candidate to run against an incumbent judge, these political ties continue and are renewed by the necessity of facing even the formalities of an election.

The effects of selection by political leaders rarely end with a judge’s election. He may feel indebted to his party and hence feel an obligation to repay party workers with judicial patronage, e.g., guardianships or refereeships. Moreover, since he must run for re-election, he has to keep up his political connections and build political goodwill during his tenure in judicial office. Even where it has been the practice not to nominate a candidate to run against an incumbent judge, these political ties continue and are renewed by the necessity of facing even the formalities of an election.
would be embarrassed to partake.\textsuperscript{77} Others feel that judges should concentrate on the law, not politics, and simply should not have to be bothered with elections and reelections.\textsuperscript{78}

Regardless of who is right on these philosophical questions, there appears to be no dispute of the basic premise, which is that a greater number of able lawyers \textit{would} be willing to become state judges if the selection process were clearly related only to merit and did not require an initial election. Given this fact, it appears manifest that some change in the present system is necessary if we are to improve the level of our judiciary.

"Elitism" and Miscellaneous Arguments Pro and Con

Practically speaking, probably the most effective argument raised by the pro-election forces is that appointment will somehow favor the social and economic elite.\textsuperscript{79} Those groups, they claim, dominate the bar associations which have traditionally had a great say under appointive systems. Whether or not this argument is accurate or even relevant in today's society, it has strong roots historically and continued appeal to the mass of voters who fear the spectre of a system of rich man's courts. People truly believe that a switch to appointment will result in even fewer judges from our ethnic minorities and fewer female judges than we have now.

Advocates of appointment retort that this argument is no longer valid, that the upper classes no longer dominate the bar, and (pointing to the federal courts) that their system concentrates on the merits and competence of the candidates, thereby effectuating the principal goals of any selection system.\textsuperscript{80} The experience of those states using the appointive system seems to bear this out,\textsuperscript{81} but the question is far from resolved, if soluble at all.

\textsuperscript{77}See note 72 supra. See also Vanderbilt, \textit{Impasses in Justice}, 1956 WASH. U.L.Q. 267, 275 (1956). Professor Wigmore stated his view on the matter somewhat colorfully:

\[\text{An individual judge who decides his cases by submitting his own mind to the ignorant demands of the populace is recreant to his sworn constitutional duty. He is helping to undermine justice according to law and truth. It follows that any political practice which continually subjects judges to the strain of such a temptation is a false and unworthy practice.}\]


\textsuperscript{78}The cost of financing a campaign (i.e., the matter of campaign contributions) alone may subject the judge to a possible compromising situation at a later time. \textit{See}, e.g., Utter, supra note 2, at 843; \textit{Judicial Selection in North Dakota}, supra note 32, at 336. In addition, any time spent on campaigning, however minimal, is time away from and distractive from the judicial duties which the judge was elected to perform. \textit{See} Hays, supra note 62, at 129.

\textsuperscript{79}See, e.g., Roth, supra note 62, at 354; \textit{Selection of Judges}, supra note 6, at 5.

\textsuperscript{80}See note 62 supra.

\textsuperscript{81}See, e.g., Roberts, \textit{25 Years Under the Missouri Plan}, 28 TEXAS B.J. 451 (1965); Wat-
Those favoring election contend that a switch from election will merely substitute the “politics” of the bar association (who they fear will dominate the appointment process) for the “politics” of our party system. The answer to this claim is that screening panels under the appointive system can include both laymen and lawyers alike. Moreover, pro-appointment spokesmen argue that bar associations are made up of practicing lawyers whose livelihood and profession depends at least in part on knowing that the courts will construe and administer the law most competently and fairly.

In fairness to the advocates of election, one additional point should be made clear: that is, that in most states, regardless of which system is provided by law, most of the judges originally ascend to the bench by appointment. A 1965 survey of the Institute of Judicial Administration revealed that while 80 percent of judicial offices in this country are elective, about 50 percent of the judges polled had initially been appointed to office to fill interim vacancies created by death, retirement or creation of temporary new judgeships. Thus, appointment alone may not be the answer to our problems, unless combined with some form of mandatory screening before selection.


82 See, e.g., Golomb, supra note 3, at 218; Roth, supra note 62, at 351-54.

83 For an illuminating discussion of how such a nominating commission actually functions and some of the possible administrative pitfalls to be avoided in staffing such commissions see, e.g., Robertson & Gordon, Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee, 58 Mass. L.Q. 131 (1973). See also Winters, supra note 49, at 521-23.

84 Undeniably, bar associations have their own internal politics, the reality of which should not be ignored. Bar association politics, however, would appear to be a different kind and less distracting from the quest for ability than the politics of political parties. Potentially more troubling is the conflict among bar associations. For example, in New York City, some bar groups in the outer boroughs have occasionally expressed the feeling that the Association of the Bar of the City of New York, a very influential association, is dominated by the large Manhattan law firms and that it fails to represent adequately the interests of lawyers throughout the city of New York. Whether real or merely perceived, this animosity can hamper the role played by bar associations in the selective process, as occurred earlier this year in the case of one Queens judgeship. See note 100 infra.

85 Hall, Merit Selection and Merit Election of Judges, 4 GA. ST. B.J. 169 (1967); Henderson & Sinclair, supra note 72, at 442; Thompson, Selection of Judges of the California Court of Appeal, 48 Cal. St. B.J. 381, 381-82 (1973); Utter, supra note 2, at 842.

Robert Allard of the American Judicature Society noted in 1966: [The] so-called elective states have consistently had a large number, if not a majority of judges initially ascending the bench by appointment. In the ten year period 1948-57, more than 56 percent, 242 out of 434 of the justices of courts of last resort in 36 so-called elective states went on the bench by appointment. These such courts were composed entirely of appointed judges. Allard, supra note 32, at 378.

86 See TASK FORCE REPORT: THE COURTS, supra note 32, at 65.
VI. THE POSSIBLE METHODS OF SELECTION BY APPOINTMENT

Although there are many different types of appointive plans in operation in the world today, the two primary ones in this country are: (1) the federal system, where the President selects candidates (usually on the suggestion or at least with the approval of the two local United States Senators), subject to confirmation by the Senate; and (2) the so-called state "merit plan," where the state executive selects judges from a list prepared by a bipartisan nominating committee.

The Federal System

One major difference under the federal system is that judges are appointed for life,\(^\text{87}\) whereas a key feature under the "merit system" is that they be required to stand for reelection by non-competitive vote of the people, usually within a short period (e.g., one year) after appointment. In this way, the advocates of the merit plan contend, the ultimate say is still left with the public, who can remove anyone "mistakenly" appointed.\(^\text{88}\)

By and large, and especially in the federal courts in New York, the federal system appears to work quite well. The federal judiciary is highly regarded by lawyers and the public, and, rightly or wrongly, enjoys a reputation for dignity and quality which the state judiciary has never seemed able to engender. The federal judiciary appears, almost universally, to be considered superior to the various state judiciaries in this country.\(^\text{89}\)

A great deal of the credit probably goes to the United States...

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\(^{87}\) The debate over "life tenure" goes back to the great debates of the 1780's over the proposed United States Constitution. The concept of life tenure, subject only to impeachment by the Congress for "misconduct," was designed to insure that the courts would be above political and other non-legal pressure, and is central to the concept of the Constitution itself. Alexander Hamilton argued in The Federalist No. 79 that such tenure "is consistent with the necessary independence of the judicial character" which the Constitution envisioned when it established a separate judiciary. But, of course, this independence places a heavy burden of care upon those selecting our federal judges. Professor Philip B. Kurland, a leading Supreme Court scholar, has cautioned:

> It should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges... Judicial independence is held in trust for the people and only they should determine whether they would like to exchange some judicial independence for more judicial efficiency.


\(^{89}\) For example, a study conducted in Texas by University of Houston Political Science...
Senators and the President who make the federal appointments. Thus, although history shows that our Presidents have tended to pick persons of political persuasions similar to their own, most modern Presidents and many Senators have sought the view of the American Bar Association and other bar groups regarding the candidates they propose. In New York, for example, Senator James L. Buckley is reportedly advised by a small coterie of prominent and highly able lawyers, which has proposed a number of the excellent new judges who have recently ascended to our local federal bench.

But, at this stage, it does not seem possible to transplant the federal system to our state judiciary. First of all, the federal system is now 175 years old; it was not always as well regarded as it is today, either by the Bar or by Congress, nor was it so administered. We have neither the time to experiment nor the luxury of “starting from scratch,” which would appear necessary to implement the federal system. Our courts are already overloaded with cases and too bureaucratically organized.

Even more importantly, since those directly involved on the federal level, our United States Senators, are well known to the public and consequently under close public scrutiny, a form of behind-the-scenes “check” on their conduct, which would not appear to exist for their lesser known state and local counterparts, appears to exist. Significantly, no state has adopted the federal system, nor does there appear to be any prominent movement to do so.

The Merit System

Most scholars and reformers have traditionally advocated the so-called “merit plan” for the state courts. First proposed by the American Judicature Society in 1914, the “merit plan” usually has three features:

Professors B. C. Henderson and T. C. Sinclair in the late 1960's showed that by overwhelming percentages, ranging from 98.5% to 76.9%, Texas lawyers considered their federal judiciary “less corrupt, more learned, more dignified and more efficient” than their state judges. Likewise, nearly 72% said they would seriously consider accepting a federal appointment, whereas less than 49% would even consider acceptance of a state judgeship. Henderson & Sinclair, supra note 72, at 459; accord, Garwood, supra note 62, at 234.


See, e.g., HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, at 1-3 (Federal Bar Council 1962).

In an early incident, when President John Adams sought to create a whole new crop of federal judgeships on the eve of Thomas Jefferson’s ascendency to the Presidency, an outraged Congress promptly repealed Adams’ Judiciary Act of 1801. See H. CARMAN, A HISTORY OF THE AMERICAN PEOPLE 318-19 (1960). It was this incident which gave rise to the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
(1) Nomination by a bipartisan committee of a list of candidates certified to be highly qualified;
(2) Appointment by the Governor from the list;
(3) Public review of all appointees at a non-competitive election (i.e., a public referendum as to whether the particular judge should be reappointed or dismissed), to be held shortly after appointment (e.g., one or two years later).

The American Bar Association formally endorsed such a merit plan in 1937 and in 1962 adopted a Model State Judicial Article which codified its three basic tenets.

The essence of the merit plan is its emphasis on competence as a basis for judicial selection. By careful screening, the nominating committee not only reviews but can also seek out the most able lawyers available to stand for selection. Thereafter, the new judge's performance is tested by the people in a non-competitive election where only his record is at issue. In theory at least, the system would focus inquiry, by both the governor and the public, upon the qualifications of the candidate, and only on that.

In practice, however, much depends on the ability of the nominating committee to insure that its selections are politically, socially and economically non-partisan. In a sense, that is a potential problem which will always plague or threaten the merit plan. Yet, the numerous "post-mortems" which have been written about the Missouri plan over the past few years have generally concluded that the caliber of the bench there has been greatly improved by its implementation, that the courts


According to recent statistics compiled by the Institute of Judicial Administration, since Missouri pioneered the merit system in 1940, the merit selection aspect of the "merit plan" has now been adopted in 10 states (Alaska, Colorado, Idaho, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma and Utah). Merit retention is used in fourteen states (e.g., California, Colorado, Maryland, Alaska, Iowa, and Oklahoma). In several others, voluntary use of this system is made by some of the authorities who select judges. For example, in New York City, both former Mayor Wagner and former Mayor Lindsay voluntarily implemented a variant of the merit system for their New York City Criminal and Family Court appointments since 1960. While some, such as Pennsylvania, have dabbled with the merit system but ultimately rejected it, movements for adoption of the merit system are afoot in every state. See A Guide to Court Systems 23-24 (Institute of Judicial Administration 5th ed. 1971) [hereinafter cited as A Guide to Court Systems].

A judicial selection and tenure system should fulfill three requirements: (1) Selection in the first instance must be according to qualifications of professional competence. (2) Security of tenure for the qualified must be provided. (3) There must be adequate means of removing those who demonstrate unfitness for office. See also Wood, Elements of Judicial Selection, 24 A.B.A.J. 541 (1938).
have gained added respect among both the Bar and the public and that the system has not fallen prey to partisan or socio-economic discrimination.\textsuperscript{96}

Other potential weaknesses are inherent in the merit plan. For example, who will serve on the nominating committees? How will they be selected? How will their own performance be reviewed? In what manner will the judge's qualifications be aired in the reelection campaign?\textsuperscript{97}

The method suggested in the 1970 Judicial Reform Bill for the screening commission there proposed (i.e., selection in part by the Governor and in part by the local and Appellate Division presiding justices) offers one workable method.\textsuperscript{98} Another possibility was recently proposed for New Jersey whereby the nominating committee would be elected by the members of the Bar in the county in which they reside or work.\textsuperscript{99}

Careful drafting of the implementing legislation can remove many of these problems, as follows: (a) by dividing the power to select the committee among the Governor, presiding judicial leaders and non-partisan civic groups; (b) by requiring that the committee itself be bipartisan; (c) by requiring that the Governor pick some minimum stated percentage of nominees from the minority party or from "independents"; (d) by listing categories of qualities upon which the committee must rate the candidates; (e) by insuring that some laymen are on the committee; (f) by staggering the terms of the committee members and changing its personnel every few years; (g) by requiring the committee to report its results in writing; and (h) by adequately funding and staffing the committee, so as to insure that it has the ability to do its job effectively.

VII. MANDATORY SCREENING: THE MINIMUM SOLUTION

If the foregoing indicates anything, it is that the answer to our problem of judicial selection appears to lie more in the screening process than in the mechanics of selection itself. There is some voluntary screening going on already by the local bar associations.\textsuperscript{100} But this

\textsuperscript{96} See note 81 supra. See also Gershenson, A Reply Concerning Missouri Court Plan, 33 Fla. B.J. 22 (1959); Roberts, Twenty-Five Years Under the Missouri Plan, 3 Ga. St. B.J. 185 (1960).

\textsuperscript{97} In view of the public's lack of information regarding the qualifications of sitting judges, the merit retention aspects of the plan poses the danger that voters will be influenced by the popularity of a judge's decision, which could be destructive of the system. See notes 46-54 supra.


\textsuperscript{99} And in New York City, former Mayors Robert Wagner and John Lindsay both
is not mandatory screening and is of no binding effect. Candidates sometimes boycott the screening process and those expressly declared as unqualified still can run and have been elected.

A good example was provided in New York and Bronx Counties in 1968 when 17 new judgeships were created. County leaders of both parties initially agreed to support only those nominees which a blue-ribbon panel of the Association of the Bar of the City of New York, chaired by former Justice Botein, certified as qualified. Unfortunately, when the Botein Committee refused to certify four nominees of the then Bronx County Democratic Leader, he broke the pact and nominated them anyway. All were elected, amid a futile public outcry.

Moreover, as already noted, the bar associations have been subjected to criticism themselves, as unrepresentative of the community as a whole and as subject to their own "politics." A screening commission, such as the nominating committee utilized or called for under the merit plan of appointment and the 1970 Reform Bill, can readily be utilized to screen our elective candidates, as well as appointive candidates. If all candidates are required to be certified by such a commission as "highly qualified" (provided the commission itself is carefully selected, staffed and run, as pointed out above), we will be assured at least that all potential selections will be ably suited for office. Regardless of whether we stick to elections or switch to appointment, New York deserves at least this minimum but potentially far reaching reform.

VIII. OTHER PROPOSALS

A number of other alternative means for improving our system of selection warrant some brief comment.

101 TOLCHIN, supra note 4, at 131-34.
102 Herman Badillo (who was then Bronx Borough President and is now a United States Congressman) among others, angrily branded this incident "an outrage to everyone who believes in good government and respect for the judiciary." TOLCHIN, supra note 4, at 33.
103 See notes 82-84 supra.
Salaries of Judges

One suggestion focuses on the age-old cure-all, money—that is, an increase in judicial salaries. A recent study by the American Judicature Society shows that New York trial and appellate judges (whose salaries range from $37,817 to $49,665) are already the highest paid in the nation. But by improving the pay we offer our judges we may be able to attract better candidates away from lucrative private practice. Some states have already reacted to this problem. For example, California grants automatic salary increases to its judges every four years based upon the fluctuation of per capita income in the state.

The argument, it should be noted, is not limited to the state system. Distinguished advocates, such as former United States District Judge Lawrence Walsh, have raised it with regard to the federal judiciary, and in response thereto, Congress created a special commission in 1967 to review and revise all federal salaries continually, including those of the judges.

It seems true that many able lawyers who would like to become judges simply will not offer themselves because of the financial difficulties they feel they would face, even at the apparently high salaries we now pay. With earning power far in excess of those figures and with college-age children to educate and homes to maintain in the face of skyrocketing inflation, many of our ablest lawyers are asked to make a genuine financial sacrifice under the present system.

But money alone is not the answer. Raising salaries will not insure that the more able (and now willing) candidates will be elected or that the unqualified choices are "screened out." This is not to say that judicial salaries should not be raised; rather it merely means that more must be done if the selection process is really to be improved.

Discipline and Removal

Another proposal would focus our efforts on judicial discipline and removal, rather than pre-selection screening. As noted earlier, the Report of the Temporary Commission on the Courts focused its attention in this direction, calling for a Committee and a Court on the Judiciary to sit in review of our state judges, with power to censure and remove them.

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105 Walsh, Two Basic Steps Toward the Better Selection of Federal Judges, 12 Am. U.L. Rev. 14 (1963) [hereinafter cited as Walsh].
107 See, e.g., Utter, supra note 2, at 843-44; accord, Walsh, supra note 105.
108 Judicial Administration 1972-73, supra note 5, at 721-23.
Eleven other states currently have Courts on the Judiciary and twenty-one states have Judicial Qualifications Commissions which review the conduct of sitting judges.\textsuperscript{100} New York basically relies on the four appellate division courts for this purpose,\textsuperscript{110} but this method places a difficult burden on the judges to oversee their own colleagues.

Regardless of the form used, such after-the-fact review has many disadvantages and is not an adequate substitute for pre-selection screening. First of all, it can be a difficult and messy process to remove a judge, especially when the charges against him are less than outright corruption. Secondly, it can do the public image of the judiciary no good to have judges removed.\textsuperscript{111} Deficiencies which might have prevented a judge's selection in the first place, had there been mandatory screening before selection, may look pale to a reviewing committee which must also consider the effect on the public's and bench's own confidence when a sitting judge is removed. The threat of inquisition may also dampen the willingness of able candidates to serve, since the very fact of inquiry may prove fatal to the career of an official serving in such a trusted capacity; subsequent exoneration can rarely remove the stigma. And finally, but at least as importantly, why should the public be subjected to the risk of bad judges in the first place? The litigant who will have suffered from improper judicial conduct will never recoup his loss and will find little solace in the subsequent removal of the judge. Our focus should be on trying to avoid any chance of an error before it can happen, \textit{after which}, of course, a "retention review" can and should still be made.

\textit{The Career or Professional Judiciary}

Other proposals seek to borrow from the European and other foreign systems of judicial selection: that is, the so-called "career" or "professional" judiciary. Under the civil law system in countries such as France, Belgium and Germany, judicial candidates undergo postgraduate training which teaches them to be judges.\textsuperscript{112} Admission is frequently on a competitive basis, with law school graduates taking an

\textsuperscript{100} A\textsuperscript{ }\textsuperscript{A\ }\textsuperscript{G\ }\textsuperscript{U\ }\textsuperscript{D\ }\textsuperscript{E\ }\textsuperscript{T\ }\textsuperscript{O\ }\textsuperscript{C\ }\textsuperscript{O\ }\textsuperscript{T\ }\textsuperscript{U\ }\textsuperscript{R\ }\textsuperscript{S\ }\textsuperscript{Y\ }\textsuperscript{E\ }\textsuperscript{M\ }\textsuperscript{S\ }\textsuperscript{S\ }\textsuperscript{S\ }\textsuperscript{\textit{systems}}, \textit{supra} note 93, at 29.
\textsuperscript{111} Witness the "removal" of New York County Supreme Court Justice Mitchell D. Schweitzer in 1972, who was accused of outright corruption on the bench. Another embarrassing case was that of Supreme Court Justice-elect Seymour Thaler who was convicted in federal court of receiving stolen bonds. \textit{See 169 N.Y.L.J. 44, Mar. 6, 1973, at 1, col. 8.}
\textsuperscript{112} \textit{See Alexander, \textit{supra} note 29, at 64.}
entrance examination and other factors, such as moral character, also being considered. At the school, specific attention is given to the particular type of court on which the candidate will ultimately serve, which is also often selected by some form of aptitude or achievement examination. Thereafter, the graduate enters the civil service where he works his way up the ranks, often via special appointment by the national Justice Ministry. Variations, of course, occur under all of these systems.

One must remember, in analyzing these selection systems, that they involve a legal system entirely different from our own. The European or civil law system is based largely on statutes and rigid construction thereof. The United States system and that of 49 of our 50 states (all except Louisiana) is derived from the English common law system, not the Napoleonic Code. The task of our judges focuses greater attention on the peculiar facts of each case and application to those facts of previous opinions based upon other specific but similar factual situations. Under such a system, more actual practicing experience appears necessary for a judge to understand fully the problems presented to him when on the bench. This requirement of years in practice on "the other side of the bench," the penchant for red tape that our legislative and executive bureaucracies seem to spawn, and the philosophical considerations which led to our creation of a separate, non-bureaucratic judiciary argue strongly against the establishment of a "career" judiciary in this country. Significantly, in England, whose judicial system is the father of and closest to our own, judges are appointed from the ranks of highly qualified practicing barristers; there is no career judiciary.

Finally, it should be noted that various programs do exist in this country (and in New York) to help train our judges while they are on the bench. Since 1956 the Institute of Judicial Administration at New York University has run an annual two-week Appellate Judges Semi-
nar and an Intermediate Appellate Judges Seminar.\textsuperscript{118} Other institutes, such as the National College of State Trial Judges in Nevada, offer courses for new and sitting judges from all over the nation,\textsuperscript{119} and the New York Academy of the Judiciary orients new judges in the courts located in New York City's five counties and runs refresher seminars for those already sitting.\textsuperscript{120} Similar programs are being implemented for our federal judges and court staffs by the Federal Judicial Center in Washington, D.C.\textsuperscript{121}

IX. CONCLUSION

The time is ripe and the need exists for implementation of some program to insure that all of our judges possess the highest qualifications before they ascend to the bench. The many excellent judges presently sitting in our courts themselves favor such a reform, since it will necessarily work to elevate the respect for their office.

At minimum, pre-selection screening by a blue-ribbon committee selected from the bar and the public should be mandatory for all of our state and local courts, whether appointed or elected. Procedures for subsequent review of sitting judges are also advisable, but that form of review alone cannot take the place of mandatory before-the-fact screening. A strong case can and has been presented for adoption of the "merit plan"; but even as we continue to debate that question, mandatory screening should be established without further delay.

\textsuperscript{119} Id.
\textsuperscript{120} See A Guide to Court Systems, \textit{supra} note 93.