

**THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK**

COUNCIL ON JUDICIAL ADMINISTRATION

**REPORT ON THE CONTINUED USE OF THE
TEMPORARY JUDICIAL SCREENING COMMITTEE**

Summary

For over 20 years, the Governors of this State have used independent screening committees to evaluate candidates for judicial appointment by the Governor to the Court of Claims and other courts in the State. While far from perfect, the process has played a significant role in improving the quality of judicial appointments in this State. By Executive Order issued in April 1995, Governor Pataki established judicial screening committees at the state and departmental levels that were similar in some respects to those used by past administrations. In the ensuing 22 months, however, the Governor has failed to implement his Executive Order. Instead he has relied upon a "temporary" screening committee, composed mainly of administration appointees and staffed by the Governor's own counsel, to evaluate candidates for judicial appointment by the Governor.

This Association has deep concern with the Governor's failure to establish truly independent and nonpartisan screening committees and with his continued use of a judicial appointment process that creates an unfortunate appearance of political control over those appointments. We urge that the 1995 Executive Order be implemented by the immediate replacement of the temporary screening committee with the state and departmental screening committees that were established by that Order.

Report

One of the enduring legacies of a Governor's administration is its appointment of judicial officers. Those appointments may well affect the quality of justice for years after that administration has left office. Because the appointment of judges is so important to the interests of the citizens of this State, and yet so vulnerable to the appearance of political influence, the process by which those appointments are screened and made is of critical significance. The integrity of that process is best assured when prospective appointees are evaluated in an independent, unfettered manner by a diverse group of individuals that is not, nor appears to be, beholden to the Governor or to any political party.

For more than two decades, the Governors of this State have taken steps, albeit imperfect ones, to create a nonpartisan process for the appointment of judges based on merit rather than politics. By Executive Order, past Governors have created a state screening committee to evaluate candidates for appointment to the Court of Claims, as well as departmental screening committees to evaluate candidates for designation to the Appellate Division and for interim appointment to the Supreme Court. The independence of the departmental screening committees has been fostered by the diversity of their membership: the Governor, the Chief Judge of the Court of Appeals, the legislative leaders of each political party and the President of the State Bar Association all had a role in selecting one or more members of the departmental committees, but none had the power to select a majority of the members. This salutary selection process, however, has not been used in appointing members to the state screening committee. Instead, the Governors have appointed all the members to that committee, thereby creating at least the opportunity for the Governor's

office to exercise political control over that committee. Nonetheless, these screening committees have been important and positive steps toward the selection of judges of the highest quality.

On April 25, 1995, shortly after he took office, Governor Pataki issued Executive Order No. 10 (attached as Appendix A to this Report) in which he established judicial screening committees at the state and departmental levels that were similar in certain respects to those used by past administrations.^{1/} In an unusual move, however, Governor Pataki simultaneously issued Executive Order No. 11 (attached as Appendix B) in which he created a seven-member "Temporary Judicial Screening Committee" to be chaired by former Chief Judge Lawrence H. Cooke, which was charged with the responsibility of screening

^{1/} Although not the focus of this Report, the Association notes that Executive Order No. 10 perpetuates a troubling aspect of the state screening committee used by past administrations and injects additional troubling features in the judicial screening process. Briefly, they are the following:

1. Under Executive Order No. 10, the Governor continues to retain complete control over the appointment of members to the state screening committee, as did past administrations. The risk of political control over that committee is heightened further by the fact that the Counsel to Governor is designated in Executive Order No. 10 to be a member of the state committee, which is an unfortunate departure from the practice of past administrations.
2. Under Executive Order No. 10, the administration has greater control than past administrations over the appointment of members to the departmental screening committees. Of the 13 members on each departmental committee, the Governor appoints five members and the Attorney General two members. Thus, unlike past administrations, where the appointments were evenly allocated among the three branches of government, a majority of the 13-member departmental committees is appointed by the executive branch.
3. While Executive Order No. 10 makes reference to the desirability of candidates possessing "diverse backgrounds and experience," the Order expressly prohibits members of the screening committees from considering, among other things, a candidate's race, religion, gender or national origin. The Association is troubled by the Governor's exclusion of judicial diversity as an important consideration in the appointment process, since that eliminates a significant source of the public's confidence in the fairness of our judicial system.

candidates for judicial appointment by the Governor until the screening committees established by Executive Order No. 10 were "fully operational." In addition to the Chairman, the temporary committee consisted of four other administration appointees,^{2/} one appointee of the Chief Judge of the Court of Appeals, and the President of the State Bar Association.

Nearly two years later, Governor Pataki's "temporary" screening committee continues to function as the only screening committee for judicial appointments by the Governor, other than the constitutionally mandated Commission on Judicial Nominations for the Court of Appeals. The Governor has yet to fulfill his April 1995 pledge to establish "permanent" 13-member state and departmental screening committees. This situation is of deep concern to the Association. The introductory passages of the Governor's own Executive Order No. 10 state clearly the reasons why independent screening committees are so important:

- "[T]he highest quality of judicial officer appointments can best be assured with the assistance of non-partisan judicial screening committees composed of outstanding citizens drawn from all quarters of the State;"
- "[b]oth the rule of law and public confidence in the integrity of the judicial process require that the primary criteria for selecting judicial officers be the quality of their intellect, judgment, temperament, character and experience;"
- "[h]ighly qualified candidates should be drawn from a cross-section of the state, reflecting a diversity of experience and background."

^{2/} They are: (1) the Counsel to the Governor, (2) the Secretary to the Governor, (3) the Director of Criminal Justice and (4) the designee of the Attorney General.

The Governor's continued use through the first half of his term of a temporary committee, a majority of whose members are administration appointees, gives the appearance of a committee that may lack independence because the administration's representatives are in a position to control the judicial screening process. To the critical eye, the Governor's delay in appointing members to the screening committees established under Executive Order No. 10 might look like the Governor was waiting until "political favors" had been paid with judicial appointments. If the temporary committee has in fact focused on the quality of appointees — and if persons, regardless of political connections, are to be considered for judicial appointment — then the Governor's delay in carrying out Executive Order No. 10 ill-serves the Governor, the members of the temporary screening committee and the public interest in a highly qualified judiciary.

The Association is also concerned about two other aspects of the current screening process, which reinforce the appearance of political control. First, the Governor's office has controlled the process for submitting names to temporary screening committee. Since April 1995, individuals interested in seeking a judicial appointment have been required to submit a resume to the Governor's Appointments Secretary. According to one published report, the temporary screening committee "has interviewed whatever names have been submitted by the Governor's office." *New York Law Journal*, December 10, 1996, at 7. To the extent the Governor's office "pre-screens" candidates for judicial appointment before submitting names to the temporary committee, the screening process has been turned on its head. Instead of providing the Governor with the names of qualified candidates from which to make a final selection, the temporary committee is put in the position of passing on (critics

might say "rubber stamping") candidates already selected by the Governor's office for possible appointment. Such a practice not only impairs the committee's ability to consider the best qualified individuals from among a larger pool of candidates,^{3/} but it also opens the Governor's office to charges that it is using the screening committee for partisan political purposes.

Second, the appearance of partisan control is heightened by the pervasive role played by the Counsel to the Governor and his staff in the screening process. The temporary screening committee lacks its own independent staff, but instead must rely upon members of the Governor's Counsel's staff to assist it in evaluating candidates for judicial appointment. The independence of the temporary screening committee is compromised by using the Governor's Counsel's staff in that function, especially when the Governor's Counsel is also a member of the committee and key adviser to the Governor on his judicial appointments.

In recent months, a number of bar groups and judges have expressed concern with the Governor's current process in making judicial appointments. For example, the Erie County Bar Association noted in November 1996 its "grave concern" that this process "does not inspire public confidence in the independence and non-partisanship of [the Governor's] 'temporary' Screening Committee on the appointment process." The Onondaga County Bar Association has expressed similar concerns. Members of the judiciary have also criticized the process to the media, albeit without attribution. In the December 10 *New York Law Journal* article cited above, one unnamed judge's views were quoted as being typical: "It

^{3/} We have been unable to determine whether every candidate who has expressed an interest in a judicial appointment has been considered by the temporary committee. Nor do we know what affirmative efforts have been made to encourage individuals to apply for appointment.

seems they are just screening the names they are interested in. I've heard one [name] goes in, one goes out and one is appointed."

Whether such criticism is fair or not is largely beside the point. The fact remains that the current appointment process invites such criticism: Five of the seven "temporary" screening committee members are appointed by the Governor. In addition, the Governor's office further controls the screening process by controlling the names submitted to the committee and by having the Governor's Counsel serve both as a member of, and as staff to, the Temporary Committee.

In Executive Order No. 10, Governor Pataki correctly noted that "the highest quality of judicial office appointments can best be assured with the assistance of non-partisan judicial screening committees." The Association respectfully calls upon the Governor to fulfill that commitment.

Dated: February 7, 1997

Prepared for the Council on Judicial Administration
by William M. Dallas, Jr.

Executive Order No. 10: Establishing Judicial Screening Committees to ensure that Judicial Officer Appointments are of the Highest Quality

WHEREAS, under the Constitution and Laws of the State of New York the Governor is entrusted with the responsibility of appointing various judicial officers;

WHEREAS, both the rule of law and public confidence in the integrity of the judicial process require that the primary criteria for selecting judicial officers be the quality of their intellect, judgment, temperament, character and experience; that candidates for judicial office be chosen without regard to political party affiliation or background; that highly qualified candidates be encouraged to apply for judicial offices; and that highly qualified candidates should be drawn from a cross-section of the state, reflecting a diversity of experience and background;

WHEREAS, the highest quality of judicial officer appointments can best be assured with the assistance of non-partisan judicial screening committees composed of outstanding citizens drawn from all quarters of the State; and

WHEREAS, the first obligation of Government is to protect its citizens from crime and violence; public confidence in the criminal justice system has been eroded; and certain judicial offices exercise important responsibilities in the administration of the criminal justice system;

NOW, THEREFORE, I, GEORGE E. PATAKI, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order as follows:

1. Judicial Screening Committees, as described below, are hereby established.

2. Each Judicial Screening Committee shall:

a. Actively recruit candidates for appointment or designation to the judicial offices within the committee's jurisdiction, to the end of obtaining candidates reflecting the diverse backgrounds and experience of the citizens of this State;

b. Review and evaluate the qualifications of candidates recruited by it or proposed to it by any person or organization, and conduct all appropriate inquiry into the qualifications of all such candidates. In reviewing and evaluating the qualifications of candidates, each committee member shall give primary consideration to the quality of a candidate's intellect, judgment, temperament, character and experience, and shall not give any consideration to the race, religion, gender, national origin, sexual orientation or political party affiliation of a candidate. Whenever appropriate to a particular judicial office, each committee member shall remain cognizant of my commitment to protecting the citizens of this State from crime and violence and to enhancing public confidence in the criminal justice system;

c. Recommend for appointment or designation only those candidates who, as determined by a majority vote of all members of the committee, are highly qualified for the judicial office for which they are being considered. No committee shall pass on the qualifications of any candidate until after a thorough inquiry has been made by the committee and its staff;

d. Prepare written reports on the qualifications of each candidate it determines to be highly qualified and recommends to the Governor. The reports shall remain confidential, except that upon the announcement by the Governor of an appointment the report relating to the appointee shall be available for public inspection. All records and deliberations of, and all communications to, the Judicial Screening Committee with respect to

a candidate's qualifications shall be held in confidence and shall not be disclosed to anyone other than the Governor, Counsel to the Governor or their designees. Notwithstanding the foregoing, information submitted to the Judicial Screening Committees relating to an appointee may be disclosed to the Senate when necessary for constitutional confirmation of the appointee, and information submitted to the Judicial Screening Committee may be disclosed to any other person or organization if disclosure is required in connection with disciplinary proceedings.

3. A State Judicial Screening Committee is hereby established. The State Judicial Screening Committee shall consist of thirteen members: the Counsel to the Governor, the Chairperson of each of the Departmental Judicial Screening Committees established by paragraph 4 of this Order, and two of the other members of each of the Departmental Judicial Screening Committees, who shall be selected by the Governor. The Chairperson of the State Judicial Screening Committee shall be appointed by the Governor from among the members of the Committee.

The term of office of any member of the State Judicial Screening Committee shall expire at the same time as the member's term of office on a Departmental Screening Committee expires.

The State Judicial Screening Committee shall have jurisdiction to consider the qualifications of candidates for appointment to the offices of Judge and Presiding Judge of the Court of Claims, and to recommend to the Governor all persons whom it finds highly qualified for those judicial offices.

When exercising the power to designate the Presiding Judge of the Court of Claims pursuant to section 2(7) of the Court of Claims Act; or the power to appoint a Judge of the Court of Claims pursuant to section 9 of Article VI of the Constitution and sections 2(2) and 2(4) of the Court of Claims Act; or the power to fill a vacancy in the office of Judge of the Court of Claims pursuant to section 21(b) of Article VI of the Constitution, the Governor shall appoint or designate only persons who have been recommended by the State Judicial Screening Committee as highly qualified for the judicial office to which the appointment or designation is to be made.

The State Judicial Screening Committee shall promulgate appropriate rules and regulations to govern its proceedings and those of the Departmental and County Judicial Screening Committees established by this Order. The rules and regulations shall include standards and procedures for ensuring, to the extent possible, uniformity of criteria for evaluating the qualifications of candidates for appointment or designation to judicial office throughout the State.

4. A Department Judicial Screening Committee is hereby established in each judicial department of the State. Each Departmental Judicial Screening Committee shall consist of thirteen members: five members shall be selected by the Governor, two members shall be selected by the Chief Judge of the Court of Appeals, two members shall be selected by the Attorney General, one member shall be selected by the Presiding Justice of the Appellate Division for that department, one member shall be selected jointly by the leaders of one major political party in each house of the Legislature, one member shall be selected jointly by the leaders of the other major political party in each house of the Legislature, and one member shall be selected by the President of the New York State Bar Association. The Chairperson of each Departmental Judicial Screening Committee shall be appointed by the Governor from among the members of the Committee. Each member of the Committee shall be a resident

of, have an office in, or work in the judicial department in which he or she is to serve.

Each Departmental Judicial Screening Committee shall have jurisdiction to consider the qualifications of candidates for designation to the offices of Justice, temporary Justice and Presiding Justice of the Appellate Division of the Supreme Court for such department, and candidates for appointment to the office of Supreme Court Justice for such department, and to recommend to the Governor all persons whom it finds highly qualified for those judicial offices.

When exercising the power to designate the Presiding Justice of each Appellate Division pursuant to section 4(c) of Article VI of the Constitution; or the power to designate other justices of any Appellate Division pursuant to sections 4(c) and 4(d) of Article VI of the Constitution; or the power to designate additional Justices of any Appellate Division pursuant to section 4(e) of Article VI of the Constitution; or the power to fill a vacancy in the office of Justice of the Supreme Court pursuant to section 21(a) of Article VI of the Constitution, the Governor shall appoint or designate only persons who have been recommended by the appropriate Departmental Judicial Screening Committee as highly qualified for the judicial office to which the appointment is to be made.

5. A County Judicial Screening Committee is hereby established in each county of the State, consisting of the members of the Departmental Judicial Screening Committee for the department in which the county is located plus one additional person who shall be resident of, have an office in, or work in the county in which he or she is to serve, to be selected by the chief executive officer of the county. The Chairman of the Departmental Judicial Screening Committee shall also serve as Chairman of the County Judicial Screening Committee.

As used herein, the term "chief executive officer" for the county shall mean the appointed or elected county executive, as the case may be, or if there be no such office, the chairman of the governing body of the county; provided, however, that for counties within the City of New York, the term "chief executive officer" for the county shall mean the Mayor of the City of New York.

Each County Judicial Screening Committee shall have jurisdiction to consider the qualifications of candidates for appointment to the offices of Judge of the County Court, Judge of the Surrogate's Court, and Judge of the Family Court outside of the City of New York, for such county, and to recommend to the Governor all persons whom it finds highly qualified for those judicial offices.

When exercising the power of appointment to fill a vacancy in the office of Judge of the County Court, Judge of the Surrogate's Court, or of Judge of the Family Court outside of the City of New York, pursuant to section 21(a) of Article VI of the Constitution, the Governor shall appoint only persons who have been recommended by the appropriate County Judicial Screening Committee as highly qualified for the judicial office to which the appointment is to be made.

6. The terms of office of the members of the Judicial Screening Committees established by this Executive Order shall be for a term of three years and subject to the provisions of section 5 of the Public Officers Law. Vacancies shall be filled in the same manner as initial appointments, and a person appointed to fill a vacancy shall serve for the remainder of the unexpired term. No member shall be removed by the Governor except for cause.

7. No member of a Judicial Screening Committee shall hold any judicial or elected public office for which he shall receive compensation during his period of service, nor shall he hold any office in any political party. No member of a Judicial Screening Committee shall be eligible for appointment to any judicial office within the jurisdiction of the Judicial Screening Committee on which the member serves during the member's period of service or within one year thereafter. Members of Judicial Screening Committees shall receive no compensation for their service, but shall be entitled to reimbursement for any necessary expenses incurred by them in connection with the performance of their duties. Each judicial screening committee shall have a paid staff available to it sufficient to enable the committee to carry out properly its responsibilities including adequate investigations into all matters relevant to the qualifications of candidates for appointment to judicial office.

8. Except as may be necessary or appropriate prior to the time the Judicial Screening Committees established by this Executive Order are fully operational, the power to fill a vacancy in a judicial office will be

exercised by the Governor in accordance with the provisions of this Executive Order. Executive Order Number 134.2 dated May 26, 1993, revoked and superseded by this Executive Order.

(L.S.)

GIVEN under my hand and the
Seal of the State in the City of Albany
this twenty-fifth day of April, in
the year one thousand nine hundred and
ninety-five.

BY THE GOVERNOR
/s/ George E. Pataki
/s/ Bradford J. Race, Jr.
Secretary to the Governor

Executive Order No. 11: Establishing a Temporary Judicial Screening Committee to ensure that Judicial Officer Appointees are of the Highest Quality

WHEREAS, under the Constitution and Laws of the State of New York, the Governor is entrusted with the responsibility of appointing various judicial officers;

WHEREAS, by Executive Order No. 10 I have ordered that Judicial Screening Committees be established to ensure that judicial officer appointments are of the highest quality; and

WHEREAS, vacancies presently exist in various judicial offices and it is or may become necessary or appropriate to appoint highly qualified candidates to fill these vacancies, and other vacancies that may hereafter arise, prior to the time the Judicial Screening Committees are fully operational;

NOW, THEREFORE, I, GEORGE E. PATAKI, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order as follows:

1. A Temporary Judicial Screening Committee is hereby established.
2. The Temporary Judicial Screening Committee shall:

a. At the direction of the Governor, following the Governor's determination that it is necessary or appropriate to the administration of justice that a vacancy in a judicial office be filled prior to the time the Judicial Screening Committees are fully operational, review and evaluate the qualifications of candidates proposed to it by any person or organization and conduct all appropriate inquiry into the qualifications of all such candidates. In reviewing and evaluating the qualifications of candidates, each member shall give primary consideration to the quality of a candidate's intellect, judgment, temperament, character and experience, and shall not give any consideration to the race, religion, gender, national origin, sexual orientation or political affiliation of a candidate. Whenever appropriate to a particular judicial office, each member shall remain cognizant of my commitment to protecting the citizens of this State from crime and violence and to enhancing public confidence in the criminal justice system;

b. Recommend for appointment or designation only those candidates who, as determined by a majority vote of all members of the committee, are highly qualified for the judicial office for which they are being considered. The committee shall not pass on the qualifications of any candidate until after a thorough inquiry has been made by the committee; and

c. Prepare written reports on the qualifications of each candidate it determines to be highly qualified and recommends to the Governor. The reports shall remain confidential, except that upon the announcement by the Governor of an appointment the report relating to the appointee shall be made available for public inspection. All records and deliberations of, and all communications to, the Temporary Judicial Screening Committee with respect to a candidate's qualifications shall be held in confidence and shall not be disclosed to anyone other than the Governor, Counsel to the Governor or their designees. Notwithstanding the foregoing, information submitted to the Temporary Judicial Screening Committee relating to an appointee may be disclosed to the Senate when necessary for constitutional confirmation of the appointee and to the Judicial Screening Committees; in addition, information submitted to the committee may be disclosed to any other person or organization if disclosure is required in connection with disciplinary proceedings.

3. The Temporary Judicial Screening Committee shall consist of the following members: the designee of the Attorney General, the designee

of the Chief Judge of the Court of Appeals, the Counsel to the Governor, the Secretary to the Governor, the Director of Criminal Justice, the President of the New York State Bar Association or his designee and the Honorable Lawrence H. Cooke, former Chief Judge of the Court of Appeals, who shall act as its chairperson. No member of the committee shall hold any judicial or elected public office for which he shall receive compensation during his period of service, nor shall he hold any office in any political party. Members of the committee shall receive no compensation for their service, but shall be entitled to reimbursement for any necessary expenses incurred by them in connection with the performance of their duties. The Office of Counsel to the Governor shall make available to the committee sufficient staff and resources to enable the committee to carry out properly its responsibilities including adequate investigations into all matters relevant to the qualifications of candidates for appointment to judicial office.

4. Upon written notification to the chairperson of the Temporary Judicial Screening Committee from the chairperson of a Judicial Screening Committee that the committee is fully operational, the Temporary Judicial Screening Committee shall cease reviewing the qualifications of candidates for judicial offices within the jurisdiction of the notifying committee and shall transmit to the chairperson of the notifying committee all relevant information, records and reports relating to candidates.

(L.S.)

GIVEN under my hand and the Privy Seal of the State in the City of Albany, this twenty-fifth day of April, in the year one thousand nine hundred and ninety-five.

BY THE GOVERNOR
/s/ George E. Pataki
/s/ Bradford J. Race, Jr.
Secretary to the Governor