

Blocked due to copyright.
See full page image or
microfilm.

Walter Gurbo

Merit System For Choosing Judges Isn't A Cure-all

By TOM GOLDSTEIN

Mayor Koch wants "to establish the best qualified judiciary in New York City history." Governor Carey has promised to appoint people who "by virtue of their learning, experience, character and temperament" are "well qualified to assume the duties of judicial office." And for openings on Federal appellate courts in New York and elsewhere, President Carter would like people of "integrity, good character and common sense" who have demonstrated a commitment to "equal justice under law."

How is all this to be done? By avoiding traditional politics and patronage and setting up blue-ribbon panels of dedicated, incorruptible lawyers and citizens to screen candidates for the Mayor, Governor and President to appoint.

But human failings persist and indications are growing that proponents of what has come to be known as merit selection of judges may have promised more than can be delivered. There are even signs of disenchantment with the new procedure, which within the space of a few years has begun to challenge unscrupulous appointments and elections as the most common way of choosing judges.

A few days ago, Judge Sol Wachtler of the New York Court of Appeals wondered aloud at a forum about the

process employed in picking the new Chief Judge of the state, Lawrence H. Cooke. Instead of seeking out qualified people, Judge Wachtler said, the nominating commission met and "asked for those interested to 'please apply.'"

From those who applied, seven finalists were chosen. "All white, all male, and all present or former sitting judges," Judge Wachtler, who did not apply, said. "There is no question that any one of them was suited for appointment and that the final choice was an excellent one, but I wonder whether this was the merit selection which we envisioned when we worked for the passage of the amendment" that scuttled elections for appointments.

In the New York region, never before have there been as many groups as there were this month evaluating people for the bench. In New York City, at least seven panels have been screening candidates for different municipal, state and Federal courts. Other committees have been doing the same in New Jersey and Connecticut.

Across the country, where 152 new Federal judgeships have been created, citizens' commissions, instead of Senators, are recommending nominees for Federal appeals courts. In many cases, Senators have set up such commissions to help them choose Federal trial judges. Another sign that an individual Senator's grasp over judicial appointments is weakening came last week, when Senator Edward M. Kennedy, the new chairman of the Judiciary Committee, said he was ending the "blue slip" system that allowed a Senator to veto any prospective Federal judge from his own state.

A Change in Procedure

Earlier this month, in the first time such a procedure has been used in New York, a commission appointed by President Carter began considering nominees for two vacancies on the United States Court of Appeals for the Second Circuit. According to a Presidential directive, that panel, like similar groups across the country, is "encouraged to make special efforts to seek out and identify well-qualified women and members of minority groups as potential nominees," and Lawrence E. Walsh, chairman of the commission, said several lawyers had been invited to apply. Although not explicitly stated, this commission must also worry about such factors as religion, geography and religious background. It is doubtful, for example, that in giving President Carter eight nominees, the Committee for the Second Circuit (New York, Connecticut and Vermont) would choose eight law professors from New Haven.

When the state nominating commission gave Governor Carey the seven names last month from among whom he chose the Chief Judge, it listed three associate judges on the court and one person from each of the state's four judicial departments. Last week, the commission began accepting names for the vacancy left by Judge Cooke, who had been an associate judge before his promotion. Although an associate judge need not have the administrative skills of the Chief Judge, most likely the finalists on this list will be some of those who were finalists but not appointed Chief Judge.

Right now, of the six judges on the court, one is from New York City, one from Long Island and six from upstate New York. There are many lawyers who are predicting that, as a political reality, the Governor will choose the next Court of Appeals judge from the metropolitan area.

Questions of geography are naturally less important to the committee of Mayor Koch, who has generally won high praise for his appointments to the Criminal and Family Courts. Last month, after the Mayor appointed and reappointed 20 people to Criminal and Family Court, Merrell E. Clark, president of the City Bar Association, said the choices were "refreshingly free of political considerations."

In a report issued a few days ago, a special committee of lawyers and law enforcement officials said: "Those who favor the appointment of judges must accept the fact that that system can also produce poor judges, as it has too frequently done on the New York City Criminal Court bench during recent administrations." Of the present Mayor, the committee said, his system "has already produced a number of very able Criminal Court judges." It has also resulted in the rejection of five judges, including two who had been regarded highly enough by their superiors to be appointed Acting Supreme Court judges.

And there is the case of Thomas Meskill, the former Connecticut Governor, who was appointed to the Second Circuit Court of Appeals four years ago. His appointment was strongly opposed by most lawyers' groups, which questioned not only his experience but also his competence. According to lawyers who practice in the Second Circuit, he has proven himself a capable judge.

What all this shows is that the determination of who will make a good judge is, at bottom, very subjective. Daniel J. Meador, an Assistant Attorney General of the United States, has reviewed the literature on judicial selection and found 30 qualities that knowledgeable people have thought judges should possess.

They should have courage, compassion, courtesy, fairness, humility, integrity, impartiality, independence, patience, common sense, openmindedness, wisdom, industriousness, promptness and on and on. And measuring and weighting such abstract virtues is not easy.

All these virtues add up to the ideal judge, who, said Oliver Wendell Holmes, should be a "combination of Justinian, Jesus Christ and John Marshall."

Tom Goldstein reports on legal affairs for The New York Times.

Exhibit A-1