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When it was established in 1978, the Commission on Judicial Nomination was supposed to remove politics from the process of choosing Court of Appeals judges and lead to true merit selection for New York State's highest

court.

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But in the last two weeks, as a result of inconsistencies in the law, disagreement over its role and dissatisfaction with its per-

formance, the 12-member panel itself has become something of a political football.

By law, the commission's deliberations are secret. However, several days before any official announcement, its selections became known to everyone concerned, including the man who must make the final choice, Governor-elect Mario M. Cuomo.

The commission's choices to succeed Judge Domenick L. Gabrielli, who is retiring, were: Judge Joseph M. McLaughlin of Federal District Court in Brooklyn; Bertram R. Gelfand, Surrogate of Bronx County, and Judges Richard D. Simons and Vito J. Titone of the Appellate Division of State Supreme Court.

Publicly, Mr. Cuomo said he was pleased with the commission's selections. The list, however, did not include several people considered likely prospects, particularly Judge Gabrielli's personal choice, Joseph W. Bellacosa, now the clerk of the Court of Appeals. Absent, too, were the women and others with extensive criminal justice experience that Mr. Cuomo had requested.

The Governor-elect asked the commission to provide him with more names — only to be told that the panel could not legally do so.

Mr. Cuomo is not the only one unhappy with the commission's perform-

ance. Lawyers, judges and journalists who follow the Court of Appeals were surprised that of the roughly 50 candidates the panel considered, only four were found "well qualified."

There was a feeling, too, that the four men selected did not represent the best legal talent in the state.

Americans have long insisted upon what may well be an impossibility: a judiciary accountable to the public and insulated from political pressure. The selection formula has ranged from appointment to election, with most states now relying on something in between.

Two-Step Selection Process

The New York plan, proposed by a committee on court reform headed by Cyrus R. Vance and enacted in 1978, was one such compromise. It replaced direct election of Court of Appeals judges with a two-step process, under which a panel of lawyers and lay people provide a list of "persons who by their character, temperament, professional aptitude and experience are well qualified." The Governor then selects one.

The dispute provoked by the current list focuses not on the commission's basic function, but on how many "well qualified" candidates it must provide.

During Mr. Cuomo's term as Governor, five of seven seats on the Court of Appeals will become vacant.

The commission is bound by statute to recommend "at least three persons and not more than five" for all court vacancies except Chief Judge, for which five to seven names are required. But the State Constitution, the supreme law for state questions, Mr. Cuomo notes, specifies no numbers.

Mendes Hershman, the commission's chairman, contends that Mr. Cuomo is in fact proposing a screening body rather than a nominating body. That option, he says, was specifically rejected by the Legislature, which feared that a

Governor could paper the commission with names until it recommended a candidate of his choice.

In a letter to Mr. Cuomo last week, Mr. Hershman acknowledged the differences between the statute and the Constitution. But the commission, he wrote, cannot ignore the statute and must abide by it until it is declared unconstitutional or changed.

Mr. Hershman's interpretation of the commission's genesis is shared by several of the organizations behind the court-reform package.

"We thought the issue was closed and clear," said Alan Rothstein, associate director of Citizens Union, one of the groups that supported the reform measure. "The goal here was not to create a system where the Governor would have a wide range to select from, but in which a commission composed of people with diverse backgrounds and experience would be the major selector."

'Authority Lies With Commission'

"We weren't designing this for Governor Carey or Governor Cuomo or Governor anyone," added Elizabeth Hubbard of the League of Women Voters of New York, which also supported the 1978 law. "The real authority under this plan lies with the commission."

When the new system was enacted, supporters predicted it would broaden the pool of applicants. This year, as in its three previous tours of duty, however, the panel did little more than to round up the usual type of candidate: sitting judges. There were no lawyers or law professors on the list.

Nor were any of them women, though the panel interviewed several, including Judge Mary Johnson Lowe of Federal District Court in Manhattan; Judith Kaye, a Manhattan lawyer, and Betty Weinberg Ellerin, Deputy Administrative Judge in New York City.

According to one panel member, Judge Lowe, who was on the commission's list as well qualified in 1979, tied for fifth place in this year's voting.

Critics assert that rather than judge candidates on their merits, the panel functions more as a mini-political convention, filled with horsetrading. They point to its membership, which includes Robert F. Wagner, a former New York City Mayor; former Gov. Malcolm Wilson; Paul J. Curran, another past gubernatorial aspirant, and Judah Gribetz, once Governor Carey's counsel.

The charge is hard to document, given the secrecy that shrouds the panel's activities. But Mr. Wagner, now a New York lawyer, disputes it.

Must Fill Seat by Jan. 15

"I have never heard from the Governor or anybody in the Democratic Party in favor of anyone," he said. "Our balloting is secret, and it's a little hard to trade votes when you don't know how anybody's voting."

Mr. Cuomo says he will continue to seek more names from the commission or to change the statute. But because he is required by law to fill the court seat by Jan. 15, he will probably have to choose from the four men on the list.

In the meantime, Mr. Hershman defends the commission's work and predicts that as time passes, more diverse candidates will seek court seats.

"If we were attuned politically, we would have kept on voting until we had a fifth name or selected a woman, just to be in the political swim," he said. "But isn't the purpose of the commission something other than that?"

"We don't have an organized public-relations campaign to go out to the highways and byways to broaden our pool of applicants," he added. "All of this publicity is going to be helpful, even though we're getting criticism rather than applause."

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