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## RETHINKING JUDICIAL SELECTION: A CRITICAL APPRAISAL OF APPOINTIVE SELECTION FOR STATE COURT JUDGES

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### Cover Page Footnote

John Feerick is a professor and former dean of Fordham University School of Law.

# RETHINKING JUDICIAL SELECTION: A CRITICAL APPRAISAL OF APPOINTIVE SELECTION FOR STATE COURT JUDGES

KEYNOTE ADDRESS  
FORDHAM UNIVERSITY SCHOOL OF LAW  
FRIDAY, APRIL 7, 2006

## WHY WE SEEK REFORM

*John D. Feerick\**

I appreciate very much the opportunity to speak at this program on what makes for a good appointive system.

My involvement with the subject of judicial selection comes from two roles. From 1987 to 1990, I chaired a New York State Commission on Government Integrity,<sup>1</sup> which Peter Bienstock was the executive director of.<sup>2</sup> Richard Emery, who is here, was a distinguished member of that commission,<sup>3</sup> which, when it concluded its work, recommended the abolition of the elective system for selecting New York State trial judges.<sup>4</sup>

The ideas put forward did not prevail at the time, certainly, in terms of political change.<sup>5</sup> I am certainly happy that the views of

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\* John Feerick is a professor and former dean of Fordham University School of Law.

1. See Elizabeth Kolbert, *Ethics Panel Is Treading Quietly*, N.Y. TIMES, May 3, 1987, at D6 (referring to John Feerick as Chairman of the Commission). For a description of the Commission's purpose, see Frederick A. O. Schwartz, Jr. & Eric Lane, *The Politics and Processes of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 881 n.585 (1998) (citing John D. Feerick, *Reflections on Chairing the Commission on Government Integrity*, in GOVERNMENT ETHICS REFORM FOR THE 1990s: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 1-14 (Bruce A. Green ed. 1991)).

2. See Cohen Hennessey & Bienstock P.C., Attorney Directory Listing for Peter Bienstock, <http://www.chblaw.com/pb.html> (last visited Nov. 26, 2006) (detailing Bienstock's position on the New York State Commission on Government Integrity).

3. See Kolbert, *supra* note 1 (listing Richard Emery as one of seven members of the Commission).

4. See Daniel Wise, *Elective System Is Put Under Intense Review: But Suggested Reforms Are Likely to Be Narrow, Voluntary*, N.Y.L.J., Nov. 12, 2003, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1067351016201> (discussing the Commission's "broad-ranging condemnation of the elective system and [recommendation] for its replacement with an appointive one").

5. See *id.* (stating that the Commission's "recommendation was never implemented").

that commission, Norman tells me, have contributed to his own thinking on the subject, and perhaps that of others.<sup>6</sup>

More recently, I have been chairing a commission appointed by Chief Judge Kaye with a mandate of promoting and enhancing confidence in judicial elections in this state.<sup>7</sup> When she asked me to chair this commission in the fall of 2002, she said, “Don’t get hung up with appointive systems and changing the elective system and the idea of amending the New York State Constitution, because you know there’s no support for that.” Finding out what we could do to promote confidence in judicial elections was the task and assignment of our commission, a commission of twenty-nine citizens and judges—a lot of different backgrounds, from every part of the state.<sup>8</sup>

We made a number of recommendations,<sup>9</sup> some of which have been adopted by administrative rule and by the Court of Appeals, through its rulemaking authority and supervisory functions, with respect to the court system.<sup>10</sup> But many recommendations that we made can only be implemented by the Legislature, and the Legislature has so far been reluctant to embrace any change in the elective process, with one exception having to do with campaign filings being sent to a central office rather than having to search throughout

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6. See John Caher, *Cardozo: Fix Party Conventions to Fight Voter Participation*, N.Y.L.J., Mar. 27, 2006, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?hubtype=TopStories&id=1143207014197> (stating that Norman Greene planned the Rethinking Judicial Selection Symposium to “take a broad, national look not at whether the appointive system is superior to the elective system, but on how to devise the best appointive system”).

7. See, e.g., Press Release, David Bookstaver, Dir. & Mai Yee, Assistant Dir., N.Y. State Unified Court Sys. Comm’n Office, Comm’n to Foster Pub. Confidence in State’s Elected Judges and the Electoral Process (Apr. 16, 2003), available at [http://www.nycourts.gov/press/pr2003\\_08.shtml](http://www.nycourts.gov/press/pr2003_08.shtml) (discussing Chief Judge Kaye’s appointment of the Commission to Foster Public Confidence in Judicial Elections).

8. See *id.*; see also COMM’N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK iii-iv (2006), available at <http://www.courts.state.ny.us/reports> (follow “Feerick Commission to Promote Public Confidence in Judicial Elections, Supplemental Report” hyperlink) (listing the names and cities of origin for commission members).

9. See COMM’N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 8, at 17-18 (listing the Commission’s recommendations).

10. See, e.g., JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2006, at 5 (2006), available at <http://www.nycourts.gov/admin/stateofjudiciary/soj2006.pdf> (“[T]he Court of Appeals last month approved rules establishing a Statewide system of independent judicial qualification commissions, or screening panels, for all candidates for elective judicial office.”); see also NEW YORK STATE UNIFIED COURT SYSTEM, FEERICK COMMISSION REPORT URGES OVERHAUL OF CONVENTION SYSTEM (Winter 2006), available at <http://www.courts.state.ny.us/publications/benchmarks/issue3/elections.shtml> (noting that the rules were based on “earlier Feerick Commission reports”).

fifty-seven counties for information as to what is going on in the elective process in the state.<sup>11</sup>

When Norman invited me to participate in today's program, I responded by email as follows (I'm not sure what was on my mind when I gave him this response, but this is what I said):

"What would you think of a philosophical reflection by me on the role of a judge in our society and why it is important to always look at and try to improve the way we select our judges, notwithstanding the enormous resistance to any change from public leaders, political party officials, the bar, and the people themselves, who do not vote in elective systems or get much involved in appointive systems, except for the various special-interest groups? Everyone seems to have his own idea of reform, as I have discovered, leading to no consensus or even any real attempt at consensus, thereby keeping in place a failed system."

I concluded my email by saying, "Are we tilting at windmills?"

Norman called me immediately and asked me to explain my email. I now do so.

I start with a personal reflection. I have been a member of the bar for forty-five years (and I suspect that I am joined by at least a

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11. The Feerick Commission recommended that campaign finance disclosure filings for judicial candidates for all courts should be filed electronically with the State Board of Elections. See *COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS*, *supra* note 8, at app. A (summarizing the Commission's 2003 and 2004 recommendations regarding campaign finance disclosure, including the recommendation that "[c]ampaign finance disclosure filings for judicial candidates for all courts . . . be filed electronically and made publicly available in a searchable electronic format on a timely basis"). This recommendation was adopted by legislation that took effect on January 1, 2006. See N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.1 (2006); see also KAYE, *supra* note 10, at 5 ("Last year, the Legislature enacted one important Feerick Commission recommendation: all candidates for county and local elective office must file their campaign finance reports electronically with the State Board of Elections."); N.Y. STATE BD. OF ELECTIONS, HANDBOOK OF INSTRUCTIONS FOR CAMPAIGN FINANCIAL DISCLOSURE 2006 i-iv (2006), available at <http://www.elections.state.ny.us/NYSBOE/download/finance/hndbk2006.pdf> (listing electronic filing requirements). The Feerick Commission also recommended expanding and revising the content and format of judicial disclosure filings. See *COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS*, *supra* note 8, at app. A (summarizing the Commission's 2003 and 2004 recommendations regarding campaign finance disclosure, including the recommendation that "[t]he content and format of judicial disclosure filings should be expanded and revised"). The Chief Administrator's Rules Governing Judicial Conduct section 100.5(A)(4) adopted this recommendation in an amendment effective September 1, 2006. See 28 N.Y. Reg. 99 (Aug. 9, 2006) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(g)) (announcing the section amendment and stating that judge and non-judge candidates for public election to judicial office must file a financial disclosure statement with the Unified Court System Ethics Commission "containing the information and in the form set forth in the Annual Statement of Financial Disclosure adopted by the Chief Judge of the State of New York").

few of you) and have spent time in almost all those years on the subject of government reform—ethics reform, campaign finance reforms, voter participation reforms, judicial selection reforms, and the like. These are not subjects for the short-winded or for the faint of heart. I have noticed in all of those efforts the different points of view that manifest themselves, the difficulty of groups compromising deeply felt positions, the intense resistance by those with political power to change the status quo and give up the advantages they believe they have under the present system, and, most noticeably, the absence of a public groundswell in support of specific changes.

Finding sufficient common ground to effect reform is certainly a very elusive goal, in my experience.

Not too many years ago, after a highly public effort by the New York State Commission on Government Integrity, which I made earlier reference to,<sup>12</sup> to achieve government ethics reform, I went to Albany to meet with the speaker of the New York State Assembly,<sup>13</sup> and I asked him what problems he had with the commission's recommendations. He said he had none, but the members of his body were not hearing from their constituents about such subjects of ethics reform. In other words, there was no public pressure to change the system.

He also observed that whenever legislators adopt reforms in areas of government ethics, they are inevitably criticized by reformers for not going far enough, thereby receiving no credit for what they did, or even worse, being positioned as not being interested in ethics reform. He suggested that there was very little incentive in the legislative body to give leadership in such areas.

In my recent experience for the Commission to Promote Confidence in Judicial Elections,<sup>14</sup> with no mandate to move to an appointive system, I have received similar reactions to change, as I have gone throughout the state—often with the commission's very able counsel, Mike Sweeney, who is going to speak later in the program—to the reactions that I have experienced in the past:

- Some lawyers and judges have complained that the work of commissions to study and promote confidence in judicial elections do harm to the judiciary by their very creation, casting a negative reflection on their work.

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12. *See supra* notes 1-6 and accompanying text.

13. Speaker Mel Miller. This reference is to a meeting between John Feerick and Mel Miller that took place in Mel Miller's Office in Albany in either 1988 or 1989.

14. *See supra* notes 7-11 and accompanying text.

2007]

*RETHINKING JUDICIAL SELECTION*

7

- Some see judicial qualification commissions as the first step in a process to substitute a system by appointment, to which they strenuously object.

- One or more groups, with systems of ranking judges in their particular areas, have expressed to me the view that the creation of an independent qualifications commission would undermine their work, undermine what they do in terms of ranking judges.

- Lawyers who are familiar and comfortable with the workings of the courts in which they practice worry over what change will bring.

- Citizens are vulnerable to appeals that a change to an appointive system is nothing more than an effort to rob them of the right to vote and place power with either a small elite group or a diverse group with whom they cannot identify.

- Public office holders often are reluctant to embrace change, sometimes contending that their mandate to govern includes a right to choose people who reflect the prevailing philosophy or point of view.

- Political party leaders see the judiciary as a way to promote and reward political party involvement.

Then there are a multiplicity of groups with their own points of view as to the ideal system, with the perfect becoming the enemy of the good.

Pessimists about the benefits and chances of reform can be found everywhere. In my view, whatever we believe about any particular system, we should all approach our democracy as reformers and agents for change, especially lawyers, who take an oath to uphold and improve the law. While some sit back and praise what we all believe to be the greatest government in the world, others, like Norman Greene—and many of you, obviously—continually focus on not what our democracy is, but what it should be.

The importance of programs like this one is underscored by the fact that the framers of the United States Constitution and our state constitutions made the judiciary not part of another branch of government, but an entirely separate and independent branch. They identified the judicial power as one of the three great powers of society, which, in an appropriate relationship with each other, would ensure a government that was stable, just, and enduring. They saw an independent judiciary as fundamental to the rule of law and a bulwark against tyranny.

Late Chief Justice William Rehnquist described an independent judiciary as one of the crown jewels of the nation's system of government.<sup>15</sup>

To assure the judiciary's rightful place in the architecture of government, the framers of the Constitution carefully addressed in their handiwork the subject of judicial selection, as well as threats to judicial independence associated with tenure of office and judicial compensation. At the Constitutional Convention of 1787, they debated over a period of months whether the President or the legislature should appoint federal judges.<sup>16</sup> In the end, as you know, presidential nomination was chosen, in the belief that the executive would be responsible, accountable, and also knowledgeable of those with the qualifications to be good judges.<sup>17</sup> Appointment by a legislative or numerous body, as they had experienced in their states, was subject to deal-making and other practices that gave full play to intrigue, concealment, and partiality, and insufficient attention to the proper qualifications for the office.<sup>18</sup>

A combination of nomination by the President and, as a check and balance, confirmation by the United States Senate, a smaller body than the entire Congress, was chosen as the means by which to select qualified individuals for federal judgeships.

The process, as we all know, is certainly not without its politics, but it has remained a durable part of our federal system since 1789.<sup>19</sup>

State judicial systems have had a checkered history. Like many of the original colonies, New York began with an appointive process, but its failings led to the popular election of judges in 1846.<sup>20</sup>

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15. Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 274 (1996) (quoting Chief Justice William Rehnquist's remark that the idea of an independent judiciary is "one of the crown jewels of our system of government today").

16. See FED. JUDICIAL HISTORY OFFICE, FED. JUDICIAL CTR., CONSTITUTIONAL ORIGINS OF THE FEDERAL JUDICIARY 2-5 (2005), available at [http://www.fjc.gov/history/home.nsf/page/constitutional\\_origins\\_pdf](http://www.fjc.gov/history/home.nsf/page/constitutional_origins_pdf).

17. See *id.* at 3.

18. See THE AVALON PROJECT AT YALE LAW SCHOOL, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON: JUNE 5 (2006), available at <http://www.yale.edu/lawweb/avalon/debates/605.htm> (imaged from THE DEBATES IN THE FEDERAL CONVENTION IN 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON, A DELEGATE FROM THE STATE OF VIRGINIA (Gaillard Hund & James Brown Scott eds., Oxford University Press 1920)).

19. U.S. CONST. art. II, § 2, cl. 2.

20. Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 342 (1996) (evaluating the possibility that merit selection for the New York Court of Appeals was adopted in order for various political actors to maintain influence in selecting judges).



Despite efforts to do so at a number of constitutional conventions here in New York, we have not returned to a system-wide appointive regimen for judges. One notable exception was in 1977, when the voters approved a constitutional amendment providing for the appointment of the court of appeals by the Governor from candidates recommended by a commission on judicial nominations, subject to confirmation by the State Senate.<sup>21</sup>

In my opinion, the catalyst for change was the Governor at the time, Hugh Carey, who, in his campaign to be Governor, said to Cyrus Vance and other leaders of the bar that, if elected, he would give strong leadership to change in the system. He delivered on his promise.

As a historical note, in the selection of the state supreme court justices, New York early adopted a system of direct primaries, but then gave it up because of all kinds of problems with it. It adopted, instead, in 1922, a system of judicial district-wide conventions for the nomination of supreme court justices. In proposing such a system, a special legislative committee of our state legislature said, “[i]t is inherent in the functions of the judicial office that the office should seek the man, and not the man the office.”<sup>22</sup>

It is inherent in the functions of the judicial office that the office should seek the man, and not the man the office.

Nominating conventions were seen as the way to do this. That system, as you know, has been found unconstitutional by a federal district court judge because of its domination by county political party leaders.<sup>23</sup> The commission that I have been involved with for the chief judge over the past several years has laid out, in a series of reports preceding the decision by Judge Gleeson, similar conclusions and findings with respect to the influence of political party leaders in the system of the judicial nominating conventions in this state.<sup>24</sup>

As this program occurs, the good news is that important changes are taking place in New York through the leadership of Chief Judge Kaye, but there is a limit to what courts can do administratively and pursuant to their supervisory and rulemaking authority.

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21. *Id.* at 346-47; *see also* N.Y. CONST. art. VI, §2.

22. COMM’N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 8, at 23-24.

23. *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 255 (E.D.N.Y. 2006), *aff’d*, 462 F.3d 161, 208 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). The Supreme Court granted review of *Lopez Torres* as this article was going to print.

24. *See* KAYE, *supra* note 10, at 4-5.

One major development, which I am sure has been commented on in the program—or will be—is the adoption by the court of appeals recently of a rule calling for the establishment here in New York State of a statewide system of independent judicial qualification commissions within each judicial district for full-time trial judges in the state.<sup>25</sup> That system is now being implemented, as a result of that initiative by our court of appeals.

Those commissions will be charged with identifying and encouraging a diverse pool of candidates as judicial vacancies occur and assuring that every candidate possesses the requisite qualifications for judicial office.<sup>26</sup> Because of separation-of-powers concerns, these qualification commissions will not have some of the features proposed by the commission which I chair, because legislation, and only legislation, is required in order to make those features a reality.

What the court of appeals has done, however, by rule, is both historic and commendable, if not incredibly positive, in terms of the reform process in New York State at this time. With a single exception, as I noted before,<sup>27</sup> involving the filing of campaign disclosure statements, the legislature here in our state so far has declined to act on proposals that are now before it from our commission and bar groups and other groups with respect to public financing of judicial races, retention elections, reform of the judicial nominating convention, voter guides, and independent qualification commissions.

I just would give one aside. I had two experiences with two very significant groups in the state that were critical about our commission's recommendation with respect to voter guides. I said, "What problem can you possibly have with respect to voter guides?" They said, "They will cost a lot of money, and nobody will pay attention to the voter guides." But that is not the evidence, as one looks at the initiatives that have taken place in different parts of the country with respect to the recommendation of voter guides. But that is part of the context in which reformers must proceed.

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25. N.Y. COMP. CODES R. & REGS. tit. 22, § 150.1 (2006) (mandating the establishment of an Independent Judicial Election Qualification Commission in each judicial district); see also *Judicial Screening Panels Members Announced*, N.Y.L.J., Feb. 9, 2007, available at <http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?hubtype=&id=1170928969016> (last visited Mar. 21, 2007).

26. See KAYE, *supra* note 10, at 5 ("These commissions . . . provid[e] credible, independent local bodies to evaluate the qualifications of judicial aspirants. The ratings issued by these panels will stand as assurance to the public that whoever ultimately appears on the ballot has been found qualified for judicial service.")

27. See *supra* note 11 and accompanying text.

In my work for the Commission to Promote Public Confidence in Judicial Elections, the public, at public hearings and focus groups and in response to a public opinion poll, has expressed its general interest in reform, although, as I have noted, there is no widespread—I don't believe there is—public outcry for reform, despite all the scandals we have had. There is no question, however, from our public hearings and focus groups, that the public wants and expects an honest and ethical judicial system, and, when they have a case in court, a decision by a well-qualified judge.

Reform is so difficult because the specifics of reform are often quite technical. The public is easily persuaded that elections—certainly, when they have the right to vote—are preferable to appointment, believing they are more open and transparent and more fully reflective of the democratic principle. Yet what happened with respect to appointment to the court of appeals in 1977 offers, certainly, some hope for reformers in the present context—not to speak about the incredible impact of Judge Gleeson's decision.

For those engaged in judicial selection reform, the words of Elihu Root are instructive. I quote:

There are no worse enemies of all attempts at improving the machinery of government than the people who are always in a hurry, who are dissatisfied if results are not reached today or tomorrow, who think that if they cannot, on the instant, see a result accomplished, nothing has been done. The process of civilization is always a process of building up, brick by brick, stone by stone, a structure which is unnoted for years, but finally, in the fruition of time, is the basis for greater progress.<sup>28</sup>

As I read that statement again, I kept thinking about Elizabeth Stanton and Susan B. Anthony, who, in the 19th century, made the case, in New York and all over the United States, for the women's right to vote.<sup>29</sup> But neither was present when that amendment to the Constitution was added.<sup>30</sup>

Leadership from elected officials is important, but critical to the shaping of leadership is the engagement of the public. Members of the legislature need to hear from their constituents, citizen groups need to be active, and lawyers who are expert in these areas must

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28. THOMAS SCHICK, *THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNOR* 133 (1978).

29. See, e.g., Sarah Miller Little, *A Woman of Property: From Being It to Controlling It. A Bicentennial Perspective on Women and Ohio Property Law, 1803-2003*, 16 *HASTINGS WOMEN'S L.J.* 177, 193 (2005).

30. U.S. CONST. amend. XIX. The 19th Amendment was ratified in 1920. *Id.* Elizabeth Stanton died in 1902. See, e.g., Little, *supra* note 29, at 183 n.36. Susan B. Anthony died in 1906. See, e.g., *id.* at 196 n.97.

step forward. An important component for change must come from groups who have the expertise to understand the deficiencies in our laws and are committed to improving them—people like yourselves. It must come from the organized bar. Bar associations can be tremendously effective, both in galvanizing public support for law reform and in promoting reform within the highest reaches of state government. While the bar has many worthwhile causes to promote, in the years to come, can there be any more important cause to include among them than judicial selection reform?

But our most important agent for change is education. The long-term response to the challenge of safeguarding the independence of the judiciary must be found in educating the citizenry about our government, our society based on the rule of law, and the purposes and work of lawyers and judges, for, as Thomas Jefferson said, “If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be.”<sup>31</sup>

James Madison put it differently: “A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”<sup>32</sup>

I conclude by mentioning that this May, our outstanding Chief Judge, Judith Kaye, will convene a statewide conference, supported by many groups here, as well as citizen groups, for the purpose of developing methods, beyond where we are in this state, for educating the public about the judiciary and judicial elections.<sup>33</sup> I believe, through education, we have our best chance of moving the system to, perhaps, where, we might find common ground, it should be.

Thank you very much.

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31. See, e.g., Molly Townes O’Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 369 (1997) (quoting LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL* 29 (1951) (quoting Thomas Jefferson)).

32. See, e.g., Thomas C. Hennings, Jr., *A Legislative Measure to Augment the Free Flow of Public Information*, 8 AM. U. L. REV. 19, 19 (1959) (quoting HAROLD D. LASSWELL, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* 62-63 (1950)).

33. See, e.g., KAYE, *supra* note 10, at 5 (announcing the then-upcoming symposium). The “Symposium on Enhancing Voter Participation on Judicial Elections” was held at the New York State Judicial Institute on May 17, 2006. See, e.g., Joy Beane, *Judicial Institute Hosts Voter Education Symposium*, J. N.Y. ST. UNIFIED CT. SYSTEM, Summer 2006, available at <http://www.courts.state.ny.us/publications/benchmarks/issue4/votereducation.shtml> (“More than eighty lawyers, judges, educators and civic organization representatives participated in a May 17 symposium at the New York State Judicial Institute that offered both a state and national perspective on enhancing voter participation in judicial elections.”).