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Model for Selecting Top Court Judges Reveals Its Flaws

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ALBANY — In the debate over elected versus appointed judges, the New York Court of Appeals is routinely hailed as the model for judicial selection.

"It ought to be adopted across the board for all trial court and appellate court judges," said Steven Zeidman, associate professor at the CUNY School of Law and former executive director of the Fund and Committee for Modern Courts, an organization strongly in favor of merit selection. "It really is the blueprint."

Others disagree, despite the fact that under almost any measure the appointive process has succeeded.

Since New Yorkers gave up their right to elect Court of Appeals judges on Nov. 8, 1977, and effective the following year, the state's highest court has become far more diverse: the first woman, the first black and the first Hispanic to serve in anything but an interim capacity all arrived under the appointive system. In the prior 130-year history of the Court, only white males had secured full terms.

Several stellar jurists who never would have run for public office have served with distinction since the elective system was scrapped, and their precedents will undeniably influence the law and public affairs for generations to come.

And, not insignificantly, there has never been a scandal involving on-the-bench conduct of an appointive Court of Appeals judge. Plus, the vitriolic and image-bruising high court campaigns that have tarnished other state court benches are foreign to New York. It does not happen here.

"When you look and see what is going on in other states with regard to the partisanship and the campaign fund-raising and the tenor of campaigns, you have to be convinced that elections are not a very favorable way to select judges," said Luke Bierman, director of the Justice Center at the American Bar Association in Chicago and author of several articles and a dissertation on New York's judicial selection processes. "From that perspective, I think the choice made by New Yorkers 25 years ago was probably a positive one. It is certainly a [court] that seems to be less subject to the vagaries of partisanship and money than we see in other states."

From most angles, the process appears dignified, the results seems sound.

But as the Commission on Judicial Nomination and advocates of merit appointment celebrate a quarter century of apparent success, there are increasing suggestions that the process, as good as it may be in comparison to others, is not nearly as good as it should be.

Many of the concerns center around the perception that, at least under Governor George E. Pataki, only a small circle of judges and attorneys with close ties to the governor, the right politics and ethnic, gender and geographic attributes — plus the crucial connections — need apply.

"Look at the Court of Appeals right now," scoffed former Appellate Division, First Department Justice John Carro, now with Carro Batista & Velez in Manhattan. "Since Pataki came in, the only people he has named are Republicans . . . He puts in his buddies . . . I don't know what the [Commission on Judicial Nomination] does, but apparently it just gives [Mr. Pataki] what he wants. People are not even bothering to apply because they think it is a foregone conclusion."

Exhibit B-3

Commission members and staff consistently support the process and deny that it has been exploited for political or policy goals. Still, that perception persists.

In recent years, the commission has had to extend the application process and actively recruit candidates because there was so little interest. For the current vacancy, only one of roughly 60 Appellate Division justices statewide applied for a spot on the most prestigious court in New York and one steeped in this nation's legal tradition. Several of them confided that they view the process as a waste of time.

"Word in the judiciary is that only one or two potential contenders have any shot at all," complained one Appellate Division judge who declined to apply for the latest vacancy but has applied in the past.

"People think they have no opportunity, that it is fixed and that they don't want to participate in a sham," said an upstate attorney. "Some of the Appellate Division judges think that the prestige of the Court has dropped so much that they are better off staying where they are."

"I think New York has a tainted merit selection plan," said a partner in a Manhattan law firm who closely monitors judicial selection. "What it really seems to be is a system where the governor picks his favorite, without the intervention of a judicial nominating commission of any substance and no Senate confirmation process of any substance."

That perception, perhaps the greatest threat the Court of Appeals selection system has known, arrives at a time when the elective process is under intense scrutiny, given the Brooklyn judge scandals.

But proponents of merit selection fear that if they do not take action now, if they do not cleanse the process of flaws both real and perceived, if they do not prove through the Court of Appeals example that this is the better way to go, they will have lost the best opportunity in generations to improve judicial selection in New York.

"An attack on the New York Court of Appeals selection system is strong medicine to take, but if it is not taken, it will give the supporters of the elective system, who are now on the run, ammunition," said the Manhattan law firm partner.

The complaints about Court of Appeals selection were muted only slightly last month, when the Commission on Judicial Nomination shocked nearly everyone and declined to advance the name of James M. McGuire, former counsel to Mr. Pataki, for a current vacancy. Still, though, skeptics assumed that the commission was responding to criticism that it tends to deliver the governor's choice, rather than making an objective, principled determination as to whether Mr. McGuire had the credentials to measure up to at least seven other applicants.

Although the governor surprised court watchers for the first time since he took office in 1994 and selected Manhattan litigator Robert S. Smith rather than the odds-on favorite, Presiding Justice Eugene F. Pigott of Buffalo, observers were quick to point out that Mr. Smith is a Republican and was a major campaign contributor to the governor.

While Mr. Smith's credentials were roundly lauded, his appointment — and news that he and his wife had contributed at least $146,000 to Mr. Pataki and supportive political committees — reinforced the perception that only friends and contributors have a realistic shot at garnering the support of Mr. Pataki. The governor said he appoints on merit alone and, until the day he named Mr. Smith, did not even know the candidate's political affiliation.

"The point is that the Court that is supposed to get the best from the talent pool is clearly not getting it because so many people are not applying," said the law firm partner who has been active in the Association of the Bar of the City of New York. "Only with a system where there is a desire by many, many people of talent are you going to have a system that works."

Secretive Process

It is impossible to judge whether the seven candidates that survive commission scrutiny are the seven best, since the process is secret. The public is not told who applied, how many applied, who was interviewed, how many were interviewed, how the various members of the commission voted or how many votes any particular nominee received.

Although applicants are required to complete extensive applications detailing their experience and describing their most important decisions or cases, none of that information is shared with the public. Even when it announces the names of the finalists, the commission provides only bare-bones biographical sketches that are often no more detailed than a Martindale-Hubbell listing.

At the private meeting of the 12-member commission, the candidates are ranked and the list is winnowed through multiple votes. After several rounds, a list of seven candidates, all with the support of at least two-thirds of the commission, is presented to the governor.

In recent years, that list has been carefully balanced. It includes at least one woman, at least one minority and a practicing lawyer. There are always at least three Democrats and three Republicans. And the list, until Mr. McGuire was rejected, has routinely included the person perceived to be the governor's top choice.

"Today, the process is definitely politicized, and I am not quite sure how to fix it," said Lenore Banks, a judicial specialist with the League of Women Voters and member of a commission appointed by Chief Judge Judith S. Kaye that is studying ways to improve judicial elections.

Ms. Banks said the Commission on Judicial Nomination does not function as a truly independent body, as evidenced by the fact that it nearly always delivers the candidate the governor prefers. She said the process should act as a check-and-balance — a limitation on the powers of the appointing authority (the governor) — but instead seems intent on ensuring that the governor gets his way. Ms. Banks said the secrecy of the commission also breeds skepticism and leads to the impression that members are accountable only to the public official who put them on the panel, or to no one at all.

"Certainly the process lacks openness," Ms. Banks said. "It was designed to shield the process from political influence, and it doesn't do that. We need to take a look at how the commission is appointed. There is obviously a lack of checks and balances. I think we really need to take another look at the process."

Some reform advocates would devise a commission where the governor and chief judge have less influence and where bar and good government groups have a voice in deciding who serves on the nominating panel.

Ms. Banks and others said that if the goal of merit selection is to remove the influence of politics, there is scant evidence that it has succeeded.

Prior Experience

The appointive system tends to recruit the same type of nominee that had most frequently emerged from the elective process, sitting judges who, at one time or another, earned their loyalties through the political system. Mr. Smith is only the second person in 25 years to win appointment despite a lack of judicial experience. The other was Chief Judge Kaye.

"Almost everybody who has been selected in this [appointive] process has judicial experience, mostly on an appellate level," said Mr. Bierman. "So we do seem to see a process where we have created a career judiciary, judges who know and are brought up in the judicial system of New York."

And that means the political system. With the Brooklyn scandals and statewide controversy over the elective system, critics question the breeding ground for future Court of Appeals judges.

"I'd like to see people come up in the 'right' way, but I'm not sure today we can say anybody comes up in the 'right' way. The taint of cronyism is so very strong," said a Manhattan lawyer.

The appointive system retains many of the characteristics of the elective system. Political leaders pick the commission members, and they tend to pick political people. Among those who have served are a former governor, former New York City mayor, former legislators, political campaign officials and contributors. Some reformers would alter the way commission members are appointed, perhaps by giving the governor and chief judge only one pick each, instead of four, and transferring some of their power to bar groups, good government organizations or academics.

After the commission presents a list of nominees to the governor, he has up to 30 days to name his candidate, who is then subject to Senate confirmation.

However, Senate Judiciary Committee hearings appear mere formalities as candidates are almost never asked substantive questions about their background, their judicial philosophy or the major cases they argued or presided over. Confirmation by the full Senate is usually a ceremonial matter where all 61 Senators, after hearing a series of laudatory speeches by the nominee's friends in the Legislature, unanimously confirm.

Diversity

One of the arguments for preserving the elective system is diversity, although there seems to be some

disagreement over whether the elective or the appointive system better serves that objective.

Supreme Court Justice Rose H. Sconiers of Buffalo, president of the Association of Justices of the Supreme Court of the State of New York, is convinced that minorities like herself have far better odds with the voting public than the forces that control appointive judgeships. Others, however, are not so sure, and note that until the Court of Appeals selection process was changed from elective to appointive, there had never been a woman or minority who had served in more than an interim basis on the high court.

"We know that the political processes that are inherent in elections do bring diversity to the bench, sometimes," Mr. Bierman said. "We also know that in a number of states judges of color have been defeated, particularly in the last couple of elections. We saw judges of color go down in North Carolina and Alabama and other states, so one has to wonder if those forces really are able to attract a diverse bench."

A study of judicial diversity in New York City shows that from 1977 through 2002, minorities and women were better represented on elective than appointive courts. Statewide, however, elections seem to yield an overwhelmingly white, male judiciary.

"The elected judiciary outside of New York City is so lily white it is frightening," said Mr. Zeidman. "It is appalling. That is what our elective system is producing. That, if nothing else, should give people pause to reconsider how we select judges."

Justice Carro has experience with, and concerns about, both the elective and appointive processes as they now work in New York.

"Right now, I am not enamored with either system," he said.

The former appellate judge echoed comments of other candidates who have applied for the Court of Appeals and been interviewed by the Commission on Judicial Nomination. Justice Carro, like others, said the interview questions tended to be general, lacking in substance and to some extent were irrelevant. He appeared before the commission twice, emerging as a contender for one vacancy but not the next.

"At the interview I was asked if I considered myself a Puerto Rican, an American or a New Yorker," Justice Carro said. "I thought, 'What the hell does this have to do with the Court of Appeals?' I said, 'How would you like me to answer? Which would please you most?' "

On the other hand, when Justice Carro was interviewed for Supreme Court, an elective court even though in reality a great many of the justices are hand-picked by political leaders and then cross-endorsed, the questions were not any more relevant to judicial performance, he said.

"I was interviewed by someone from the Association of the Bar who wanted to know how I got the nomination, who I knew and what were my connections," Justice Carro said.

Last month, the City Bar issued a report in which it recommended merit-based appointment for all New York judges.

Mr. Zeidman acknowledges that the Court of Appeals selection process is far from flawless, but insists it is infinitely better than the alternative.

"If the last 25 years has taught us anything, it is that we are a far cry from where we were 26 years ago — where vicious, vitriolic campaigns, increased fund-raising, judges promising how they would rule and judiciary elections were turning into elections with all the trappings of other elections," Mr. Zeidman said. "Nobody is saying appointment is perfect, but it does a better job of insulating the judiciary from those sort of pressures."