

Challenge for Cuomo: Picking Judges

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It has become something of an annual ritual in the Cuomo administration, like the State of the State Message or the submission of a budget.

On each occasion, a special panel has reviewed applicants for vacancies on

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the New York Court of Appeals. It has submitted its recommendations to Governor Cuomo, who by law must make his selection from this list. Each time,

the Governor, along with many others, has grumbled about the choices offered him in particular and the judicial selection process in general.

Last Saturday, the routine began anew, as the Commission on Judicial Nomination, meeting in Manhattan, placed its two latest lists on an Albany-bound bus.

The stakes this time around, however, are unusually high. One of the two vacancies is for Chief Judge, the person who not only leads the deliberations of New York's highest court but also administers the entire state judicial system.

Only One Black

Mr. Cuomo was quick to weigh in with his response. All 14 candidates, he conceded, were "competent to excellent." But only one, he noted, was black: Justice Fritz W. Alexander 2d of the Appellate Division of State Supreme Court in Manhattan.

Entirely unrepresented, he pointed out, were representatives of three other groups: women, Italian-Americans and Hispanic people. Things would be far better, he said, if court appointments were left entirely up to him.

The Governor was not the only dissatisfied party. Two incumbent judges of the Court of Appeals, Bernard S. Meyer and Matthew J. Jasen, are said to feel embarrassed and betrayed after applying for the Chief Judgeship, only to be left off the list. Both will reach mandatory retirement age in the next two years.

Italian-Americans Upset

Leaders of the Italian-American community, who have long considered one seat on the Court of Appeals to be their own, were indignant that their candidates — Justice Vito J. Titone of the Appellate Division, Second Department, in Brooklyn, and Joseph W. Bellocosa, the former, longtime clerk of the appeals court, were passed over for the second year in a row. They plan to meet tomorrow to discuss what to do about the situation.

Their comments are more than an expression of ethnic pride. Along with Mr. Cuomo's statements, they reflect how, six years after the direct election of Court of Appeals judges was abandoned in favor of "merit selection," politics continue to play a part in the process.

Indeed, considerations of politics, religion and race could well influence Mr. Cuomo as he prepares to make

what he calls his most important appointment.

The commission, following its statutory mandate, offered Mr. Cuomo seven choices for Chief Judge: Associate Judge Sol Wachtler of the Court of Appeals; Milton Mollen, presiding justice of the Appellate Division, Second Department, in Brooklyn; Justices Joseph P. Sullivan and E. Leo Milonas of the Appellate Division, First Department, in Manhattan; Federal District Court Judges Abraham D. Sofaer of Syracuse, and Surrogate Bertram R. Gelfand of the Bronx.

Walking a Fine Line

For the next month, or until Mr. Cuomo makes his choice, all seven men must walk a fine line — encouraging the Governor to take their respective candidacies seriously, while not appearing to engage in any unjudicious, offensive lobbying. The Governor once served as a law clerk at the Court of Appeals and is known to regard the institution with near reverence.

"I'm telling everyone, 'Please, I beg of you, don't write letters to the Governor or make any phone calls,'" one finalist said. "His sensitivity is at such a heightened pitch that I think it would strike a sour note. It would be counter-productive."

Most of those who follow the Court of Appeals believe that Judge Wachtler, who is 54 years old, and Justice Mollen, 64, are the front-runners for the post. But each has certain liabilities, making the already imperfect science of predicting court appointments in the Cuomo administration less reliable still.

A Clear Front-Runner

In fact, while Justice Alexander appears to be the clear front-runner for the associate judgeship vacancy — and would become the first black ever to serve on the Court of Appeals in other than an interim capacity — few are quite so certain about the Chief Judgeship.

Judge Wachtler's problem is that he is a Republican and at one time had political aspirations of his own. He has said, however, that he would never run for elective office again, and his undeclared gubernatorial bid in 1982 was stillborn, in part because the party's conservative leadership considered him too liberal.

But that same year he testified as a character witness during the trial of Joseph M. Margiotta, the former Nassau County Republican leader, who was later convicted on Federal mail fraud and extortion charges.

Justice Mollen, long identified with the Brooklyn Democratic organization, has no such problem. But his appointment could cause political problems of a different sort. Were he elevated, he would become the fourth Jew on the seven-member court, an institution that past governors have labored to keep in balance, both ethnically and geographically.

Governor Cuomo, a Democrat, has said that he will not be bound by party affiliation, and has in fact already appointed one Republican — Richard D. Simons — to the court. The most relevant considerations, Mr. Cuomo said, are knowledge of the court, collegiality, open-mindedness and administrative experience.

Beyond these generalities, there are few clues to the Governor's thinking, although his recently published diaries may provide some hints. The book contains passing references to Judges Milonas and Gelfand, none to Judges Sofaer, Sullivan and McCurn. Justice Mollen and Judge Wachtler receive more extensive treatment.

"Good meeting with Milt Mollen this morning," Mr. Cuomo wrote on Dec. 5, 1980. "A good man. Intelligent, wise, honest, tough, and with me, very generous. We talked mostly about how to improve the situation in the courts."

The evidence on Judge Wachtler is more equivocal. In his entry for Feb. 12, 1981, the Governor declares: "I think Sol is really eager to run for Governor against Carey. He'd make a good candidate, too."

Footnote Problems

But in a single explanatory footnote on Judge Wachtler, the Governor makes three mistakes, calling him Justice rather than Judge, identifying him as a member of the "New York City Court of Appeals," and calling him a former County Executive of Nassau County, a position that he never held.

Benjamin N. Cardozo, who served as the Chief Judge of the State Court of Appeals from 1926 until 1932 and who has come to personify its distinguished reputation, once defined the court's mission as "translating into law the social and economic forces that throb and clamor for expression."

Since it was reorganized in 1897, the Court of Appeals has produced a long line of highly respected Chief Judges, among them Judge Cardozo, Irving Lehman, Stanley Fuld and Charles Breitler.

Never Really Contested

The position was never really contested. In each case, the Democratic and Republican parties jointly endorsed the senior associate judge — a situation that assured political stability outside the court and harmony inside.

It was only after "merit selection" was instituted that the horse-race element was introduced. In 1978, Gov. Hugh L. Carey bypassed Judges Domenick Gabrielli and Jasen to appoint Judge Lawrence H. Cooke, who had less seniority on the court, as Chief Judge.

And now, with his choices of incumbents limited to one, Mr. Cuomo said he did not feel bound to elevate someone from within.

From his perspective, there may be one additional reason not to. Should he promote Judge Wachtler, another vacancy will open on the court, and the whole process of judicial selection must begin all over again.