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Becoming a Judge: Report on the Failings of Judicial Elections in New York State

John D. Feerick

Cyrus Vance

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Report

Foreword

Dean John D. Feerick†

Cyrus Vance††

The last few years have been particularly bad for government integrity in New York. Since 1985, New York City has been rocked by a series of highly publicized scandals, arguably the worst since the days of Tammany Hall. One borough president was convicted of felonies; another committed suicide while under investigation; a congressman was recently convicted of bribery and extortion; former party chairmen in two boroughs were convicted of serious crimes; and a number of agency heads, judges, and lesser officials either have been convicted or forced to resign under a cloud of suspicion. And the City does not have a monopoly on malfeasance. Scandals have also plagued the New York State Legislature and governments elsewhere in the State.

The Commission on Government Integrity was created in early 1987 by Governor Cuomo, with the approval of the State Legislature, to arrest the destructive effects of these scandals

† Dean John D. Feerick is the Chairman of the State of New York Commission on Government Integrity and current Dean of Fordham Law School.

†† Cyrus Vance is a Commissioner of the State of New York Commission on Government Integrity.

and help make this period one of reform. In establishing the Commission, Governor Cuomo stated that the Commission should “move as soon as possible to make tangible reform, real reform, to begin the process of converting this period of castigation, accusation, and scandal into a period of enlightenment and reform.” He observed that “we are in danger of having this era recorded as the most scandal-ridden era in the history of the State of New York.”

The Executive Order creating the Commission directs it to investigate weaknesses in existing laws and practices in the State and municipal governments in New York that foster corruption and the appearance of improper behavior. The Commission has no law enforcement functions, and is charged with a vastly different task than prosecutors or other investigatory bodies. Although the Commission has subpoena power and examines specific cases, it does so in order to suggest system-wide reforms necessary to restore our public life.

The Commission’s Executive Order covers the management and affairs of every department and political subdivision of the State, but does not extend to the affairs or management of the Legislature. The Commission derives its authority from the Moreland Act of 1907 and the Attorney General powers set forth in Section 63 of the Executive Law. Moreland Act Commissions have been used throughout this century to investigate, expose and improve the functioning of government. For the most part, they have focused on specific areas of inquiry or specific departments of government.

The Commission has conducted investigations, held public hearings, and issued reports containing far-reaching recommendations for substantial ethics reform in New York State. The recommendations reflect work in various areas, including campaign finance, pension forfeiture, ballot access and ethics in government model legislation. Numerous Commission investigations are ongoing in other critical areas, such as government hiring and patronage practices, and procurement procedures of government agencies, municipalities, authorities and other quasi-governmental organizations.

One of the most important issues under the Commission’s mandate is judicial selection in New York State. Under current law, most of our judges are chosen by elections that are almost

totally controlled by political party leaders, a system which clashes with the fundamental objective of an independent and nonpartisan judiciary. By encouraging political favoritism and rewarding party loyalty, judicial elections enhance political leaders' influence over judges, discourage lawyers without political connections from seeking judgeships, and undermine public confidence in the integrity of our judicial system. New York can and must do better. Our State and its citizens deserve to have the finest people that will serve. We expect much from our judges: independence, courage, honesty, ability, knowledge, understanding and compassion. Political connections should not be the overriding consideration in their selection.

As set forth in the Commission's "Report on the Failings of Judicial Elections in New York State" which follows, New York should eliminate the election of judges and adopt a merit-based appointive system that will foster judicial independence and guarantee that qualified candidates without political connections have a fair chance to become judges. The Commission thus adds its support for an appointive system to a long list of endorsements by every major civic group that has studied the issue, including the Citizens Union, Common Cause, the League of Women Voters, the Fund for Modern Courts, and the New York City and State Bar Associations. Nationally, thirty-four states already use the appointive process to select at least some of their judges.

We must stop perpetuating the myth that judicial elections give us a democratic choice. They do not and will not. We firmly believe that a merit-based appointive system such as we have recommended will hold judicial ability — not political party service — paramount, and will give us the finest judiciary possible.

Becoming a Judge: Report on the Failings of Judicial Elections in New York State[†]

I. Introduction

The Executive Order that created the Commission charges it with, among other tasks, “investigat[ing] weaknesses in existing laws, regulations and procedures regarding the selection of judges and . . . determin[ing] whether such weaknesses create an undue potential for corruption, favoritism, undue influence . . . or otherwise impair public confidence in the integrity of government.” No task of this Commission is more important. Judges, as the personal embodiment of our American ideal of justice, occupy a unique place in our system of government and must be held to the highest standards of skill, independence, honesty and fairness.

The Commission has found that New York State fails to choose its judges in the manner that best fosters the presence of these attributes on the bench. Indeed, some methods of judicial selection — namely, judicial elections — are so captive to the interests of political party organizations that they clash with the ideal of an independent and nonpartisan judiciary. By subordinating judicial values to political favoritism and party loyalty, judicial elections invite undue influence over judges and threaten public confidence in the integrity of the judicial system.

Appointive as well as elective systems exist in New York State. Judges on our highest court — the Court of Appeals — are appointed by the executive branch, as are judges on the Court of Claims, Criminal Court and, in New York City only, Family Court. In contrast, judges are elected to New York’s court of general jurisdiction — the Supreme Court — as well as to the Surrogate’s, County, City, District, Civil and, outside of New York City, Family Courts. Furthermore, the laws provide a variety of methods both for appointing and for electing judges.

Recognizing this complexity, the Commission has conducted an extensive investigation and study of judicial selection in New

[†] Editor’s Note: Members of the Commission staff who participated in the preparation of this report were: Deputy Counsel Carol B. Schachner, Chief Counsel Kevin O’Brien, and Staff Counsel Diane Archer and Emily Remes.

York State. We have interviewed approximately 50 sitting and former judges around the state, and more than 60 experts, political figures, spokespersons for various organizations concerned with judicial selection and other individuals acquainted with the selection of judges in various parts of the state.¹ The Commission also has subpoenaed or otherwise obtained relevant documents from different political organizations, from the New York State Board of Elections, and from various county Boards of Election. Finally, on March 3 and March 9, 1988, the Commission held public hearings concerning issues raised in the course of this investigation.

Our investigation has shown that the election of Supreme Court justices and judges of courts of limited jurisdiction² is so intertwined with party politics that the process violates two principles basic to our ideal of an independent judiciary. First, a method of judicial selection should protect the judiciary as much as possible from pressures and concerns that may detract from the ability to be fair and impartial. The concern here is not only undue influence but the appearance of undue influence and its effect on public confidence. As Chief Judge Sol Wachtler testified at our hearings, "the whole justice system is balanced very delicately on what we call public trust."³ The elective processes threaten this delicate balance by exposing judges, even after they have won party support, to political pressure arising from the need to maintain the favor of the party organizations that sponsored them. Even when judges resist this pressure, it places judicial independence in jeopardy.

Second, a method of selecting judges should guarantee that the broadest possible pool of qualified candidates be considered

1. A number of individuals who provided information, including judges, asked that they not be publicly identified by the Commission. Still other individuals, including judges, declined to speak with us at all. For the sake of uniform treatment, an individual will not be identified by name in this report unless he or she gave public testimony before the Commission.

2. By "courts of limited jurisdiction," we refer to the Court of Claims and to Surrogate's, County, City, District, Civil, Criminal and Family Courts. We do not consider in this report Town and Village Justices or Justices of the Peace.

3. I Tr. at 35. In this report, "I Tr." or "II Tr." refers to the transcript for the first or second day of the public hearings, respectively, followed by the page of the transcript. A list of all persons who testified or submitted written statements at the hearings is attached as Appendix A.

for judgeships, without regard to political party support. Adherence to this principle not only ensures that candidates are treated fairly but also encourages the best potential judges to come forward and promotes their maximum representation on the bench. Elective systems, however, in granting control over judgeships to political party leaders in the various parts of the state, have made service and influence within party organizations usually a prerequisite to obtaining a judgeship. These systems unquestionably have produced many fine judges in our state's history. But the fact remains that candidates who lack a political connection, no matter how impressive their credentials, are usually excluded from consideration.

Our investigation further persuades us that these defects in elective systems stem, not from individual abuses or unusual local circumstances, but from the inherently partisan nature of political party activity. While party control may be appropriate in the case of election to offices within the legislative or executive branches, in the case of judicial elections such control undermines the moral foundation of the judiciary by threatening its independence and nonpartisanship.

Appointive systems, by contrast, while also vulnerable to partisan politics, can be carefully designed to minimize the risks that politics poses to judicial independence and to fair access to the bench. For example, judicial nominating commissions, by nominating for possible appointment to the bench only a small number of candidates found to be well-qualified, can limit the executive's discretion over appointments and thus the role of partisan politics at the executive level. Moreover, if each nominating commission itself is nonpartisan or multipartisan and reflects a broad spectrum of community interests, then nominations are more likely to represent a genuine consensus of informed opinions rather than the will of a political leader or faction. In these and other ways, a well-designed appointive process can free sitting judges from at least those pressures that stem from dependence on political leaders.

For these reasons, the Commission recommends abolition of the elective systems for selecting Supreme Court justices and judges of courts of limited jurisdiction in favor of an appointive system. The appointive process we recommend should have the following features:

1. Nominating commissions should be established in each judicial district for Supreme Court nominations and in the appropriate geographical area for nominations to courts of limited jurisdiction.

2. The members of each nominating commission should be selected by a range of government authorities, including the Governor, the four majority and minority leaders of the New York State Senate and Assembly, the Chief Judge of New York State and the Presiding Justice of the relevant Appellate Division, and local authorities such as relevant mayors and county executives.

3. These authorities should strive to achieve as broad a range of community representation on the commission as possible. To that end, limits should be set on the number of commission members who may belong to any one political party and who may be members of the bar.

4. Each nominating commission, after actively recruiting and thoroughly scrutinizing judicial candidates pursuant to written, uniform procedures, should nominate for each vacancy a small number of candidates found well-qualified by a majority of the commission members.

5. The executive vested with the authority to appoint judges from among these nominees should vary depending on the nature and jurisdiction of the court. The Governor, subject to confirmation by the State Senate, should appoint nominees to the Supreme Court, the Court of Claims and the Surrogate's Court. In the case of the other courts, the relevant county executive or mayor should make the appointments.

6. The re-appointment of an incumbent judge should follow the same process within the nominating commission. The commission members must decide by majority vote whether the incumbent is qualified to serve another term. If so, re-appointment by the relevant executive should be automatic.

7. Finally, each nominating commission should be required to compile and make publicly available certain statistical information on applicants, nominees and appointees, including information on the numbers of minority group and female applicants, nominees and appointees.

In urging these recommendations, we do not suggest that an appointive system necessarily produces more qualified judges or

fewer corrupt ones. We have found no persuasive evidence correlating systems of judicial selection with the quality and integrity of judges. Nor do we believe that politics can be banished completely from the selection of judges. What our investigation has shown is that elective systems are so infused with party politics that they do not and cannot protect the independence of the judiciary and promote the broadest possible access to the bench, and that the threat to public confidence alone requires New York State to adopt less partisan alternatives.

II. Elective Systems

This section provides, first, a brief overview of elective systems; second, a description and criticism of elective systems; third, a consideration of the most common arguments raised in favor of elective systems; and finally, our conclusions regarding these systems.

A. *Overview*

Judges in New York State are elected through one of two processes: a judicial nominating convention process, in the case of Supreme Court justices, or a primary process, in the case of judges of some courts of limited jurisdiction. These processes must be repeated for each judicial seat at the end of a fixed term, which is 14 years in the case of the Supreme Court and varies from four to 14 years for the other elective judgeships.

Under the judicial nominating convention system, judicial candidates for each party are nominated by a vote of party delegates at a judicial convention. Each party holds its own nominating convention within each of the eleven judicial districts throughout the state. Party delegates are elected in primary elections preceding the nominating convention. Delegates in each district are not legally obligated to vote for any particular nominees. However, they may only elect as many nominees as there are Supreme Court vacancies.⁴ Independents can run for Supreme Court without party nomination, but they must comply with special petition requirements of the New York Election

4. See N.Y. Elec. Law sections 6-124 and 6-126 (McKinney 1978 & Supp. 1988).

Law.⁵

Under the primary system, candidates for judicial office who desire to enter a party primary must garner a specified number of petition signatures from members of that party in their locale (although the candidates themselves need not be a member of that party), and otherwise comply with the petition requirements of the New York Election Law. Only those candidates who satisfy these requirements may appear on the ballot on primary day.⁶ Typically, one or more candidates from within this group, corresponding to the number of court vacancies, carry the official designation of the party. On primary day, voters from each party choose from among the candidates from their party, thus narrowing the field of candidates from each party to the number of judicial seats available.⁷

B. *Description And Critique Of Judicial Elections*

Two telling facts emerge from the Commission's investigation into judicial elections: first, the choice of candidates usually rests with local party leaders who base their decisions in large part on political considerations; second, the party system exposes candidates to political pressures even after they have been nominated or designated for office.

1. *Queens County As An Illustration*

In its investigation, the Commission found that the elective systems in Queens County illustrate clearly the conflict between party politics and judicial values. Consequently, in this report we describe in detail the Queens systems as they have operated over the past ten to 15 years. In so doing, we do not mean to single out the practices in that county. Indeed, our investigation shows that the elective processes in Queens are in important ways representative of those in other areas of the state.

Queens County politics is dominated by the Democratic Party, officially represented in Queens by the Queens Democratic Organization ("QDO"). The Democratic county leader in

5. See *id.* at sections 6-138, 6-140 and 6-142.

6. See, e.g., *id.* at sections 6-118 and 6-136.

7. See *id.* at section 6-160.

Queens (the chairman of the QDO) and important district leaders (heads of local Democratic organizations who sit on the Executive Committee of the QDO) control access to positions on both Supreme Court and Civil Court.⁸ The district leaders refer the names of potential candidates to the county leader, who sends all names to the Queens County Bar Association and, at times in the past, to a screening panel established by the QDO. Then, after negotiations and discussions with district leaders, the county leader and his aides pare down the list of candidates found qualified. In the case of Civil Court candidates, the QDO Executive Committee eventually ratifies the county leader's choices of party designees. In the case of Supreme Court candidates, the political leadership reaches an informal agreement on the party's nominees before the nominating convention. After the QDO officially designates and nominates its candidates, the organization assists in the petition process and the election campaigns.

In Queens, the official support of the Democratic Party almost always assures election. None of the many persons with whom we spoke could recall any instance since the mid-1970's when a Supreme Court candidate backed by the QDO was not nominated at the convention. And only on a handful of occasions in the last 15 years has a candidate designated by the QDO failed to win the Civil Court Democratic primary. Success in the Democratic primary or at the Democratic convention has been and still is "tantamount to election."⁹

In New York State there are, of course, variations in elective processes from place to place. At least two kinds of variations are significant and should be explained here. First, in some jurisdictions, such as New York County, political party structure is not as monolithic as it is in Queens, but rather is divided into competing factions. As a result, in these areas political control over the primary designation and judicial nominating convention processes may be less centralized than it is in Queens. Whereas in Queens the county leader can usually rely on unanimity within his organization by the time the party designates or

8. Civil Court positions are the only judgeships in Queens obtainable through the primary process.

9. 1 Tr. at 111 (Weprin).

nominates its candidates, in other areas two or more factions may vie to designate or nominate their candidates. Second, in some jurisdictions, no one political party predominates to the degree that the Democratic Party does in Queens. To the extent there is real competition between parties, general elections are more closely contested and perhaps more closely followed by the voting public.

These variations, however, do not alter our fundamental conclusion that the state's elective systems as a whole fail to protect judicial independence and to promote the broadest possible access to the bench. Relatively decentralized management of the primary and convention processes, for example, may affect the type of political control exerted over judgeships but it does not lessen the relevance of political connections to judicial selection or reduce political pressures on party designees. And contested elections, while arguably a gain for democracy, pose other threats to judicial independence by compelling some judicial candidates to raise large sums of campaign money or to become dependent on the resources of political organizations.

2. *Elective Systems Fail To Assure All Qualified Candidates Access To The Bench*

a. *Political Control Over Elective Systems Closes Nominating Conventions And, To A Lesser Extent, Primaries To Candidates Who Lack Party Organization Backing*

In virtually every county in the state, the party nomination for Supreme Court is in the hands of a small group of political leaders, typically the county leader, other top officials of his or her organization, and local political figures with sufficient power to make claims upon the county organization. And in most counties, these same leaders exercise similar control over the party designation for judicial primaries. Political party control over judicial elections is most clearly revealed at the Supreme Court nominating convention. The convention, as Assemblyman and Queens District Leader Saul Weprin testified at our public hearings, "really operates as a rubber stamp of the county leader."¹⁰

In Queens, the convention delegates are invariably hand-

10. I Tr. at 105-106.

picked by the district leaders and usually elected unopposed on party slates. Accordingly, the delegates need little persuasion to do the leaders' bidding. Indeed, the organization's choices are nominated routinely because the conventions are "pretty well-orchestrated," with "scripts" supplied beforehand to the delegates.¹¹

One individual who served for several years as a delegate at the Queens judicial convention told us that, typically, he and other delegates would not receive notification of their election as delegates from the Board of Elections until just before the nominating convention. Thus, he attended the conventions without advanced knowledge of the candidates. He also confirmed that a pre-set script determined the course of the convention. According to this former delegate, the delegates were well aware that the county leader chose the nominees prior to the nominating convention. Only after the nominations, in the experience of this former delegate, were delegates afforded the opportunity to meet the candidates.

The QDO's success in the primary elections for Civil Court seats, while not as complete as in the Supreme Court nominating conventions, also testifies to its power over the judicial selection process. QDO-backed Civil Court candidates have available to them the resources of the QDO and the local Democratic clubs. Club workers collect signatures, prepare the petitions, litigate petition challenges, and distribute campaign literature. Candidates backed by the organization also carry the official designation of the Democratic Party. These advantages are particularly telling in judicial elections, in which voter knowledge of individual candidates is often quite limited and voters more often than not vote according to party labels.¹²

Those few independent Democrats who win judicial primaries against QDO-backed candidates sometimes pay a price. One such individual who won election to Civil Court has spent many years there, despite both his proclaimed desire to join the Supreme Court bench and the ascendancy of many other Civil Court judges with fewer years of judicial experience. Since his election to Civil Court, the judge has attempted to win the or-

11. 1 Tr. at 107 (Weprin).

12. See the discussion of voter participation in judicial elections at pp. 26-29 below.

ganization's good graces by hiring QDO-recommended law secretaries. He told us this was "part of making the peace. You don't want to make enemies with people who determine whether you get redesignated."

The political realities of the nominating convention are not affected by variations in political conditions throughout the state. Even in locales with a less unified party structure than exists in Queens, candidates must still obtain the support of party leaders who control blocs of delegates. In the Bronx, where the Democratic organization has been in disarray, Justice Frank Torres won election to the Supreme Court as the Democratic nominee in 1987. Justice Torres testified at the Commission's public hearings that, after years of being absent from politics, he was compelled "to make the political connections to influence those that you recognize are key towards the development of support at the Judicial Convention."¹³ Even when a script does not control the course of the convention, the fact remains that, in Justice Torres' words, "there are a few dozen key people who control [the] delegates and who control the outcome of the convention."¹⁴

Two additional examples from our hearings make the same point. Court of Claims Judge Joan Carey testified to her repeated frustration in seeking a Supreme Court nomination at several judicial conventions in New York County. Despite her high rating from the local Democratic screening panel and her attempts to discuss substantive issues such as court reform with convention delegates, she found them unwilling or unable to address her candidacy on the merits. She testified that "there is no way in which . . . a delegate really examines the qualifications of the particular candidate," and indeed the results of all but one of the four conventions she attended were determined in advance.¹⁵

Justice David Levy of the Bronx told an even more striking story of convention politics. In 1979, Justice Levy, a reform Democratic candidate, was denied nomination by one vote after eleventh-hour lobbying by Democratic politicians in the Bronx

13. II Tr. at 142.

14. II Tr. at 145.

15. I Tr. at 185-95, 214.

and Manhattan¹⁶ caused even sympathetic district leaders to desert him. In the next year, 1980, Justice Levy was excluded from meaningful consideration because the Bronx Democratic organization and Manhattan reformers struck a deal in which the two groups divided between themselves the two vacant Supreme Court seats, thus shutting out Justice Levy and other Bronx reformers. Finally, in 1981, Justice Levy easily obtained the nomination after using the political power of his reform group to reach an accommodation with Bronx Democratic leader Stanley Friedman. Justice Levy stated that in each of these years the pivotal factor at the convention was a political "deal" of some kind.¹⁷

In the upstate judicial districts as well, the nominating convention fits Assemblyman Weprin's description of a "rubber stamp." Delegates are selected by and loyal to county leaders, and as a result the nomination process usually proceeds without debate. Similarly, party designees upstate usually run unopposed within the party and therefore do not have primary races. Many knowledgeable people mentioned the time and expense of campaigning without party organization support as one reason for the absence of primary competition in upstate counties.

b. *Political Service And Influence In The Party Organization Is Almost Always A Prerequisite To Receiving The Organization's Support*

For party leaders, the tremendous power they exercise over judgeships is first and foremost a political asset, not a public trust. As Chief Judge Wachtler observed at the public hearings, "[n]o political leader has been given the mandate to improve the judiciary, and that really isn't on the political leader's agenda."¹⁸ Queens illustrates three aspects concerning this agenda: first, past political service to a local club or the county organization is of paramount importance in the selection of judges; second, in the discussions leading to the selection of the party organization's candidates, political leaders often bargain over judgeships;

16. Until 1981, the Bronx and Manhattan comprised a single judicial district and consequently judicial nominating conventions included delegates from each borough.

17. II Tr. at 52-66, 82-88.

18. I Tr. at 34.

and third, there is no assurance that political leaders will select the most qualified judicial candidates.

(i) *The Importance Of Political Service*

Local Democratic Party clubs are the basic building blocks of the QDO because they serve as the power base of the district leaders who comprise its leadership. As Queens District Leader Archie Spigner stated at our hearings, district leaders

have a family, and that's a clubhouse . . . [T]hey have a clubhouse which they have to respond to, and you just can't maintain the support of your club if you do not reward . . . the club . . . [District leaders are] not very successful if [they] don't have a club, because . . . that's your family, your supporters.¹⁹

Almost all the Democratic judges in Queens whom we interviewed were members of local Democratic clubs prior to becoming judges. Through these clubs many performed services for the party, such as gathering signatures for petitions, distributing campaign literature and volunteering legal assistance in election cases. We learned from several witnesses that district leaders almost invariably choose to support judicial candidates who have been active in their clubs or who have been recommended by others who were active. The preferences of the county leader, too, are based largely on a person's past assistance to the party.

Moreover, the right political affiliation may enable a judge to rise to higher judicial office more swiftly. For example, Justice Nat Hentel was a Republican when he was elected to the Queens Civil Court, where he remained for 18 years. After 15 years on that bench, Justice Hentel became a Democrat; three years later, he won the party's nomination to the Supreme Court. Justice Hentel testified that many Democratic Civil Court judges junior to him were nominated to Supreme Court ahead of him because "they were active in the community and were active in the political life of the community before they went on the bench."²⁰

Assemblyman Weprin succinctly summarized the current system in Queens:

The person who is active in the political process will certainly

19. II Tr. at 165-66.

20. II Tr. at 18-19.

have a much better chance to be designated, and many people who probably would be very capable judges are probably ruled out of the system that way.²¹

Assemblyman Weprin also testified that "being active in civics, politics, community organizations, religious organizations [has] something to do with being a good judge."²² Yet other well-qualified, civic-minded individuals who choose not to serve the Democratic organization or local clubs are by that fact excluded from consideration for judgeships.

(ii) *The Role Of Political Bargaining*

The process by which the Queens county leader and district leaders reach agreement on the party's candidates is one of bald political bargaining. Since the QDO chairman is elected by the district leaders and needs their support, he has a strong interest in keeping as many of them as happy as possible. This is no less true for the allocation of judgeships than the allocation of other political benefits. Councilman Spigner characterized the process as:

balancing the equities . . . [A] County Leader . . . has to have the support of the majority of the 64 [district] leaders to get elected, so in order for him to maintain his support system, he has got to satisfy . . . the majority of the leaders. .

By the same token, according to Councilman Spigner, a district leader will "withdraw" his or her candidate "in the interest of harmony" when he or she sees that "it's not my turn."²³ The process, in essence, is one of mutual accommodation to political power. As Councilman Spigner testified, the selection process works the same "whether it be for judgeships or for legislative posts."²⁴

Queens judges themselves have characterized their election in terms of political trading. In one case, a judge told us in substance that he believed his nomination was a political favor from the county leader to the judge's district leader. Judges also

21. I Tr. at 120.

22. I Tr. at 124.

23. II Tr. at 167-68, 173.

24. II Tr. at 162.

spoke of their chances in terms of whether it was their "turn" to get "the nod", that is, the designation or nomination. One judge told us that "my time had come. I had been passed over again and again, and I had been a good boy."

(iii) *The Lack Of Assurance That The Most Qualified Candidates Will Be Endorsed*

This emphasis upon political criteria provides no assurance that political leaders will endorse the most qualified candidates, even from among those who have been politically active. Councilman Spigner, for example, explained at the hearings how he determines which candidates to sponsor for judgeships in Queens:

[I]t's based on friendships, relationships built up over the years. For example, there's a young man that goes to my Church who has been — I've known him since he was a Little Leaguer, so now he's a lawyer, and he also belongs to my political club, and I sort of look to the day when I will be able to nominate him for a judgeship, you know. So that's a particular personal relationship. If you run out of friends, then you look to see other considerations Obviously, the only requirements that I know of for being a judge . . . is having been admitted for ten years, and I don't even know of any other objective test besides that. I don't know of any other official requirement So if you have been admitted to practice and you are without any experiences of a negative nature, I assume that on the face of it, that qualifies you to become a judge.²⁵

Councilman Spigner later added, "I certainly would not nominate anyone who would be an embarrassment or had displayed tendencies or who was inarticulate or who did not have the respect of his colleagues."²⁶

The essentially political nature of these deliberations is not unique to Queens. To the extent that party leaders control access to elective processes and outcomes at the conventions or primaries, political considerations such as party service and clout within the organization will loom large in the selection of judges. And screening committees, where they do exist, as in

25. II Tr. at 163-64; see also I Tr. at 98 (Weprin).

26. II Tr. at 178.

Queens, do not offset the influence of partisan politics. At best, they help ensure that the party endorses judges who are qualified as well as politically connected, not that candidates who are qualified but lack political connections are also seriously considered. Furthermore, at present no statute or rule prevents the county leaders from simply refusing to abide by the decisions of the screening committee and supporting candidates found to be unqualified.

c. Even The Renomination Of A Sitting Judge Can Be Subject To Politics

One of the most striking problems with elective systems is that demonstrably well-qualified judges can be denied renomination at the end of their terms because of the whims of political leaders. While many party organizations, including the QDO, have adopted the practice of supporting the renomination of any judicial incumbent who has demonstrated basic competence, no law or regulation prevents this custom from being breached. Thus, in the words of Chief Judge Wachtler, an incumbent judge is "entirely at the mercy of a political process that may give little or no regard to his or her demonstrated capacity to serve,"²⁷ as several dramatic examples in recent years illustrate.

In 1983, the Bronx Democratic organization denied Justice Donald Sullivan renomination, despite his excellent reputation as a judge and the conclusion by various bar associations that he was qualified. Former Justice Sullivan testified that when he called Stanley Friedman, the county leader, for an explanation, he was simply told that "political considerations" precluded his renomination.²⁸

Similarly, Judge Stuart Namm testified that the dominant Suffolk County Republican Party refused to endorse his re-election to District Court in 1981, in effect condemning him to defeat, even though he had received the highest rating from the Suffolk County Bar Association. Judge Namm explained that the Republican Party refused to endorse him because he was a Democrat. Two years later a similar fate befell Leon Lazer, a

27. I Tr. at 16.

28. I Tr. at 156, 173.

well-respected Supreme Court Justice in Suffolk County, when the Republican organization in Suffolk County decided for political reasons to end the practice of cross-endorsing incumbent judges who were Democrats.²⁹ Moreover, since 1984 the Republican Party in Nassau County has also declined to cross-endorse Democratic judges, with the result that at least five sitting judges in County, District and Family Courts have failed to win re-election.

Incumbent judges are no more secure upstate, even in judicial districts with informal traditions of cross-endorsements. In recent years, sitting judges with fine records in at least two such districts — the Seventh and the Eighth — have been denied politically important cross-endorsements, although in many cases the affected judge still won re-election.

Such patently partisan behavior deprives the judicial system of the services of not only sitting judges but also potential candidates for judicial office. As Chief Judge Wachtler observed at our public hearings, “[c]apable candidates for judicial office may be discouraged from seeking such office, knowing that periodically they must contend with the vicissitude[s] of the partisan political process in order to remain in office.”³⁰

3. *Elective Systems Also Expose Judges To Political Pressures Even After They Obtain Party Support*

Our investigation has revealed a number of ways in which pressure on judges to maintain the favor of the party, whether to assure support for another term or merely to show loyalty, can threaten judicial independence.

a. *Judges May Feel Obligated To Contribute To Local Political Organizations*

By law, judicial candidates are prohibited from making any contribution, directly or indirectly, in connection with an election or nomination for election.³¹ However, judges who are announced candidates for another elective judicial office are per-

29. I Tr. at 126 (Weprin); II Tr. at 205-09 (Namm).

30. I Tr. at 16-17.

31. See N.Y. Elec. Law, *supra*, sections 17-162 and 14-100.

mitted by an Office of Court Administration ("OCA") rule to purchase "a ticket to a politically sponsored dinner or other affair" from nine months before the primary or nominating convention until six months after the general election.³² This limited exemption is designed to allow judicial candidates to contact political leaders in order to be able to compete for politi-

32. Rules Of The Chief Administrator Of Courts, Section 100.7, 22 N.Y.C.R.R. Section 100.7 (1986), states as follows:

No judge during a term of office shall hold any office in a political party or organization or contribute to any political party or political campaign or to take part in any political campaign except his or her own campaign for elective judicial office. Political activity prohibited by this section includes:

(a) The purchase, directly or indirectly, of tickets to politically sponsored dinners or other affairs, or attendance at such dinners or other affairs, including dinners or affairs sponsored by a political organization for a nonpolitical purpose, except as follows:

(1) This limitation shall not apply during a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating a candidate for elective judicial office for which the judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported his or her candidacy, and ending, if the judge is a candidate in the general election for that office, six months after the general election. If the judge is not a candidate in the general election, this period shall end on the date of the primary election, convention, caucus or meeting.

(2) *During the period defined in paragraph (1) of this subdivision:*

(i) A judge may attend a fundraising dinner or affair on behalf of the judge's own candidacy, but may not personally solicit contributions at such dinner or affair.

(ii) *Notwithstanding subdivision (b) of this section, a judge may purchase a ticket to a politically sponsored dinner or other affair even where the regular cost of a ticket to such dinner or affair exceeds the proportionate cost of the dinner or affair.*

(iii) Notwithstanding subdivisions (c) and (d) of this section, a judge may attend a politically sponsored dinner or affair in support of a slate of candidates, and may appear on podiums or in photographs on political literature with the candidates who make up that slate, provided that the judge is part of the slate of candidates.

(b) Contributions, directly or indirectly, to any political campaign for any office or for any political activity. Where the judge is a candidate for judicial office, reference should be made to the Election Law.

(c) Participation, either directly or indirectly, in any political campaign for any office, except his or her own campaign for elective judicial office.

(d) Being a member of or serving as an officer or functionary of any political club or organization or being an officer of any political party or permitting his or her name to be used in connection with any activity of such political party, club, or organization.

(e) Any other activity of a partisan political nature.
(Emphasis added.)

cal support.³³

Our review of documents received from the QDO as well as from the State and New York City Boards of Elections shows, however, that a number of Democratic judges in Queens appear to have purchased more than "a ticket" to a particular event. A ticket to one of the several annual QDO functions has cost over the years between \$50 and \$250. Yet one Civil Court judge, for example, spent \$1,000 toward the purchase of tickets for one QDO event during the year he was elected to Supreme Court. In many cases, moreover, a judge's spouse, other family members, friends or campaign committees purchased additional tickets to QDO affairs.

Equally noteworthy are the lengths to which some judges have gone to purchase tickets. Several Queens judges told us that, every year following their election to Civil Court, they gave official notice that they were candidates for Supreme Court so that, as "announced candidates," they could purchase tickets to and attend QDO functions without running afoul of the OCA rule. In some cases, this notice was given regardless of whether the judges believed they would be a serious contender for a Supreme Court nomination. Indeed, one judge recalled contacting someone at the QDO once and saying, "don't get angry . . . I know I'm not going to get the nomination but I'm going to send out the letter to say I'm a candidate so that I can give money." In this fashion, the judge explained, it was possible to "keep in contact" with the party even though the judge knew it was not yet time to get the "nod."

Chief Judge Wachtler testified at our hearings about this practice, which he described as "perverse" and a "distortion of the ethical canons." According to the Chief Judge, "there are judges who haven't missed a political dinner any year during their term of office as judge."³⁴ He also pointed out that, in order to be able to attend these dinners, judges to whom no higher office is available sometimes announce their candidacies for another vacancy for the same office.³⁵

Leaving aside what the rules allow, extensive ticket-buying

33. I Tr. at 16, 23 (Wachtler).

34. I Tr. at 15-16; *see also* II Tr. at 223 (Namm).

35. I Tr. at 25-26.

creates at least the appearance of a politically dependent rather than an independent judiciary. Although the judges we interviewed denied that the QDO explicitly pressured or asked them to purchase tickets to QDO affairs, several judges told us they thought their purchase of tickets to QDO affairs was "expected." Another judge told us that "no one had to force you to do anything." He just "knew" to purchase tickets and attend the affairs. He also admitted that, had there been explicit pressure from the organization, he would have acceded to it. This judge also said he believed that if he did "all the required things" while he was a Civil Court judge, he would eventually become a Supreme Court justice. Another judge told us that purchasing tickets to QDO functions was "a way of saying thank you" to the party. In fact, in many of the cases we examined, Queens Democratic judges' contributions to the QDO through ticket purchases peaked during the year they were elected to the Civil or Supreme Court.

One Queens judge talked to us at length on this subject. He said that the QDO "wants all the people to come that they can get to come [N]o one ever told me that I had to do X, Y, or Z in that context [of obtaining a judgeship] but certainly the word got to me that we're going to need money and therefore you're going to need to get people to come." The judge said he was asked, "How many tables do you think you can sell for us to get money?" This same judge's campaign committee coordinator told us that the committee gave approximately \$5,000 to the QDO for the purchase of tickets because that was the custom.

In some cases, purchases by Queens judges and their campaign committees of tickets to QDO affairs and to political affairs at local Democratic clubs constituted a substantial portion of their total campaign expenditures. For instance, the campaign disclosure statements of one successful Supreme Court candidate reflect that, of approximately two thousand dollars in campaign expenditures, almost one-half was spent on the purchase of tickets to QDO affairs and an additional 30 percent on tickets to local Democratic club affairs. Thus, contributions to fundraisers sponsored by Democratic political leaders constituted nearly 80 percent of the judge's total campaign expenditures. In another instance, after a victorious Supreme Court campaign, a Queens judge's campaign committee gave the balance of its

funds — several thousand dollars — to the QDO.

b. *Judges May Be Keenly Aware Of Their Re-election Chances When Deciding Politically Sensitive Cases*

Many elected judges with whom we spoke view with trepidation the prospect of seeking political support for renomination or redesignation at the end of their terms. Not only is this effort distracting and to some demeaning,³⁶ but it may fail. The inherent uncertainty of winning political support can have a chilling effect on a judge's exercise of his duties. Justice Hentel of Queens was asked at our public hearings if he would feel special pressure in deciding a case involving the law partner of a political leader who could help determine his judicial career. Justice Hentel responded candidly:

I'm human . . . I would think about it. I would struggle with it . . . I shouldn't have to think about it. I shouldn't have my energies dissipated in wondering what the reaction is going to be or how I'm going to kill myself for the next election. It takes some guts, but that's the system. It should be changed.³⁷

One Bronx legislator told us that he knew several Supreme Court justices in the Bronx who were in "a state of terror" over their renomination in the wake of Justice Sullivan's treatment by the Bronx Democratic organization. Both Justice Sullivan himself and Judge Namm testified that the prospect of winning or not winning renomination can weigh, in Judge Namm's phrase, "in the back of [the judge's] mind" when he or she renders a decision in a politically important or otherwise sensitive case.³⁸

c. *The Need To Finance Election Campaigns Threatens Judicial Independence*

Another threat to judicial independence is posed by the imperative to raise money in election races, which may compel judges to depend upon outside contributors.

Typically, this threat is most serious in judicial districts

36. I Tr. 192-95 (Carey); II Tr. at 146-47 (Torres).

37. II Tr. at 36, 38.

38. II Tr. at 219 (Namm); See also I. Tr. at 157-58 (Sullivan).

where one party is not dominant, such as the Third District (including Albany), the Seventh District (including Rochester), and the Eighth District (including Buffalo). Even as early as 1978, judicial campaign expenses in these districts averaged more than \$30,000 per candidate in Supreme Court races.³⁹ In 1980, the two most heavily financed Supreme Court races were held in the Seventh and Eighth Districts, the only two districts that year with competitive Supreme Court races. In the Seventh District, Supreme Court campaigns averaged more than \$55,000. In the 1980's, these costs have skyrocketed. Anthony Palermo, an attorney in Rochester and Chairman of the Fourth Department Screening Committee, testified that five years ago Supreme Court election campaigns cost as much as \$100,000 in Rochester.⁴⁰ According to Board of Elections records, in a 1986 Supreme Court race in Rensselaer County, in the Third District, the two candidates raised and spent a combined total of more than \$140,000.

The New York Code of Judicial Conduct bars judges from learning the identities of contributors to their campaign committees.⁴¹ This rule, however, is unrealistic. We learned in our investigation that judges frequently discover the identities of contributors through their attendance at fundraising events. Moreover, the rule fails to address the appearance problems that follow from extensive fundraising by judges. For example, according to Mr. Palermo, judicial campaign committees in the Seventh Judicial District sometimes seek contributions "from those who appear before the [judges], primarily lawyers and so forth."⁴² In 1978 through 1980, almost 40 percent of the reported contributions to Supreme Court judicial campaign committees statewide were made by lawyers.⁴³

39. *Judicial Elections In New York, Voter Participation And Campaign Financing Of State Supreme Court Elections 1978, 1979 and 1980*, 4, 18 (Fund for Modern Courts, Inc. 1982) ("Judicial Elections In New York 1978-1980").

40. II Tr. at 255, 264.

41. See N.Y. Code Of Jud. Conduct, Canon 7B(2) and Commentary, N.Y. Jud. Law (McKinney 1975).

42. II Tr. at 255.

43. *Judicial Elections In New York 1978-1980*, *supra*, at 4-5.

C. *The Arguments In Support Of Elective Systems*

The proponents of judicial elections most often cite three arguments in support of their position: first, that the democratic values of our government are best served by giving the people the power to choose judges; second, that elective systems are more sensitive than other systems to the judicial aspirations of minority groups and women; and third, that the involvement of judges in local party politics is on balance beneficial because it best insures that they will know and appreciate the needs of their community and be able to temper the law with common sense.

The Commission believes, after studying the record we have compiled, that these arguments either lack substance or pale beside the considerations that militate against the election of judges.

1. *Democratic Values*

The short answer to the democratic argument in favor of electing judges is that elective processes in fact have little to do with democracy, beyond the basic ability of the voter to pull the lever based on party affiliation. Moreover, the real choice is made, not in the voting booth, but well before, in the nominating process and in the primary designation process, and neither of these processes is more than marginally responsive to popular will. Consequently, the sharp conflict that elective systems engender between partisan politics and judicial values is in no sense offset or justified by democratic principles.

In the nominating convention system, a few political leaders select in advance, with little or no public input, the candidates whom the convention will nominate. To be sure, the public plays a role in the election of judicial delegates, but these delegates usually have been hand-picked by party leaders and follow their will. Moreover, the public has virtually no choice of delegates since they usually run unopposed on party slates. Thus, conventions even in jurisdictions where party structure is fragmented into many factions, such as New York County, run according to the agenda of a relative few and with no meaningful popular participation. As Judge Carey, a candidate at New York County conventions, testified, "there is no way in which . . . a delegate

really examines the qualifications of the particular candidate." Accordingly, there is "just no connection [between] the citizens and the people who are running."⁴⁴

Nor is democratic reform of the convention process a realistic possibility. As long as delegates owe their seats to the party and not to the voters, conventions will not reflect popular will. In theory, contested delegate races could democratize the conventions. But a high percentage of contested delegate races is unlikely for several reasons. First, in order to have any real voice at the convention, non-organization candidates would have to win a large bloc of delegate seats. Such a hurdle, combined with the time and money involved in campaigning for election, may deter non-organization candidates from running at all. This analysis applies to conventions with rival delegate blocs as well as to more monolithic conventions.

Second, voter interest in delegate races is extremely low. In 1983, for example, only 39 of 115 delegate races in New York County were contested, and approximately 8,000 (two percent) of the county's registered Democrats voted; in Brooklyn, only 12 of 140 delegate races were contested, and less than 1,000 (0.2 percent) of the registered Democrats voted; in the Bronx, approximately half of the delegate races were contested and less than 15,000 (eight percent) of the registered Democrats voted; and, in Suffolk and Nassau Counties, there were no contested delegate elections in either the Democratic or the Republican parties.⁴⁵

The primary system allows only marginally more popular participation than the convention system. Candidates designated by the local party organization are chosen by the same party leaders that select Supreme Court candidates, and according to the same criteria. And designation usually ensures that candidates will reach the general election, for one of two reasons. First, in many if not most cases there is no primary because the designated candidates runs unopposed. For example, no Democratic Party primaries were held in more than 70 percent of the

44. I Tr. at 212, 214.

45. *Judicial Elections In New York, Voter Participation And Campaign Financing Of State Supreme Court Elections 1981, 1982 and 1983*, 51-52, 59, 62 (Fund for Modern Courts, Inc. 1984) ("Judicial Elections In New York 1981-1983").

New York City Civil Court elections held between 1980 and 1985.⁴⁶ Similarly, between 1980 and 1985 primaries were held in less than 30 percent of all Surrogate's Court races across the state. These primaries were held in only six counties: Broome, Dutchess, Erie, Jefferson, New York and Suffolk Counties.⁴⁷

Alternatively, when there are primary contests, party designation is a significant asset. It entitles the candidate to the substantial resources — especially assistance and advice in the petition process and the election campaign — that the party organization can confer. Moreover, party designation itself carries great weight. Judicial candidates are barred from announcing their views on disputed legal or political issues,⁴⁸ which makes it extremely difficult for the public to evaluate judicial candidates except on the basis of their records. Yet, as Judge Carey testified, the public usually takes little interest in judicial candidates' records and backgrounds.⁴⁹ In such circumstances, a candidate's designation as the official candidate of the party can be decisive. Low citizen awareness of the issues is probably also the reason why a number of judicial primaries appear to have been decided by such arbitrary factors as the location of candidates' names on the ballot,⁵⁰ or the perception of a given candidate as a member of a particular ethnic group. Party labels, or other kinds of labels, fill the vacuum created by voter ignorance or disinterest.

Similar factors — uncontested races, lack of voter participation, and dependence on party labels — also make general elections less than meaningful exercises in democracy. For example, in 1978 through 1983 approximately 87% of the Supreme Court races throughout the state were either uncontested or noncompetitive.⁵¹ The majority of these races were uncontested or noncompetitive because of the general dominance of one party. But

46. *The Illusion of Democracy: New York City Civil Court Elections 1980-1985*, 15 (Fund for Modern Courts, Inc. 1986).

47. *Surrogate's Court Elections In New York State 1980-1985*, 10-12 (Fund for Modern Courts, Inc. 1986).

48. N.Y. Code Of Jud. Conduct, *supra*, Canon 7B(1)(c).

49. I Tr. at 203-05, 213-14.

50. See, e.g., II Tr. at 49-50 (Levy).

51. *Judicial Elections In New York 1981-1983*, *supra*, at 79. A noncompetitive race is a contested election in which the winner obtains more than 55 percent of the vote. *Id.*

even in the Third, Seventh and Eighth Judicial Districts, where one party is not generally dominant, only approximately one-third of the Supreme Court races during this period were competitive. One reason for this low figure is that political leaders from different parties often agree to cross-endorse candidates. In 1982, for example, all eight Supreme Court vacancies in the Third and Eighth Districts were filled in this manner — the Republicans cross-endorsed four Democratic candidates, and the Democrats cross-endorsed four Republican candidates.⁵²

Moreover, voter participation in judicial elections is often extremely low. For instance, only approximately 30 percent of the eligible voters participated in the general elections between 1978 and 1980 and approximately 20 percent of these voters failed to vote for a Supreme Court candidate.⁵³ Similarly, only 8.3 percent of all the Surrogate's Court elections in New York State between 1980 and 1985 were competitive, and roughly 18 percent of those who voted in the general elections in those years did not vote for a Surrogate's Court candidate.⁵⁴

Finally, one example may show how dependent judicial voting is on party labels. In 1982, when the Manhattan Democratic organization failed to file nominating papers for its candidates, the voters had no Democratic endorsements to guide them in local judicial races. As a result, approximately 58 percent of those Manhattan voters who cast a ballot for governor that year failed to vote for a Supreme Court candidate — more than twice the statewide rate of such failure.⁵⁵

In short, judicial elections do not significantly promote democratic values.

2. *Minority Representation On The Bench*

The Commission shares the concern that qualified judicial candidates who are women and members of minority groups be fairly represented on the bench. While some progress has been made, that goal is far from being achieved in New York State. However, there is no evidence to suggest that elective systems

52. *Id.* at 28, 37, 79.

53. *Judicial Elections In New York 1978-1980*, *supra*, at 4-5.

54. *Surrogate's Court Elections In New York State 1980-1985*, *supra*, at 9, 19.

55. *Judicial Elections In New York 1981-83*, *supra*, at 15, 19-20, 75-76.

are more responsive to the aspirations of underrepresented groups than appointive systems and, indeed, there is considerable evidence to the contrary.

At our public hearings we heard persuasive criticisms of the elective systems in New York City on just this score.⁵⁶ Justice Torres of the Bronx, for example, after noting that Hispanic judges held only 16 out of over 500 state and federal judgeships in New York City, told the Commission that 13 of these 16 judgeships had been attained through appointive rather than elective processes. Justice Torres concluded:

[I]f you analyze the extent to which positions have been gained, essentially it reflects the opportunity presented by the merit selection [*i.e.*, appointive] system, not by the political process of nomination and election . . . [This] would tend to point to the merit selection system as the system that provides opportunity rather than that of the political process.⁵⁷

Indeed, at least one of the current appointive committees in New York State — the Mayor's committee on the Judiciary in New York City — appoints to the bench a relatively high percentage of the female and minority candidates who apply, although these groups are underrepresented in the applicant pool itself.⁵⁸ Nationwide studies also show that appointive systems are more sensitive to the aspirations of minority groups and

56. II Tr. at 132-37, 153 (Torres); II Tr. at 190-92 (Spigner).

57. II Tr. at 137. In addition, Terri Austin, an attorney and member of the board of the Metropolitan Black Bar Association, testified at our hearings on behalf of that organization. Ms. Austin criticized the present performance of appointive systems in appointing blacks and other minorities to the bench in New York City, but concluded that either an appointive or an elective system could be designed to rectify this problem. II Tr. at 93, 104-106. Ms. Austin also strongly recommended that judicial nominating conventions be abolished. II Tr. at 96-97.

58. Of the appointive systems we surveyed on this point, the Mayor's Committee on the Judiciary provided us with the most extensive data for assessing its efficacy in placing women and minority groups on the bench. During the years 1978-87, minorities (male and female) comprised 10.7 percent of the total applicants seeking appointment by the Mayor's Committee to Criminal or Family Court; of these applicants, 44.9 percent were approved by the Committee and ultimately 59.1 percent of those approved were appointed by Mayor Koch to Criminal or Family Court. Non-minorities (male and female) comprised 89.3 percent of the total applicants; of these, 34 percent were approved and 40.8 percent of those approved were appointed. (By letter dated February 24, 1988 from Committee Chair David G. Trager).

women than are elective systems.⁵⁹ Accordingly, the persistent underrepresentation of such groups in the judiciary does not of itself argue in favor of elective systems.

3. *Community Values And Common Sense*

The notion that judges should have a feel for their community and empathy with the practical needs of those who appear before them is compelling. However, we are not persuaded that near-exclusive recruitment of judges from political ranks is the best way to foster community awareness and common sense on the bench. Political service in a club or county headquarters is only one of many ways in which judicial candidates can acquire these traits, and a proper method of judicial selection should be open to qualified candidates from all backgrounds.

More important, the need for judges with experience and sensitivity of this kind can and should be satisfied without compromising judicial independence. When individuals ascend to the bench their break with politics should be complete, even as they carry the lessons of their practical experience with them.

D. *Conclusion: The Conflict Between Partisan Politics And Judicial Values*

The Commission's investigation has necessarily focused on specific illustrations of judicial election processes in New York State. Our investigation persuades us, however, that the conflict between party politics, on the one hand, and judicial independence and nonpartisanship, on the other, is not peculiar to any of the local elective systems examined in this report.⁶⁰ Rather,

59. Results of a nationwide study undertaken in 1985 indicate that a higher percentage of women and minorities were selected to be judges in state courts through some type of appointive process than through partisan or nonpartisan elections. *The Success Of Women And Minorities In Achieving Judicial Office: The Selection Process*, 69 (Fund for Modern Courts, Inc. 1985). According to M.L. Henry, Jr., the Executive Director of the Fund for Modern Courts, who testified at our hearings, these results have not been contradicted in the two years since the study was published. II Tr. at 230. The fact that women and blacks have done considerably better under appointive systems nationwide was corroborated by the hearing testimony of Frances Zemans, the Executive Director of the American Judicature Society. I Tr. at 235.

60. In particular, this conflict is not peculiar to Queens County. While Queens has served as an illustration in our report, its elective systems are not atypical of those in other areas of New York State.

this conflict is inherent in the partisan nature of party activity and political elections. As our investigation shows, political parties are geared to reward loyalty, not merit; to discourage, not encourage, independence and diversity; and to obtain power rather than promote justice. Such goals, however valuable to the operation of the party system in general, have no place in the selection of our judges.

We therefore conclude that the selection of judges should be removed as much as possible from the control of political parties. We further conclude that, to achieve this result, judicial elections should be eliminated. We have already considered, and rejected, partisan elections. Even nonpartisan elections — in which each candidate's name appears on the ballot without party designation — are inadequate. In the states where they have been used to select judges, the same defects that afflict partisan elections often manifest themselves: heavy reliance on campaign contributions; low voter identification with candidates; and the decisive influence of party affiliations, notwithstanding the absence of such information from the ballot.⁶¹ We therefore recommend an appointive method for the selection of Supreme Court justices and judges of courts of limited jurisdiction.

III. Appointive Systems

In this section we first briefly describe, by way of background, the forms of appointive systems currently in place in New York State. We then discuss the general principles that an appointive system should embody in order to best promote judicial independence and the broadest possible access to the bench. Finally, drawing on these general principles, we put forward our recommendations for the preferred method of appointing judges.

A. *Types Of Appointive Systems*

Judges in New York State are appointed either through a screening or a nominating process. In each process, an appointed committee evaluates candidates and makes recommendations to the executive vested with the appointing authority. But whereas

61. M. Comisky and P. Patterson, *The Judiciary - Selection, Compensation, Ethics and Discipline*, 9-10 (1987).

nominating commissions recommend only a limited number of the most highly qualified candidates, screening committees recommend all well-qualified candidates, which normally results in a larger pool of candidates from which the executive must choose.

1. *Nominating Process*

Two different nominating systems are in place in New York State: the State Commission on Judicial Nomination (the "Nominating Commission"), which nominates seven candidates for Chief Judge and between three and seven candidates for Associate Judge to the Governor for possible appointment to the Court of Appeals; and the Mayor's Committee on the Judiciary (the "Mayor's Committee") in New York City, which nominates three persons for each vacancy to the Mayor for possible appointment to the Family and Criminal Courts and to Civil Court on an interim basis only. The Nominating Commission has both a constitutional and a statutory mandate,⁶² while the Mayor's Committee exists by Mayoral Executive Order only.⁶³

The Nominating Commission consists of 12 persons who reside in the state and serve four-year staggered terms: the Governor selects four (two from each party and two of whom may not be members of the bar), the Chief Judge of the Court of Appeals selects four (two from each party and two of whom may not be members of the bar), and the Speaker of the New York State Assembly, the Temporary President of the State Senate and the Minority Leaders of both the Assembly and the Senate each select one. The Commission members select their Chair from among their ranks.⁶⁴

The Mayor's Committee is comprised of 27 persons, all of whom the Mayor appoints. The Mayor appoints 13 members without nominations and receives nominations for the remaining 14 positions: six each by the Presiding Justices of the Appellate Division for the First and Second Judicial Departments, and

62. N.Y. Const. art. VI, section 2; N.Y. Jud. Law, sections 61-68 (McKinney 1983 & Supp. 1988).

63. Exec. Order No. 10, dated April 11, 1978, as amended by Exec. Order No. 87, dated December 6, 1985.

64. N.Y. Const. art. VI, section 2; N.Y. Jud. Law, *supra*, section 62.

nominations of one each by the deans of two New York City law schools (on an annual rotation basis). The Mayor also appoints the Committee Chair. All of the Committee members must reside or have their principal place of business in New York City.⁶⁵

The Mayor's committee also re-evaluates each appointed judge toward the end of his or her term. If the Mayor's Committee approves the judge for re-appointment, the Mayor automatically re-appoints the judge; if the Mayor's Committee fails to approve the judge, the Mayor denies re-appointment.⁶⁶

2. *Screening Processes*

By Executive Order, the Governor has established screening committees in the four judicial departments across the state to recommend candidates for appointment to the Appellate Divisions and for appointment to the Supreme Court on an interim basis. In addition, the Executive Order provides for a State Judicial Screening Committee to recommend candidates for appointment to the Court of Claims, and County Judicial Screening Committees to recommend candidates for appointment to interim vacancies on the Family Court outside of New York City, the County Court and the Surrogate's Court.⁶⁷

Each Departmental Screening Committee consists of nine members: four selected by the Governor, two by the Chief Judge of the Court of Appeals, one by the Presiding Justice of the Appellate Division of the relevant department, and two collectively by the Speaker of the Assembly, the Temporary President of the Senate, and the Minority Leaders of the Senate and Assembly. The State Judicial Screening Committee consists of the Chairs of each of the Departmental Judicial Screening Committees (appointed by the Governor from among the Committee members) and two other members selected by the Governor from each Departmental Screening Committee. Finally, each County Judicial Screening Committee consists of the members of the Departmental Judicial Screening Committee for the relevant county and one additional person selected by the chief executive officer

65. Exec. Order No. 87, *supra*.

66. See Procedure and Policy of the Mayor's Committee on the Judiciary, Section 14, adopted March 2, 1978.

67. Exec. Order No. 9, 9 N.Y.C.R.R. section 4.9 (March 4, 1983).

of the relevant county.⁶⁸ Committee members must reside or work in the judicial department or county in which they are to serve.

B. *General Principles For An Appointive System*

Appointment systems, like elective systems, are exposed to politics at several levels: the selection of members of the nominating commission or screening committee; the choice of nominees; and finally the executive's appointment from among the nominees. However, it is possible to design appointive systems that minimize political influence because, unlike elective systems, they can be removed from both the control of party organizations and the pressures of election campaigns. For these reasons, appointive systems can better achieve the goals of protecting the independence of the judiciary and promoting fair access to the bench by the broadest possible pool of qualified candidates.⁶⁹

A proper appointive system can promote judicial independence by minimizing political pressures on judges. Judicial appointment of course eliminates the concern with campaign fundraising. Moreover, by narrowing if not eliminating the discretionary power of party leaders over judgeships, appointment also undercuts the need to cultivate ties with and maintain the favor of local party organizations. In any system in which a judge's selection depends in whole or in part on the actions of political officials, that fact may affect a judge's perception of his or her role. An appointive process, however, can remove at least the most direct pressures — those that stem from the elected judge's perceived debt to the political party leader.

To the extent that the appointment process wrests control over judgeships from political leaders, it also opens judicial positions to qualified candidates who are otherwise excluded because of their lack of political party service or clout. Once potential candidates know that they do not need a political connection to

68. *Id.*

69. Thus, it may be no coincidence that, of the more than 30 states that over the past 35 years have replaced their elective systems in whole or in part with appointive systems, none has reverted to elections. The nationwide trend is unmistakably toward appointive systems. See 1 Tr. at 233-34 (Zemans).

be considered seriously by a screening or nominating committee and to obtain appointment to the bench, the appointive process should be able to attract a broader pool of well-qualified candidates than any elective system.⁷⁰

In order best to realize these advantages an appointive system should, in our judgment, embody the principles that are set forth below.

1. *An Appointive System Should Significantly Constrain Executive Discretion Over Appointments*

An appointive system should constrain executive discretion over appointments by restricting the number of nominees from which the executive must choose. After all, the appointing executive may be as politically motivated as a party organization leader. For this reason, a nominating process, in which the executive must choose from among a small number of the best candidates, is preferable to a screening process, which allows the executive to choose from a potentially unlimited number of candidates. Limiting the number of nominees from which the executive must choose also helps foster judicial independence by increasing the role of the commission and, in that way, reducing the debt that a successful nominee might feel toward the executive who appointed him or her.

The screening process, to be sure, has the merit of limiting nominees to exactly the number of candidates found well-qualified. However, under a nominating system the problem of including unqualified candidates can be addressed by requiring the commission to nominate only those candidates who are found to be well-qualified.

70. Indeed, several witnesses testified at the hearings that, to the extent statistical evidence exists, it supports the proposition that, in New York and across the nation, appointive processes attract a more diverse pool of judicial candidates than do elective processes. See testimony of Frances Zemans, Executive Director of the American Judicature Society (I Tr. at 238-39), Robert Kaufman, President of the Association of the Bar of the City of New York (I Tr. at 266), Anthony Palermo, Chair of the Fourth Department Screening Committee (II Tr. at 258-60, 273-74) and M.L. Henry, Jr., Executive Director of the Fund for Modern Courts (II Tr. at 267-69).

2. *The Composition Of The Nominating Commission Should Reflect A Broad Spectrum Of Community Interests*

The nominating commission itself should be multi-partisan, if not nonpartisan, and broadly representative of the demographic make-up of the community served. These features broaden access to judicial office by ensuring that nominations are the result of a cross-section of views. Moreover, they work to minimize the intrusion of party politics by neutralizing the power of any one faction within the commission, and by lessening the likelihood that the commission will come under the sway of the executive. A broad spectrum of represented interests also rebuts what is perhaps the most common allegation against appointive processes, namely that they are "elitist" and mirror the preferences of the established bar.

Accordingly, the members of each nominating commission should be appointed, not by one central authority, but by a range of government authorities appropriate to the community served. Furthermore, there should be limits on the number of commission members who belong to any one political party or who are members of the bar. And both commission members and the government authorities responsible for appointing judges should be officially charged with the goal of carrying out their duties in a nonpartisan fashion.

3. *The Nominating Commission System Should Be Significantly Decentralized*

A decentralized system of nominating commissions is essential in order both to facilitate community involvement in the selection of judges and to attract a diverse pool of candidates. Accordingly, each judicial district and other relevant locale should have a nominating commission, and a portion of its members should be selected by local political officials. Moreover, all of the members of each commission should reside or work in the geographical area it serves. Each commission should also actively recruit qualified judicial candidates from all segments of the relevant community.

Toward this same end, the authority for the selection of judges should also be decentralized. In contrast to most current court reform proposals for New York State, which lodge the

power of appointment almost exclusively with the Governor,⁷¹ we prefer that the Governor's appointment power be restricted to a few courts and that appropriate local authorities, such as the mayor or county executive, appoint judges to most local courts.

4. *Sitting Judges Should Not Have To Face Re-election*

In light of our investigation of elective systems, it is imperative that judges not have to face the sometimes chilling prospect of securing political support or financial resources for their re-election. The appointive system should therefore provide for the automatic retention of an incumbent judge for a new term upon a finding by the nominating commission, in the last year of his or her current term, that the judge has served competently and with integrity. This feature is preferable to requiring, as do some appointive proposals, that judges seeking re-election submit to an uncontested retention election.⁷² This referendum-like feature unnecessarily exposes sitting judges to what Chief Judge Wachtler termed "the inherent danger" that even uncontested judicial elections will be unduly politicized.⁷³

5. *The Work Of The Nominating Commission Should Be Subject To Public Scrutiny*

Finally, some public scrutiny of the work of the nominating commission is essential to help ensure that it operates fairly. We realize that the identities of applicants, the data collected concerning them and their evaluation by the commission must remain confidential in order to encourage well-qualified candidates to apply and to protect their privacy. But the nominating com-

71. See, e.g., the Governor's Program Bill No. 186, S.8246/A.9939, 211th Session (1988) ("Governor's Program's Program Bill No. 186"). This bill gives exclusive appointment power to the Governor — except for certain Mayoral appointments in New York City — in the context of court merger, which would consolidate various trial courts into a single court system.

72. See, e.g., Governor's Program Bill No. 186, *supra* section 12; Chief Judge's Proposal For Retention Election Of Sitting Judges, S.8247/A.10791, 211th Session (1988), section 1.

73. I Tr. at 21. Chief Judge Wachtler testified that uncontested retention elections are preferable to the present partisan elections, but that an appointive method is preferable to both. See *id.* at 11-12, 21.

mission should be required to maintain and disclose statistical information on, for example, the numbers of applicants, the numbers and percentages of minority group and female applicants, and the numbers and percentages of minority group and female applicants who are nominated and appointed.⁷⁴ Not compiling or disclosing such statistical information serves no useful purpose and can only undermine public confidence in the appointive process.

C. *Recommendations*

The Commission recommends amending the New York State Constitution to provide for an appointive system for the selection of all Supreme Court justices and judges of courts of limited jurisdiction. We conclude that, in light of the foregoing principles, the following seven features embody the best appointive system for New York State:

1. Nominating commissions for Supreme Court should be established in each judicial district, and nominating commissions for courts of limited jurisdiction should be established in the appropriate geographical area. These locales range in size from the entire state (Court of Claims) to individual cities (City Courts).⁷⁵

2. Members of each nominating commission should be selected by a range of relevant government authorities. In the case of each nominating commission, four officials or groups of officials should have the power to appoint roughly equal numbers of commissioners: the Governor; the four majority and minority leaders of the State Senate and Assembly (with each leader enjoying equal appointing power); the Chief Judge of the State of

74. Only the Mayor's Committee and the Screening Committee for the First Department made available to the Commission such information in meaningful detail. The other departmental and statewide screening committees provided at most limited statistical information, and the State Commission on Judicial Nomination declined on grounds of confidentiality to provide the Commission with any information beyond the names of the nominees and appointees for each vacancy and the mailing list utilized to seek applicants.

75. Many current court reform proposals include provisions for court merger. *See, e.g.,* the Governor's Program Bill No. 186, *supra*. Court merger would greatly simplify the nominating commission scheme by making the judicial district the sole jurisdictional unit throughout the State. The Commission, however, takes no position as to the merits of court merger, since it raises issues that are outside the scope of our Executive Order.

New York and the Presiding Justice or Justices of the relevant Appellate Division or Divisions (with the Presiding Justice or Justices enjoying an appointing power roughly equal to that of the Chief Judge); and officials from the relevant geographical area, such as the mayor and/or county executive. In all cases, the commission members themselves should select the chair from among their own ranks.

3. The authorities who appoint commission members should be officially charged with the goal of achieving as broad a range of community representation on the commission as possible. The commission members themselves should also be charged with the goal of acting in a nonpartisan manner in carrying out their duties. In order to help ensure that these goals are achieved, limits should be set on the number of commission members who may belong to any one political party and who may be members of the bar. In addition, all of the commission members should reside or work in the geographical area that is served. Commission members should also be barred from holding any judicial or elected public office or any office in a political party during their periods of service. Moreover, they should be ineligible for appointment to judicial office during a prescribed period after their service on the commission.

4. Each nominating commission should broadly and promptly disseminate public notice of every judicial vacancy as well as the procedures prospective candidates should follow. In addition, commission members should actively recruit prospective candidates who appear to be qualified. The commissions should adopt written, uniform procedures for screening candidates and evaluating candidates. These procedures should include the following elements.

Each candidate should be required to submit a questionnaire detailing his or her personal and professional background and qualifications. Counsel to the commission and a subcommittee designated by the chair should preliminarily screen candidates by reviewing their questionnaires and conducting a thorough investigation to obtain an accurate view of the candidate's integrity, professional competence and probable judicial temperament. This investigation should include contacting as many individuals and institutions as is deemed necessary. Counsel should then prepare a written report of the investigation of each

screened candidate and submit it along with the questionnaire to the full commission for review. The chair should then convene commission meetings to discuss the questionnaires and reports and to interview each screened candidate.

Following this interview, the members should discuss the merits of the candidates and then vote, ranking the candidates in order of preference and determining whether they are well-qualified or not. This vote should be conducted openly within the commission, to minimize the risk of partisan or other unfair forms of voting. Commission members should vote only for as many candidates as there are potential nominees. For each vacancy, the commission should nominate a small number of candidates, provided each has been found well-qualified by a majority of the commission members.⁷⁶

5. The executive vested with the authority to appoint judges should vary depending on the nature and jurisdiction of the court. The Governor should appoint nominees to the Supreme Court and the Court of Claims, both of which are courts with statewide jurisdiction. The Governor, in our view, should also appoint nominees to the Surrogate's Court, because of the extraordinary powers of the judges on that court. The Governor's power of appointment should be subject to confirmation by the State Senate. The relevant mayor should appoint judges to City Courts, to Family Courts in New York City, and to Civil and Criminal Courts (which exist only in New York City). The relevant county executive should appoint judges to County and District Courts and to Family Courts outside of New York City. Each appointing executive must make his or her appointment from the list of nominees within a prescribed period of time. Each appointing executive should also be officially charged with the goal of acting in a strictly nonpartisan manner in making judicial appointments.

6. If an incumbent judge seeks re-appointment, the judge must so inform the commission in the last year of his or her term. Following a process of investigation and interview similar to what has already been described, the commission members

76. In most proposals, the number of nominees for one vacancy ranges from three to five, with an additional two nominees for each additional vacancy in cases of multiple vacancies.

must decide by majority vote whether the incumbent judge is qualified to serve another term. If so, re-appointment should be automatic.

7. Each nominating commission should be subject to certain confidentiality provisions. However, each commission should also be required to compile, maintain and make publicly available statistical information on applicants, nominees and appointees, including the number of applicants, the numbers and percentages of minority group and female applicants, and the numbers and percentages of minority group and female applicants who are nominated and appointed.

* * *

We urge these recommendations because, in our judgment, they are best calculated to preserve the independence of the judiciary and justify public confidence in the integrity of the judicial system. In considering the selection of our judges, nothing less than the best possible method will suffice. We expect much of judges: independence, courage, honesty, ability, knowledge, understanding and compassion. Accordingly, it is imperative that we have the best and most qualified people serving on the bench. Our recommendations have been designed to achieve that end.

Dated: New York, New York

May 19, 1988

STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

John D. Feerick
Chairman

Richard D. Emery
Patricia M. Hynes
James L. Magavern
Bernard S. Meyer
Bishop Emerson J. Moore
Cyrus R. Vance

Appendix A

Witnesses Testifying and Documents Submitted at the Public
Hearings of the New York State Commission on Government

Integrity
in New York, New York
March 3 and 9, 1988

March 3rd Witnesses

Sol Wachtler, Chief Judge, State of New York (Transcript pages 7-44).

Malcolm Wilson, Former Governor, State of New York (pages 44-79).

Saul Weprin, Member, New York State Assembly (pages 80-150).

Donald Sullivan, Former Justice, Supreme Court of the State of New York (pages 151-181).

Joan Carey, Judge, New York State Court of Claims (pages 181-215).

Joseph Bermingham, President, Erie County Bar Association (participant in panel discussion, pages 216-270).

Robert Kaufman, President, Association of the Bar of the City of New York (participant in panel discussion, pages 216-270).

Frances Zemans, Vice President and Executive Director, American Judicature Society (participant in panel discussion, pages 216-270).

March 9th Witnesses

Nat Hentel, Justice, Supreme Court of the State of New York (Transcript pages 4-46).

David Levy, Justice, Supreme Court of the State of New York (pages 46-92).

Terri Austin, Member, Board of Directors of the Metropolitan Black Bar Association (pages 93-106).

Robert Levinsohn, Co-Chair, Law Committee of the New York County Democratic Committee (pages 106-129).

Frank Torres, Justice, Supreme Court of the State of New York (pages 129-160).

Archie Spigner, Member, New York City Council (pages 161-202).

Stuart Namm, Judge, New York State County Court (pages 202-224).

M.L. Henry, Jr. Executive Director, Fund for Modern Courts (participant in panel discussion, pages 225-313).

David Trager, Chair, Mayor's Committee on the Judiciary, City of New York (participant in panel discussion, pages 225-313).

Anthony Palermo, Chair, Fourth Department Screening Committee (participant in panel discussion, pages 225-313).

Documents Submitted

Statements by the witnesses.