Fine Results, But a Flawed Process

By John Caher

An Albany attorney and political gadfly once suggested, only half in jest, that every generation we ought to flip-flop the way we select judges—electing those we have been appointing, appointing those we've been electing. His reasoning was that whatever process of judicial selection is used, it always ends up polluted by politics or malaise. And besides, he figured, it's always healthy to rattle the status quo every so often. Recent experience with the New York Court of Appeals selection process suggests he just may have a point.

It is hard to believe that when New Yorkers gave up their right to elect Court of Appeals judges—nay, when they *delegated* their responsibility to an independent commission and the governor, with the promised oversight of the Senate—they bargained for this: A process where the public is entirely excluded, is kept in the dark as to how and why a certain candidate emerges for consideration, knows next to nothing about the nominee's qualifications and is generally denied any meaningful opportunity to comment about a designee—whose elevation is rubber-stamped by a Judiciary Committee that seems more intent on conducting coronations than anything that might approximate a serious confirmation inquiry. Yet that is the system as it exists today. That this process has generally produced outstanding judges and has never yielded a bad judge is quite beside the point. Rather, the point is that a process that has grown sloppy will inevitably, eventually produce bad results, and risks sowing the seeds of its own destruction.

At the beginning, the Court of Appeals was designed to be an elective bench, consisting of four judges elected statewide and four elevated from the popularly elected trial bench. Eventually, the configuration changed, but the elective method of selection remained intact. However, after bitterly contested races for chief judge in 1896, 1913 and 1916 were criticized as unseemly, political leaders reached a general agreement to cross-endorse candidates and avoid true electoral contests.[1] That arrangement broke down in 1972 when State Democratic Committee Chairman Joseph Crangle of Buffalo demanded the lion's share of three open seats. Infuriated, Republican Governor Nelson Rockefeller decided to go for all three. Governor Rockefeller's hand-picked candidates—Dominick Gabrielli, Hugh Jones and Sol Wachtler—were all victorious, and the days of cross-endorsing were numbered.

Momentum for converting the court to an appointive bench began building. The incidents that finally propelled the issue to the forefront were the 1973 and 1974 campaigns of Jacob Fuchsberg, a wealthy Manhattan lawyer with no judicial experience and no bar support. Although Mr. Fuchsberg was defeated in a 1973 crusade, his high-profile media promotion forced Judge Charles Breitel, who would soon become chief judge, to campaign and spend excessively to retain his seat.[2] The following year, Mr. Fuchsberg succeeded in winning a Court of Appeals seat by defeating the first black man to serve on the court, Harold A. Stevens.

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The Fuchsberg races were deemed so injudicious and his career was so checkered (Judge Fuchsberg was the target of a 1977 court-initiated investigation into his financial dealings and was criticized by a special court), that Chief Judge Breitel and Judge Wachtler convinced Governor Hugh Carey to actively promote a merit selection process.[3] With the strong support of Governor Carey and Chief Judge Breitel and a massive public relations campaign, voters in 1977 approved by a 200,000-vote margin a constitutional amendment making the court an appointive bench.[4] To a large degree, the Legislature was left to work out the logistics, and the scheme it concocted was most fervently opposed by Assemblyman Charles D. Henderson of Hornell.

In a May 10, 1978 letter to Governor Carey, Assemblyman Henderson bemoaned that a "plush hundred-thousand dollar campaign by [political media consultant] David Garth . . . persuaded about 20% of the total

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registered voters in this state to surrender their elective franchise."[5] The Assemblyman observed that the occasion marked only the second time in history where a free people had voluntarily surrendered their right to vote. "The first time was in Germany in April of 1933 and I need not remind you of the disastrous results of that experiment," he wrote to the governor.[6]

Further, Assemblyman Henderson complained that no public hearings were held on the bill, which was available for legislators to review only a few days before the vote. "The disgraceful and repugnant method by which the amendments and implementing legislation was presented to the people and the Legislature has never been equaled, at least in this century," the assemblyman wrote.[7] "How, in good conscience, Governor could you, the Chief Judge of the Court of Appeals and the legislative leaders who participated in this ignominious power grab from such an unholy alliance in the rape of the people?"

The process that resulted is as follows: A 12-member Commission on Judicial Nomination is appointed by the governor, chief judge and legislative leaders. Section 63 of the Judiciary Law requires the commission to evaluate the applicants and simultaneously reveal to the governor and the public its "findings relating to the character, temperament, professional aptitude, experience, qualifications and fitness for office of each candidate who is recommended."[8] The governor then must select from the list provided by the Commission (usually seven candidates) and his or her selection is then subject to Senate approval.

In practice, the Commission operates in near total secrecy. It does not disclose who has applied, who it has selected to interview, how many votes a particular candidate received, whether there was a dissent or why a particular applicant made the final seven and another did not. The "findings" that it is required to prepare for the governor and the public amount to one-paragraph, bare-bones biographical snapshots. They do not dissect or even mention the candidate's primary opinions (if he or she is already a judge) or major cases (if he or she is a practicing attorney). They do not discuss the candidate's intelligence, aptitude or temperament. They do not even reveal his or her political affiliation. Although this practice is apparently acceptable to the current overnor, his predecessor was, initially anyhow, quite critical.

Interestingly, just prior to taking office, Governor-elect Mario M. Cuomo in 1982 recommended change that would require the Commission to "provide a more detailed account of its activities, along with a more complete assessment of the strengths and weaknesses of those whose names it submits." In an interview with *New York Times* writer David Margolick, the governor-elect said: "Obviously it needs to be something more than what you get out of a yearbook, which is what we got here . . . They ought to help me make a judgment, not just say that somebody was born in Hamilton County and has been on the bench for 14 years."[9] Nearly two decades later, the governor and the public get little more from the Commission.

"We are more out of the loop now than we ever were," complained Robert L. Schulz, a citizen activist and chairman of an organization called *We the People*.[10] "There ought to be 'findings,' there ought to be much more information about people who approach the Commission, people who the Commission approaches, what the Commission discovered during its investigations . . . but there is nothing."[11]

In a Nov. 2, 2000 article in the *New York Law Journal*, Stuart A. Summit, counsel to the Commission, provided a revealing perspective into how the panel performs, and why it functions as it does.[12] At the outset, he said, the Commission rejected a proposal to numerically rate the nominees, fearing that "would lead to at least conjecture, and probably worse, that the Commission really liked this one better than that one."[13] Ultimately, it adopted a set of procedures designed to preclude the endorsement of a candidate who lacks consensus support.

There are several rounds of voting. In the first round, members rank all of the interviewed candidates in order of preference. The ballots are counted and aggregate scores are computed. In order to survive to the next round, an applicant must be among the top seven choices of at least eight commissioners (statutorily, two-thirds support is required to make the final cut). After the list is whittled through several rounds of voting and it becomes clear that some applicants have more support than others, the Commission generally agrees to limit voting to those at the top of the heap.

Mr. Summit said that as the collective body begins leaning toward particular individuals, the voting patterns of the commissioners begin to shift to reflect newly emerging levels of support. While the voting remains secret, commissioners openly discuss the various contenders. It is during those discussions that matters such as race, gender and geography—in other words, matters other than objective merit—are factored in. Eventually, the list is reduced to seven names for submission to the governor. Mr. Summit said:

> I honestly concede it would be really neat to have some sort of description of what makes people different, and why they have risen to the top . . . It would be really nifty. If I was the czar of the process, or [the commission chairman] was, and we could actually write out what we thought made these the seven best that we had seen, that would be lovely. But it can't be done . . . There is no one view of what makes a good judge of the highest court.[14]

Mr. Summit acknowledged that "it is arguable that the drafters of the statute were hoping for high detail," but said that goal is impractical. "Twelve people vote and who is nominated evolves from a highly complex voting process. You would have to have 12 psychoanalysts, and good supply of sodium pentothal [truth serum] handy, to take each commissioner and diagnose their reasons and findings for who they chose."[15]

In the fall of 2000, when the Commission on Judicial Nomination was called to action following the retirement of Senior Associate Judge Joseph W. Bellacosa, two fringe organizations demanded a full accounting of just how the Commission arrived at its list of seven. As usual, the Commission in its report to the public and governor did not in any sincere sense address the individual "character, temperament, professional aptitude, experience, qualifications and fitness for office" of the candidates. It simply noted generally that all met the criteria, including, of course, Appellate Division Justice Victoria A. Graffeo, who was ultimately nominated by Governor George Pataki and confirmed by the Senate. The "findings" the commission reported on Justice Graffeo were typical:

> Currently serving as an Additional Justice, Appellate Division, Third Department, she was born in 1952, and admitted to the Bar in 1978. Received a B.A. degree with high honors, State University of New York Oneonta, and a J.D. degree from Albany Law School of Union University. Engaged in private practice of law in Albany, 1978-82, and 1984-89. Assistant Counsel, New York State Division of Alcoholism and Alcohol Abuse, 1982-84. Counsel to New York Assembly Minority Leaders, 1984-94. Solicitor General and Counsel to the New York Attorney General, 1995-96. Became a Justice of the Supreme Court, Third Judicial District in 1996. Designated Additional Justice, Appellate Division, Third Department in 1998. Lecturer to professional and community organizations. Active in professional, educational and community affairs.

Mr. Schulz and Elena Ruth Sassower, who runs an organization called the Center for Judicial Accountability, raised a ruckus, but to no avail. In a letter to Mr. Schulz, the governor's counsel, James McGuire, opined that the report from the Commission "contained the statutory finding that the candidates were qualified to hold judicial office as associate judges of the Court of Appeals. There is no requirement in statute that the report set out in detail the factual basis for this finding."[16]

Despite occasional grumblings, the procedures followed by the Commission on Judicial Nomination have been relatively consistent since it was formed following the 1977 election. Not so with the Senate Judiciary Committee. Although the Judiciary Committee has never conducted hearings as probing (and perhaps political) as those that are customary in Washington, once upon a time it did actively solicit and accept public comment and members occasionally asked questions that suggested the senator actually knew something about the nominee. For instance, when Judge George Bundy Smith came before the committee in 1992, he was questioned for a full two hours and asked about constitutional interpretation, search and seizure and other relevant issues.[17] Similarly, a year later Judge Carmen Beauchamp Ciparick was grilled over a decision she had written on abortion rights,[18] and asked to reveal her thoughts on separation of powers and legislative intent.[19]

But the tide seemed to shift following the 1993 confirmation hearing for Judge Howard A. Levine. Judge Levine's hearing was disrupted when Ms. Sassower and her mother, Doris L. Sassower, were escorted from the floor by the sergeant-at-arms and six assistants. The Sassowers, who have for years alleged widespread corruption within the judiciary, were removed after Doris Sassower exceeded the ten-minute time limit for testimony.[20] Now, Judiciary Committee confirmation sessions are held in a relatively small meeting room rather than the auditorium where they were previously conducted, very little advance notice is provided, testimony is by invitation only—and only friends of the nominee are invited to testify.

When Justice Graffeo came before the committee in November 2000, Mr. Schulz and Elena Sassower both asked to testify. Both were denied. Instead, four admirers spoke, predictably bestowing praise and adulation.

The day before the hearing, two minority members of the Committee, Senators Richard A. Dollinger, D-Rochester, and Neil Breslin, D-Albany, called for more open hearings. Senator Dollinger said:

> It seems to me that there is nothing wrong with giving people, even people who may have an ax to grind [an opportunity to testify] . . . We are big enough boys and girls to deal with someone who clearly has an unrelated complaint. This is the only chance the public gets. I don't think it is unfair for people to be given a chance before the Judiciary Committee to air their concerns.[21]

Senator Breslin made similar remarks.

> If there are zealots who want to yell about the courts, the confirmation of a judge is not the proper forum . . . But if you have some information, you ought to be presented with a forum to present it . . . We should allow public testimony on the nominations and not close it off.[22]

Yet, at the hearing neither Senator Dollinger nor Senator Breslin said a thing about open hearings and neither raised a finger when Mr. Schulz and Ms. Sassower pleaded for an opportunity to testify. If either Mr. Schulz or Ms. Sassower had anything to offer other than zealotry, we will never know. During the hearing, Justice Graffeo was asked a grand total of one question, and an incredibly generic one at that: Senator Dollinger inquired as to what the judiciary could do, in light of the presidential electoral fiasco in Florida, to restore and maintain public confidence. No one asked Justice Graffeo about her qualifications, her decisions on the Third Department bench, her juridical philosophy or even why she wanted to be a Court of Appeals judge. The nomination was promptly forwarded to the full Senate where, following more accolades, Justice Graffeo was unanimously confirmed that same afternoon.

Defenders of the process deny that it has devolved to an exercise in rubber-stamping,[23] and persistently claim the proof is in the pudding of the results. They note that by the time a nominee arrives before the full Senate, he or she has undergone intense scrutiny by the Commission and the governor's office—including a review of opinions, interviews with adversaries, an accounting of personal finances and taxes, and so forth. The fact that there has never been a scandal arising from an appointed Court of Appeals judge's official performance, and the consistent quality of the bench, suggests that the process has yielded positive results. But the increasing exclusion of the public from this process can only erode confidence and jeopardize a system which, after all, is allowed to exist only through the good graces of the very people who are seemingly excluded—the voting public.

Endnotes

1. *See* Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* at 247 (1985).
2. *See* John M. Caher, *King of the Mountain: The Rise, Fall, and Redemption of Chief Judge Sol Wachtler*, 75 (1998).
3. *Id.* at 78.
4. *See* Luke Bierman, *Institutional Identity and the Limits of Institutional Reform: The New York Court of Appeals in the Judicial Process*, unpublished doctoral dissertation, 1994, at 87.
5. *See* Charles D. Henderson, letter of May 10, 1978 to Governor Carey re: Senate Intro 10014, at 1.
6. *Id.*
7. *Id.* at 3.
8. Jud. L. § 63(3).
9. *See* David Margolick, *Cuomo Requests Greater Leeway to Select Judges*, N.Y. Times, Dec. 30, 1982, at B1.
10. *See* John Caher, *Semi-Secret Court of Appeals Nominations Draw Criticisms*, N.Y.L.J., Nov. 2, 2000, at 1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* Jay Gallagher, *Picking Judges Can Be a Tricky Business*, Albany Times Union, Dec. 4, 2000, at A9.
17. *See* Gary Spencer, *Smith Confirmed as Court of Appeals Judge*, N.Y.L.J., Sept. 25, 1992, at 1.
18. *Hope v. Perales*, 150 Misc. 2d 985.
19. *See* Gary Spencer, *Ciparick Faces Sharp Questions from Senators*, N.Y.L.J., Dec. 16, 1993, at 1.
20. *See* Gary Spencer, *Levine Wins Confirmation to Top Court*, N.Y.L.J., Sept. 8, 1993, at 1.
21. *See* John Caher, *Support Grows for Open Confirmation Hearings*, N.Y.L.J., Nov. 29, 2000, at 1.
22. *Id.*
23. *See* Gary Spencer, *Polite, Friendly Senators Likely to Confirm Smith Swiftly*, N.Y.L.J., Sept. 21, 1992, at 1.

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