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JUDICIAL SELECTION IN NEW JERSEY

*Margaret Gordon Seiler**

I. SCOPE AND BACKGROUND

> There is a fundamental relation between the quality of judges and the proper administration of justice.[1]

So wrote the late Chief Justice Arthur T. Vanderbilt in his comprehensive treatise on judicial administration. He was writing in the aftermath of New Jersey's judicial reform movement of the nineteen-forties, during which the present state constitution was forged. That document retained the state's traditional method of selection for judges above the municipal court level:[2] gubernatorial appointment with the advice and consent of the Senate.[3] This system had been in effect since 1844,[4] and proposed changes were unheeded.[5]

* B.A., Sweet Briar College; J.D., University of Virginia; Member, Virginia and District of Columbia Bars; Associate Director of the Bar Institute and Law Center of New Jersey.

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1 A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 3 (1949).

2 The selection of judges for the municipal courts within this state is governed by N.J. STAT. ANN. § 2A:8-5 (Supp. 1973-74), which provides in pertinent part:

> Each magistrate of a municipal court of a single municipality shall be appointed as follows:
>
> In municipalities governed by a mayor-council form of government, by the mayor with the advice and consent of council . . . .
>
> In all other municipalities, by the governing body of the municipality.

Municipal courts, although very important, will be excluded from consideration in this article except insofar as judicial qualifications may be apropos. There are over 500 New Jersey magistrates, and the subject of selection at that level would require separate treatment.

3 N.J. CONST. art. 6, § 6, ¶ 1, reads in part:

> The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and Associate Justices of the Supreme Court, and Judges of the Superior Court, and Judges of the County Courts and the judges of the inferior courts with jurisdiction extending to more than one municipality.

For an interesting commentary see L. Milmed, *The New Jersey Constitution of 1947*, in N.J. STAT. ANN. CONST. arts. 1-3, at 91-114 (1971).

After more than a quarter-century's additional experience under the New Jersey Constitution of 1947, it is appropriate to ask if the time has arrived to alter the 130-year-old system. Is the present method as good as any for expeditiously placing attorneys of outstanding character and ability in judicial posts? How does it work? What are the alternatives and can we find out whether one of these alternatives would be more workable in New Jersey?

The time is ripe for reconsideration. The seventies promise to be another decade of judicial reform, this one on a national scale. The wave of interest in improving the administration of justice has been gathering momentum since the early sixties. The quantity and variety of literature on the subject are unprecedented, explaining the urgent need for improvements in our courts, and in the law itself, and offering suggestions.[6] Conferences in many parts of the country are bringing together professionals and laymen to consider the problems of the courts.[7] Law schools are focusing attention on the need for court reform.[8] Citizen organizations are studying their local courts, and are being encouraged to sponsor and participate in court-related volunteer

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N.J. CONST. art. 6, § 6, ¶ 3, reads in part:

> The Justices of the Supreme Court and the Judges of the Superior Court shall hold their offices for initial terms of seven years and upon reappointment shall hold their offices during good behavior.

4 *See* N.J. CONST. art. 7, § 2, ¶ 1 (1844).

5 *See* notes 113-14 *infra* and accompanying text. For an analysis of the successes and failures of the court reformers at the 1947 convention and an appraisal of their goals see Wolinsky, Arthur T. Vanderbilt: The Amending Hand, 1958 (unpublished Princeton University honors thesis in the State Library at Trenton).

6 *E.g.*, ABA JUDICIAL ADMINISTRATION SECTION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (5th ed. 1971); J. FRANK, AMERICAN LAW, THE CASE FOR RADICAL REFORM (1969); J. GROSSMAN, LAW AND CHANGE IN MODERN AMERICA (1971); H. JAMES, CRISIS IN THE COURTS (1968); THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965).

A valuable source of current information is the monthly journal JUDICATURE, published by The American Judicature Society (AJS), a national and international organization of over 40,000 lawyers, judges, and laymen founded in 1913 to promote the efficient administration of justice. AJS publishes books and other materials, conducts conferences, and renders consultation service. The author gratefully acknowledges the aid of AJS in the preparation of this article.

7 AJS had sponsored 80 citizens' conferences throughout the country by the fall of 1971, and currently continues to conduct these educational functions. Two of the more recent examples are the National Conference on the Judiciary in March, 1971, at Williamsburg, Virginia, and the Houston Citizens' Conference on the Courts held in 1972. Another example was the December, 1972, National Conference on Criminal Justice in Washington, D.C., convened by the Chief Justice of the United States Supreme Court.

8 The theme of Law Day, 1973, observed by law schools throughout the country, was "Help Your Courts—Assure Justice." Reprint of *Presidential Proclamation*, 96 N.J.L.J. 481 (1973).

activities.[9] Citizens are also accepting responsibility to work with lawyers and judges on special commissions, such as one in Rhode Island with the august title of "Commission on the Jurisprudence of the Future," which has the responsibility of analyzing trends towards new concepts of law.[10] Some states are restructuring their judicial systems,[11] while in others independent groups are engaging in intensive study. For example, the New Jersey State Bar Association, which has furthered many reforms through the years, has established the Bar Institute and Law Center of New Jersey, an independent nonprofit corporation with a board of trustees composed of leading attorneys and laymen. Its purpose is

> to study the system of delivering justice in the State of New Jersey with a view to the improvement of its quality and to develop and plan programs to improve the system,[12]

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9 LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA), VOLUNTEERS IN LAW ENFORCEMENT PROGRAMS (1972). This staff study describes and recommends many court-related programs sponsored by or utilizing citizen volunteers throughout the country.

In New Jersey, a number of civic organizations are currently studying the local court system as an area of major interest. The Junior Leagues, the New Jersey League of Women Voters, and the National Council of Jewish Women are particularly interested in juveniles. In April, 1973, The New Jersey Executive Committee of the National Council on Crime and Delinquency was organized by business leaders to

> combat crime and delinquency and to effect meaningful and lasting changes in the state's criminal justice system by coupling corporate citizen effort and know-how with NCCD's technical assistance and expertise.

96 N.J.L.J. 516 (1973). Obviously, a catalyst of citizen interest is a concern with crime and delinquency.

10 Licht, *The Trial Judge and Today's Social Issues*, 12 THE JUDGES' JOURNAL 1 (1973). The Commission's membership

> comprises men and women of preeminence in the religious community of the state; in the field of medicine, particularly psychiatric medicine; in the educational disciplines; and in particular, persons knowledgeable in the area of rehabilitation, of both the mentally ill and the convicted criminal.

Id. at 2. Presumably, it also includes lawyers and judges, since it is one of several "bench and bar" committees working on a master plan for reorganization of the judicial system.

11 Alabama is one example. For a list of that state's accomplishments see Snodgrass, *Alabama Judicial Reform*, 12 THE JUDGES' JOURNAL 4 (1973). A permanent study commission was created to evaluate Alabama's judicial system. Alabama is one of those states where the judicial selection system is a mixture of old and new: elections are statewide, but in Birmingham a Merit Plan is in effect for the trial courts of general jurisdiction.

12 Certificate of Incorporation of The Bar Institute of New Jersey, filed with the Secretary of State on January 3, 1973, and Certificate of Amendment, changing the name to The Bar Institute and Law Center of New Jersey and expanding its council, filed June 12, 1973.

When the Bar Institute was founded in 1972, the need for such an organ of creative change was being articulated almost simultaneously by the deans of the law schools of the state who, with other leaders, sponsored a conference that fall highlighting the need

in order to render the legal process more responsive to society's needs.

The present article explores the issue which should be considered "fundamental" to sound judicial administration: the quality of judges. What is the best method for placing men and women of superior abilities on the bench? How can qualifications of judicial candidates be determined with objectivity? How is New Jersey's present selection system working, and should it be changed?

Although such questions may be asked with equal force about the federal courts,[13] this inquiry is limited to state courts, especially New Jersey's. Consideration will be given to the Merit Plan, a selection method adopted by law in varying forms in eighteen states or localities, and undergoing experimentation on a voluntary basis in others.[14] New Jersey's present selection system will be examined with particular attention to the evolving cooperation between the Governor and a responsible segment of the organized Bar, primarily a screening function, although labeled a "voluntary" Merit Plan.[15] This cooperation certainly has usefulness, but it does not and cannot make a consistently significant impact on the fundamental selection mechanism, which is essentially an interplay of political forces emanating from the legislative and executive branches.

"Political" is a derogatory word when used in the popular sense to describe the award of favors, usually in a partisan context, by allocating power without regard for the public good or without giving priority to the merit of the recipient. However, if the words "political" and "politics" are used in the Aristotelian sense, to refer to the art of government, the words lose their negative overtones; in this sense, the judiciary must be admitted to be a political institution.[16]

In this broader sense, judicial appointments may be said to be

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for a Law Center. By 1973, the two groups had merged to form the Bar Institute and Law Center of New Jersey, with an enlarged governing council representative of the bar, the citizenry, and the law schools with the judiciary in an advisory role. Avenues of cooperation with the other two branches of the state government are being developed.

The Bar Institute gave priority in its early days to the importance of the judiciary by publishing an article on judicial vacancies. Waugh, *Judicial Vacancies—A Statement by the Bar Institute of New Jersey*, 96 N.J.L.J. 9 (1973). It pointed out the burdens imposed on the New Jersey courts by unnecessary delays in making judicial appointments.

13 For a recent study of the federal system see H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972), reviewed in 56 JUDICATURE 348 (1973).

14 *See* App. A pp. 788-97 *infra*. For explanation see pp. 766, 797 *infra*.

15 *See* VOLUNTARY MERIT SELECTION PLANS 6 (AJS Rep. No. 36, 1972). *But cf.* App. A p. 797 *infra*.

16 For development of the thesis that courts are political institutions see H. GLICK & J. VINES, STATE COURT SYSTEMS (1973) (a recent paperback in the Foundations of State and Local Government Series, published by Prentice-Hall).

inevitably political. Although modern American scholars have concentrated their first empirical studies of our political institutions on executive and legislative processes, in the last decade their attention has begun to focus on the courts as playing a significant, though different, role in the body politic.[17]

The issue, therefore, is not whether judicial selection can be removed from politics. Because courts form an important link in the network of governmental power, their chief officers do fulfill a political role. Rather, the issue is how the public's interest in obtaining the most competent, disinterested, and independent judges can be best protected. That question is broader than judicial selection, raising issues of tenure and discipline. This article, however, will concentrate on the selection aspect and will suggest avenues of further inquiry.

It is important to recognize that both formal and informal selection processes are at work. To quote constitutional and statutory provisions only, without exploring in some depth the way they operate, may be misleading or somewhat superficial. New Jersey provides a good illustration of this point, since here one of the most important, if not *the* most important source of discontent with the selection system is "senatorial courtesy," an informal procedure enshrined in custom, but not sanctioned by law. The fact that scholars miss the significance of such informal processes is illustrated in one treatise on senatorial courtesy in the federal system, where it is stated that the custom presents no problems on the state level.[18]

Informal processes are probably everywhere modifying the formal processes—fleshing out, as it were, with human and environmental realities, the bare bones of legalistic prescriptions. Nevertheless, there is value in beginning to examine the formal mechanisms, giving only as much attention to the informal as can be gleaned without intensive study. Only empirical studies, using such techniques as personal interviews, collection and analysis of data on judicial characteristics and environmental facts, have the potential of presenting reliable evidence for the superior efficacy of one method over another in obtaining the best qualified men and women as state judges. Such an approach is beyond the scope of this article.

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17 *See* H. GLICK, SUPREME COURTS IN STATE POLITICS 150-56 (1971), a thought-provoking comparative study of four state supreme courts, including New Jersey's. Professor Glick suggests that judicial roles can vary widely from state to state and urges more comparative studies relating differences to the economic, social, and political characteristics of each state. *Id.* at 154.

18 J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 6 (1953). The federal experience is beyond the scope of this article.

Recognition of these limitations suggests caution and awareness that all change is to some degree experimental. This author encountered only one study attempting to trace causal connections between formal selection mechanisms and judicial characteristics or calibre.[19] Yet these supposed effects were questioned by another scholar, who pointed out that the differing results could as well be ascribed to regional or cultural factors as to formal selection procedures.[20] This criticism highlights the need to isolate all variables that might possibly operate on the selection process. In the above article, for example, the influence of New Jersey's senatorial right of confirmation was ignored, this state being classified, without further explanation, as a state using executive appointment as the selection method.[21]

The present article, therefore, represents only a beginning, a point of departure for debate and further study. It acknowledges the limitations in the comparative method that relies mainly on formal, visible procedures. This author will be satisfied, nevertheless, if the attention of the bar and the public is more clearly focused on the importance of judicial selection; if some local, informal procedures are partially exposed; and if the study serves to stimulate further inquiry.

Two hypotheses are suggested in reevaluating New Jersey's system and in attempting to redesign it. One is that *high visibility* is a test of a good system—as much visibility as is consistent with the privacy and dignity necessary to recruit the best judicial candidates. A second criterion of a good system is clear definition of *responsibility* for judicial selection so that accountability for the process in operation can be maintained.

The problem of evaluating judicial candidates and developing criteria will be considered at some length, with a focus on the importance of trial judges. The difficulty inherent in appraising candidates will remain under any selection system. Therefore, this article will examine the method by which the New Jersey State Bar Association's

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19 Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

20 Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579, 579 (1972). Although this article concerned only supreme courts, the author specifically contrasted his findings with those of Jacob, *supra* note 19, which concerned trial judges:

> It seems clear that institutional mechanisms surrounding recruitment to state supreme courts do not have the impact on personal characteristics which advocates of competing selection systems often imply they have—or even the impact which investigators such as Jacob seemed to find.

6 LAW & SOC'Y REV. at 588. Canon points out that "formal, rule-structured processes are often modified by informal norms or traditions." *Id.* at 589.

21 Jacob, *supra* note 19, at 107.

Judicial Appointments Committee now rates candidates whose names are submitted to it by the Governor, under the informal screening procedure.

In 1950, Charles O. Porter of Oregon rated the states in an order corresponding to their achievement under the American Bar Association's Minimum Standards of Judicial Administration; New Jersey led the list.[22] In 1969, however, one of New Jersey's ablest court professionals, who had then served for 23 years as Administrative Director of the Courts, said that the state's judicial system "no longer [held] the position of pre-eminence that it once occupied and so richly deserved."[23] In a farewell address four years later, that official reiterated his belief that New Jersey was not moving ahead as it should, and called for "specific reforms." One of his recommendations called for the improvement of the calibre of judges by changing the method of judicial selection to provide a more impartial, effective, and expeditious method of filling vacancies.[24]

A trend towards the Merit Plan concept is now discernible in New Jersey; its main feature, a nominating commission, has potential for improving recruitment here. It is suggested that a strengthened voluntary plan and further study can provide background for the eventual adoption of a Merit Plan by constitutional amendment.

II. A Brief History of Judicial Selection in America

The Variety of Selection Methods

In the long perspective of Anglo-American history,[25] the pendulum of power over judicial selection swung from single-handed control by the executive, the British monarch, to many-handed control by the

22 Porter, *Minimum Standards of Judicial Administration: The Extent of Their Acceptance*, 36 A.B.A.J. 614, 616 (1950).

23 E. McConnell, A Blueprint for the Development of the New Jersey Judicial System 1-2 (1969) (reprinted in 92 N.J.L.J. 369 (1969)).

24 Keynote address by Edward B. McConnell, New Jersey State Bar Annual Meeting, May 18, 1973, reprinted in 96 N.J.L.J. 649, 658 (1973). Mr. McConnell left his New Jersey post to become Executive Director of the National Center for State Courts at Denver, Colorado.

25 This development within the Anglo-American system has been summarized in the following manner:

> The struggle for an adequate and independent judiciary in Anglo-American law has been a long one. From the beginning, in England, as in the other countries of the continent, the judicial function was viewed as a part of the royal prerogative of the sovereign. The royal courts were an adjunct of the Executive and the judges served at the pleasure of the king. The Magna Carta did provide that "We will appoint as justices . . . only such as know the law and mean duly to observe it

people of the young republic, who initiated the practice of electing judges during the nineteenth century. It appears that the pendulum is now swinging back in the United States, as the states that had adopted the elective system move in an uneven, piecemeal fashion to a middle position, placing responsibility for judicial selection in the hands of small groups, considered to be representative of the whole community.

One of the dissatisfactions expressed in the Declaration of Independence was that "He (George III) has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[26] It is not surprising that the original thirteen states, faced with the task of designing their own methods of choosing judges, did not follow the British method, where "the judicial function was viewed as a part of the royal prerogative of the sovereign."[27] In none of the states was the power of appointment vested in the governor without restriction: in three states the authority was subject to consent of the council;[28] in two states appointment was by both the governor and council;[29] and in the other eight states, among which was New Jersey, the power was vested solely in one or both houses of the legislature.[30] Popular election of judges was practiced nowhere.

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well" and for the most part the English judges have been selected regularly from among the leading barristers.

. . . .

The last vestige of dependence disappeared in 1761 when a statute was finally passed providing that judges should continue in office notwithstanding the death of the King. Since that time, the judges in England have not been dependent on the royal office for retention of their commissions or payments of their salaries. But the achievement of this position for the English judges had no direct effect on the American judiciary since the Act of Settlement was held to be inapplicable to the American colonies.

Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 13-14 (1962) (footnotes omitted).

26 *Id.* at 14.

27 *Id.* at 13.

28 Maryland, Massachusetts, and New York. *Id.* at 14 n.45.

29 New Hampshire and Pennsylvania. *Id.* n.46.

30 Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia. *Id.* n.47. These classifications are necessarily somewhat arbitrary. For example, Delaware has been classified as a state where the executive appointed judges. Winters, *Judicial Selection and Tenure*, in SELECTED READINGS, *infra* note 40, at 27, 29-30. Delaware's first constitution gave selection power to a "president" who himself was elected by the legislature; he was to choose judges jointly with the legislature by balloting. DEL. CONST. art. VII and art. XII (1776).

When the United States Constitution was drafted, executive appointment was retained with the provision that the Senate would confirm appointments to the Supreme Court, and judicial independence was emphasized by the requirement that judges hold their offices during "good behavior" and that their compensation not be diminished during their continuance in office. U.S. CONST. art. II, § 2; art. III, § 1.

Chief Justice Vanderbilt commented that in post-revolutionary America the methods adopted recognized that

> the selection of impartial, honest judges learned in the law must be entrusted to a person or group capable of making an intelligent choice and that because of the professional qualifications demanded for judicial office the electorate as a whole cannot be expected to make such a choice intelligently any more than it could be expected, for instance, to select a surgeon general.[31]

Nevertheless, around the middle of the last century most of the states amended their constitutions to provide for the "popular election of judges, to hold office for short terms of years."[32] The New York constitutional convention of 1846, which substituted popular election for appointment of all of New York's judges, ushered in the era of elected judges.[33] In each of the states that joined the Union after 1846, all or most of the judges were "elected by the people for terms of years."[34]

New Jersey did not adopt the elective method and in the Constitution of 1844 shifted from legislative selection to the practice of appointment by the Governor, with the advice and consent of the Senate, a method which remains unaltered today. The history of the New Jersey experience will be examined more fully in a succeeding section. Suffice it to note at this point that in New Jersey it has always been the custom to give some degree of power over judicial selection to the legislature.

Even though New Jersey has never used the elective system, except for surrogates,[35] it is appropriate to consider the origins of that system, because the Merit Plan in its standard form incorporates some kind of voter participation, and, more important, includes the notion of a judiciary which is responsible to the public, a theory which many people believe is in accord with fundamental democratic principles.

One author maintained that the American system of popular election of judges was adopted without due regard for "the nature and functions of the judicial arm of the government."[36] This phenomenon,

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31 Nelson, *supra* note 25, at 15 (quoting from A. VANDERBILT, THE CHALLENGE OF LAW REFORM 15 (1955)).

32 Nelson, *supra* note 25, at 15.

33 Winters, *Some Notes on the History of Judicial Selection and Tenure in the United States*, in Selected Readings on the Administration of Justice and its Improvement 1 (G. Winters & S. Lowe eds. 1971) (Working Papers of the Houston Citizens' Conference). Georgia and Mississippi had experimented earlier with the elective system, but until mid-century most states used either gubernatorial or legislative selection. *Id. See also* JUDICIAL SELECTION AND TENURE 39 (AJS Rev. Rep. No. 7, 1971).

34 Nelson, *supra* note 25, at 15.

35 N.J. CONST. art. 7, § 2, ¶ 2.

36 Nelson, *supra* note 25, at 15, relying upon E. HAYNES, THE SELECTION AND TENURE OF JUDGES 100 (1944).

which was a part of the Jacksonian Revolution, was attributed to three forces. First, Thomas Jefferson supported the idea of popular election of judges for short terms because, after the decision in *Marbury v. Madison*,[37] he became convinced that the ability of judges to "nullify legislation agreed upon by Congress and the President," without any responsibility to the people for their actions, was undemocratic. Another cause may have been the belief that American judges, more than judges elsewhere, performed legislative functions, because in the new country there was a scarcity of statute law and precedent, and the common law, being associated with England, was viewed suspiciously. New Jersey and Kentucky even passed statutes preventing citations of common law authority. Third, soon after the American Revolution, the legal profession was for various reasons in disrepute in many communities, and the growing sentiment in favor of the common man no doubt contributed to the idea "that all lawyers had an equal right to aspire to judicial office."[38]

However, in states where the method of popular election was adopted, disenchantment soon followed when it was observed that partisan politics dominated the system. By the latter part of the nineteenth century, efforts to modify the evils of partisan political influence had begun, but these proved largely unsatisfactory.[39]

Now, about a century later, the efforts are reaching new intensity during the current ferment of judicial reform. In over twenty states today the judges of major courts are chosen initially by popular election.[40] However, a drive is in progress to encourage widespread adoption of a combination of appointive-elective methods, known as the Merit Plan, especially where it can be introduced as an improvement over the system of election.[41]

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37 5 U.S. (1 Cranch.) 137 (1803).

38 Nelson, *supra* note 25, at 16, relying upon E. HAYNES, *supra* note 36, at 93-97.

39 Brand, *Selection of Judges—The Fiction of Majority Election*, 34 JUDICATURE 136, 136-37 (1951).

40 *Cf.* Winters, *One-Man Judicial Selection*, 45 JUDICATURE 198, 198 (1962). The Soviet Union is said to be the only other country where popular election is an important method of judicial selection, but because it is a controlled society, comparisons are inappropriate. *See* Stason, *Judicial Selection Around the World*, 41 JUDICATURE 134, 139-40 (1958). *But see* Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, 48 JUDICATURE 126, 129 (1964) (Argentina and a few cantons of Switzerland). *See generally* SELECTED READINGS—JUDICIAL SELECTION AND TENURE (G. Winters ed. 1967) [hereinafter cited as SELECTED READINGS], an excellent anthology published in paperback by AJS; it is the most complete recent compilation of views about judicial selection, containing, among other matters, articles on judicial qualifications and Merit Plans as well as useful appendices and bibliography. *See also* E. HAYNES, THE SELECTION AND TENURE OF JUDGES (1944).

41 New York, where most judges are still elected, is a prime example. When research

Development of Merit Plan by Legal Profession

Impetus to reform the judicial selection method was given by the eminent legal scholar, Roscoe Pound, in a famous address before the American Bar Association in 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[42] In a much quoted passage, Dean Pound said:

> Putting courts into politics, and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench.[43]

At first, bar association leaders sought to limit the power of political parties over judicial elections by such means as judicial nominating conventions, direct primaries, nonpartisan judicial ballots, separate judicial elections, and bar referenda of candidates' qualifications, on the basis of which recommendations were then made to voters. However, when such efforts to work within the elective system made no significant impact, the legal profession developed the Merit Plan, also called the Nonpartisan Court Plan or the Missouri Plan, as an alternative selection scheme. The Plan combined features of the elective and appointive methods with a new idea: nomination of a slate of names of qualified candidates for the bench by a publicly designated group.[44]

The Plan in its original form is attributed to Professor Albert M. Kales of Northwestern University Law School, then director of drafting

for this article was begun in the Spring of 1973, a hotly debated election was in progress in New York. No less than four plans for comprehensive judicial reform had been placed before the citizenry. These were summarized in the Institute for Judicial Administration's Parallel Tables of Proposals for New York State Courts (March 1, 1973). All plans except the Governor's recommended nominating commissions.

A Voluntary Merit Plan has been in operation in New York City since 1962, under which the Mayor appoints judges to fill vacancies in the city's criminal and family courts from a slate of names submitted by a nominating commission of lawyers and laymen. The complete story of the New York City experience, however, is outside the scope of this article. For particularly helpful articles on judicial selection rooted in the New York experience see Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, in SELECTED READINGS, *supra* note 40, at 68; Rosenberg, *The Quality of Justices—Are They Strainable?*, in SELECTED READINGS, *supra*, at 1.

As this article neared completion, the elected chief judge of the New York court of appeals, called for appointment of judges by the executive with confirmation or rejection by a commission composed of bench, bar, and public. N.Y. Times, Feb. 28, 1974, at 1, col. 5. Almost immediately others suggested a nominating commission as preferable. N.Y. Times, March 2, 1974, at 35, col. 1.

42 Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61, 64 (1968).

43 *Id.* (footnote omitted) (quoting from Roscoe Pound's speech, reprinted in 46 JUDICATURE 54, 66 (1962)).

44 *See* pp. 767-71 *infra*.

of the American Judicature Society. He proposed a three step procedure for filling vacancies: nomination, appointment and voter-confirmation:

(1) A list of names should be submitted by an impartial nominating council (preferably judges) to

(2) a chief justice, chosen at fairly frequent intervals by the electorate, who would appoint one of the nominees; and

(3) such appointees would be confirmed by the voters after a stated period in an uncontested election.[45]

Kales' idea, emphasizing judges' selection by judges, with voter participation at two stages, was endorsed in a somewhat different form by the American Bar Association in 1937.[46] The ABA suggested that the nominating commission include "high judicial officers" and citizens not holding "other public office;" it mentioned the executive as a possible appointing agent and raised the question of legislative confirmation.[47]

Judges as a Unique Category of Public Officials

Richard A. Watson, a social scientist who has studied the various American judicial selection systems in depth, has advanced the idea that judges should be selected differently from other public officials because the requirements of their office place them in a unique position. According to Watson, the three ways in which public officials are normally chosen in the United States are inappropriate where judges are concerned because their functions are not analogous.[48]

The three methods of choosing other government officials are popular election, appointment and the civil service.[49] The first ensures the greatest degree of control by those "outside the government" over those "inside," usually through partisan contests. However, the vast number of office-holders does not allow election of all officials, and therefore the second technique has been adopted: appointment by the chief executive of heads of agencies, often with confirmation by a legislative body. (Such appointees are usually subject to removal by the executive.) The appointive technique is justified on the theory that such appointees are expected to follow the political lead of the chief execu-

45 Winters, *Judicial Selection and Tenure*, in SELECTED READINGS, *supra* note 40, at 27, 32-33.

46 *Id.* at 33.

47 *Id.*

48 Watson, *Judging the Judges*, 53 JUDICATURE 283, 283-85 (1970).

49 *Id.*

tive and be subject to his control in matters of public policy. In the same category are persons who hold major staff positions in the legislature, who are appointed and removed by the elected representatives.[50]

The third selection method, the civil service, governs choice of intermediate and lower level public officials of both the executive and legislative branches, who, in theory, do not make policy or exercise discretion, but implement established policies.

> [S]uch persons are generally appointed by a high-level executive official from a list of three candidates chosen on the basis of their professional background and performance on examinations.[51]

(Normally such officials are protected by tenure.) This ministerial view of the civil service has been questioned seriously by many students of the social sciences. It is thought that the civil service has, in fact, a profound effect upon policy-making.[52]

None of these patterns is appropriate, however, for judges; they do not make public policy in the unrestricted sense that elected legislators do, nor should their decisions be controlled by the voters. Furthermore, voter selection of judges is impractical because the qualifications of judicial candidates seldom are known or appreciated by many voters. In New York a poll of voters taken just after an election showed the vast majority were unable to recall the names of the judicial candidates.[53] On election day, "[t]he judicial ballot is always the most neglected."[54]

The appointive method cannot be supported because judges are not members of an executive team who ought to be responsible to its elected head. Nor are their functions analogous to those of civil servants: obviously, American judges exercise far more discretion. Although the judicial function is circumscribed by precedent, rules of procedure and the character of the cases presented, judges, especially on the appellate level, often do exert a decisive influence on basic political philosophy.[55]

Watson thought that our founding fathers had failed to see or provide for the uniqueness of the judge's role.[56] This argument is perhaps

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50 *Id.* at 283.

51 *Id.*

52 *See* G. PARRY, POLITICAL ELITES 15-17 (1969).

53 Klots, *The Selection of Judges and the Short Ballot*, 38 JUDICATURE 134, 136 (1955).

54 Winters & Allard, *Two Dozen Misconceptions About Judicial Selection and Tenure*, 48 JUDICATURE 138, 140 (1964). It is probable that those who do vote are supporting an incumbent or voting a straight party ticket. The choices are not actually made by the voters, but by the politicians. Klots, *supra* note 53, at 138-39.

55 Watson, *supra* note 48, at 284-85.

56 *Id.* at 285.

illustrated by the not atypical blending of legislative, executive, and judicial powers in the first New Jersey Constitution. According to that document, the legislature elected the Governor and was also the court of last resort, the Governor presiding.[57] It was not until 1844 that a new constitution established a separate court of final review.[58] In the first constitution, the power to appoint judges was concentrated in the joint meeting of the Legislative Council and the Assembly.[59] This was shifted in the 1844 constitution to the Governor with the advice and consent of the Senate. However, the first major step towards viewing judges as a unique category of public official occurred only after the Civil War as an expression of lawyers' "resentment over Boss Tweed's control of the courts" and in the form of the development of local bar associations.[60] These groups have fostered the view that "judges are a special type of public official, for which the legal profession has a unique responsibility."[61]

Before discussing in what ways judges may be considered unique, it would be helpful to consider the role of the judge. The functions of the trial judge provide the best illustration because visualizing him in action reminds us that selection mechanisms are only legalistic prescriptions: in seeking better judges what we are really talking about is people.

III. A Priority: Recruiting Better Trial Judges

The Trial Judge's Important and Difficult Role

"Men count more than machinery," was the succinct comment of Roscoe Pound, the eminent American legal scholar who is credited with being the first to draw attention early in this century to the need for judicial reform.[62] The remark remains true today. The application of modern management techniques to courts, or the use of such scientific tools as computers and tape recorders, would not render obsolete Jus-

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57 N.J. Const. art. 7, 9 (1776).

58 N.J. Const. art. 6 (1844).

59 R. McCormick, Experiment in Independence: New Jersey Critical Period 1781-1789, at 70 (1950); N.J. Const. art. 7, § 2, ¶ 1 (1844).

60 Watson, *supra* note 48, at 285.

61 *Id.* Watson does not define judicial uniqueness.

62 Rosenberg, *The Qualities of Justice—Are They Strainable?*, 44 Texas L. Rev. 1063, 1063 (1966). Early historical records reflect complaints about the administration of justice, especially delays. *See* A. Vanderbilt, Improving the Administration of Justice—Two Decades of Development 6-8 (1957).

tice Cardozo's statement that "[i]n the long run there is no guarantee of justice except the personality of the judge."[63]

A recent New Jersey Law Journal editorial calling for evaluation of judicial performance pinpointed the painful situation of the seriously inept judge:

> While not so poor that impeachment proceedings would be justified because of misconduct in office, the performance of [some] judges is bad enough so that lawyers dread trying cases before them and assignment judges have to select the cases they send to them with care.[64]

Occasional serious ineptitude may be inevitable, sometimes arising after appointment, and should be dealt with under mechanisms related to removal. At the selection stage, however, the greater problem is mediocrity.

Former Attorney General Herbert Brownell vividly described the "ordinary, likable people of small talent" who often become state judges under both the elective and the appointive systems.[65] Unobtrusive, without high academic qualifications, political activity and loyalty, rather than excellence, win one of these judges his seat, which he too likely views as a "cozy rest home"[66] with prestige and security.

Mediocrity is more pervasive than corruption.[67] A dishonest judge

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63 Jones, *Preface* to THE TRIAL JUDGE—ROLE ANALYSIS AND PROFILE, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 124 (H. Jones ed. 1965). Scathing descriptions of judges, courts, and their performances in two urban centers have recently appeared in popular magazines. *See* Guinther, *The Whole Justice Catalogue*, PHILADELPHIA, Jan. 1973, at 92; Harris, *Annals of Law in Criminal Court* (pts. 1-2), NEW YORKER, April 14, 1973, at 45, and April 21, 1973, at 44 (Boston); Rottenberg & Amsterdam, *Judging the Judges*, PHILADELPHIA, Jan. 1973, at 96.

Judges are sometimes goaded into refuting such attacks. In response to an article in New York Magazine critical of judges in New York City's civil court, Edward Thompson, Justice of the Supreme Court of the State of New York, wrote:

> Tell your readers that this, the Civil Court of the City of New York, is the largest court of its kind in the world! Tell them that the calendar is absolutely up to date and that every one of their civil disputes can be resolved by a trial within 30 days of its appearance on the calendar! Tell them also the truth that the Judges mount the bench on time! Tell them that in addition to disposing of the more than 120,000 law cases on the calendar each year they handle another 1,000,000 filings! Tell them the whole truth that those Judges are assisted by a horribly undermanned staff now made 33-1/3% short by a job freeze. Tell them that they work under deplorable physical conditions in the Counties of Kings and Queens. Tell them that some 800 lawyers volunteer their services at night as Arbitrators in the Small Claims Division of this Court to assist the administration of justice!

14 FOR THE DEFENSE 1, 2 (1973).

64 *By All Means—Let's Evaluate Judicial Performance*, 96 N.J.L.J. 4 (1973).

65 Brownell, *Too Many Judges Are Political Hacks*, in SELECTED READINGS, *supra* note 40, at 97, 98.

66 *Id.* at 97-98.

67 *Id.* at 98.

waits for the right opportunity, and in the meantime often handles cases competently. But the mediocre judge bungles every day, so that at best "litigants do not get a full measure of justice" and may even "find their affairs in a worse tangle than before they came to court."[68]

Furthermore, it is the "vast number of 'small people' " such a judge hurts most since they cannot afford to appeal. In cases involving domestic problems or criminal matters, the mediocre judge can of course wreak havoc in human lives.[69]

The unfortunate impact of such judges is felt most keenly at the trial court level. It has been persuasively argued that "[t]he trial judge is the key man in our system of adjudication."[70] A major reason is that the trial judge is the most visible member of the judicial hierarchy:

> The typical citizen will never see an appellate court in action, but there is every likelihood that he will sooner or later be drawn into the operation of one or another of our trial courts, whether as litigant, witness, or juryman.[71]

The initial contact of a juvenile or petty offender with a court may have determinative influence on his future development. If he experiences "split-second disposition of his case by a tired, bored or irascible magistrate, the social effects can be disastrous."[72]

The increasingly heavy caseload is less tolerable at the trial level. An inadequate trial judge, working alone, is more affected by calendar congestion than an appellate judge. Appellate courts, too, are burdened by the proliferating litigation of a complex society, particularly by additional criminal appeals resulting from expanded constitutional rights. Nevertheless, demands on the trial judge intensify an already stressful situation because of the strains built into the role itself.

The tensions are too numerous to summarize but a few will serve to illustrate. One pressure is the constant need for speed in making decisions on procedure and evidence. Another is the aggravation of dealing with aggressive counsel in our adversary system, and yet another is the emotional burden on the sensitive and compassionate judge which inheres in the duty of sentencing criminals.[73] Greater awareness today

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68 *Id.*

69 *Id.*

70 Jones, *supra* note 63, at 129.

71 *Id.* at 125.

72 *Id.* at 126.

73 *See id.* at 135-41. Vanderbilt says the role of the American trial judge is more limited than his English counterpart's. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. REV. 1, 6-7 (1956). Such restrictions probably intensify judicial frustrations.

of the psychological damage which may attend punishment probably makes the sentencing function more arduous than it formerly was; it was once thought that compassion was a trait best left out of judges!

Weak trial judges are a more potent source of injustice than ineffectual appellate judges. Injustice at the trial level is often irremediable since many important decisions become final at the trial level. Most cases are not appealed, but even if they were, most factual conclusions made at trial are not reviewable. Appellate courts seldom upset the trial judge's findings of fact. Invisible to them are his tone and manner; they do not see him turn his back on counsel or glare at a witness, manners which the jury sees. His lack of tact or clarity in dealing with participants in the trial may be apparent on the record but unless flagrantly erroneous will not cause a decision to be reversed; only errors of law will be considered on appeal.

Hindrances in Recruiting the Best for the Bench

If only numbers are considered, the recruitment task for the trial bench is by far the bigger job. In New Jersey there are only 25 positions for judges performing appellate functions, with 7 of these on the supreme court, while there are 268 authorized positions for judges below the appellate level.[74]

Outstanding attorneys may more easily be persuaded to accept appointments to the state supreme court or even a federal court because of the prestige these positions entail and because it may seem possible to make more significant contributions in these positions. The lower state courts are not always as attractive to men of exceptional ability, even though they may be most needed on that "firing line."

A professor at Columbia University, who has been on the Mayor of New York's panel for recruiting judges, tells of an able attorney's declining to accept a nomination to a criminal court, explaining his refusal as follows:

> What enforces my decision is my appraisal of the work of the court, the opportunity to do scholarly work, and meaningful work, which would keep me functioning so that I would be happy to get up each morning. I see this as the trouble. I don't honestly think I could make the kind of dent you foresee. The procedures, the caseload, the requirements of dealing with numbers rather than with quality of cases are too discouraging.
>
> . . . What I end up with is that the so-called "sacrifice" en-

[74] Office of the Administrative Director of the New Jersey Courts.

> tailed in going on the bench is not balanced by the kind of bench this is.[75]

Obviously, creating better conditions in the courts is one way to attract the best attorneys. Fortunately, New Jersey is in the forefront in court administration, but recent delays in appointing new judges to fill vacancies have further aggravated overloading where additional positions were already needed to carry the current caseload properly.[76] The possibility of such delays is one weakness in the present selection system.

Even if courtroom conditions were ideal, personal preferences and life styles will rule out some able attorneys. Although many believe that judges work under less pressure, they tend to see the judge's job as more regulated than their own. They view with distaste the daily necessity of prescribed hours sitting on the bench; to them, the judges' longer carefree vacations do not compensate for the inflexibility of the courtroom schedule. Sometimes attorneys are reluctant because they see the judge as removed from the mainstream of the profession, circumscribed in his social life, community activities and public pronouncements.

To counteract these obstacles encountered in recruiting for the bench, it would not be unduly extravagant to consider giving judges sabbatical leaves. This privilege could be a significant magnet for excellence and could provide renewal from the "bench fatigue" of the trial courts.

One writer has suggested the best way to recruit trial judges would be to create a "pattern of upward mobility" for the ablest lower court judges so that the hope of reaching a higher level would be strong.[77] But counter to this prescription is the need to foster a greater sense of status in the lower courts and courts of limited jurisdiction so that there are both continuity of personnel and excellence at these levels.

A potential asset in recruiting here, which may not now be widely recognized, is total remuneration. In late 1972, New Jersey judges' salaries were third in the nation.[78] If economic value is assigned to

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[75] Rosenberg, *Improving Selection of Judges on Merit*, 56 JUDICATURE 240, 241 (1973).

[76] *See* Waugh, *supra* note 12, at 9; McConnell, *The New Jersey Courts—Summary of Developments in 1972*, 96 N.J.L.J. 434 (1973):

> Over the last five years, authorized judgeships have increased only 16%, while cases have been added to the calendars in sharply disproportionate volume—criminal cases for example have increased by more than 117% since 1967.

Id. at 434.

[77] Rosenberg, *supra* note 75, at 241.

[78] *See* Table 1, 56 JUDICATURE 167 (1972).

judges' generous vacations and holidays, now totaling seven weeks annually, salary figures are significantly augmented. When fringe benefits, such as hospitalization and pensions are considered, the total "package" is probably more attractive than many attorneys realize.

The foregoing discussion of the danger of mediocrity at the trial level is not intended to disparage the New Jersey bench, which has a very good reputation nationally,[79] but to focus attention on the importance of recruiting. The problems in attracting personnel were emphasized by the late Chief Justice Pierre Garven in an interview with the press before his nomination to the supreme court, while he was still serving as Chief Counsel to Governor William T. Cahill. In a discussion about a backlog of unfilled positions, Garven was quoted as saying: "It's becoming increasingly difficult to obtain qualified judges." He mentioned salaries, administrative "red tape," and regimented work schedules as three reasons why lawyers shun the bench.[80]

Successful recruitment must be considered the primary goal of a good selection system. Some scholars think that the European system of selecting judges is probably more effective in attracting able candidates for lower court positions than the various American systems.[81] Brief consideration of the European system is helpful, remembering that England is not embraced in that term.

The European Emphasis on Education

The basic European approach is quite different from the Anglo-American one. In America a legal professional is chosen by appointment or election in mid-career, without previous specialized training, and he sometimes decides to resign and resume his previous career. By contrast, the European judge chooses his judicial career early in life and undergoes advanced training to fit him for a lifetime profession on the bench.

The French "magistracy" provides one example. Each year a number of French law school graduates are admitted to the National Center of Judicial Studies on the basis of competitive examinations; a smaller number are also admitted without examination by virtue of special experience, such as teaching. These candidates receive student appointments to the "magistracy" and earn salaries during three years of training, both theoretical and practical, which covers social and economic as

79 *See* H. GLICK, *supra* note 17, at 150-56. The authors evaluated the New Jersey supreme court as being progressive and innovative.

80 Newark Star Ledger, Feb. 25, 1973, § 1, at 15, col. 2.

81 *See, e.g.*, Vanderbilt, *supra* note 73, at 47.

well as legal subjects. A final examination places them by rank on a roster of eligible candidates, from which appointments are made as vacancies occur.[82]

In Germany, there are similar requirements consisting of examination and lengthy apprenticeship for all members of the legal profession. In practice, a judicial career is open only to those with superior rank on examinations. In the Scandinavian countries, apprenticeship to a judge is the usual avenue of judicial appointment, although others also may choose such clerkships, as some law graduates do here.[83]

Although closer study would be required to validate comparisons, the impression is that the European system places greater stress on education for the bench than does ours. While a judicial career is normally chosen and planned early in life, it seems the judiciary there is more separated from the practicing profession than here. As Chief Justice Vanderbilt pointed out, the European judge is integrated into an administrative hierarchy, on which he is dependent for advancement.[84] He is therefore less independent than his Anglo-American counterpart. His life pattern is predetermined, and the pattern may be lacking in incentive; indeed, the promotion system in Germany, which is based on seniority, is thought to have a "deadening" effect.[85]

Although empirical research has been slower in being adopted on the continent than in the United States, comments by European scholars about the judicial product in France and Germany have been highly negative. "The basic complaint, both in Germany and in France, is one of mediocrity, 'civil service mentality' and lack of creative thinking."[86] Such characteristics might be attributed to a bureaucratic education, which molds personality in conforming patterns, and also to the career system, which probably attracts those who value security above freedom and creativity.[87]

The rigidity of the European system is not appealing; the internal politics within the judicial bureaucracy may be less desirable than those operating in our more open arena. Vanderbilt mentioned that the constraints induced by the ambition to advance may hinder independence

82 Mueller & LePoole-Griffiths, *Judicial Fitness: A Comparative Study* (pt. 1), 52 JUDICATURE 199, 200 (1968). Recent French reorganization is discussed in Richert, *Recruiting and Training of Judges in France*, 57 JUDICATURE 145 (1973).

83 Mueller & LePoole-Griffiths, *supra* note 82, at 200-01.

84 Vanderbilt, *supra* note 73, at 47.

85 Mueller & LePoole-Griffiths, *supra* note 82, at 203.

86 Mueller & LePoole-Griffiths, *Judicial Fitness: A Comparative Study* (pt. 2), 52 JUDICATURE 238, 240 (1968).

87 *Id.*

in the European judge.[88] However, our system might profitably incorporate some of the continental emphasis on education.

One authority on comparative law has concluded that

> [t]here is no reason the independence of vision, as it is bred by the federal system of the United States, cannot be combined with the educational advantages of the continental system.[89]

That authority suggested the establishment in the United States of a national academy for post-appointment judicial education, comparable to the French one. A trend in the direction of such education is already discernible in the successful operation of the Institute of Judicial Administration's course for appellate judges and the National College of the State Judiciary, which is now attended yearly by a few New Jersey judges on a voluntary basis.

A question to be considered is whether expanded education within the American system would not be helpful. A well-known legal scholar has suggested that perhaps graduate training for judicial candidates, coupled with practical experience in trial work and clerkships, should be introduced as a prerequisite for appointment.[90] A similar idea has been expressed by leaders of the New Jersey bar.[91] This theory will be elaborated in the concluding section of this article, suggesting judicial education can be helpful as a recruiting tool.

Before examining New Jersey's present selection methods, it is appropriate to consult the writings of Justice Vanderbilt. The task serves to place this discussion in the context of the New Jersey environment, and to raise the question of evaluating judicial candidates.

IV. New Jersey as a Leader: The Vanderbilt Legacy

Vanderbilt's Views

New Jersey was considered a leader in court reform when it became one of the first two states to adopt a unified court plan and pioneered in the use of court administrators.[92] Its position reflected the dis-

88 Vanderbilt, *supra* note 73, at 47 (citing to Ploscowe, *The Career of Judges and Prosecutors in Continental Countries*, 44 YALE L. REV. 268, 275, 289 (1931)).

89 Mueller & LePoole-Griffiths, *supra* note 86, at 242.

90 J. FRANK, *supra* note 6, at 53-54.

91 *See State Bar Judicial Council Airs Plans for Improving New Jersey Justice*, 95 N.J.L.J. 256 (1972). Theodore Sager Meth, Esq., of Newark, the present Chairman of the Institute's Council, noted "the lack of psychological or intelligence testing in judicial selection." *Id.* at 256.

92 *See* J. GAZELL & H. RIEGER, THE POLITICS OF JUDICIAL REFORM 10 (1960). The other

tinguished reputation of the late Chief Justice of the New Jersey supreme court, Arthur T. Vanderbilt, whose leadership contributed to the state's innovative role. Vanderbilt's statesmanship in New Jersey, his founding of the Institute of Judicial Administration at New York University, and the persuasiveness of his writings, among other accomplishments, earned him the title of "The Father of Court Reform."[93] The heritage of Justice Vanderbilt imposes on New Jersey a unique responsibility to exercise sound leadership in further judicial reform.

Vanderbilt did not apparently aim at change in the traditional method of judicial selection in New Jersey. At the time of the framing and adoption of our present constitution he was chiefly concerned with structural reforms.[94] In later writings he stated categorically that the elective system was the worst,[95] but he had good words for the appointive system both on the federal level[96] and as it then operated in New Jersey:

> In New Jersey, where the governor is a political official with the usual party obligations, a tradition of bipartisanship has resulted in the elimination of the purely political appointment in many instances where the governor is making his selections from the opposite political party and indicates what can be achieved under the appointive system if the bar and the public are alert and interested.[97]

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state was Delaware. The New Jersey experience will be discussed more fully in section V. *See* pp. 747-65 *infra*. However, Vanderbilt's attempt in 1947 to achieve a totally unified court system in New Jersey was narrowly defeated when senatorial forces prevented a merger of the county and superior courts. Today, one may call the system "unified" for all practical purposes, because salary and tenure of judges in these courts have been equalized, and the supreme court coordinates their functions through assignment procedures. Information supplied by the Hon. Alexander P. Waugh, June 14, 1974.

93 As one commentator has stated:

> Arthur T. Vanderbilt . . . probably did more to reform American law than any other man, with the possible exception of Dean Roscoe Pound, during the present century.

Goodhart, Book Review of SELECTED WRITINGS OF ARTHUR T. VANDERBILT (F. Klein & J. Lee eds. 1965), 51 JUDICATURE 27 (1967).

94 For a complete record of that convention see 1-5 STATE OF NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1947 (1949).

95 Vanderbilt, *supra* note 73:

> No system could be worse, however than popular selection on the party ticket along with a host of other state and local party candidates. . . . In such circumstances there is not the slightest chance of a judge being thus selected on the basis of his qualifications for the office.

Id. at 48-49 (footnote omitted).

96 Vanderbilt stated that the calibre of federal judges is evidence that the appointive system is best, even though he admitted that political considerations are strong and that, while the President is supposedly free in his choice, the wishes of the senators usually control. *Id.* at 38-39.

97 *Id.* at 48.

The bi-partisan tradition has continued and is reflected in statutory law at the county court level.[98]

Justice Vanderbilt commented with approval on the Merit Plan concept as a compromise between the appointive and elective traditions, but seemed to see it as a means of removing the worst of partisan politics from the elective method.[99] Nevertheless, he emphasized the legal profession's responsibility for judicial selection:

> The lawyers of the community have daily opportunities to observe the character and the professional qualifications of their fellow lawyers seeking judicial appointment for the first time and of judges themselves seeking another term of office. The Bar is therefore in a better position than any other group to evaluate a candidate's judicial ability. Accordingly, whether judges are appointed or elected, the members of the organized bar manifestly have the clear duty as citizens, as well as a professional responsibility as lawyers, to advise the appointing authority or the electorate of their informed and unbiased opinion of each candidate's fitness.[100]

One can thus infer that Vanderbilt would have welcomed a clarification of the role of the legal profession in judicial selection and the strengthening of its participation within a framework responsible to the citizenry. Such could be the result of a well-drafted Merit Plan.

A latent public hostility towards the legal profession has been recently exacerbated by the wrong-doings of attorneys in positions of public trust. Deserved as this reaction may be, the profession must not shrink from leadership in judicial reform for fear of being accused of unworthy motives. In developing the Merit Plan, the legal profession has not sought to obtain a monopoly of judicial selection for those trained in law, but a special voice among others representing the community and the political structure. If the average person is to accept this idea, however, we should ask the question, why are judges unique officials?

The Triangle of Judicial Uniqueness

Can we glean from Justice Vanderbilt's writing any clues about the uniqueness of judges? Although he did not pose such a question, he did

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98 N.J. STAT. ANN. § 2A:6-9 (1952), which reads in part:

> In every county in which there are or may be 2 or more county district court judges, all appointments to such judgeships shall be made in such manner that the appointees shall be as nearly as possible, in equal numbers, members of different political parties so as to constitute the county district court in any such county bipartisan in character.

99 Vanderbilt, *supra* note 73, at 47.

100 A. VANDERBILT, THE CHALLENGE OF LAW REFORM 29 (1955).

write extensively about the desired qualifications for a judge. The perfect judge, as Vanderbilt describes him, is almost god-like, and can make or break the law he administers:

> We need judges learned in the law, not merely the law in books, but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and—equally important—believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth and keenly conscious of the evils arising in workaday world from any unnecessary delay. Judges with all of these attributes are not easy to find, but which of these traits dare we eliminate if we are to hope for evenhanded justice? *Such ideal judges can after a fashion make even an inadequate system of substantive law achieve justice; on the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable.*[101]

The layman, however, needs not simply a statement of ideals but a succinct statement of a judge s uniqueness. Let us venture to formulate an answer: a judge in our system differs from other public officials in possessing, ideally the sum of three requirements:

(1) He must be *trained and experienced in the law.* In New Jer sey except for surrogates, judges are required to have been admitted to the practice of the law of this state for at least ten years prior to their appointment.[102] Presumably, the experience this requirement implies could include teaching as an alternative to active practice. Most other public officials need not belong to any particular profession.

(2) A judge needs a *set of skills of greater variety* than the combination normally required or expected of legislators or executives; none of them is wholly delegable or assignable. Roughly speaking, skills (excluding strictly legal skills) are needed in such categories as:

(a) Administration

(b) Intellectual leadership (swiftness of comprehension and decision, reasoning powers, common sense, memory, ability to grasp readily insights from other disciplines, and so on)

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101 *Id.* at 11-12 (emphasis added).

102 N.J. CONST. art. 6, § 6, ¶ 2; N.J. STAT. ANN. § 2A:4-4a (1952).

(c) Speaking
(d) Writing
(e) Public relations
(f) Psychological awareness

and others: a judge, it seems, should be the modern equivalent of the Renaissance man!

(3) Lastly, he must have an *aptitude for authority*. Under our system, a judge's power is awesome over persons, property and even other branches of government. Vanderbilt pointed out that the role of the judge in the Anglo-American tradition differs from that of the judge in Europe, where he is a civil servant in an administrative hierarchy; in our heritage he is largely an independent figure, responsible only to the common law [103] To exercise such power properly one requires a certain personality, combining restraint with decisiveness.[104] Unfortunately, such power may elicit unexpected behavior by activating childhood conflicts with authority [105] Therefore, the temperament or psychological makeup of a judge is more significant for successful performance of his office than that of other officials.

The Role of the Legal Profession in Judicial Selection

Legal training and experience, a wide variety of skills, and aptitude for authority—is the legal profession more qualified to identify this triple combination than others?

In that the bar may know the particular candidate better than others do, yes; in that lawyers can judge legal training and skills better than the layman, yes; in that they understand the judicial functions better than anybody except a judge, or possibly a law professor, yes; but as to the candidates' attributes as a human being, as to non-legal skills, attorneys are no better than other professionals or non-profession-

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103 Vanderbilt, *supra* note 73, at 13-14.

104 For fascinating description of three judges with differing personalities that affect the performance of their judicial functions see H. LASSWELL, POWER AND PERSONALITY (1948). The author has psychoanalytic orientation and explains, in layman's language, personality structures in terms of the judges' childhood experiences.

A recent article urged that physicians should take part in governmental policy-making because they have been trained in assessing human behavior objectively and might at least raise their voices when greed and ambition in candidates seem to predominate. The author admitted that he had been criticized for suggesting at an earlier time that candidates, before entering political race, ought to be cleared by body of physicians. Hutschnecker, *A Suggestion: Psychiatry at High Levels of Government*, N.Y. Times, July 4, 1973, at 15, col. 2.

105 *See* H. LASSWELL, *supra* note 104.

als. In fact, attorneys may be disadvantaged by the narrowness of their specialization and the over-involvement of their own interests.

Not all scholars agree with Vanderbilt and his faith in the legal profession's superior judgment. For example, it has been suggested that, although lawyers are competent to pass on judicial qualifications, in a large community they may be ignorant of a particular candidate's qualifications.[106] They may be influenced by misinformation or prejudice about a candidate. Lawyers' preferences might also tend to be influenced by the nature of their cases: thus criminal lawyers might prefer sympathetic personalities, while others might prefer the staunch, technical types who would likely resist emotional appeals. Judges' reappointments ought not to be subject to the bar's influence, as they must be if attorneys have influence in judicial selection.[107]

The author concludes that Justice Vanderbilt was correct in emphasizing that "lawyers have a clear duty to advise the appointing authority," and that insofar as Merit Plans facilitate such advice, such plans are desirable. Judgment about other characteristics of such plans is deferred for later discussion.

Lawyers should not be the dominant influence in selection. Moreover, the question must be raised as to whether judges may be better qualified and more likely than lawyers to be disinterested in assessing professional qualifications. It is judges who have the greatest stake in seeing their profession operate to the credit of the bench as a whole. It is judges who understand from personal experience all three aspects of the unique set of qualities desirable for the job. In designing a Merit Plan, preference for one group or the other may be reflected in the composition of the nominating commission or the designation of a judge as the appointing authority.

Presented as a new technique that recognizes the need for advice from the legal profession and infers the uniqueness of judges, the Merit Plan appears to be a forward step; it also appeals to American value judgments that favor *shared* responsibility and reject accumulations of power. It represents a compromise between the felt need for expert judgment from the legal sector and for common sense from the layman. Its voter retention feature gives it a democratic flavor, since the populace has a "final" say; and the people have some additional input through the political structure if the governor appoints the laymen.

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106 Nelson, *supra* note 25, at 35.

107 *Id.*

There is a "little something for everybody" and in some Plans even for the legislature.[108]

The most significant departure from tradition in the typical Merit Plan is that small group decision-making by an unpaid group of citizens, theoretically responsible to the people but not chosen directly by them, becomes the key to judicial selection. This group would be substituted where the appointive technique is used for a single individual as the initiator of appointments.

Sociology and social psychology offer us interesting insights into the decision-making process of small groups. Briefly stated, there is a tendency for the emergence of a single extremely strong group leader. As the other members of the group tend to defer to the judgments of the leader, the process approaches that of individual decision-making.[109]

The Merit Plan is being so ardently supported that it is very difficult to assess it objectively. In most places it has succeeded the undesirable elective system. But New Jersey is not similarly situated. Is it preferable to our appointive system, and if so, why, and in what form?

The Vanderbilt tradition reminds us not to embrace a popular formula or tamper with a relatively workable system without rigorous questioning: "The method of best selecting the best judge is one which must always be determined in the light of history and local conditions . . . ."[110] A first step is to examine more closely New Jersey's present system.

V. New Jersey's Present Selection System

Senatorial Influence in New Jersey

As we have noted, the New Jersey legislature originally had the chief responsibility for judicial selection, which was shifted to the Governor in the Constitution of 1844, with confirmation rights retained by the Senate.[111]

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108 For example, the Iowa Merit Plan requires senate confirmation of lay commissioners. The Montana Plan requires senate confirmation of nominations for judgeships. *See* App. A pp. 788-97 *infra*.

109 *See, e.g.*, D. Fox, I. Lorge, P. Weltz & K. Herrold, *Comparison of Decisions Written by Large and Small Groups*, 8 American Psychologist 351 (1953).

110 Vanderbilt, *supra* note 73, at 47.

111 It is difficult to classify states according to the system used because many use different methods for different judicial posts. Six states in addition to New Jersey and Puerto Rico may be said to use the gubernatorial appointment method for most judicial posts, all of them giving some degree of responsibility or check to another body:

Hints of concern about abuse of legislative power appear from the beginning: it was reported that at the time of drafting of the first constitution in 1776, "Chief Justice Brearly was deeply concerned about the ability of the legislature to exercise 'improper influence' on the Supreme Court."[112] When the constitution of 1844 was debated, Delegate James C. Zabriskie of Middlesex argued that experience had shown that connecting the power of appointment with the legislature was an evil, leading to secret influences in securing nominations.[113] Delegate Abraham Browning of Camden said:

> [A]ll the appointments made by joint meetings are previously determined upon in caucus. Members sit there with *closed* doors and by ballot determine all the appointments of the State. Here, sir, you have a true representation of a *Star Chamber*.[114]

These remarks were made in the context of debate on whether the appointing power should properly be given to the Executive, some delegates favoring the old system. There was brief mention of the complications that could arise if the responsibility was divided and the power of confirmation given to the Senate.[115] However, senatorial courtesy, as the custom is now exercised, was apparently not anticipated. Yet it is said that after 1844 "the practice quickly became common and has been more or less followed ever since."[116] Certainly, the most aggravating

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Delaware and Hawaii require advice and consent of the Senate; Maine, Massachusetts and New Hampshire give some control to a council (an advisory body either appointed or elected); Connecticut has the governor nominate and the legislature appoint; Puerto Rico uses executive appointment with advice and consent of the Senate. These methods are used for initial selection, not necessarily for filling vacancies. JUDICIAL SELECTION AND TENURE 13-38 (AJS Rev. Rep. No. 7, 1971).

Closer study of these jurisdictions to gauge the ways in which the non-gubernatorial components influence selection would be interesting: for instance, has a tradition of senatorial courtesy become entrenched in Delaware and Hawaii? In seeking an answer to that question, one should also take a look at New York, where the Senate confirms appointments by the Governor to fill vacancies on the court of appeals. *See* N.Y. CONST. art. 6, § 23. California also appoints. *See* p. 765 *infra*.

112 R. MCCORMICK, *supra* note 59, at 70 n.2. The author noted that

> the Supreme Court and all inferior courts were creatures of the legislature; the terms of all judicial officers were limited and their salaries might be reduced at any time.

Id. at 70.

113 PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, 351 (N.J. Writers' Project ed. 1942).

114 *Id.* at 352.

115 *See, e.g., id.* at 352-53 (remarks of Delegate Mahlon Dickerson of Morris County). *See generally id.* at 485-510.

116 Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161, 171, 260 A.2d 261, 266-67 (Ch. 1969), *appeal dismissed*, No. A-811-69 (App. Div., June 29, 1970), *aff'd*, M-50 (Sup. Ct., Oct. 7, 1970), *cert. denied*, 401 U.S. 1003 (1971).

cause of dissatisfaction with New Jersey's system in recent years has been senatorial influence.

"Senatorial courtesy" is the custom, also strong on the federal level, whereby the Senate accedes to the veto of a single member where a nomination from his or her district is concerned. It is not written into the New Jersey Senate rules, nor grounded in any law. Through its exercise, its critics assert,

> the appointment of judges is a power of the Governor in name only. The fact seems to be that the appointment is made in conference between the Senator of the county concerned and the Governor. The choice is influenced by political considerations, advice from organization leaders and, we trust, some thought as to candidate's ability. But the power of veto lies in the hands of the State Senator as far as he wishes to use it.[117]

At its worst, it is said to be an outlet for the "personal political jealousies of a single disgruntled member" and, at best, "an antidemocratic anachronism."[118]

Defenders of the custom argue that it is actually a practical mechanism which the Senate has developed to allow it to exercise efficiently its constitutional duty to advise and consent. Since it would be impractical for the whole Senate to consider the qualifications of each nominee,[119] the Senate has, in effect, designated the senator from the same locale as the nominee to act for it or advise it. Defenders of the custom also point out that senatorial courtesy helps senators "get the ear of the executive;" junior senators need such a tool, it is said, to facilitate

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117 4 STATE OF NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1947, at 698 (1947). The Essex County Bar Association's Special Committee concerning revision of the judicial article mentioned in its report that

> the system of Senate confirmation of appointments has been criticized as productive of such evils as failure to act indefinitely on appointments at the instigation of the home-county senator, the frequent delegation, in effect, of the appointing power by the governor to the senator, and the use of the confirming power as a bargaining lever in legislation and otherwise.

Id. at 642-43. Nonetheless, the committee approved with only one dissent the draft of that portion of the judicial article which continued this practice.

118 Newark Star Ledger, Mar. 30, 1972, at 10, col. 1.

119 Wiley, *Senatorial Courtesy*, 97 N.J.L.J. 65, 65 (1974). The author urged abolition of senatorial courtesy but maintained that the senate should "advise" prior to nominations. Senator Wiley stated that

> [t]he "advise and consent" limitation is found in seven places in the New Jersey Constitution. The Governor of New Jersey has one of the broadest appointive powers of any Chief Executive in the nation, and the senatorial balancing power of advise and consent, while not co-extensive, is likewise one of the broadest in the nation. In the year 1973, the Senate of the State of New Jersey gave it consent to some 360 executive nominations.

Id.

communication between them and a busy, powerful governor.[120] Those who defend senatorial courtesy distinguish between misuse of the senatorial power, such as blackballing a candidate because he is "personally obnoxious" to a senator, and its "correct" use in advising and consenting on the merits.[121]

The defenders of senatorial courtesy assert that it must be viewed in the context of a divided constitutional power and the necessity for an accommodation between the two major institutions of government which hold it. However, the detrimental result which can occur through its use was most graphically demonstrated in Passaic County, New Jersey, between 1967 and 1969:

> During the two-year period alluded to the Governor and Senate were deadlocked; that is to say, the Governor either refrained from making nominations or when he did make nominations, they were not confirmed. Indeed, they were never reported out of the Judiciary Committee.[122]

The situation became so acute that in June, 1969, the Assignment Judge of Passaic County suspended the civil trial list so that available judges could devote themselves to criminal trials.[123] Such a breakdown in judicial administration is simply indefensible from the public's viewpoint. The suit which resulted from this situation is discussed below.

There have been many attempts in recent years to impose some restraints on exercise of the courtesy custom; a revision of the Senate rules in 1966 to increase the visibility and fairness of Senate procedures did not, however, eliminate the courtesy prerogative.[124] The new rules did provide that the Report of the Senate Judiciary Committee be in writing, that the report must show how each member of the committee voted,[125] and that nominations must be brought before the Senate within sixty days. (The 60-day rule has since been eliminated.)[126] The new rules also required that the names of the senators voting be

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120 For reports of an attempt by a New Jersey senator to influence the Governor to appoint more judges from minority groups see Newark Star Ledger, Jan. 21, 1973, at 28, col. 1; *id.*, June 27, 1972, at 1, col. 6.

121 *Cf.* Wiley, *supra* note 119, at 71.

122 Brief and Supplemental Appendix for Plaintiffs-Appellants at 1, Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161, 260 A.2d 261 (Ch. 1969).

123 *Id.*

124 *See Parsekian Moves To Completely Abolish "Senatorial Courtesy,"* 89 N.J.L.J. 389 (1966).

125 N.J. STATE SENATE, SENATE RULES, RULE XX, ¶ 149 (1973).

126 Information on 60-day rule, interview with David Goldberg, Counsel to the N.J. Senate, in Trenton, New Jersey, Jan. 10, 1974.

recorded, and that the nominee could demand and receive a hearing, which would be public or private at the discretion of the committee; he could demand to know the objections against him and demand the right to respond publicly or privately.[127] Nevertheless, senators continued to vote against a nominee "blackballed" by the senator from his district for personal reasons only.

Editorials and articles in the New Jersey Law Journal dating back over ten years reflect the bar's general dissatisfaction with the selection system, especially senatorial courtesy. In 1965, then Governor Richard J. Hughes, now Chief Justice, addressed the Bar Association very forcefully on "Advice and Consent;" he called it "inexcusable that a Senator should attempt to dictate who the judge shall be."[128] He quoted extensively from the record of the constitutional convention of 1844, urging that the delegates' arguments that the appointing power is an executive power showed their intention to vest the primary responsibility for appointment in the Executive, negating any intent to "entitle any member of the Legislature to select judges."[129]

This idea was tested in 1969-70, in a suit by the Passaic County Bar Association to compel Governor Hughes, the President of the Senate, and other senators to exercise their powers of appointment. The court refused, saying that the courtesy question was not a justiciable issue: the authors of the constitution did not intend the court to supervise the internal affairs of the legislature.[130] The court pointed out that the Governor's appointive power is not subject to the courts and in any event the issue was moot, since by then the Governor had acted.[131]

The Bar Association Trustees called for an amendment to the Constitution to require the Senate to act on appointments within a prescribed time and condemned senatorial courtesy as a power not conferred by the Constitution.[132] Opposition to senatorial courtesy has been strengthening. The latest skirmish occurred in January, 1974, when the incoming Democratic majority of the Senate met to adopt rules for the new session. Although the Governor, Brendan Byrne, a former judge, lent his support to the Senate Majority leader and others

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127 N.J. STATE SENATE, SENATE RULES, RULE XX, ¶ 151 (1973).

128 Hughes, *Advice and Consent*, 88 N.J.L.J. 330, 330 (1965).

129 *Id.* at 330-31.

130 Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161, 172, 260 A.2d 261, 267 (Ch. 1969), *appeal dismissed*, No. A-811-69 (App. Div., June 29, 1970), *aff'd*, M-50 (Sup. Ct., Oct. 7, 1970), *cert. denied*, 401 U.S. 1003 (1971).

131 108 N.J. Super. at 175, 260 A.2d at 269.

132 *See State Bar Calls for Action on Judicial Nominations Within Specified Time*, 93 N.J.L.J. 257 (1970).

opposing the custom, the move to eliminate it was defeated, reportedly by a large margin.[133] The tally was not made public.[134]

Reapportionment of legislative districts in 1973 is thought to have complicated the operation of the custom. Formerly, before the United States Supreme Court decision requiring apportionment of state legislative districts by population, each of New Jersey's twenty-one counties was represented by one senator. Now, however, counties have different numbers of senators and district boundaries cross county lines. Nobody knows exactly how this will affect senatorial courtesy. It is said that the Democrats have tentatively agreed on a rule that would restrict the courtesy veto to a nominee residing in a senator's home county.[135]

New Jersey's "Voluntary Merit Plan"

Another State Bar strategy which has had at least limited success in influencing appointments, if not curbing the use of courtesy, is the informal process whereby the Bar is consulted about the fitness of nominees. This is accomplished through two committees of the Bar Association, the Judicial Selection Committee and the Judicial Appointments Committee (now known as the Judicial and County Prosecutor Appointments Committee). The procedure was begun during Governor Alfred E. Driscoll's term in office, and formalized in 1969, when both gubernatorial candidates accepted the procedure. Governor Richard Hughes accepted the proposal by letter on September 25, 1969, and Governor William T. Cahill, honoring his campaign commitment, continued the arrangement during his term of office. At the end of his term he endorsed a new bar proposal to expand and strengthen the arrangement.[136]

The Judicial Selection Committee. The Judicial Selection Committee's purpose is

> to attempt to identify a number of individuals of the highest qualifications for possible appointment to the judiciary, and to furnish data thereon to the Governor for his consideration.[137]

It is carefully stated, however, that the Governor is not bound in any

133 N.Y. Times (N.J.), Jan. 5, 1974, at N.J. 1, col. 4; *id.*, Dec. 30, 1973, at N.J. 1, col. 6.

134 N.Y. Times (N.J.), Jan. 5, 1974, at N.J. 1, col. 4; *id.*, Dec. 30, 1973, at N.J. 1, col. 6.

135 N.Y. Times (N.J.), Dec. 30, 1973, at N.J. 1, col. 6.

136 *See Governor Supports State Bar Judicial Selection Plan*, 96 N.J.L.J. 1237 (1973); *New Procedures Adopted for Judicial Nominations*, 92 N.J.L.J. 657 (1969). See notes 264-65 *infra* & accompanying text.

137 New Jersey State Bar Association, Procedures for Liaison with the Governor on Judicial Selection and Appointment, Exhibit A (Oct., 1969). *See* note 143 *infra*. *See also* section VIII *infra*.

way, as he would be under a true merit plan, to accept one of the recommended nominees.[138]

The Selection Committee is composed of five members at large, appointed by the President of the New Jersey State Bar Association, assisted by county committees composed of five members from each county, two named by the State Bar President and three by the County Bar President; these are referred to as joint committees. The Selection Committee is not to submit the name of any incumbent judge for reappointment or promotion, but is to limit itself to the search for new talent. An assignment to develop a report on prospects for vacancies from the county court level is to be given to a single joint committee, whereas a number of joint committees are asked to recommend prospects for superior and supreme court posts. The joint committees are expected to make inquiries of reliable sources such as assignment judges, experienced trial lawyers, and bar association presidents. Laymen are not suggested as sources, although not specifically excluded. A willing candidate whom the joint committee considers outstanding is asked to answer a detailed questionnaire, which is then sent with a written report of the joint committee's evaluation to the State Committee, all taking place with the utmost confidentiality. The State Committee then reviews the reports, making its own inquiries and evaluation, and submits the remaining names to the Governor without disclosing the identity of these to "any other person in any way whatever."[139] When the prospect is originally contacted, he is to be asked if he will consent to appointment to a court other than the one vacant, in case the Governor should wish to promote a judge to the vacant post.[140]

As the voluntary plan was established, there must be no communication whatever between the Judicial Selection Committee and the Judicial Appointments Committee. Only the Judicial Selection Committee members at the state level, the joint committees which make recommendations, the candidates, and the Governor and his staff know whose names have been submitted. Nobody except these people know whose names have been suggested, how many names have been forwarded since the inception of the committee, who among them, or how many, if any, have been chosen by the Governor. The reason for secrecy is, of course, to spare embarrassment to persons not chosen, since well-qualified candidates might not otherwise permit submission

138 New Jersey State Bar Association, Procedures for Liaison with the Governor on Judicial Selection and Appointment, Exhibit A (Oct. 1969).

139 *Id.*

140 *Id.*

of their names. However, the confidentiality of the system precludes any independent evaluation of the success of the Committee's work. No separate report of its work was filed in 1972 or 1973 with the Bar Association. Instead, a description of the original plan and its method of operation was incorporated into the written report of the Judicial Appointments Committee.[141]

The immediate past Chairman of the Selection Committee believes the system works satisfactorily. According to him, some county committees are much more active than others in recruiting well-qualified, potential judges. When asked if senators ever suggested a nominee to the committee, he said during his chairmanship he had never had a proposal directly from a senator, although he had originally been told that he might receive such suggestions.[142] The question of the extent of senatorial influence both at the state level and at the county level are unknown to the public.

It is privately said that the Selection Committee has not functioned aggressively enough in recruiting and also that the Governor's staff has found some of its nominees unqualified. Attempts to gain figures on the number of nominees presented to the Governor by the Judicial Selection Committee, and the number accepted for appointment, or a percentage figure, were unsuccessful.

One reason suggested for the asserted lack of aggressiveness on the part of this Committee is that it has no power to compel the Governor to use its "talent bank." This weakness may undermine its powers of persuasion in recruiting.

The Judicial Appointments Committee. The Judicial and County Prosecutor Appointments Committee is patterned after the ABA Committee which has been given the opportunity by the President to rate nominees for federal judgeships. The purpose of the New Jersey committee is to determine the qualifications of those whom the Governor is considering for appointment, reappointment or promotion. It is composed of a Chairman, two Vice-Chairmen (one from the northern half of the state, the other from the southern) and one member from each of the twenty-one counties, all appointed by the President of the State Bar Association. The Committee operates in the following manner:

(1) After the Governor has obtained from the prospective nominee his answers to a detailed questionnaire, which was prepared by

141 *See State Bar Committee and Section Reports, Judicial and County Prosecutor Appointments Committee,* 96 N.J.L.J. 536 (1973).

142 Theodore Lebrecque, Jr., was Chairman of the Judicial Selection Committee when interviewed in the Spring of 1973. There are now co-chairmen: Mark L. Stanton and Howard Stern. Mr. Stern was interviewed in January, 1974.

the Committee for the Governor's use, and an indication of the possible nominee's willingness to be appointed, without any commitment by the Governor that he will nominate, the completed questionnaire is forwarded to the Committee. It is reproduced at State Bar Headquarters and forwarded to each member of the Committee.

(2) Thereafter, the Committee conducts a thorough and comprehensive confidential investigation of the possible nominees' qualifications, such investigation centering largely among members of the bench and bar in the area where the possible nominee sits or practices.

(3) At the same time, the possible nominee's record for ethical conduct is screened through the Office of the Administrative Director of the Courts.

(4) As part of the confidential investigation, the Judicial Appointments Committee of the County Bar Association of the county in which the prospective nominee practices or the judge being considered for reappointment or promotion sits is requested to make a confidential investigation of its own and to report back to the State Bar Committee before it reaches its final conclusion. Forms of evaluation questionnaire are completed by both the members of the State Bar Committee and the County Bar Committee.

(5) All prospective nominees are requested to appear in person before the State Bar Committee after the confidential investigation has been completed and before the Committee reports its conclusions to the Governor.

(6) After the investigation and personal interview have been completed, the Committee reports its conclusions to the Governor.

(7) A judge being considered for reappointment or promotion normally is not invited to appear before the Committee unless the Committee has some doubt as to his qualifications after making its confidential investigation. One exception to this rule is that anyone being considered for appointment to the Supreme Court, whether he be a lawyer or a judge, is requested to appear before the Committee, that appointment being considered of sufficient importance to require such, regardless of the person's reputation at the bar or on the bench.

(8) The only reservation in this agreed confidentiality is when and if the Governor nominates one whom the Committee concludes is not qualified. Then the Committee reserves the right to appear before the Senate Judiciary Committee to make known its conclusions, without, however, revealing the sources of its information upon which its conclusions are based.[143]

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143 *State Bar Committee Report*, 95 N.J.L.J. 481, 490 (1972). The report for 1973, 96 N.J.L.J. 536 (1973), is identical in its descriptive passages and incorporates by reference the questionnaires appearing with the 1972 report, reprinted here in Appendices B and C *infra*. They are unchanged to date.

The Committee rates each candidate as qualified, well qualified, exceptionally well qualified, or not qualified. The Committee also indicates approval or disapproval.

In only two instances has the Governor appointed persons whom the Committee considered unqualified. Occasionally, if a candidate is rated unqualified, the Governor may send the name to the Committee a second time with additional information asking it to reconsider, which sometimes it has done.[144]

In one case in which the Committee and Governor disagreed, the Committee requested that it be heard before the Senate Judiciary Committee.[145] According to the Chairman of the Judicial Appointments Committee, the Senate Committee gave only one hour's notice that it was ready to hear the reasons for the unqualified rating; the Committee Chairman was out of town, and another member had to appear hastily.[146] The Governor called the reasons for the disqualification "patently shallow and insufficient,"[147] while the Appointments Committee felt it was hampered in presenting all its reasons by its regard for confidentiality, as well as the lack of sufficient time to prepare its presentation. Many county confreres supported the nominee, and the Senate confirmed the appointment. In one other case of conflict, involving a promotion, the Committee chose not to object publicly, since that judge was near retirement.[148] In another instance, a member of the county bar's screening committee "leaked" to the press that the candidate had been disapproved at the local level, and that there was also opposition from local party leaders. The home county senator was reportedly threatening to exercise his senatorial courtesy prerogative. Since the state-level Judicial Appointments Committee approved the nomination, the Governor announced he would propose it despite the opposition. However, the nomination "died" in the Senate Judiciary Committee.[149]

This incident was not an example of the exercise of senatorial courtesy, but an illustration of possible flaws in the bar's screening system: breach of confidentiality and failure of communication or conflict between county and state levels. Nevertheless, in light of the fact that

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144 Interview with T. Girard Wharton, then Chairman of the Judicial and County Prosecutor Appointments Committee, Trenton, New Jersey, Jan. 16, 1973.

145 This incident was the subject of a law journal editorial. *Judicial Selection*, 94 N.J.L.J. 632 (1971).

146 Interview, *supra* note 144.

147 *Judicial Selection*, *supra* note 145.

148 Interview, *supra* note 144, at 632.

149 N.Y. Times, Dec. 2, 1973, at 112, col. 3. However, the accuracy of this report is not beyond dispute.

the voluntary system has operated with so few problems over a 4-year period, one must conclude that the attempt at cooperation between the Governor and the bar has operated fairly smoothly, permitting the bar to bring their suggestions and objections to the Governor's attention.

The New Jersey Appointments Committee's Standards and Techniques

A chart of the Committee's screening[150] to February 1, 1973 appears below:

Dates of Reports	Total	Not Qualified	Qualified	Well Qualified	Exceptionally Well Qualified
Apr. 21, 1971	105*	5	76	19	4
Apr. 21, 1971-May 10, 1972	52	0	34	18	0
May 10, 1972-Feb. 1, 1973	109	8	75	24	2
Total	265	13	185	61	6

* Discrepancy in the total is explained by withdrawal of a name.

Broken down by appointments, reappointments, and promotions, the same period appears as follows:

	Total	Not Qualified	Qualified	Well Qualified	Exceptionally Well Qualified
Appointment:	35	4	25	5	1
Reappointment:	34	0	20	14	0
Promotion:	40	4	30	5	1

The most striking feature of the chart is that during a period of about 20 months, three-fourths were rated unqualified or qualified and more than two-thirds of the candidates were rated merely "qualified." One member of the New Jersey Judicial Appointments Committee said that it had an informal policy of withholding the highest rating from all except those who had had previous experience on the bench.[151]

150 The information in both charts was supplied by the office of T. Girard Wharton, then Chairman of the Judicial Appointments Committee.

151 Interview with Martin L. Haines, former member of the Judicial Appointments Committee and past President of the New Jersey State Bar Association, Trenton, New Jersey, Feb. 6, 1973.

The Committee's 1973 report gave the following figures: since January, 1970, 325 persons were reported to have been considered for appointment, reappointment or promo-

One difficult but important question will not go away, whatever the selection mechanism: how can the selectors, whoever they are, best evaluate a candidate in terms of suitability for the bench objectively and without reference to such considerations as friendship or political expediency?

The New Jersey State Bar Association's criteria have been revealed by implication in its questionnaires.[152] Comparison of these with the criteria for selection recommended by the American Bar Association leads to the following observations: the selectors in both systems, when they discuss qualifications, list desirable qualities in the abstract, attempting to intellectualize the process. It would be unrealistic to assume, however, that subjective factors do not influence their decisions; interviews with prospective candidates must introduce personal elements, as do hidden predilections, such as "old school ties." The extent to which such considerations are important remains unanswerable. Chief Justice Vanderbilt thought it nearly impossible to make such judgments objectively.[153] Some consideration of the ABA's recommended standards for state bar committees and of the New Jersey committee's reported procedures may point up some differences between them and raise questions about New Jersey's evaluation techniques.

The ABA's Handbook for Members of Judiciary Committees, prepared by its Standing Committee on Judicial Selection, Tenure and Compensation, uses the same categories of ratings as does the New Jersey Judicial Appointments Committee: exceptionally well-qualified, well-qualified, qualified and not qualified. The ABA Handbook recommends a two-step system: candidates are first to be eliminated for any of the following: (1) lack of courtroom experience; (2) unethical conduct; (3) age; or, (4) lack of judicial temperament; and second, it is suggested the burden should be on the candidate's supporters to show he is qualified by: (1) possession of legal ability; (2) trial court experience; (3) good moral character; and, (4) judicial temperament.[154] Thus, three qualities are emphasized twice, both to disqualify and to demonstrate

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tion, of whom 231 were found "qualified," 65 "well-qualified," 9 "exceptionally well qualified," and 17 "not qualified." Two names were withdrawn, and on one name the Committee could not agree. The distributions in the various categories remained approximately the same as those in the 1972 report. *Reports*, *supra* note 141. Without knowing more about the internal workings of the Committees, no inferences can be drawn from the distribution of ratings.

152 *See* App. B pp. 797-809 *infra*. *See also* ABA STANDING COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION, HANDBOOK FOR MEMBERS OF JUDICIARY COMMITTEES (1971).

153 *See* Vanderbilt, *supra* note 73, at 31-32.

154 ABA STANDING COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION, HANDBOOK FOR MEMBERS OF JUDICIARY COMMITTEES (1971).

qualifications: courtroom experience, moral character and judicial temperament. No distinctions are made between trial and appellate court positions.

The Handbook also recommends that the highest rating be given for additional qualities such as "distinction in academic training and service to the public, a loyal clientele, reputation for outstanding integrity or well-performed service on the bench."[155]

Although the Handbook was not prepared by the same Committee that rates presidential nominees for federal judgeships, the Committee on the Federal Judiciary, it presumably reflects accurately the ABA's emphasis in selection. A study of the work of the Federal Judiciary Committee led to the conclusion that the ABA has tried to influence the selection of federal judges towards the attainment of such goals as the appointment of younger judges, the appointment of better-trained judges and of persons with judicial experience, and the appointment of lawyers with professional backgrounds as distinguished from those with primarily political backgrounds.[156]

The New Jersey Judicial Appointments Committee does not use the ABA Handbook, but its published annual report reveals a great deal about its evaluation techniques, which demonstrate a careful and thoughtful effort to define judicial qualifications. The reports show the considerable detail and depth of the Committee's investigations and, one may infer, its deliberations.[157]

The New Jersey Committee uses three evaluation tools: (1) a questionnaire filled out by the candidate, giving such information as age, health, scope and length of practice, academic background, public service and the like; (2) an evaluation questionnaire designed to reflect the candidates' reputation; and (3) a personal interview.[158]

The evaluation questionnaire is an interesting technique based on the Canons of Judicial Ethics and reminiscent of Chief Justice Vanderbilt's emphasis on the Canons in his discussion of the qualifications of

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155 *Id.* at 4-5.

156 J. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION (1965). This book could be a model for a similar study of the New Jersey State Bar Association's influence in selection. Former Attorney General John Mitchell temporarily terminated the voluntary agreement, under which the ABA was permitted to advise the President on nominations to the Supreme Court, on the grounds that the names of attorneys who were under consideration were leaked to the media by unknown sources. *Attorney General Mitchell Terminates Association's Advance Screening of Supreme Court Nominees*, 57 A.B.A.J. 1175 (1971).

157 *See* notes 141 & 143 *supra*.

158 *Id.*

judges.[159] This evaluation form is filled out by the members of the County Committee who conduct a confidential inquiry among persons who have had contact with the candidate and by the state committee members as well. The form provides a box in which the writer can indicate whether the answer provided is based on his own personal knowledge or on investigation, including reputation.

The questionnaire consists of 36 parts, each part keyed to one of the Canons. The language of some parts is general and value-laden, rather than specific and objective. For example, question 4 reads:

> 4. AVOIDANCE OF IMPROPRIETY
>
> A judge's official conduct should be free from impropriety; he should avoid infractions of the law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.
>
> (a) What is the Nominee's general reputation for propriety? (b) What is the Nominee's general reputation for personal behavior?[160]

The first impression one has of such questions is that they consist of a maze of platitudes, nebulous enough to discourage an investigator and cause him to skip over most items, concentrating on the few he thinks useful. However, closer examination of the questionnaire shows that much of the material is indeed useful. Here and there the adapter of the Canons has translated the florid language into succinct, practical terms. For instance, the moral precept of Canon 6, which reads:

> A judge should exhibit an industry and application commensurate with the duties imposed upon him,[161]

has been translated by some practical fellow into the question:

> (a) What is the nominee's reputation for hard work?[162]

The value of the questionnaire might be further enhanced if other questions were made plain and pointed in style and, where possible, more concise.

Study of the questionnaire indicates one valuable characteristic: many questions are directed towards actual future requirements and desirable behavior which would be expected if the candidate became a judge. For instance, six questions deal with potentially conflicting obligations a candidate would have to consider or resolve, such as financial

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159 *See* Vanderbilt, *supra* note 73, at 28-29.

160 App. B pp. 798-99 *infra.*

161 N.J.R., CANONS OF JUDICIAL ETHICS OF THE AMERICAN BAR ASSOCIATION, CANON 6.

162 *See* App. B p. 799 *infra.*

responsibilities, investments, connections with private business or charities, political office and the like.

Chief Justice Vanderbilt mentioned three recognized evaluation techniques: these were the methods of biographical information, job description, and testing; he thought none was really workable in judicial selection.[163] However, the New Jersey Judicial Appointments Committee seems to be attempting to use a combination of the first two. The questionnaire to be filled out by the candidate typifies the biographical approach and the evaluation questions may be viewed as arising out of an idealized job description.

Looking at the latter form from this perspective, we may group the questions which do not deal with potential conflicts of interest into the following somewhat overlapping categories:[164]

(1) *Character.* In this category there are particular questions dealing with loyalty to the Constitutions of the United States and of New Jersey; independence; ability to rise above self-interest (reflected in three questions) and integrity.

(2) *Judicial Temperament.* A cluster of personality traits are represented. Among these are patience, impartiality, firmness in dealing with counsel, witnesses and other trial participants, ability to refrain from unnecessary interference in the courtroom, courtesy, consideration for others, regard for propriety, and circumspectness or discretion, indicating the ability to shun publicity and to refrain from discussing judicial matters outside appropriate settings.

(3) *Work Habits.* Questions here focus on industry, promptness, and attentiveness to administrative matters through supervision and cooperation.

These questions accord with the ABA's emphasis on ethical standards and judicial temperament. One is struck, however, by the absence of emphasis on legal ability. Two questions mention knowledge and background in particular fields, but only one evaluation question bears directly on intellect and writing ability. No questions deal with oral communications skill.

One must assume that intellectual capacities and legal ability are considered in relation to the biographical data furnished by the candidate, but the candidate's reputation for these qualities is not empha-

163 Vanderbilt, *supra* note 73, at 31.

164 Questions (1), (3), (4), (12), (13), (14), (17), (19), (20), and (33) seem to concern "character." Questions (5), (9), (10), (11), (14), (15), (18), (21), and (35) seem to concern "temperament." The categorization is of course arguable: (1) and (3) seem to fall under both, as does (14). *See* App. B pp. 797-809 *infra*.

sized. Perhaps it is assumed. The form invites further comments where such considerations may be expressed, and these individual comments probably weigh heavily when based on the personal knowledge of a Committee member.

As for the interview, nothing is revealed in the Committee's reports about the amount of time for each interview or the conduct of the meeting. Are hypothetical situations presented to obtain reactions or to test a nominee's "boiling point?" Or is the interview a formal affair? It is understood that one chairman's favorite opening question is, "Why do you want to be a judge?", which is probably a good open-ended "ice-breaker," revealing personality. Another committee member likes to inquire into "attitudes," asking such questions as, "What do you think about the current cleavage between the bench and the bar?" Such questions may also provide clues to personality.

Overall, the New Jersey Appointments Committee's techniques seem to be thorough and thoughtful. The attorneys who have served and are serving on the Appointments Committee deserve appreciation for the great amounts of time and talent they have undoubtedly given in a delicate and largely thankless service. With great respect for the Committee's work in trying to develop standards, a few suggestions are ventured for the consideration of the Committee, for a nominating commission if a Merit Plan were adopted, or for the Governor.

First, it would be helpful to formulate and make public a concise statement of the factors considered to be of primary importance and those which are considered secondary, and to determine whether there are any preliminary disqualifying factors other than lack of moral character. The New Jersey Committee might consider these questions:

(1) What weight is or should be given to the candidate's age, a factor which the ABA considers so important? Are the citizens' interests well-served when a judge is selected who may be within a few years of retirement?

(2) What of health? While inquiry is made in the biographical questionnaire and at the interview about the candidate's health, no evidence of sound physical or mental health is required. Should a physical examination be required? Pension considerations are relevant in regard to health as well as age.[165]

(3) What about courtroom experience? This requirement might

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165 *See* App. C pp. 810-11 *infra*. Biographical question 16 asks about the candidate's history of hospitalization or incapacity, and present handicaps. *Id.*

be thought more necessary for a trial court judge than an appellate judge and is emphasized by the ABA Committee.[166]

Second, the evaluation questionnaire should be used as the basis for a new, more readable questionnaire shorn of overly stylized or repetitious language, and revised to make it clearly a job-descriptive tool. It should retain all its present emphases, but should add others that concern intellect and legal ability.

Third, the quality of judicial temperament is so critical that it merits special attention. A survey of 144 trial judges conducted at the 1965 session of the National College of State Trial Judges revealed that both neophyte and experienced judges ranked personal and subjective qualities ahead of more measurable and objective qualities.[167] These findings accord with the emphasis given to judicial temperament both by the ABA and the New Jersey Committee.

Temperament or personality is probably important at both appellate and trial levels, but in different respects and for different reasons. The appellate level may demand cooperation on a collegial tribunal, while at the trial level temperament may be an extremely important ingredient because of the stresses involved. These differences are illustrated by the case of an appointee of President Kennedy who was rated unqualified by the ABA Committee for an appointment to a federal court because of supposed instability displayed in his behavior as a judge on a lower state criminal bench. The appointee and his attorneys convinced the Senate Judiciary Committee that the strains of the lower court post had produced behavior which would not necessarily be repeated on the federal bench. Since he had already served satisfactorily on the federal bench for some months as an interim appointee, his argument prevailed.[168]

If personality is so important a factor, the insights of psychology ought to be employed in the selection process in some acceptable way, to preserve the dignity and privacy of the candidate. There is an element of unreality about the present listing of personality traits in rela-

166 *Id.* Biographical questions 6, 7, 8 concern duration and type of law practice, requesting details of the last five years' experience. The weight given to this information is not known.

167 *See* Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEXAS L. REV. 1063, 1066-67 (1966).

168 J. GROSSMAN, *supra* note 156, at 181-82. Anyone involved in judicial selection would profit by a reading of this fascinating account of the battle over the nomination of Judge Irving Ben Cooper. It serves both as a study in the evaluation of a judicial candidate and as an example of the influence (or lack of influence) of the ABA Committee in the selection of federal judges. *Id.* at 182-95.

tion to judicial qualifications, as if to dissect a candidate's personality into abstractions—a technique that may result in losing sight of the person, at least until the interview itself. Gestalt, the psychologist whose principles concerning perception are generally accepted, taught that we do not perceive an object's individual qualities in the abstract but perceive the object itself as a whole.

New means of focusing on personality should be explored. Personality models of ideal judges and deficient judges could be constructed. Role-playing, viewing films of trial sequences, and other innovative techniques might dramatize the importance of personality to the evaluators. A consultant in psychology could be engaged to sit in on Committee interviews and discussions on a confidential basis over the period of a year and to participate in a workshop situation that would make more explicit the group dynamics which operate during the evaluation process. Very probably, a psychologist or a foundation would be so intrigued by such an opportunity that it would be possible to undertake the experiment without cost.

Personality testing, geared to judicial temperament, could develop out of such an experiment. Used experimentally and voluntarily with sitting judges, and made available to all attorneys who wanted to be considered for judgeships, the tests might prove to be useful techniques, whether New Jersey keeps its present selection system or adopts a true Merit Plan. However, the imprecision of such tests and their unintended biases dictate that their use should be approached with caution; they should always be considered as only one factor among others, never as a sole or determining requirement.

Over-reliance on written evaluations is, however, also a danger. Personality communicates itself uniquely in personal contact. The Committee's present custom of not requiring sitting judges to appear may be a mistake since some committeemen may then be forced to rely completely on written materials and the evaluations of others.

In what form do the Committee's deliberations and conclusions now reach the Governor's office? Only in questionable cases is material from the evaluation forms sent to the Governor in summary form. If the nominee is approved, a letter transmits the rating, but if he is rated unqualified, reasons are given. The Governor then presents his nomination to the Senate, which refers it to the Judiciary Committee.

To summarize, the present system gives primary responsibility to the Executive who regularly seeks advice from the organized bar. The screening process seems to operate with the confidence of the bar. Another bar committee is designed for recruiting but operates less openly

and probably ineffectively. The chief "headache," however, is the legislative check which is abused for local purposes and specialized constituencies and which causes delays.

How would an altered Merit Plan (voluntary or mandatory) change this arrangement? The answer requires a closer look at Merit Plans.

VI. MERIT PLANS TODAY: THE TREND IN NEW JERSEY

The American Bar Association's endorsement of the Merit Plan in 1937 was stimulated by the adoption of a similar plan in California in 1934.[169] A year earlier, the California legislature had approved a plan recommended by the California Bar Association whereby the Governor would appoint judges for Los Angeles County from nominations made by the chief justice, a presiding justice of the district court of appeals and the appropriate state senator. However, a rival plan suggested the substitution of a confirming body for the supreme and appellate courts instead of a nominating body, and the substitute was adopted by the voters in 1934.[170] Although an improvement over the elective system, the confirmation procedure has been of little value,[171] since the heart of the Merit Plan is a true nominating commission.

The Merit Plan, in its triple-featured form, was first adopted in Missouri in 1940,[172] hence its alternate name, the Missouri Plan or the Nonpartisan Court Plan. It was not until 1950 that other states began to use merit plans.[173] Since then, the pace of experimentation has quickened. In January, 1973, twenty-one states were counted as having

169 Winters, *Judicial Selection and Tenure*, in SELECTED READINGS, *supra* note 40, at 27, 33.

170 Nelson, *supra* note 25, at 20-22.

171 Winters, *Judicial Selection and Tenure*, in SELECTED READINGS, *supra* note 40, at 33. The California State Commission on Judicial Appointments, after vetoing only one candidate in its entire history, showed signs of life last spring when a nomination to the supreme court by Governor Reagan was widely questioned on the grounds that the nominee lacked the desirable educational qualifications. The Commission held public hearings, but voted 2 to 1 to confirm, with the attorney general and senior judge of the court of appeals in favor of confirmation, and the chief justice voting against it. N.Y. Times, Jan. 21, 1973, at 34, col. 1; Grodin, *A Most Remarkable Court*, THE NATION, Feb., 1973, at 236.

John Finger, past President of the California Bar Association, was reported to have told a meeting of the State Bar Association Presidents in February, 1973, that the California legislature recently "killed" a bill which would have enacted a Missouri Plan for lower court judges. The legislature would not go for the plan, he was quoted as saying, "because they enjoy the political spoils system." Newark Star Ledger, Feb. 13, 1973, at 3, col. 2.

172 JUDICIAL SELECTION AND TENURE 40 (AJS Rev. Rep. No. 7, 1971).

173 *Id. See* ALA. CONST. amend. 84 (only for the judge of the circuit court at Birmingham, Ala.).

legally constituted merit plans in some form for all or parts of their judicial systems, and ten jurisdictions were said to be using voluntary plans, of which two overlapped with the first group of twenty-one. Thus, twenty-nine jurisdictions were said to be using Merit Plans.[174]

These statistics must, however, be viewed cautiously. Three states in the first category use only the ballot-retention procedure, not the nominating commission that pre-selects a number of candidates among whom the executive must choose.[175] However, one of these three, California, does use a nominating commission for trial courts by voluntary action of the Governor in addition to the Judicial Appointments Commission.[176] Only eighteen jurisdictions, therefore, have established Merit Plans with nominating commissions.

Ten states use such commissions for all major courts (all appellate courts and trial courts of general jurisdiction), but this does not necessarily mean merit selection is their only method of choice, as some states combine an election system with the use of nominating commissions for gubernatorial appointments between elections.[177] (Its use for interim appointments is not insignificant, however, since it is believed that even where the election system is still in general use, many judges come to the bench by appointment to fill interim vacancies.)[178] It is somewhat misleading to count voluntary plans, since in such plans the nominating commissions have no power or assured continuity; the executive may ignore or dissolve them at will. For example, the Massachusetts Governor has not continued the use of ad hoc commissions.[179] However, voluntary plans may pave the way for authorized ones: Tennessee and Florida recently moved from voluntary to statutory plans.[180] But Tennessee soon repealed the Supreme Court portion.[181]

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174 *See* App. A, pp. 788-97 *infra*. The two which overlap are California and Georgia. *See id.*

The American Judicature Society will soon publish a new book-length study, proposing a narrower definition of "Merit Plan." A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE JUDICIAL NOMINATING COMMISSION. See App. A, p. 797 *infra*.

175 App. A, pp. 788-97 *infra*. These states are California, Illinois, and Pennsylvania.

176 *Id. See* AJS Memorandum 4 (Jan. 2, 1973). Under the new AJS definition of Merit Plans, 16 states plus the District of Columbia will be classified as having legally established plans for all or some jurisdictions. Information supplied by James Alfini, Assistant Director of Research, American Judicature Society, June 14, 1974.

177 *E.g.*, Idaho. *See* AJS Memorandum, *supra* note 176, at 2.

178 Winters, *One-Man Judicial Selection*, 45 JUDICATURE 198, 198-99 (1962). All elective states use some appointive methods. *Id.*

179 VOLUNTARY MERIT SELECTION PLANS 3 (AJS Rep. No. 36, 1972).

180 FLA. CONST. art. 5, § 11; TENN. CODE ANN. § 17-701 *et seq.* (Supp. 1973).

181 Information supplied by AJS, June 22, 1974.

Voluntary plans are an excellent way to pre-test features of a constitutional or statutory plan.

Political Scientists View the Missouri Plan

A major six-year study of the Merit Plan as it functioned in Missouri was made after it had been in operation for almost a quarter of a century.[182] A number of conclusions emerged which might be relevant to New Jersey.

The Nonpartisan Court Plan, as the social scientists called the Missouri Plan, succeeded the partisan election system which formerly had been used to choose trial court judges in Jackson County (in which Kansas City is located) and St. Louis City, as well as the judges of the three intermediate courts of appeal and the supreme court. Judges in "outstate" Missouri, as well as in suburban St. Louis County, continued to be chosen in partisan contests.[183] Since the study, the Plan has been extended to include suburban areas of St. Louis City.[184]

Three separate nominating commissions were in operation, one for each urban area and one for the appellate courts. The two commissions nominating for the circuit courts in Jackson County and St. Louis City each consisted of five members:

> two lawyers elected by attorneys residing in the court's jurisdiction, two resident laymen appointed by the governor of the state, and the presiding judge of the court of appeals of the area, who serves as *ex officio* chairman of the circuit nominating commission.[185]

The third commission nominated judges of the supreme court and the three courts of appeal in Kansas City, St. Louis and Springfield.

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182 R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR (1969).

183 AJS Memorandum, *supra* note 176, states that the Missouri Plan was

> limited in that state, however, to the judges of the state supreme court, its three courts of appeals and the trial courts in the two largest cities, Kansas City and St. Louis and in Jackson County. In 1966, the voters of Kansas City amended that city's home rule charter to provide for merit selection of municipal court judges, and in 1970 the voters of St. Louis County, which is a metropolitan county separate and distinct from the city of St. Louis, also approved use of the plan for selecting probate and circuit court judges.

Id. at 1.

184 *Id.*:

> Again in 1972 the Missouri legislature enacted limited legislation to permit two more counties, Clay and Platte, to vote on extending the plan to the trial courts of those Kansas City suburban counties, and the voters eagerly accepted this long-awaited opportunity by voting 2 to 1 to approve the plan in both counties.

Id.

185 R. WATSON & R. DOWNING, *supra* note 182, at 13.

This commission consisted of seven members: three lawyers elected by attorneys residing in each of three courts of appeal jurisdictions; three laymen residing in those jurisdictions, appointed by the governor, and the chief justice of the supreme court, the *ex officio* chairman. As new judgeships were created or when vacancies occurred, the appropriate commission sent three names to the governor, from which he was required to select one.[186]

After one year's service, each Plan judge went before the people at the next general election, unopposed, to gain approval for continuance in office for the remainder of his term (six years for circuit judges and twelve for appellate court judges). If he failed to be approved, a vacancy was created, and the nomination process was reactivated.[187]

The Plan's adoption was preceded by unsavory intra-party battles over supreme court positions between factions of the state Democratic party. There was an instance of a judge who did not even have legal training being elected to the St. Louis circuit court, where his performance was much criticized. Elements of the bar and the public, informed by the press, became alarmed about the existing system.[188] A state-wide reform movement developed, and when the legislature failed to submit a constitutional amendment incorporating the Plan to the voters, the citizens' organization gathered the necessary signatures to place the Plan on the ballot under the initiative provisions of the Missouri Constitution. After its adoption, a strong effort to repeal it was defeated.[189] Support for the Plan where it was adopted continued to be strong, according to the authors, and lawyers throughout the state "overwhelmingly support the Plan for selecting appellate judges in Missouri."[190]

The authors of the study analyzed the Plan as follows:

> Despite the fact that the Plan does provide a unique role for the bench and the Bar, it also contains elements of traditional judicial selection methods. The public is provided some voice in the choosing of judges through lay members of the nominating commissions and the electorate can at least in theory vote Plan judges out of office, while the chief political figure in the state, the governor, actually appoints such lay persons and also makes the final decision as to who will be selected for the bench. Thus the Plan purports to provide representation for four general interests concerned with judicial selection: the organized Bar, the judiciary, the general public and the state political system.

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186 *Id.* at 13-14.
187 *Id.* at 14.
188 *Id.* at 10.
189 *Id.* at 10-11.
190 *Id.* at 11.

> Viewed in this context, it is naive to suggest . . . that the Plan takes the "politics" out of judicial selection. Instead the Plan is designed to bring to bear on the process of selecting judges a variety of interests that are thought to have a legitimate concern in the matter and at the same time to discourage other interests. It may be assumed that these interests will engage in the "politics" of judicial selection, that is they will maneuver to influence who will be chosen as judges; (1) because such judgeships constitute prestigious positions for aspiring lawyers; and (2) because in the course of making decisions, judges inevitably affect the fortunes of persons and groups involved in the litigation process. Whether the Plan eliminates politics in judicial selection is a false issue. Instead, the key issue is whether the particular kind of politics that evolved under the Plan adequately represents the legal, judicial, public and political perspectives thought to be important in determining who will sit on the bench.[191]

This statement seems to be a realistic and fair judgment to accept as a working hypothesis in considering the applicability of a similar plan in New Jersey.

In evaluating the "politics" operating in Missouri through the Plan, the authors made the following major observations, among others, which we may evaluate for their relevance to the New Jersey environment. Their mention here is not intended as a summary of the study's conclusions, but as suggestive of the ways in which a Merit Plan's political machinery may operate.

The Missouri bar was characterized by social and economic cleavages, so that rivalries developed between groups during the elections of attorney-commissioners. Attorneys involved in personal injury litigation polarized into "plaintiffs' attorneys" and "defendants' attorneys," each group vying for attorneys in the "middle" having different or more varied types of practice. These groups operated much like political parties, with supporting ideologies and continuity. During the period studied, it appeared that the defendants' attorneys generally succeeded in dominating the commissions that selected appellate judges.[192]

This polarization of the bar was by no means the only consideration, however, which influenced the elections of attorney commissioners. Suffice it to say that the Missouri bar appeared less "monolithic" than had been expected. The observers thought that in its selection role the Missouri Bar, which under the Plan became an integrated one, represented a broader variety of interests than does the American Bar

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191 *Id.* at 331-32.

192 *Id.* at 333, 336-37.

Association.[193] Although purporting to speak for the entire bar in advising on federal judicial appointments, the ABA is considered by some to be an elite organization whose dominant orientation is conservative.[194] By contrast, the observers of the Missouri Plan concluded that the rival bar groups represented rather well the various economic and social groups affected by court decisions.[195]

There seemed to be two "pools" of candidates for the bench, one for the lower courts and one for appellate tribunals, according to different attorneys' qualifications and preferences, the differing requirements of the two posts, and other factors.[196]

The judiciary took a keen interest and was concerned with a new judge's ability to absorb a fair share of the caseload, his credentials and his congeniality. The last quality has particular importance for appellate courts where group interaction is required and the desires of these sitting judges were expressed most clearly in relation to the supreme court, since the commissions included a supreme court justice.[197]

The judiciary, it was thought, brought to bear the greatest variety of perspectives on the selection process, having an immediate interest in the court system and a background as practicing attorneys while some also had sensitivities to local and gubernatorial politics. The views of the judicial members of the commissions were thought often to be particularly influential both with attorneys and with lay commissioners.[198]

The public's interest was weakest. The average person remained uninformed about judicial matters and only groups with special interests had much effect. These groups included sporadically newspapers and civic groups, and more constantly, the clientele of the courts such as public agencies involved in litigation, established economic institutions, general business organizations, and labor unions.[199]

Since there was no discernible sustained interest among the general public, the idea that lay commissioners represent such a point of view was considered illusory. Instead they appeared to represent their own segments of the public, or those of the attorneys whose advice they sought, who tended to be lawyers representing "defendants'" interests.[200] The laymen tended to some extent "to channel political con-

193 *Id.* at 348-51.
194 J. GROSSMAN, *supra* note 156, at 350-51.
195 R. WATSON & R. DOWNING, *supra* note 182, at 350-51.
196 *Id.* at 332-33.
197 *Id.* at 337-38.
198 *Id.* at 338-39.
199 *Id.* at 335.
200 *Id.* at 338, 340.

siderations into the selection process,"[201] apparently reflecting gubernatorial interests.

There was a greater tendency for graduates of local law schools to go on the bench than under the elective system. The Plan did not give preference to the "bluebloods" of the profession as some had feared it would.[202]

Significantly, the bar generally agreed that the Plan resulted in better judges.[203] There was considerably higher support for the Plan's use for appellate judges than for trial judges. This finding reflects the differing attitudes about qualifications and functions of appellate and trial judges. Attorneys justified their preference for electing trial judges on the grounds that they felt these judges were involved in matters which "should reflect the public's sentiments," whereas appellate judges need to be insulated from public pressures because they are more concerned with "pure law."[204]

When Missouri lawyers were surveyed, attorneys who disagreed about the value of the Plan tended to agree about other matters, such as which judges were competent, what qualities were needed in a judge, and even what orientations or biases particular judges tended to have. This suggested that the lawyers' differing preferences concerning the Plan were based on ideological reasons rather than on differing assessments of its consequences.[205]

The authors cautioned, as did Chief Justice Vanderbilt, that local conditions must be considered:

> [t]he nature of the total state environment in which the selection process is located affects how the process works and the types of interest it takes into account. Therefore, it is quite possible that the Nonpartisan Court Plan might lead to different results in different states, or even in the same state over different periods of time.[206]

As compared to an elective system, the politics operating through the Merit Plan in Missouri appeared complex. A broader range of interests was represented than those overtly operative under the elective system. The Plan was also said to have taken the politics of judicial selection out of the vortex of local forces and projected them onto the state level, within the orbit of the governor.[207]

From the foregoing observations what lessons can be inferred?

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201 *Id.* at 338.
202 *Id.* at 344.
203 *Id.* at 347.
204 *Id.* at 348.
205 *Id.* at 354.
206 *Id.* at 353 (footnote omitted).
207 *Id.* at 354.

Questions for New Jersey

The politics of judicial selection in New Jersey is already complex. Unlike the elective system prevailing earlier in Missouri, New Jersey's present system already operates on the gubernatorial level, but with a strong infusion of legislative politics; it includes informal participation by the organized bar, rather than representation through attorneys elected by the entire bar.

Of course, predictions must be only conjectural and dependent on the features of whatever Merit Plan may finally be adopted by New Jersey, as well as differences in the two states' environments. Nevertheless, the study raises the following questions:

(1) How can truly disinterested and sustained representation by the general public be obtained? If neither lay commissioners nor voters performed as hoped under the Missouri Plan, are there any changes which might improve that aspect of the Plan's operation? Requiring the lay segment of the Commission (or Commissions) to be responsible for public reporting on the Commission's activities (the criteria used in selection, the qualifications of nominees, the needs of the courts) might "spotlight" the lay commissioners, resulting in a broader sense of responsibility on their part. It might also help educate the public about the courts.

Since voter participation seemed more routine than meaningful in Missouri, it is unlikely that in so populous and urbanized a state as New Jersey the voter-retention feature could be vitalized, even through continuing public education. Because the introduction of any electoral features would seem to be an unwelcome departure from New Jersey traditions, some substitute should be employed. A separate commission on judicial discipline and removal, which included laymen, would be a more appropriate mechanism here than the voter-retention feature.[208]

(2) What should be the extent of judicial participation? Since judges' views carry particular weight with both laymen and attorneys, and in New Jersey the authority of the supreme court is already strong, judges might have a tendency to dominate the commissions. To counter this possibility, the judicial member might be advisory only, having no vote,[209] or he might be *ex officio* but have a vote.[210]

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208 New Jersey supreme court Justice Mark A. Sullivan endorsed the Merit Plan concept but criticized the voter-retention feature, pointing out that in California the distinguished Chief Justice Roger Traynor was almost defeated during a bitter gubernatorial campaign. He suggested reappointment upon recommendation of the Commission, followed by life tenure. Sullivan, *Appointment of Judges, The Key to a Qualified and Independent Judiciary*, 90 N.J.L.J. 81, 87 (1967).

209 *E.g.*, Nebraska. *See* NEB. CONST. art. 5, § 21(4).

210 *E.g.*, Alaska. *See* ALAS. CONST. art. 4, § 8.

Effective utilization of trial judges, however, is a must, because of the importance of those judges and the valuable insights they could bring to selection of others. Their inclusion would also enhance the prestige of the trial bench. The Missouri study's finding that there are considerable differences between the qualifications of candidates for the trial and the appellate levels suggests the need for separate commissions for the two levels. The fact that the commissions function independently should not preclude them from sharing information on candidates and coordinating their nominations, nor should it preclude the appellate commission from "tapping" trial judges for higher posts.[211]

(3) Bar participation may be the most vexing question. The transition from the two present Bar Committees (of which the Judicial Appointments Committee is by far the most active), representing only the organized Bar, to several commissions on which attorneys theoretically represent the entire bar may be difficult. Should there be annual bar conventions at which attorneys are elected? (That would be most like Missouri's system.) Should the chief justice appoint the attorney commissioners or should the Senate Judiciary Committee? If the governor appoints the laymen, he should not appoint the attorneys as well. Colorado's constitution provides that attorneys on the various nominating commissions be selected by majority action of the governor, the attorney general and the chief justice. In Wyoming's new constitution there is one state-wide nominating commission which nominates to the supreme and district courts; if trial court vacancies involve districts not represented on the commission, a layman and a lawyer from that district are appointed especially to sit with and advise the commission.[212]

A suggestion was made a few years ago in an editorial in the New Jersey Law Journal that the chief justice should be Chairman of the Commission with six other members, two appointed by him, two by the Governor, and two by the President of the Senate. "[T]he balance between lawyer and laymen representation should be placed within the discretion of the appointing authority."[213] The looseness of that last provision seems undesirable and likely to cause difficulty.

The American Judicature Society prepared a chart reflecting fea-

211 Political scientists are beginning to explore the differences between trial and appellate functions, asking whether different roles require different types of people. Sheldon, *Contrasting Judicial Roles: Trials vs. Appellate*, 11 THE JUDGES' JOURNAL 72, 73 (1972). For a New Jersey attorney's view that trial judges should not be selected solely on the basis of intellect, see a very interesting letter to the editor from A.J. Slursburg, 85 N.J.L.J. 472 (1962). He was objecting to a suggestion that examinations be given to judicial candidates. *Id.*

212 Letter from R. Stanley Lowe, Associate Director, American Judicature Society, to the author, April 18, 1973.

213 *The Judiciary*, 88 N.J.L.J. 248 (1965).

tures of five statewide, legally established Merit Plans which have been in use at least ten years and corresponding provisions in the Model Judicial Article.[214] The five states are Missouri, Alaska, Kansas, Iowa and Nebraska.[215] These demonstrate some of the options New Jersey might consider. The five plans and the Model Judicial Article are basically alike: each uses a three-step plan, each has more than one commission, differentiating between selections for appellate courts and lower courts, all commissions have both attorneys and lay members, and all but one (Kansas) also include one judge on each commission.[216]

All plans prescribe initial terms of office for judges, varying from twelve months to three years plus a period until the next general or judicial election, when it will be determined whether the appointee will complete his term or serve another term. Some plans, including the Model Judicial Article, prescribe a time limit on the Governor's appointment power, after which the chief justice will be empowered to appoint.[217]

Assembly Concurrent Resolution 75

New Jersey is counted as having an atypical voluntary Merit Plan, operating by agreement between the Bar Association and the Governor.[218] Recently, a concurrent resolution was introduced in the New Jersey General Assembly proposing a constitutional amendment to establish a two-step Merit Plan that omits the voter-retention feature.[219] This Plan is similar to other Merit Plans in most respects: judicial appointments are to be made by the Governor from a list of three nominees presented to him by a Judicial Nominating Commission; if he fails to appoint within 60 days from the day it is presented, the appointment would be made by the chief justice from the same list. There would be one Judicial Nominating Commission for the supreme court and the superior court, and one for each county to nominate judges for county courts or inferior courts with jurisdiction extending to more than one

214 *See* SELECTED READINGS, app. 4, *supra* note 40, at 188-91. In the AJS study now nearing completion, a chapter will be devoted to each of the following Plans: Alaska, Birmingham, Colorado, Kansas, and New York City (all legally established Plans except the last). See *supra* note 174.

215 SELECTED READINGS, app. 4, *supra* note 40, at 188-91.

216 *See id.*

217 *See id.* at 188-89 (30 to 60 days).

218 *See* Lowe, *Voluntary Merit Selection Plans*, 55 JUDICATURE 161, 165 (1971).

219 Assembly Concurrent Resolution No. 75, pre-filed for introduction in the 1974 session, by Assemblyman Thomas H. Kean, reproduced in App. D, pp. 811-13 *infra* [hereinafter cited as ACR 75]. The bill was introduced on Jan. 15, 1974 and referred to the Judiciary Committee.

municipality.[220] Each commission would submit three names for each vacancy that arose. Thus there would be a total of 22 commissions.

The Governor would appoint three lay members for each commission (66 people), those on the county commissions being residents of the particular county. Terms would be fixed by law and staggered. No commission member would be eligible for public office or office in any political party or organization during his term of office,[221] and no member would be eligible for appointment to any judicial office while serving on a commission or for four years thereafter. Each commission would be composed of seven members, one of whom would be a judge. On the commission for the higher courts, the judicial member would be the chief justice; on the county commissions, the judicial member would be a judge of the superior court appointed by the chief justice. The members of the Bar of the State would elect three of their members to serve on the commission for the higher courts, and members of the Bar residing in each county would elect three members for each county commission. It is not clear whether the words "members of the Bar" refer to the organized Bar or to an integrated bar, though some kind of bar election would have to be held.

The chief difference between this proposal and most other plans is that the former requires the advice and consent of the Senate for appointment of lay commissioners[222] and does not incorporate the voter-retention feature. Instead, it retains the present method of gubernatorial appointment after the first seven-year term. Under the proposal, the Governor shall have received "non-binding recommendations" from the appropriate commission indicating whether or not in its opinion reappointment is warranted.[223] The resolution's provision for Senate confirmation of lay commissioners is apparently intended as a substitute for the present power of the Senate to advise and consent to appointment of judges, a power to be eliminated under the proposed Plan, together with all its troublesome senatorial courtesy entanglements.

VII. Merit Plan Concept: Pro and Con

Overwhelming endorsement of merit selection is evidenced by support of the ABA "good-government" groups,[224] polls of lawyers,[225] study

220 Thus, municipal courts would not be covered under this proposed bill. *See id.*

221 There is no absolute prohibition on engaging in "politics." *See id.*

222 *Id.*

223 *Id.*

224 *E.g.*, The League of Women Voters.

commission reports,[226] voters' and legislators' approval in states where statutory or constitutional Plans have been recently adopted, comments by judicial personnel where such Plans have been operating,[227] and actions by mayors and governors who have instituted voluntary Plans. In addition, such demonstrations of support attest to the workability of the concept.

Arguments in favor of the Merit Plan concept may be summarized as follows:

(1) Promotion of public confidence in judicial selection by giving an opportunity for the consideration of non-political factors;
(2) Opportunity for the development of criteria based on merit;
(3) Institutionalization of a role in selection for those most qualified to choose: the legal profession; and
(4) Widening recruitment possibilities by involving more people in the selection process, representative of the public as well as the bar.

Since New Jersey is not an elective state, this study will not attempt to present the opposing philosophical arguments for electing judges.

Objections to the Merit Plan's adoption in an appointive context deal not with the positive ideals articulated in favor of adoption but, instead, dwell on the following potential practical problems:

(1) Diffusion of responsibility;
(2) Potential domination by staff;
(3) Absence of prescribed standards of choice for commissioners;
(4) Vulnerable commissioners; and
(5) Lack of proof of improved quality of judges.[228]

In California in 1968, constitutional and statutory changes embodying a Merit Plan were defeated, despite the support of Governor Ronald Reagan, important elements of the bar and the Director of the Administrative Office of the Courts.[229] A retired chief justice,

225 *See, e.g.*, Sheldon, *The Degree of Satisfaction With State Judicial Systems: Lawyers vs. Judges*, 54 JUDICATURE 331 (1971).

226 *See* REPORT OF THE WISCONSIN CITIZENS' STUDY COMMITTEE ON JUDICIAL ORGANIZATION 121-27 (1973). *But see* E. COSTIKYAN, BEHIND CLOSED DOORS: POLITICS IN THE PUBLIC INTEREST (1968).

227 *See, e.g.*, Kelley, *Selection and Tenure in Colorado*, 55 JUDICATURE 155 (1971).

228 *See* THE LAWYERS' CLUB OF SAN FRANCISCO, COMMITTEE REPORT ON THE PROPOSED REVISED MISSOURI PLAN FOR THE SELECTION OF JUDGES (1968) [hereinafter COMMITTEE REPORT].

229 Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 21-23 (1962).

among others, opposed the plan, and the objections were summarized in a report of a five-man committee of the Lawyers' Club of San Francisco, recommending rejection of it.[230] The reasons stated might well be applicable in New Jersey; the judiciary in both states is generally recognized to be of high quality, and in both states most judges arrive on the bench as a result of executive appointments. The report urged that the proposed plan would not take judges out of politics simply by restricting the power of the Governor to appoint.[231]

The California proposal envisioned several six-member commissions, each to be composed of two judges, two attorneys appointed by the state Bar, and two laymen appointed by the Governor. The opponents of the Plan thought the commissions would be isolated from responsibility, whereas the Governor would be directly responsible to the people. They thought the manner of operation of the commissions would be unpredictable and that they would be less prepared to withstand political pressures than the executive:

> Whereas now those who want political favoritism must seek to influence the governor—the strongest political officer in the state—under the proposed plan, such pressure would be concentrated on the relatively more vulnerable members of the commission.[232]

Another strong objection was that the Plan would place undesirable power in the hands of a bureaucratic staff. Because the commission members, all presumably busy people, would give part-time only to the unpaid task of selection, heavy reliance on the full-time administrative staff would result.[233]

The opponents also objected that the proposed Plan prescribed no standards for the commissions. They described the new proposal as too drastic a change, which would, if adopted, be "locked into" the constitution before being tested.[234] Therefore, they suggested that wider discussion and empirical studies of the existing system precede sweeping changes, especially since the proponents of the Plan had not borne the burden of proof that the new system would result in better judges than the old.[235]

These objections, however, can be countered. Diffusion of responsibility need not result if the Governor retains final authority to appoint

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230 *See* COMMITTEE REPORT, *supra* note 228.
231 *Id.* at 6.
232 *Id.* at 7.
233 *Id.* at 7-8.
234 *Id.* at 11-12.
235 *Id.* at 12.

by rejecting the commission's nominations and requesting additional names.[236] Whether staff domination could occur will depend on the attentiveness and the willingness to devote the requisite time on the part of nominating commission members, especially the chairman. Over-reliance on staff can of course result under the present system. The Governor's staff is expected to reflect loyalty to him and his views and to understand the philosophy of his administration. Therefore, it can be argued, the Governor is likely to delegate considerable responsibility to his staff.

Those who work for a nominating group, however, would be in a different situation. Such persons would concentrate on the task of judicial pre-selection and would be responsible for implementing decisions of the commission and articulating its views on qualifications. The risk of over-reliance on strong staff by part-time commission members should be minimal if its activities are the focus of continuing attention by others in the government, the legal profession, and the public at large. A commission, especially if required to report regularly and publicly, would be too much "in the news" for the staff to become dominant. The commission's and its staff's functioning would surely be more open to scrutiny than the present system in which a political figure, the Governor, bargains behind the scenes, perhaps through his staff, with other political figures in the Senate. The "high visibility" of an independent nominating group, with a staff specializing in one task, would negate the possibility of staff domination.[237]

The lack of prescribed criteria exists under the present system; that lack can be remedied. Criteria can be stated and publicized, and group discussion should provide greater opportunity for clarification than now exists. Commissioners should be less vulnerable to political pressures than an elected official who must trade favors for support of his legislative program. Lay membership on a commission could be specified by categories (such as business, minorities, public interest groups, etc.) to ensure that a diversity of views is represented and domination by one interest or party avoided, although the need for such a provision should be weighed against the danger of rigidity, perhaps discouraging choice of the best people. Lack of proof of improved judicial quality may be countered by further experimentation with voluntary selection methods, which can provide more reliable data than is now available.

In New Jersey there are a number of special circumstances which

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236 *See* TENN. CODE ANN. § 17-712 (Supp. 1973).

237 *Cf.* ACR 75, *supra* note 219.

make a persuasive case for commission nomination. There is a need for the countervailing influence of a commission to strengthen the Governor's position in coping with senatorial courtesy and to minimize delays. It is improbable that senatorial courtesy will be permanently modified by changes in Senate rules or in a constitutional amendment in the near future. There exists a visible discontent with the calibre of many judges which is reflected in conversations with attorneys and in press editorials. The Bar's voluntary plan has demonstrated its readiness to provide responsible participants, some of whom are already experienced in the task of evaluation.

The legislature's record is not an encouraging one. As the analysts of the Missouri Plan pointed out, adoption of the Merit Plan concept results in the redistribution of political power among various interest groups, not an elimination of all politics.[238] However, the effect of adopting the concept in New Jersey should be to wrest some control from party forces. Despite the tradition of bipartisan appointments,[239] there can be little doubt that because of senatorial courtesy local partisan politics now unduly influence many appointments. Modification of such influences is essential in order to assure more attention to legitimate considerations.

Partisan forces rightfully elect legislators and governors. However, when these elected officials can and do become deadlocked over judicial appointments, can there be any doubt that participation by nonpartisan elements is in the public interest? The shortage of judicial manpower in Passaic County was at one time so great that the trial of civil suits was suspended for over nine months.[240] The potential for a similar situation still exists.[241]

Few citizens are informed about these matters nor are they likely

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238 *See* R. WATSON & R. DOWNING, *supra* note 182, at 339.

239 *See* note 98 *supra*.

240 Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161, 260 A.2d 261 (Ch. 1969), *appeal dismissed*, No. A-811-69 (App. Div., June 29, 1970), *aff'd*, M-50 (Sup. Ct., Oct. 7, 1970), *cert. denied*, 401 U.S. 1003 (1971). The lower court stated:

> Near the end of June 1969 the assignment judge of Passaic County, the Honorable John F. Crane, announced the suspension of the trial of civil cases in the Law Divisions of the Superior and County Courts due to the shortage of judges. The suspension became effective with the commencement of the September 1969 term of court and continues to date.

108 N.J. Super. at 165, 260 A.2d at 263.

241 The intricacies of the Senate's workings are beyond the scope of this article. For instance, it is not only senatorial courtesy, but also a custom known as the "long resolution" which defeats executive appointments. Briefly, that resolution is a device for keeping the Senate in continuous session so that the Governor cannot use the alternative power given him under N.J. CONST. art. 5, § 1, ¶ 1 to make ad interim appointments.

to be. The failure to make public how Senators voted on the recent retention of senatorial courtesy is just the latest example of "behind-closed-doors" legislative behavior. The greatest single reason in favor of a judicial nominating commission may be the opportunity it would present to spotlight judicial selection, to educate the public about the courts and to bring the power of the press into play on the side of merit criteria. Some suggestions as to how this can be done are made in the following section.

VIII. Recommended: Experimentation with Voluntary Nominating Group and Study Aimed at Constitutional Revision

New Jersey has been evolving toward a Merit Plan without the voter-retention feature; that trend should proceed, following a two-stage program:

(1) Issuance of an executive order by the Governor to establish an expanded "voluntary plan" to facilitate intensified recruiting efforts and to test the workability and efficacy of a nominating group in overcoming present problems.

(2) Announcement of the goal of constitutional revision to adopt a Merit Plan here, based on the experience accumulated under the revised voluntary plan, and on further study of the New Jersey environment and established Plans elsewhere. This two-step proposal will be discussed in reverse, the long-range goal first.

Proposing that the Governor issue an executive order defining a new Merit Plan is, in effect, a choice not to pursue a radical change in the locus of the appointing power. By way of contrast, former Chief Justice Weintraub of the New Jersey supreme court has stated that ideally the appointing authority should be the chief justice.[242] One author has suggested that appointment by a governor, even after commission nomination, "discount[s] the wisdom of the doctrine of separation of powers," since the governor may be influenced by political considerations and does not have the "direct responsibility" of administering justice.[243]

It may be unrealistic to think that the executive's power to appoint judges could be shifted to a chief justice without a basic re-

242 Chief Justice Weintraub's speech at an AJS sponsored citizen's conference in Cherry Hill, N.J., is reported in 94 N.J.L.J. 349 (1971). He called for an end to senatorial confirmation and for concentration of responsibility. *Id.*

243 Nelson, *supra* note 25, at 53.

orientation in political thinking. Such a shift may seem undesirable in New Jersey where the supreme court already is thought to have great authority.[244] Logically, such a change would require an accompanying shift to life-tenure and would tend to mingle the disciplinary and selection functions, since the New Jersey supreme court has assumed the disciplinary function.[245] Whether the latter is desirable in the long run requires study of the existing disciplinary system. For the present, it seems sensible to keep selection and discipline separated, although when a program for constitutional revision is adopted, linking selection with discipline may have more popular appeal than the issue of selection only.

We should proceed at once to examine in detail selected Merit Plans used elsewhere, concentrating on those preceded by voluntary Plans,[246] especially those having true nominating commissions. Plans with legislative features should receive special attention, such as Montana, which, incidentally, affords extensive reference materials, the fruit of a recent study preceding its constitutional convention.[247] Techniques in campaigns where the Merit Plan idea failed, such as Illinois,[248] should be contrasted with those in states where it has succeeded, e.g., Colorado.[249]

In planning the number and composition of nominating commissions and assessing the present recruitment picture, it would be helpful to know more about the New Jersey judiciary.[250] How were the present

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244 In the famous case, Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), the New Jersey supreme court asserted the independence and strength of its rulemaking power under the 1947 constitution.

245 The New Jersey supreme court's assumption of judicial discipline under the rulemaking power is described in Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1124 (1966). The legislature's belated implementation of the constitutional authority given to the court to remove judges is covered in W. BRAITHWAITE, WHO JUDGES THE JUDGES? (1971).

246 Colorado, Idaho, Iowa, Florida, Tennessee, Montana. *See* VOLUNTARY MERIT SELECTION PLANS (AJS Rep. No. 36, 1972). Tennessee has recently revised its statutory plan to exclude its supreme court, the first state to "back off" from merit selection. Information supplied by James J. Alfini, Assistant Director of Research, American Judicature Society.

247 *E.g.*, Montana Constitutional Convention Commission, Research Memo No. 3, *A Collection of Recent Constitutional Revision Activities in the Fifty States—1967-70.*

248 *See* R. COHN, TO JUDGE WITH JUSTICE: HISTORY AND POLITICS OF ILLINOIS JUDICIAL REFORM 144-57 (1973). Illinois obtained voter-retention only.

249 *See* Heinicke, *The Colorado Amendment Story*, 51 JUDICATURE 17 (1967).

250 One way to place judges' backgrounds in the New Jersey context would be to compare their characteristics with those of the members of the state bar in general. A possible model is reflected in a short article on Utah and Nevada. Sheldon, *Judicial Recruitment: What Ought To Be and What Is*, 51 JUDICATURE 386 (1968).

judges selected? What are their attitudes towards various selection systems? And what are their backgrounds? Because of current interest in the role of judges and courts, and because a scholar has already included New Jersey's supreme court in a major study,[251] it should be possible to interest a university or foundation in a follow-up study to complete a "Profile of the New Jersey Bench." This state has a combination of interesting features, most of which should be advantageous for such a study: small size, unified court structure with court administrators, on-going attempts to modernize, and variety of socio-economic environments. Urbanized, industrialized, densely populated areas contrast with sparsely populated rural areas, while ethnic diversity contributes still another dimension.

"In selecting judges on merit . . . a first step is to develop meaningful descriptions, court by court, of the nature of the judges' duties."[252] Performance standards could be devised which would be useful in identifying judicial potential "through the slow, hard process of audit and observation of the work of many judges."[253] While such a study is in progress, recruiting should be intensified by the Governor through the establishment of a Selection Commission.

> In time there will emerge from these efforts—at least for some courts and some judicial roles—sets of professional qualifications that will make the idea of merit selection an attainable reality.[254]

While this article was in the final stages of preparation, the Judicial Selection Committee of the New Jersey State Bar Association recommended to the outgoing Governor a revised voluntary Merit Plan.

The Report of the Judicial Selection Committee: A Proposal for the Merit Selection of Judges[255]

The frankly admitted purpose of this plan would be to curb senatorial courtesy. According to the Report of the Judicial Selection Committee, the expectation of the 1969 working agreement between the New Jersey Governor and the New Jersey State Bar Association has not been achieved: the agreement, in the Committee's judgment, did not operate to "avoid invidious political pressures upon the Governor and members of the Senate" and "provide a reservoir of qualified and available potential candidates for appointment to the Bench of this State."[256]

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251 *See* H. GLICK, *supra* note 17.

252 Rosenberg, *Improving Selection of Judges on Merit*, 56 JUDICATURE 240, 242 (1973).

253 *Id.* at 242-43.

254 *Id.* at 243.

255 NEW JERSEY STATE BAR ASSOCIATION, REPORT OF JUDICIAL SELECTION COMMITTEE TO THE TRUSTEES OF THE NEW JERSEY BAR ASSOCIATION: A PROPOSAL FOR THE MERIT SELECTION OF JUDGES (August, 1973).

256 REPORT, *supra* note 255, at 3.

The report describes five standards of a good selection system:[257]

1. It should systematically and aggressively seek the best potential judicial talent.
2. It should identify and reject aspirants who are not qualified for the bench.
3. It should operate with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office.
4. It should provide tenure of such a nature as to encourage each judge to do the best job of judging of which he is capable and to encourage good lawyers to give up their practices for the bench.
5. It should deserve and receive public respect and trust.[258]

The Report also enumerates five subjective qualifications which, together with health, are considered essential,[259] any one of which may be a disqualifying factor if not possessed by the candidate. "If there is credible evidence that the candidate lacks any of them, that should be a basis for veto."[260] The five qualifications are character, decisiveness, reputation for fairness and uprightness, patience, and consideration for others. Seven additional "objective" criteria which the Selection Committee would consider are legal experience, trial experience, activity in civic and community affairs (including political activity), activity in professional associations, professional training, reputation for professional ability and professional attainments. None of these criteria are new, but the emphasis given to some is new: subjective qualities and health are given priorities.

The Selection Committee suggested that the voluntary plan operate as follows: upon notification that existing or anticipated vacancies exist, the Commission will provide the Governor a list of not less than three candidates for each office; he will select from this list or notify the Commission that none is acceptable, in which event the Commission will promptly furnish a second list of at least three names. The names proposed would not be made public, but the Commission would have the right to publish the fact that a nomination by the Governor was not taken from the Commission's list. The screening function of all nominees, from whatever source, would be continued by the Judicial and County Prosecutor Appointments Committee.[261] The Plan rejected the proposal in ACR 75 (which would require a constitutional amend-

257 These standards were formulated by Judge Lawrence M. Hyde, Dean of the National College of State Trial Judges. *Id.* at 2-3.

258 *Id.* at 3.

259 *Id.* at 6.

260 *Id.*

261 *Id.*

ment) that if a nomination were not confirmed in 60 days the appointing power would shift to the chief justice.[262]

The Governor was asked to commit himself to a policy of selecting from the lists presented by the Judicial Nominating Commission and to join with the Bar to

> make known their opposition to the perpetuation of the system of 'senatorial courtesy', and their support of a Senate Rule requiring action on nominations by the body of the Senate within sixty days.[263]

Outgoing Governor William T. Cahill announced his support of the report, except that portion dealing with senatorial courtesy.[264] Governor Byrne, however, has chosen to rely upon a former judge as his aide to the Governor's counsel for judicial appointments.[265] The cooperation between the Governor and the New Jersey State Bar Association should continue, and the bar leadership should persist in their efforts to bring the judiciary and laymen into the selection process while attempting to give a new thrust to recruitment. However, to be truly representative, the attorney segment must not be dominated solely by the New Jersey State Bar Association.

Therefore, it is suggested that the Governor design an executive order using the basic idea set forth in the Selection Committee's Report while at the same time providing a means whereby the entire bar will consider itself represented in the lawyer component. Perhaps public hearings could be held at which applications or nominations of attorneys could be received. It would be unfortunate if the organized Bar's screening system were lost. There is no reason it should not continue under the new system, at least until a legal plan is established.

The Governor, in issuing such an executive order, might reaffirm the duties of the New Jersey State Bar Association's Judicial Appointments Committee and create a new Selection Commission, asserting his reliance on the latter for recruiting. The constitutionality of such an order should not present a problem. If the Governor retains the authority to disregard nominations, he has not delegated power but has merely made a firm commitment to rely on an advisory group, as has been done elsewhere.

Twelve jurisdictions now use voluntary plans,[266] some screening

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262 *See* ACR 75, *supra* note 219.

263 REPORT, *supra* note 255, at 9.

264 *Governor Supports State Bar Judicial Selection Plan*, 96 N.J.L.J. 1237, 1237 (1973).

265 The Hon. Alexander P. Waugh.

266 In June 1972, AJS reported that sixteen jurisdictions had had Voluntary Plans at

some nominating. The experience under the nominating plans suggests the Governor's order should spell out, as precisely as possible, the manner in which the nominating group should operate. For instance,

> 1. If multiple vacancies occur simultaneously, must the Committee submit five names for each vacancy? Must the [Governor] pick one of the five names from group A, one from group B, etc., Chinese-menu style? Or is he free to pick any three of the 15?
> 2. Or should the Committee not submit 15, but only seven—five for slot A, plus one each for slots B and C?
> 3. Next, take the single appointment. After it is made, there are four bridesmaids left unpicked from the slate of five. May these four be stockpiled by the [Governor], or do they go back to the starting line?
> 4. Finally, should the names the [Governor] sends to the Committee enjoy special presumption of merit?[267]

The criteria for selection should be particularized in the Governor's order. Those stated in the Judicial Selection Committee's Report are excellent, but should some recognition be given by the nominating group (not the screening group) to "ethnic, political and community factors" so that a "particular slate is not composed of persons of the same race, religion or political tenets?"[268] Here, New Jersey's bipartisan tradition would come into play, and the desirability of recruiting minorities might be recognized.

A good selection system should exhibit clear responsibility and as much visibility as is consistent with the candidate's right to privacy. Visibility presents some practical problems. Confidentiality at the prenomination stage is assumed. However, once a nominating commission receives a name, it is difficult to obtain information on his qualifications without word leaking out. If negative information about him is developed, does he have a right of confrontation? Public hearings, such as

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some time during the last decade, nine of which still used them: California, Delaware, Florida, Maryland, New Jersey, New Mexico, New York City, Oklahoma and Puerto Rico. VOLUNTARY MERIT SELECTION PLANS (AJS Rep. No. 36, 1972). Ohio also adopted a Voluntary Plan in June 1972. Colorado, Idaho and Iowa, which previously had Voluntary Plans, obtained constitutional amendments to establish full Merit Plans, and, since publication of the AJS Report, so did Montana. Florida's and Tennessee's Voluntary Plans were also converted to legally established plans. An attempt to gain a full Plan failed in Pennsylvania, although "merit retention" was obtained. Letter from R. Stanley Lowe, Associate Director, American Judicature Society, to the author, April 18, 1973. Several plans have been established by Executive Order: those in Ohio, Maryland, Pennsylvania and Georgia. AJS' 1972-73 classifications will be affected by the narrower definition of "Merit Plan" in its new study, *supra* note 174. *See* App. A, p. 797, *infra*.

267 Rosenberg, *supra* note 252, at 243.

268 *Id.* at 242.

are required by the Tennessee statute,[269] while useful as an attempt to involve the public, are not an answer to the confidentiality/confrontation problems. Ultimately, the success of the scheme will depend on the calibre of the people participating.

The stature attained by the Judicial and County Prosecutor Appointments Committee must not be undermined, even though the need for it should diminish if the Commission is a success. Screening should continue. Ways to enhance the prestige of that Committee and of a new Commission should be explored. For instance, the Chief Justice or another justice might meet separately with each committee to exchange views at their first meetings under the new Plan.

CONCLUSION

New Jersey should take the lead in a positive effort to develop a clearly identified pool of well-qualified judicial candidates. Alteration of selection mechanisms does not of itself generate good manpower or womanpower. Our society needs to develop ways to train people for public life. The judiciary would seem to be a natural segment with unique functions on which the legal profession could concentrate in developing specialized education as a recruitment tool.

A foundation should be approached to sponsor a series of short summer seminars for potential judicial candidates. The Chief Justice might be asked to invite outstanding attorneys, thus lending prestige to participants. No obligation to become a candidate for a judgeship would be required, but it should be considered a source of prestige for a law firm if one or two attorneys had completed such a course. Elevating the "image" of the trial judge would be one of the objectives of the curriculum. A by-product would be the creative thinking which would result from regularly bringing together discussion-sized groups of attorneys with judges as members of the faculty. The hope would be to increase the supply of well-qualified "availables."

At such a summer institute tests for judicial potential could be slowly developed. Eventually, a judicial aptitude test could become one tool, like the LSAT, among other criteria in identifying judicial candidates. It would be expected such a test would encompass not only in-

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269 TENN. CODE ANN. § 17-709 (Supp. 1973). *See generally* Runkle, *The Judicial Nominating Commission*, 54 JUDICATURE 114 (1970). This excellent article should be consulted about operating rules and policies for a voluntary commission. For a governor's viewpoint of a voluntary plan, see Reagan, *Judicial Selection in California*, in SELECTED READINGS, *supra* note 40, at 148.

tellectual abilities but personality evaluations as well. The course might involve not only written examinations but situational performances.

With a new Governor who is a former judge and a new Chief Justice who is a former Governor, there may now be an opportunity for a joint statement declaring the uniqueness of the judiciary's role and the importance of recruiting the best qualified attorneys. Changing the selection mechanism is, of course, only a political answer to the question of how we obtain better judges. The practical answer may need an educational dimension as well.

At the time of the last constitutional revision, Justice Vanderbilt said:

> [I]n New Jersey judicial reform came as a popular revolution, won against the opposition of the bench and without the organized support of the bar.[270]

The citizenry, the bench, and the bar must cooperate to reform the system for the selection of judges upon whom we depend in seeking justice.

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270 A. VANDERBILT, THE CHALLENGE OF LAW REFORM 9 (1955).

APPENDIX A

MERIT SELECTION AND TENURE SUMMARY CHART

I. States Having Legally Established Merit Plans for All or Parts of Court Systems.

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
1. *California* 1934 Const. art. 6 secs. 7, 16	All appellate courts (Supreme and Court of Appeal). By local option counties may (but as yet have not) extend(ed) plan to trial courts (Superior Courts). ***By executive order of the governor Judicial Selection Advisory Boards are employed for trial courts.**	No	Yes	Yes	Appointments to appellate courts are confirmed by a Commission on Judicial Appointments consisting of the chief justice, the attorney general and a presiding justice of a court of appeals of the affected district.
2. *Missouri* 1940 Const. art. 5 sec. 29	All appellate courts (Supreme and Courts of Appeal), courts of city of St. Louis and Jackson County (Circuit Courts), Probate Court of city of St. Louis and Jackson County Criminal Correction Court of St. Louis	Yes	Yes	Yes	None
Missouri Kansas City 1966 Charter Art. IV Secs. 35.600 to 35.890	Municipal Court of Kansas City	Yes	Yes	Yes	Appointment is by city council rather than by chief executive, the mayor.

* Voluntary practices are starred and boldface. If plan is entirely voluntary, it is in Part II.

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
Missouri St. Louis County 1970	Circuit Court Probate Court	Yes	Yes	Yes	None
Merit retention passed by referendum on August 4, 1970.					
Missouri Platte and Clay Counties 1972	Courts of Record of Judicial Circuits	Yes	Yes	Yes	None
3. *Alabama* 1950 Const. Amend. 83 and 110 (1955)	Only trial court of general jurisdiction in Birmingham (Circuit Courts of Jefferson County and Madison County)	Yes	Yes	No	For continued tenure after first term, judge must run in partisan election.
4. *Alaska* 1956 Const. art. 4, secs. 5-9 Stat. 22.05.80, 22.05.100; 22.10.100, 22.10.120; 15.35.030, 15.35.060	All Appellate Courts (Supreme Court) and trial courts of general jurisdiction (Superior Courts)	Yes	Yes	Yes	None

APPENDIX A *(Continued)*

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
Alaska 1966 Stat. 22.15.170; 15.35.100 Effective Jan. 1, 1968	District Court	Yes	Yes	Yes	None
5. *Georgia* 1956	***Governor Jimmy Carter in late 1971 issued executive order adopting merit plan for appellate court judicial vacancies; in practice, plan has been used to fill trial court vacancies also.**				Vacancy filled by mayor from a list submitted by a nominating commission with retention on non-partisan ballot. Vacancy filled by mayor from a list submitted by a nominating commission with retention on non-partisan ballot.
Atlanta Charter 5.1.1 to 5.1.22 1965	Municipal Court	Yes	Yes	Yes	
Atlanta Charter 5.2.1 to 5.2.7	Atlanta Traffic Court	Yes	Yes	Yes	
6. *Kansas* 1958 Const. art. 3, secs. 2, 5	Supreme Court	Yes	Yes	Yes	None
Kansas 1972 Const. art. 3, sec. 6	Under the new Judicial Article ratified Nov. 7, 1972, the plan may be extended to District Courts on a local option basis.				
7. *Iowa* 1962 Const. art. 5, secs. 15-17	Supreme Court and District Court	Yes	Yes	Yes	None

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
Iowa 1973 S.F. 428 64th Gen. Ass. 2d session Sec. 12-28	Magistrates (under new Unified Trial Court)	No	Yes	No	Six-man County Commissions (1 district judge, 3 appointees of boards of supervisors, 2 attorneys elected by bar) appoint magistrates for specified terms, with no obligation to reappoint. Electors may petition district judges to remove magistrate.
8. *Nebraska* 1962 Const. art. 5, sec. 21	Appellate Court (Supreme Court) and trial courts of general jurisdiction (District Courts)	Yes	Yes	Yes	None
Nebraska 1967 Rev. Stats. Secs. 48-152 to 48-155; 24-801 to 24-812; 26-102; 43-203.01 to 43-230.05, 43-228	Workmen's Compensation Court and Municipal Courts of Omaha and Lincoln Juvenile Courts of Omaha and Lincoln	Yes	Yes	Yes	None
9. *Illinois* 1962 Const. art. 6, sec. 12	Appellate Courts (Supreme and Appellate Courts) and trial courts of general jurisdiction (Circuit Courts)	No	Yes	Yes	Initial selection by partisan elections. Subsequently judges run on non-competitive, non-political, judicial ballots to retain office. Judicial article permits change in methods of initial selection by legislative action ratified by state electors.

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
10. *Florida* 1971 Dade County (Miami) 1963 Home Rule Charter, Sec. 6.01	Supreme Court, District Court of Appeal and Circuit Courts	Yes	Yes	No	Nominating commissions set up *originally by executive order** of Governor Askew.
Florida 1972 Const. art. 5, sec. 11 (effective, 1973)	Supreme Court, District Courts of Appeal and Circuit Courts (Dade County Plan now applied statewide)	Yes	Yes	No	Procedures apply to appointments to fill vacancies between elections.
11. *Colorado* City and County of Denver 1964 Home Rule, Chapter A.13.8 to A.13.8-3	County Court	Yes	Yes	No	Appointments made by mayor instead of governor. Initial selection procedures are repeated at conclusion of term of office and mayor not obligated to reappoint incumbents.
Colorado 1966 Const. art. 6, secs. 20(1), 24, 25, 26 (effective, 1967)	All courts of record	Yes	Yes	Yes	None
12. *Louisiana* 1964 Const. art. 7, sec. 94-II-C	Traffic Court of New Orleans	Yes	Yes	No	Vacancy filled by mayor from a list submitted by a nominating commission.

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
13. *Utah* 1965 Utah Code Ann. Sec. 55-10-70	Statewide Juvenile Courts	Yes	Yes	No	Initial selection procedures are repeated at conclusion of term of office and governor not obligated to reappoint incumbent.
Utah 1967 Utah Code Ann. Secs. 20-1-7.1 to 20-1-7.9	Supreme and District Courts	Yes	Yes	Yes	When a judge's term has expired, he must stand for election which is not competitive if no one files against him. However, if someone files against an incumbent they run on a non-partisan judicial ballot for the office.
14. *Vermont* 1966 Vt. Stat. Ann. Tit. 4, Secs. 4, 601-04	Supreme, Superior and District Courts	Yes	Yes	Yes	Nominees must have approval of the Supreme Court. Legislature appoints judges when it is in session and the governor does so during adjournments. Retention is by vote of the legislature on merit retention ballot.
15. *Oklahoma* 1967 Const. art. 7-13, secs. 1-5	Supreme Court and Court of Criminal Appeals	Yes	Yes	Yes	None

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
Oklahoma 1968 Stats. Ann. Tit. 51, Sec. 10	District and Intermediate Appellate Courts	Yes	Yes	No	***Use of nominating commission voluntary on the governor's part.**
16. *Pennsylvania* 1968 Const. art. 5, secs. 13, 15	All Appellate and general trial courts	No	No	Yes	Initial selection by partisan election. Subsequently judges seek retention on a non-partisan, non-competitive ballot.
17. *Idaho* 1967 Code Tit. 1, Chap. 21, § 1-2101-02	Supreme and District Courts	Yes	Yes	No	Seven-member Judicial Council with other duties nominates to the governor to fill vacancies.
Idaho 1971 Code Tit. I, Chap. 22, § 1-2203-06	Magistrate Division of District Court	No	Yes	No	District commissions appoint.
18. *Indiana* 1970 Const. art. 7, secs. 9, 10, 11	Supreme Court and Court of Appeals	Yes	Yes	Yes	None
Indiana	Superior Courts of Allen (Ft. Wayne), Lake, and Vanderburg Counties, and Marion County Municipal Courts	Yes	Yes	Yes	None

APPENDIX A (*Continued*)

State Year Adopted Citation	Offices Encompassed	Commission Nomination	Appointment	Merit Retention	Variation from Basic Plan
19. *Tennessee* 1971 Tenn. Code Ann. Tit. 17, Ch. 7, Sec. 17-701-716	Supreme Court (repealed-1974) Court of Appeals Court of Criminal Appeals	Yes	Yes	Yes	None
20. *Montana* 1972 Const. art. 7, sec. 8 Rev. Codes Tit. 93-705 *et seq.*	Supreme Court and District Courts	Yes	Yes	Yes	Applies to vacancies between elections; confirmation by Senate required.
21. *Wyoming* 1972 Const. art. 5, sec. 4 Stat. Tit. 5, Sec. 5-1.1	Supreme Court and District Courts	Yes	Yes	Yes	Voter retention is subject to prior approval by nominating commission.

II. States Having Voluntary Merit Plans for All or Parts of Court Systems.

1. *New Mexico* 1951	Committee on Judiciary of State Bar, a unified bar, nominates candidates for vacancies on appellate courts and trial courts of general jurisdiction, who thereafter run as partisan candidates for election.
2. *New York City* 1962	Mayor's Committee on the Judiciary nominates for vacancies on the city's criminal and family courts. Composition of Committee has varied during different administrations.
3. *Puerto Rico* 1965	Advisory Committee for Selection of Judges (10 members presided over by non-voting Secretary of Justice) nominates to Governor, who appoints with advice and consent of Senate.
4. *California* 1967	Dual plan: County Judicial Selection Advisory Boards set up by Governor evaluate qualifications of Governor's proposed appointees to fill trial court vacancies; Board of Governors of State Bar also screens.
5. *Oklahoma* 1967	Governor uses constitutionally established appellate court nominating commission to fill trial court vacancies as well.
6. *New Jersey* 1969	Two State Bar Committees advise Governor on all appointments above municipal level: Selection Committee recruits; Appointments Committee screens.
7. *Delaware* 1970	Nominating Committee of 3 lawyers and 3 laymen appointed by Governor is used in selection and reappointment of justices of peace (laymen); tests used.
8. *Maryland* 1970	Appellate nominating commission and 8 trial court commissions, established by executive order, with 50/50 lay-lawyer representation, the latter elected by bar members, plus chairmen appointed by governor.
9. *Michigan* 1970	Bar screening.
10. *Georgia* 1971	Appellate screening commission established by executive order with 50/50 lay-lawyer representation; latter are executive committee of state bar; may add names; nominate 5 best qualified.
11. *Ohio* 1972	Twelve nominating councils, one for the supreme court, and eleven for appellate districts including trialcourts; established by executive order.
12. *Pennsylvania* 1973	Appellate nominating commissions for supreme, superior, and commonwealth courts; established by executive order.

Part I of this chart is adapted from JUDICIAL SELECTION AND TENURE (AJS Rev. Rep. No. 7, 1971) and AJS Memorandum (Jan. 2, 1973).

Part II of this chart is adapted from VOLUNTARY MERIT SELECTION PLANS (AJS Rep. No. 36, 1972).

The American Judicature Society will soon publish a new study entitled *The Key to Judicial Merit Selection: The Judicial Nominating Commission*, authored by Allan Ashman and James J. Alfini. This study will present a narrower definition of a Merit Plan and will contain a new chart reflecting both established and voluntary plans, and omitting California, Illinois, New Mexico, New Jersey, Michigan, and Louisana, and adding the District of Columbia, which has adopted a merit plan in its recent home-rule charter. This new book-length study will focus on the composition and operation of the judicial nominating commission, and will qualify the popular definition of the Merit Plan as follows:

> To speak of *the* merit plan for judicial selection over-simplifies and often misleads. A large number of states and cities have adopted a variety of "merit" judicial selection methods. An inclusive definition of the plan that includes all of these jurisdictions necessarily becomes analytically imprecise. A framework is needed in order to distinguish and compare the various plans. Indeed, several frameworks could be utilized to classify the plan. Often classification schemes hinge upon whether a particular plan:
>
> —applies to all courts, or only appellate courts or trial courts;
>
> —is statewide or local;
>
> —is based upon the constitution, statute, or executive order, the voluntary compliance of the executive.
>
> While these classifications bring a semblance of order to the assortment of plans, they still do not provide an adequate framework for the purposes of this study. Given the primary concern of this study with the structure, procedures and duties of the judicial nominating commissions, the nonpartisan merit selection plan is defined for our purposes as a judicial selection system characterized by:
>
> A PERMANENT NONPARTISAN COMMISSION OF LAWYERS AND NON-LAWYERS THAT INITIALLY AND INDEPENDENTLY GENERATES, SCREENS AND SUBMITS A LIST OF JUDICIAL NOMINEES TO AN APPOINTIVE BODY OR OFFICIAL WHO IS LEGALLY OR VOLUNTARILY BOUND TO MAKE A FINAL SELECTION FROM THE LIST.

A. Ashman & J. Alfini, THE KEY TO JUDICIAL MERIT SELECTION: THE JUDICIAL NOMINATING COMMISSION 14 (1974) (draft copy).

APPENDIX B

TO: MEMBERS OF THE JUDICIAL AND COUNTY PROSECUTOR APPOINTMENT COMMITTEE OF THE NEW JERSEY STATE BAR ASSOCIATION AND MEMBERS OF THE JUDICIAL APPOINTMENT COMMITTEES OF THE COUNTY BAR ASSOCIATIONS

In order to effectuate uniformity in investigating and reporting on proposed judicial appointees, as well as prospective judicial reappointments and promotions, the attached format based upon the Canons of Judicial Ethics is appropriate.

Where there is a divergence of opinion resulting from investigation, subtotals of the opinions are appropriate.

In no case are the sources of the information to be recorded or revealed.

Comment is encouraged wherever appropriate.

Copies of the attached may be supplied to the sources of information for their use.

QUESTIONS*

1. RELATIONS OF THE JUDICIARY

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of the law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

(a) What is the Nominee's reputation for personal conduct in his association with officials of his community, his neighbors, his clients, fellow practitioners and the courts?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

2. THE PUBLIC INTEREST

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

(a) What is the Nominee's reputation for care, skill and promptness in his practice of the law?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

3. CONSTITUTIONAL OBLIGATIONS

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

(a) Has the Nominee exhibited any unwillingness to support either the Federal or State Constitution?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

4. AVOIDANCE OF IMPROPRIETY

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

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* Modify questions 1(a) through 31(a) appropriately where the Nominee is being considered for reappointment or promotion.

(a) What is the Nominee's general reputation for propriety? (b) What is the Nominee's general reputation for personal behavior?

Answer

(a)

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

(b)

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

5. ESSENTIAL CONDUCT

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

(a) What is the Nominee's reputation for even-temperedness, patience and impartiality?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

6. INDUSTRY

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

(a) What is the Nominee's reputation for hard work?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

7. PROMPTNESS

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

(a) What is the Nominee's reputation for prompt performance for his practice of the law?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

8. COURT ORGANIZATION

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as mem-

bers of a single judicial system, to promote the more satisfactory administration of justice.

(a) What is the Nominee's reputation as an administrator?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

9. CONSIDERATION FOR JURORS AND OTHERS

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

(a) What is the Nominee's reputation for consideration of others?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

10. COURTESY AND CIVILITY

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

(a) What is the Nominee's reputation for courtesy?

Answer

( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

11. UNPROFESSIONAL CONDUCT OF ATTORNEYS AND COUNSEL

A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention, and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

(a) Does the Nominee have the willingness and ability to recognize and correct unprofessional conduct?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

12. APPOINTEES OF THE JUDICIARY AND THEIR COMPENSATION

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most

scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

(a) If the Nominee is appointed, will he be influenced by nepotism, by personal or by partisan influence in making appointments of trustees, receivers, guardians, etc.

(b) Does the Nominee have sufficient knowledge and background to fix fair and reasonable compensation for services rendered by his appointees?

Answer

(a)
( ) personal knowledge—Yes No Unknown
( ) by investigation
(b)
( ) personal knowledge—Yes No Unknown
( ) by investigation

13. KINSHIP OR INFLUENCE

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

(a) Does the Nominee have any close relatives or former associates engaged in the practice of law in the area in which the appointment is to be made?

(b) If so, what is your opinion of his ability to avoid improper influence?

Answer

(a)
( ) personal knowledge—Yes No Unknown
( ) by investigation
(b)
( ) personal knowledge—Excellent Good Fair Poor
( ) by investigation

14. INDEPENDENCE

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

(a) Does the Nominee have the intestinal fortitude to do what he thinks is right under the law despite public clamor, the prospect of personal unpopularity, notoriety or unjust criticism?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

15. INTERFERENCE IN CONDUCT OF TRIAL

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto. Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

(a) Does the Nominee have the general reputation in his practice of law which would lead to the conclusion that, if appointed a judge, he would only interfere in the trial of a case when necessary?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

16. EX PARTE APPLICATIONS

A judge should discourage ex parte hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such ex parte applications only where the necessity for quick action is clearly shown; if this be demonstrated then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be retained even though only temporarily.

(a) Does the Nominee have sufficient experience and background to make detailed inquiry as to the facts surrounding an ex-parte application?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

17. EX PARTE COMMUNICATIONS

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

(a) Does the Nominee have the ability to reject private interviews, arguments or communications and compel conformance to the rules of court in this respect?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

18. CONTINUANCES

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

(a) Does the Nominee have sufficient ability and judgment to refrain from the arbitrary exercise of his authority in forcing the trial of a case?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

19. JUDICIAL OPINIONS

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that courts of appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to individual reputation other than that of the court to which he should be

loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

(a) Does the Nominee have the ability to render a well reasoned, concise, and comprehensive opinion in litigated matters?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

20. INFLUENCE OF DECISIONS UPON THE DEVELOPMENT OF THE LAW

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

(a) Does the Nominee have the ability to follow the law as it is presently enunciated and submerge his personal opinion of what the law should be to that which it is?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

21. IDIOSYNCRACIES AND INCONSISTENCIES

Justice should not be moulded by the individual idiosyncracies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

(a) Does the Nominee have any individual idiosyncracies which lead you to believe that his conduct as a judge would be extreme, peculiar, spectacular or sensational?

(b) Is the Nominee by reputation a publicity seeker?

Answer

(a)
( ) personal knowledge—Yes No Unknown
( ) by investigation

(b)
( ) personal knowledge—Yes No Unknown
( ) by investigation

22. REVIEW

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

(a) Covered by the rules.

23. LEGISLATION

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

(a) Presently covered by the Judicial Conference.

24. INCONSISTENT OBLIGATIONS

A judge should not accept inconsistent duties, nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

(a) What is the Nominee's financial status, i.e., will his income from the judgeship permit him to discharge his obligations?

Answer
( ) personal knowledge—Yes No Unknown
( ) by investigation

25. BUSINESS PROMOTIONS AND SOLICITATIONS FOR CHARITY

A judge should avoid giving ground for any unreasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

(a) Is the Nominee connected with any private business or charitable enterprise which would benefit from the use of his name?

Answer
( ) personal knowledge—Yes No Unknown
( ) by investigation

26. PERSONAL INVESTMENTS AND RELATIONS

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

(a) Does the Nominee have any personal investments or interests of any kind which might be affected by litigation in the New Jersey courts?

(b) Will the Nominee dispose of these business interests if appointed?

Answer

(a)

( ) personal knowledge—Yes No Unknown
( ) by investigation

(b)

( ) personal knowledge—Yes No Unknown
( ) by investigation

27. EXECUTORSHIPS AND TRUSTEESHIPS

A judge should not serve as an executor or trustee or in any other fiduciary capacity, except for the benefit of members of his immediate family and then only without compensation and if such service will not interfere with the performance of his judicial duties and will not involve him, as representative, in litigation or in the management of substantial business interests.

(a) Is the Nominee an executor or trustee under any court-supervised estate or fund?

(b) Is the Nominee serving in any other fiduciary capacity?

Answer

(a)

( ) personal knowledge—Yes No Unknown
( ) by investigation

(b)

( ) personal knowledge—Yes No Unknown
( ) by investigation

28. PARTISAN POLITICS

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political

party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

(a) Does the Nominee hold any political office which will not be surrendered upon his confirmation?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

29. SELF-INTEREST

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

(a) Is the Nominee involved in any pending litigation?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

30. CANDIDACY FOR OFFICE

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

(a) Does the Nominee have the discretion and judgment necessary to follow this Canon?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

31. PRIVATE LAW PRACTICE

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practice law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

(a) Presently covered by court rule.

The following Questions should be answered where Reappointments or promotions are involved.

32. GIFTS AND FAVORS

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

(a) Has the Nominee accepted presents or favors from litigants or lawyers while in his judicial position?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

33. SOCIAL RELATIONS

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

(a) Has the Nominee refrained from discussing pending or prospective litigation with other members of the Bar or personal friends?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

34. A SUMMARY OF JUDICIAL OBLIGATION

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

(a) Has the Nominee demonstrated his ability to meet the standards set forth in Canon 34?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

35. IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs or the making of sketches of the court room or of any person in it during sessions of the court or recesses between sessions, and the broadcasting of court proceedings by radio or television are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

(a) Has the Nominee conducted proceedings before him with dignity and decorum and complied with the rules of court in this respect?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

36. CONDUCT OF COURT PROCEEDINGS

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the Bar of the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness.

(a) Has the Nominee so conducted his court as to impress upon those appearing before him the importance and seriousness of the inquiry to ascertain the truth?

Answer

( ) personal knowledge—Yes No Unknown
( ) by investigation

Reprinted from State Bar Committee Report, *Annual Report of the Judicial and County Prosecutor Appointments Committee*—Exhibit E, 95 N.J.L.J. 481, 495-97 (1972).

APPENDIX C
JUDICIAL CANDIDATES' QUESTIONNAIRE

1. Name, residence, date and place of birth and political affiliation.
2. College and law school attended, with dates and degrees.
3. Courts in which presently admitted to practice, including dates of admission in each case.
4. Are you now actively engaged in the practice of law? If so, give office location and name of firm, as well as prior firms with which associated, with dates, and whether partner or associate. If practicing alone, during any period, so state.
5. If you have practiced in other localities, please specify with dates.
6. What is the general character of your practice? Indicate nature of typical clients and any legal specialties. If nature of your practice has not been substantially different in past, state nature of prior practice in as much detail as possible, with dates.
7. Do you regularly appear in court or administrative agencies? State, for the past five years, the average number of litigated cases in which you have personally appeared, the particular courts or agencies, whether the cases involved (a) trials, and if so whether jury or non jury, or (b) appeals, and whether such cases were civil or criminal. Give approximate percentages of cases in each group and as between Federal and State jurisdictions. Give as much detail as possible, with citations of reported cases, and indicate whether you served as chief, associate, or sole counsel.
8. Summarize your experience as in Question 7 prior to the last five years. If during any prior period you appeared in court with greater frequency than during the last five years, state periods during which this was so and give with as much detail as possible as to such prior period, data requested in Question 7.
9. Have you ever been engaged in any occupation, business or profession other than the practice of law? If so, specify.
10. Have you ever held judicial office? If so, state court and period of service.
11. Have you ever been a candidate for public office, other than judicial? If so, state the offices, whether elected or appointed, and how long you occupied the offices, if any.
12. Have you ever been arrested, taken into custody, indicted, convicted, or tried for or charged with a crime or petty offense? If so, give details.
13. Have you ever been sued by a client? If so, give particulars.
14. Have you ever been otherwise a party to or personally involved in any legal proceedings? If so, give particulars.
15. Have you ever been disciplined or cited for breach of ethics or professional conduct by a court or by any bar association, or committee thereof? If so, give particulars.
16. What is the present state of your health? Have you ever been hospitalized or otherwise incapacitated from work for a period in excess of ten days? Do you suffer from any impairment of eyesight or hearing or any other physical handicap? Give details.

17. Have you published any legal books or articles? If so, list them, giving citations and dates.

18. List any honors, prizes, awards or other recognition you have received.

19. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

20. Civic background and activity.

21. State your willingness to have the Governor consider your name for appointment to (a) County Court, (b) Juvenile and Domestic Relations Court, and (c) County District Court.

22. State any other information you regard as pertinent.

Reprinted from State Bar Committee Report, *Annual Report of the Judicial and County Prosecutor Appointments Committee*—Exhibit A, 95 N.J.L.J. 481, 495 (1972).

APPENDIX D

ASSEMBLY CONCURRENT RESOLUTION NO. 75

STATE OF NEW JERSEY

Pre-Filed for Introduction in the 1974 Session
By Assemblyman Kean

A CONCURRENT RESOLUTION proposing to amend Article VI, Section VI, of the Constitution of the State of New Jersey.*

BE IT RESOLVED *by the General Assembly of the State of New Jersey (the Senate concurring):*

1. The following proposed amendment to the Constitution of the State of New Jersey is hereby agreed to:

PROPOSED AMENDMENT

a. Article VI, Section VI, paragraphs 1 and 3 be amended to read as follows:

1. The Governor shall [nominate and] appoint[, with the advice and consent of the Senate,] the Chief Justice and associate justices of the supreme court, the judges of the superior court, the judges of the county courts and the judges of the inferior courts with jurisdiction extending to more than one municipality. [No nomination to such an office shall be sent to the Senate for confirmation until after 7 days' public notice by the Governor.] *Each judicial appointment shall be made by the Governor from a list of three nominees presented to him by the Judicial Nominating Commission. If the Governor shall fail to make an appointment from the list within 60 days from the day it is*

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* EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

presented to him, the appointment shall be made by the Chief Justice of the Supreme Court from the same list.

3. The justices of the supreme court and the judges of the superior court shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior. *Prior to any such reappointment, the Governor shall have received a nonbinding recommendation from the appropriate Judicial Nominating Commission indicating whether or not in its opinion such reappointment is warranted.* Such justices and judges shall be retired upon attaining the age of 70 years. Provisions for the pensioning of the justices of the supreme court and the judges of the superior court shall be made by law.

b. Article VI, Section VI, be amended by adding thereto a new paragraph 8 to read as follows:

8. There shall be one Judicial Nominating Commission for the Supreme Court and the Superior Court, which shall present to the Governor a list of three nominees whenever there shall exist a vacancy in the office of Chief Justice or associate justice of the supreme court or judge of the superior court and shall furnish nonbinding recommendations to the Governor regarding reappointment of justices of the supreme court and judges of the superior court.

There shall be for each county one Judicial Nominating Commission which shall present to the Governor a list of three nominees whenever there shall exist within such county a vacancy among the judges of the county courts or judges of the inferior courts with jurisdiction extending to more than one municipality and shall furnish nonbinding recommendations to the Governor regarding reappointment of any such judges.

Each Judicial Nominating Commission shall consist of seven members, one of whom, in the case of the Judicial Nominating Commission for the Supreme Court and the Superior Court, shall be the Chief Justice, and, in the case of the Judicial Nominating Commissions for the several counties, shall be a judge of the superior court designated by the Chief Justice. The members of the Bar of the State shall elect three of their number to serve as members of the Judicial Nominating Commission for the Supreme Court and the Superior Court, and the members of the Bar of the State residing in each county shall elect three of their number to serve as members of the Judicial Nominating Commission for their respective counties.

The Governor shall appoint, with the advice and consent of the Senate, three citizens of the State not admitted to practice law before the courts of the State as members of each Judicial Nominating Commission, who, in the case of the Judicial Nominating Commissions for the respective counties, shall be residents of the county for which the commission sits. The terms of office and compensation for members of the Judicial Nominating Commissions shall be fixed by law, provided that the terms of not more than two members of a commission shall expire in any 1 year. No member of a Judicial Nominating Commission shall hold any other public office or office in any political party or

organization and no member shall be eligible for appointment to a State judicial office so long as he is a member of a Judicial Nominating Commission and for a period of 4 years thereafter.

2. When this proposed amendment to the Constitution is finally agreed to, pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election occurring more than 3 months after such final agreement and be published at least once in at least one newspaper of each county designated by the President of the Senate and the Speaker of the General Assembly and the Secretary of State, not less than 3 months prior to said general election.

3. This proposed amendment to the Constitution shall be submitted to the people at said election in the following manner and form:

There shall be printed on each official ballot to be used at such general election, the following:

a. In every municipality in which voting machines are not used, the following legend shall immediately precede the question:

If you favor the proposition printed below make a cross (×), plus (+) or check (√) in the square opposite the word "Yes." If you are opposed thereto make a cross (×), plus (+) or check (√) in the square opposite the word "No."

b. In every municipality the following question:

	Yes.	Shall the amendment to Article VI of the Constitution to provide for appointment of judges by the Governor or under certain circumstances by the Chief Justice of the Supreme Court, from a list of nominees proposed by Judicial Nominating Commissions be approved?
	No.	