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Public Hearing of Judicial Selection

New York State Commission on Government Integrity

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PUBLIC HEARING ON JUDICIAL SELECTION
[MARCH 3, 9, 1988]

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STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

PUBLIC HEARING:
ON:
JUDICIAL SELECTION:

New York County Lawyers Association
14 Vesey Street
New York, New York

Thursday, March 3, 1988
9:00 O'clock a.m.

BEFORE:
JOHN D. FEERICK,
Chairman
RICHARD D. EMERY
PATRICIA M. HYNES
JAMES L. MAGAVERN,
Commissioners

FOR THE COMMISSION:
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PETER BIENSTOCK,
Executive Director

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Assemblyman Weprin 80
Judge Sullivan 151
Judge Carey 181
Mr. Bermingham 217
Mr. Kaufman 225
Ms. Zemans 231

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THE CHAIRMAN: This Public Hearing is now in session. Good morning.

Let me, before making a brief opening statement, introduce, in terms of the Commission, the Members.

To my immediate left is Commissioner Hynes. To my immediate right is Commissioner Magavern. To his right is Commissioner Emery. To Commissioner Emery's right is Chief Counsel Kevin O'Brien, and to his right is Carol Schachner, who has been intimately involved in the work of the Commission in the judicial selection area. To Commissioner Hynes' left is Nicole Gordon, counsel to the Chairman of the whole Board, and to her left our Staff Director, Peter Bienstock.

The Executive Order that created this Commission charges us with investigating, among other things, weaknesses in existing laws, regulations and procedures regarding the selection of judges in the New York State Court System and determining whether such weaknesses impair public confidence in the integrity of government or create an undue potential for favoritism or corruption.
The drafters of both the Federal and State Constitutions recognized the need for an independent judiciary by making it one of the three great branches of government and by including provisions to secure its independence, so that judges would render justice without fear, bias or prejudice. Indeed, it has been said, "The judge is the personal embodiment of our American idea of justice, the leader in all judicial matters, the one to whom all look for the administration of justice."

Thus, much is expected of judges -- independence, courage, honesty, ability, knowledge, understanding and compassion. We ask that they make choices between conflicting claims and competing and often amorphous principles, draw conclusions and inferences from evidence, interpret and give meaning to legal language, and develop, apply and shape legal precedence. Accordingly, it is imperative that we have the best, most qualified people serving as our judges.

The Commission has spent time and effort examining the judicial selection process. We
have scheduled these two days of hearings, today and March 9, for a number of reasons. The hearings enable the Commissioners to explore the subject of political influence on the selection of judges, under the elective as well as the appointive systems currently in operation in New York. We will hear testimony from those who have personally been involved in the judicial selection processes in New York. In addition, the hearings will serve as a public forum for debate among advocates of different judicial selection methods.

In exploring this subject, we recognize that both the elective and the appointive systems have advantages and disadvantages, and we are grateful to have in this State so many fine judges serving both in elective and appointive positions. Our purpose today, however, is to pursue what must be a continuing quest to improve the process of selection and to support the independence of the judiciary.

The testimony from these hearings, as well as the results of our investigations and study over the last several months, will form the
basis for our Commission's report to the Governor, which will include recommendations to improve existing laws regarding judicial selection.

There are a number of aspects of both the elective and the appointive systems which may impair public confidence. For example, the primary system for designating some judges almost always favors the candidate backed by the dominant political organization and may keep other equally or more qualified candidates off the ballot. And, similarly, the convention system for nominating other judges is controlled largely by District and County Leaders. The result is that the electorate has a limited choice at the polls. This problem is exacerbated by the fact that voters because they know little or nothing about the competing candidates, often simply skip over them without voting, or if they do vote, do so based primarily on party affiliation rather than on judicial qualifications.

But would an appointive system inspire greater confidence in government? The appointive system can also be political. Why should a Governor or Mayor have the final choice in
judicial appointments? Won't judges be as
dependent on the Executive as some people
claim elected judges are dependent on party
leaders? How can the Executive be held
accountable for appointments when a nominating
or screening commission can present a small
number of nominees to choose from, and should
so much power be vested in nominating commission
members? Aren't these commissions elitist?
Shouldn't members of a community have the
greatest voice in selecting judges to sit in
their region?

Whatever method one prefers, appointive
or elective, I believe there can be little
justification for removing competent sitting
judges at the end of their terms in office
for political reasons, or requiring sitting
judges to return to partisan politics as their
terms draw to a close in order to assure re-
nomination. This can only bring into question,
in reality or in perception, the independence
of the judiciary.

But here, too, there are alternative answers
to be considered. For example, should the electorate
vote "yes" or "no" on the question of retention of a sitting judge, or should a reviewing body evaluate the judge's track record and make the decision? Or would a combination of these two approaches be preferable?

These and other issues will be addressed at these hearings by judicial selection experts, former and current judges and political party leaders and legislators. Each witness will offer a different and unique perspective on this subject, which is of great concern to us all.

On behalf of all the Commissioners, I would like to thank these witnesses for their cooperation in this important endeavor.

It is now my privilege to call as the first witness today, the Chief Judge of New York State, Sol Wachtler.

CHIEF JUDGE WACHTLER: Thank you very much, Chairman Feerick, Members of the Commission, staff. Thank you for giving me the opportunity of appearing before you this morning.

Last September 17th I was privileged to be in Philadelphia representing the State of New York.
The Chief Judges of the thirteen States were there, and each State was to tell of its contribution to the Constitution-making process. New York State -- I really couldn't talk about what we did in Philadelphia, because we didn't do too much in Philadelphia, but we could speak about what we did ten years before that convention in framing our own State Constitution. Ours was the first Constitution to provide for due process of law and to establish the three separate branches of government. These principles, as you know, were later embodied in our Federal Constitution.

I am here to represent that third branch of government charged with the responsibility of protecting due process of law and giving to our citizens the greatest gift which any government can give to its citizens, the gift of a system which does justice.

The quality of justice depends to a large extent on the quality of those selected to administer justice. It is not enough to devise a body of laws that are wise and impartial, unless those chosen to administer the laws possess those same qualities. And it is not
enough to choose the best judges unless the public believes that the best judges are being chosen -- and this is very significant -- and the public must believe that those judges have the ability to dispense justice intelligently and with an even hand. There we deal with the whole problem and concept of perception.

A Constitutional ideal of an appointed judiciary was first put in place by the framers of the United States Constitution, who recognized that a truly independent judiciary must be free of partisan influence. Therefore, they took the judicial system away from the electorate in saying that judges would be appointed for life.

Now, John Marshall, who certainly knew -- if we want to talk in terms of original intent, certainly knew what the original intent of the founders were, he having been a member of the Virginia Ratifying Convention -- put it well when he said a judge "should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience." The framers of the United States Constitution realized that political leaders, no matter how well motivated,
should not be added to that list.

I have often said that our State has an excellent of producing the finest judges in the nation. I don't say that as a hyperbole. I've been to the different States, I've read the opinions of judges from the various States, and I would stand by that. I do believe that we have the finest judges in our State system, on balance, than any other State in the country.

But, that historical record can be undermined by the action of political leaders who will grant or withhold party endorsement, not out of a desire to maintain judicial excellence, but for the purpose of partisan advantage. I will concede that the partisan election process probably produced judges as able as those produced by any other system. I can find no empirical data which would convince me that the appointive system produces better judges than the elective system. But, the independence of those judges is placed in jeopardy, as never before, by political leaders who are efficiently and effectively doing their job of rewarding political service and not judicial potential or
I, personally, believe that the appointment of judges after nomination by a non-partisan commission on judicial nomination, as now applies to the Court of Appeals, remains the best system, and could take the selection of judges entirely out of the partisan political arena.

The Chairman referred earlier to the method of selecting candidates in the initial stages. We know that the Supreme Court Justices in the State of New York, which is the highest court of original jurisdiction, are selected at conventions, and that the delegates to those conventions are by and large chosen by the political leaders. So, let's make no mistake about it. As far as the initial nomination process is concerned for the Supreme Court Justices, this is entirely in the hands of the political leadership.

Now, again, I would like to see that initial nominating process being handled through the merit selection process, but I don't think that that's a reality which will ever be seen, certainly not in the reasonable or foreseeable
future. I don't want to say not in my lifetime, because I hope to live for an awfully long time, and perhaps it will come about.

I was talking to a leader of one of the bodies of our State government recently, a very influential and important person in that body, and I asked him what he thought about the chances of a merit selection process for our trial judges had for initial passage in this session, and he said, "You have a better chance of growing wings and flying over this court house than such a bill would have of passage."

So, recognizing the fact that politics is the art of the possible, I would like to address a much needed change in our judicial selection process, which I believe is possible. This he conceded, as well, would be possible, and political leaders to whom I've spoken have said that this is possible. That is, the method of non-partisan judicial retention.

I begin with the unequivocal belief that no sitting judge should be compelled to seek re-election on a partisan political line. Now, some legislators are quick to challenge that.
They will say, "Well, I have to run every two years on a partisan line. Why shouldn't judges have to run after their terms also on a partisan political line?"

The answer is obvious. Legislators are supposed to be active political partisans. Judges must not be. Legislators are expected to vote with, be loyal to and even sit on a partisan side of the aisle. Judges are prohibited from doing so. Legislators respond to partisan political leadership and give allegiance to party platforms. It would be illegal for a judge to do so.

The idea of partisan political loyalty on the part of a legislator is consistent with the legislative function, but anathema to the judicial process.

How then should we treat sitting judges whose terms are about to expire?

It is my clear conviction that a judge who has served a full term, with excellent performance, competence and dedication, should not be subjected to the uncertainties of a partisan election at the close of that term. It is
especially difficult for judges to resubmit themselves to a partisan political contest, because full time judges are required by rules and by the Code of Judicial Conduct to refrain from virtually all political activities and to significantly restrict their business and civic activities. Moreover, judges must end their private career ties by severing all connections with their legal practices. Judges who make these sacrifices must reasonably be assured that high performance on the bench will result in retention of judicial office.

It is very difficult to take people who are successful in practice and say to them, become a judge in our State system, work well, work diligently, and then if everything is all right you can go back to the political leader and perhaps seek renomination to run again.

Under our present system, a sitting judge must go with his or her hat in hand to a political leader, and is usually greeted by the question: "Where have you been for the last ten years," or, in the case of a Supreme Court Justice, "Where have you been for the last thirteen years? When
we needed you, you were never there. Now that you need us, you come around seeking our favors, seeking our nomination." Of course, the political leaders should know that the judge hasn't been around because he or she was under the constraint of the rules governing judicial conduct, which prohibited such contact.

On the other hand, the political leader knows that certain other judges have dealt with the canon in a rather interesting way. This was something I was not even aware of until just a few months ago.

There are judges in the lower courts taking advantage of a specific provision in the rules who have filed a notice with the Chief Administrator of the Courts that they intend to seek the nomination for a higher judicial post. Such notice entitles them, under the law, for nine months prior to the time of actual nomination to contribute to and participate in partisan political activities. The perverse part of the practice is that they file such notices every year, thereby maintaining a constant presence at partisan political dinners and clubhouses. I have been told by some who know that there are judges who haven't missed a political
dinner any year during their term of office as judge.

As intolerable as this practice is, given the system, its existence is understandable. It is understandable that the person who seeks higher political office and has to go to a political leader for that higher political office will, indeed, go to or try to go to as many political affairs as possible to maintain the favor and recognition of that political leader.

This distortion of the ethical canons is not the only vice produced when a judge is compelled to engage in partisan political maneuvering in order to garner re-election. To name but a few:

A judge seeking re-election is entirely at the mercy of a political process that may give little or no regard to his or her demonstrated capability to serve;

Capable candidates for judicial office may be discouraged from seeking such office, knowing that periodically they must contend with the vicissitude of the partisan political process.
in order to remain in office;

The exigencies of a political campaign are

often fundamentally at odds with the ethical de-

mands imposed upon sitting judges;

And the need to campaign for re-election
takes judges away from the Bench.

I would like to urge that sitting judges,
that have been well-qualified by a merit screen-
ing panel, be reappointed for another term with-
out the need to again run for office. Here
again, this will be met, I am certain, by those
who say that judges should always have to face
the electorate. This is a tradition which was
born in New York State in the middle 1800's, and
something that perhaps many people want to cling
to. If that be the case, and it is the continued
legislative desire to preserve the elective pro-
cess in the judicial selection matrix, then I
would urge, once again, that the non-partisan
retention election of judges be considered.

Rather than take up any more of your time,
I have taken the liberty of giving to your
honorable body a message which we sent to the
Legislature in the past, together with a proposed
Constitutional Amendment which would permit that to happen. This measure, if approved by the Legislature and by the People, will relieve sitting judges and the courts of much that is unseemly in our elective system while, at the same time, maintaining in the electorate the right to choose its judges.

First, by requiring a judge seeking election to secure endorsement by the local Commission on Judicial Qualifications, it provides the public with objective assurance that he or she remains qualified to sit.

Second, through the vehicle of the retention election, it permits the public to voice its approval or disapproval of the sitting judge, without any partisan political intervention.

In 1977, the Legislature allowed the public to vote on a Constitutional amendment changing the method of selecting the judges who would sit on our Court of Appeals, on which I am privileged to sit. The public gave overwhelming support to the change. Our Court -- every member of which has been appointed -- has received praise and accolades from other bodies throughout the
country, and I think that without trying to appear immodest, that this is deserved, because I think it's a good Court.

I now urge the Legislature to consider giving the public the chance to vote on a method which would allow the retention of those judges who have already been elected, have proven their ability to serve, and who wish to remain part of an independent judiciary.

The Chairman spoke in his initial remarks of the importance of public confidence. I think that public confidence in a judiciary can be maintained, and perhaps enhanced, if the people do not believe that sitting judges at the end of their term, have to go back to political leaders to seek those political leaders' endorsement in order to continue serving as a judge.

Thank you very much.

THE CHAIRMAN: Thank you very much, Chief Judge, for your statement.

I would like -- and I know my fellow Commissioners have some questions to put to you. I would like to ask for your reflection on any potential jeopardy to the independence
of the judiciary that you might see in a system of non-partisan elections where -- as we know, in California, for example, there was organized opposition to a sitting judge in a re-election context -- and can we structure a system of retention elections in a way to protect against the threat to independence that might be there when different groups, angry about some decisions, might muster a lot of support to go against a particular sitting judge in the context of a second term on the Bench.

CHIEF JUDGE WACHTLER: The answer is very simply, no. There's always a trade-off. I think if you're going to have retention elections, there's always the danger of certain forces being mounted against a particular judge as that judge goes before the electorate.

I am comforted though by the thought that we have so many trial judges in the State of New York and so many disparate courts that it would be very difficult for anyone to marshal that kind of populous opposition to particular judges. I don't think that it would be of that great an interest. I think the only time that would really
come into play, as was the case in California, would be with the court of last resort, and, of course, our court of last resort is insulated from that.

Again, even recognizing that that's an inherent danger in the retention process, it nevertheless is far better than that judge going to a political leader, who might have other motivations, either by virtue of a ruling that that judge has made in the past, or because of some promise of a future favor that the political leader would want to consider that particular judge.

THE CHAIRMAN: The older I get, Chief Judge, the more I appreciate the courts of our judiciary that hold together our democracy.

I recognize if one sought to change the elective system, that perhaps it's not politically feasible now and may not be politically feasible at any point in this century or maybe in the next century. Yet, there are things we can do to improve the functioning of the elective system, particularly in areas where, if you're going to be involved in a partisan election, money has to be raised, and lawyers who subsequently may appear
before the courts are participants in the fund-raising process. We know certainly from our political campaigns serious issues are raised at times. Now I am speaking just generally about campaign financing that hurts the institution and hurts those who serve the institution.

I wonder if there's not more we can do in the way of rule-making or legislating to eliminate the inferences that are sometimes borne and talked about among members of the practicing bar that hurt the judiciary.

CHIEF JUDGE WACHTLER: It's extraordinarily difficult. Again, whenever you have the elective process, you buy into a whole package of vices and devices used in that context, so that it's hard to separate them out.

I will just give you an illustration of sitting judges who go to political dinners. We've discussed that at the Administrative Board. I must tell you that the four Presiding Justices and I feel that this is a deplorable practice. We don't want to see this, again not because it's corrupting the judges, but because the perception of an independent judiciary is diminished by virtue
of their attending these dinners, and yet we cannot possibly -- and we are at a loss right now to frame a rule which will prevent it from happening, because if you say that a judge is going to run for election, that judge is, indeed, entitled to participate in the political process.

Once you let down the gate and put him in the partisan political process, then you're saying that he or she can go to political dinners.

It's the same thing with raising money. If someone has to run for office, that person has to raise money. Lawyers become a logical source of funds. If you say that he or she can't raise any money from lawyers, then you're cutting out 90 percent of the potential source of revenue and, indeed, you might have some constitutional problems in that regard as well.

So then you say what we do say, and that is, that there has to be a blind list, that the judge is not entitled to know what lawyers contribute to his or her campaign. Now, you try to convince the public that the judge really doesn't know.

By the way, I would tell you that many of the judges, a great many of them, really do not know,
but, again, it would be very difficult to convince the public that a lawyer could give a sum of money for a judge's campaign and the judge wouldn't know who that lawyer was. We saw what has happened in Texas, how very bad this can be, so bad that the Chief Justice of the Texas Supreme Court has resigned now to fight against this process of the re-election of sitting judges in the Texas Supreme Court, and that's a vice, I think, we should think about avoiding here in New York State.

THE CHAIRMAN: Thank you.

Commissioner Hynes?

COMMISSIONER HYNES: Judge, on the practice that you have talked about, of judges attending political functions, if you have a situation where a judge is on the Civil Court, for example, and wishes to be considered for a Supreme Court nomination and, therefore, feels that they have to be showing up at these political functions and, maybe, filing these notices each year that they are going to run because they wanted to show their face, is there nothing that we can do to deal with that, are we to just say that is what the system is and we have to accept it because that's what it
is?

CHIEF JUDGE WACHTLER: Commissioner Hynes, I would appreciate your telling me what we can do. We don't know how to frame the rule, frankly. We are now struggling with it. We've spoken to the judges. And, the judge says, the Civil Court Judge says, "I really do want to be nominated for the Supreme Court. I don't want to stay in the Civil Court all my life and so I'm going to file this notice every year. Every time there's a Supreme Court vacancy, I will file the notice."

Now, if we say to that Civil Court Judge, "Now, wait a minute, you know the political leader has said that you're not going to get that nomination, so that's not realistic," this person would say, "Well, you know, a person's reach must exceed his grasp or what is a heaven for. I'll continue to seek it and I'll continue going for it."

Meanwhile, that person is going to be going to political dinners. We have found now that some judges in the County Court, for example, in some counties, when there isn't a Supreme Court vacancy, will send in a letter saying that
he or she wants to run for another County Court vacancy. Now, we know that's not realistic, but, nevertheless, they get their letter in and, therefore, they are able to go back to the political dinner.

COMMISSIONER HYNES: That brings me to the point where we might sit here and say that politics is the art of possibility, but is there some way that we can start to deal with the partisan politics in the selection of judges in some way that will improve the public perception and make improvement in that system so we are not going through this process of having judges go through this subterfuge and basically saying in the political process in the hopes of being designated.

CHIEF JUDGE WACHTLER: I don't know, I don't know, really, how we can. Again, I would say that if we are dealing with non-judges who are seeking to become judges, that's a very discrete problem, that's the initial selection nomination process. My primary concern -- and I try to emphasize that in my statements here today -- deals with those judges who are sitting judges every day hearing
cases. For that judge to be active in partisan political activities, again, I think diminishes the perception of the judge, and the only way to take that away is to say that, number one, that that judge who has served a full term should be automatically, if found well-qualified, be re-named or reappointed for an additional term without any election at all, and that would avoid the retention problem that Justice Byrd had in California, or if that is tellingly un-acceptable, then have a non-partisan retention election so that that judge does not have to go to the political dinners or does not have to curry favor or give the perception of currying favor with the political leader.

That's the only options that I can really think of.

COMMISSIONER MAGAVERN: Judge Wachtler, I'm particularly interested in your proposal for a merit screening panel in connection with reten-
tion elections, and I'm concerned as to the possibility of decentralizing that process as much as possible and giving as much of the power to appoint to a merit screening panel,
or those who sit on it in the local regions, rather than centralizing it in State government.

I would like you to comment on two questions. One is the possible role of the local Bar Associations and, secondly, the possible role of elected, locally elected officials in appointing members to the screening panels.

CHIEF JUDGE WACHTLER: You will notice in the proposed legislation that we offered, there is such a provision. In other words, we are not talking about a one State-wide merit screening panel. We are talking about one for each Judicial District.

COMMISSIONER MAGAVERN: My recollection was, the Governor still is.

CHIEF JUDGE WACHTLER: The Governor is involved in that as well. See, any suggestion that's made in that connection would be quite acceptable to me. We offer a proposal. As local as you can make it, perhaps, the better it would be. I quite agree with you, or, at least, the import of your question, because I believe that if we could have that local input by those people who deal with those judges in a more direct way, then we could, indeed, have a more effective screening panel on the Judicial
District level.

I would be very much in favor of that so long as there is the non-partisan balance within that screening panel.

COMMISSIONER MAGAVERN: What about the local Bar Associations, do you have any qualms about giving them a very strong voice in that process?

CHIEF JUDGE WACHTLER: Yes, I have some qualms about giving any single body a very strong voice in the process, because once you do that, then you're substituting one political body for another. That's why I think it has to be as diverse as possible so that you don't have the opportunity for politics of another sort. It might not be that kind of partisan politics, but it could be, again, Bar Association politics, which can be as strong, sometimes, in certain areas, as any other kind of politics.

COMMISSIONER MAGAVERN: Thank you. May I turn to one other subject, and this is outside your remarks, but it's a question I think we should be concerned about, and that concerns how well is the Court of Appeals Nominating Commission and that process really working in reality and in perception.

My question is: Are you aware of instances
in which judges which you would consider to be well-qualified for nomination to the Court of Appeals have either not been nominated or, worse yet, not been given serious consideration by the Nominating Commission?

CHIEF JUDGE WACHTLER: Whether or not they were given serious consideration, I wouldn't know, but I have been sorely disappointed by certain people whose names were submitted who never came out of that Commission, a couple that I could think of, without mentioning them, that were totally inexplicable. And, yes, I have had certain disappointments with that Commission.

Initially, I was very critical of the Commission on the first round, when they did what was almost similar to posting an advertisement, you know, "Whoever is interested in going to the Court of Appeals, please apply."

I had thought that that Commission would function better if it were an outreach Commission which really sought out the most talented people in the State and urged them to come forward.

I was disappointed in the first round where every single candidate was a white male sitting
judge. I thought that we could do better in as diverse a State as the State of New York as far as presenting some balance for the Governor to choose from. I think that every time the Commission has functioned, though, it has improved. I think it's getting better and better, but even at its worse, I think it is better than the system we had before.

COMMISSIONER MAGAVERN: Are there ways to improve on that system to meet the concerns you had?

CHIEF JUDGE WACHTLER: Well, I think that the way to improve on it is, number one, to be openly critical of it. Number two, I think we have to be very careful with those who are appointed to the Commission, to make sure that we appoint the very best people, and I think, again, it's getting better and better.

And, three, hope for the best, knowing that you're dealing with a system which is better than the one you left behind.

COMMISSIONER MAGAVERN: Thank you very much.

THE CHAIRMAN: Commissioner Emery.

COMMISSIONER EMERY: Judge, putting the
retention issue aside for a moment, which I would like to get back to, isn't it the case, especially -- well, isn't it the case, for judges in the initial process of getting an appointment, or getting elected, that judges suffer from a peculiar disability in the election process, that is, they really can't -- or, candidates for judgeships suffer from this disability, that is, they really can't go out and address issues, create popular support for their candidacy, they can't do that, can they, as a practical matter?

CHIEF JUDGE WACHTLER: No. As a practical matter, no, they can't, but, beyond that, people don't really care.

COMMISSIONER EMERY: Isn't it a sham to call it an election process? It really is a nominating process by a party, or even more exactly, isn't it a process by which, in most counties, the party leader selects the people who will inexorably become judges?

CHIEF JUDGE WACHTLER: Without question. In most counties, of course, those counties which are tipped to one political party or another. There's no question.
In the City of New York, you're nominated by the political leader to run for the Supreme Court, and the political leader happens to be the Democratic Leader, you're going to be elected to the Supreme Court.

In Nassau County, it's, by and large, the Republican Leader.

COMMISSIONER EMERY: Isn't it also the case that those political leaders, in the Manhattan instances, either are lawyers or lawyers who haven't practiced for a long time or are lawyers who really don't often emphasize in their list of priorities the concerns that they have in picking judges, the quality of those judges, the capabilities, but, rather, their own political needs as leaders?

CHIEF JUDGE WACHTLER: That's true. By the way, I want to make it very clear. I think, by and large, we have very fine people as our political leaders. We are not talking about bad people.

COMMISSIONER EMERY: This isn't their concern, is it?

CHIEF JUDGE WACHTLER: Precisely. Their concern
is to do the best they can for their party and, indeed, that's what they are there to do.

COMMISSIONER EMERY: Right.

CHIEF JUDGE WACHTLER: No political leader has been given the mandate to improve the judiciary, and that really isn't on the political leader's agenda.

COMMISSIONER EMERY: And the best they can do for their party includes raising money, garnering support, pulling people together, making sure their candidates are elected, consolidating their own position, but not necessarily appointing people who will do justice?

CHIEF JUDGE WACHTLER: Precisely.

COMMISSIONER EMERY: Isn't that correct?

CHIEF JUDGE WACHTLER: Precisely. By the way, they don't want to put people up who would embarrass them, so there is a level below which they will not go, and we can be thankful for that.

COMMISSIONER EMERY: But, because of their consolidated control, I guess we get back to that old -- I'm reminded of your wonderful statement about grand juries. We can pick a
deli food --

CHIEF JUDGE WACHTLER: Make it corned beef.

COMMISSIONER EMERY: They can nominate a corned beef sandwich, isn't that right?

CHIEF JUDGE WACHTLER: I say that the people who run our political parties, by and large, I think, are good enough people, so that they don't do that.

COMMISSIONER EMERY: But they could?

CHIEF JUDGE WACHTLER: Potentially, they absolutely could.

COMMISSIONER EMERY: Regrettably, at this point in time, the public's perception is that that is sometimes what happens.

CHIEF JUDGE WACHTLER: You see, that's what worries me. I don't really know. I know that it could be. And, you see, the whole justice system is balanced very delicately on what we call public trust.

COMMISSIONER EMERY: Yes.

CHIEF JUDGE WACHTLER: And if the public perceives the judiciary as being hand-maidens of one political leader or another, or political hacks, then they won't trust that judiciary, and
I don't think we've come near that yet, but no matter how good the judges are -- and I start again by saying that we have excellent judges -- no matter how good they are, they will not be perceived as being that good, and that's the danger.

COMMISSIONER EMERY: Now, I agree with everything you said, entirely, and I just want to bring that back to the retention proposal that you made, which I also agree with in principle, and has great appeal.

What I would like to ask you is: Don't the same concerns that you have with respect to the retention proposal -- although I do agree with you, it's a first step -- don't they really apply to the initial selection of judges almost as strongly -- I mean, I think you listed four of them, and I think three of them, at least, apply, namely, that they are at the mercy of the political process, that good candidates are discouraged by the political activities that flow or are inevitably part of the process of being a judge, and that the exigencies of a political campaign take a great
toll in some ways on good candidates.

I think the only one that doesn't apply is, that it takes a judge away from the bench, the political process, to achieve renomination, in that context.

But don't the other three really argue for exactly the same sort of solutions or reforms?

CHIEF JUDGE WACHTLER: Absolutely, absolutely. There is no question about it.

COMMISSIONER EMERY: There is one other final question I have, and that is: What's your opinion on the taking of the one aspect of the Federal system and imposing it or reforming the State system in accordance with it, and that is, simply, life appointment, or at least appointment to the term of retirement since we are concerned about retirement, apparently, in the New York court system for trial judges and for Appellate Division judges as well as this current system for Court of Appeals judges, which isn't a life appointment?

CHIEF JUDGE WACHTLER: I would be very much in favor of that. As a matter of fact, we have a Bill in now which talks in terms of
senior status for judges which tries to parallel the Federal system. But I would be very much in favor of that.

Once a person has passed all of the necessary hurdling to become a judge and is accepted as a judge, I would think that we could improve on the Federal system by having some interim step where the judge's qualifications and character and ability and competence is evaluated, again, through some body or screening panel, and then, after that, certified for a life term. I think that would be excellent.

COMMISSIONER EMERY: Isn't the life term, in fact, what ends up being the single most important factor in making judges independent and, therefore, credible and trustworthy, from the public perception?

JUDGE WACHTLER: Absolutely. I think that goes back to the statement that I quoted from John Marshall, where a judge can truly be responsible only to -- as he put it -- to his God and his conscience without worrying about anyone else.

COMMISSIONER EMERY: Thank you very much.

CHIEF JUDGE WACHTLER: Thank you.
THE CHAIRMAN: There is one other area, Chief Judge, that I would like to ask your thoughts on.

I have no doubt that you have given a great deal of thought to the present rules having to do with the partisan activities of judicial candidates and sitting judges, and as I understand those rules, there is a certain period of time before the nomination or the election day, and then some months afterward, when one can be a participant in terms of political events in the process.

Has any thought been given in your oversight group to expansion of the rules having to do with members of families, spouses, members of families in terms of their participation in the process at other times?

CHIEF JUDGE WACHTLER: No, actually, I don't know. This entire set of rules is now under study, as I indicated earlier. I don't know that they are even looking into that, although that would be an interesting area to explore.

THE CHAIRMAN: Are there any other questions?
MR. O'BRIEN: Could I just pick up on that?

THE CHAIRMAN: Sure.

MR. O'BRIEN: I share the same concern that Dean Feerick has, Your Honor. The OCA rules, as I understand it, at present allows a judge who is running during a certain period of time to buy a ticket at a county or party affair.

Now, I think it's fair to say that in the course of our study of this problem state-wide, we uncovered instances where judges, indirectly, through friends, through family, even through campaign committees, were purchasing hundreds or even thousands of dollars worth of tickets for functions, and I think I would agree, that presents a far greater appearance problem than just one ticket.

My question is: Should we expand the OCA rules to address that particular problem?

CHIEF JUDGE WACHTLER: I think it's an excellent point. As I say, we are studying that whole thing. We would like to see the practice of having to buy any tickets eliminated entirely, but, again, we are faced with that constant dilemma. If the legislation surrounding
the system says that you have to run, how can
you tie both hands behind the judge's back be-
fore you put him in the ring for the heavy-
weight match?

MR. O'BRIEN: Is that because the challenger
is free -- the non-incumbent is free to attend as
many affairs --

CHIEF JUDGE WACHTLER: That's right. The
challenger can swing away all he wants to, and
then you're saying that the incumbent can't, so
that it's grossly unfair.

And then, if you let the incumbent do every-
thing that the challenger does, what you're say-
ing is, that this incumbent judge can, for this
nine month period, do everything that anyone
else can do in the political arena.

Whereas, some legislators would sit back
and say, "So what."

As I tried to point out, there is a big
difference between what the legislator could
and should be able to do and a sitting judge
who is supposed to give the appearance of
complete impartiality. I would hate to be a
litigant in a contest before a bench which is
made up entirely of judges who were part of
this process if I was very strongly allied
with the opposition party. I would be worried
about it.

Now, if I say to all of you, and say it
with every ounce of sincerity I can muster,
that that litigant, 99 times out of a hundred,
and maybe even a hundred times out of a hundred,
will be in a very fair open tribunal, neverthe-
less, I think you will be hard pressed to
accept that.

THE CHAIRMAN: A group of students at my
law school recently did a study, which I will
pass along if you haven't seen it, on the sub-
ject of judicial elections, and they surveyed
judges around the country, and one of the
suggestions made in the conclusions of that
study was that a number of judges nation-wide
felt that they wanted to have more knowledge
of who contributed to their campaign committees
because in the course of their administration
of justice, they would like to know if there
are facts present that would require them to
recuse themselves or might raise some issues,
and right now, in the absence of that kind of knowledge, there are some issues that they felt were present in terms of appearance involving themselves.

And, as I say, I will send along the results of this survey.

CHIEF JUDGE WACHTLER: That will be very interesting.

By the way, talking about other States, I was asked by the Chief Justice of Kentucky to speak to the Kentucky Bar Association not too long ago, and I said, "Is there any particular pressing problem?", and he said, "Yes," he said, "We want to get away from the system of electing judges."

I said, "You have partisan elections in Kentucky, too?" He says, "Partisan elections?" He said, "You can't have anything like that a partisan election. No, we just have retention elections. We want to do away with all elections."

I found out in most States, by the way, when you mention the fact that judges are actually running on party lines, they are rather
astonished.

THE CHAIRMAN: We appreciate very, very much your participation. You are an example of where the appointive and elective systems meet and agree, because you were originally appointed to the Supreme Court and then elected, and then elected to the Court of Appeals, and then appointed.

CHIEF JUDGE WACHTLER: And given a choice, appointment is much more interesting.

THE CHAIRMAN: Thank you very much.

CHIEF JUDGE WACHTLER: Thank you very much.

THE CHAIRMAN: I would like to call as the next witness, Governor Wilson.

THE CHAIRMAN: Good morning.

GOVERNOR WILSON: Good morning.

THE CHAIRMAN: It is an honor to have you with us today.

I would note for the record that Governor Wilson has held elected State office longer than anyone in the history of New York State: Twenty years as an Assemblyman, fifteen years as a Lieutenant Governor, and one year as our Fiftieth Governor.
He is presently a member of the New York State Commission on Judicial Nominations, as well as of counsel to the law firm of Kent, Hazzard, Jaeger, Friedman, Green & Wilson.

It is a pleasure to have you, Governor.

GOVERNOR WILSON: Thank you very much.

I have no written statement. I was interviewed by two very fine women, members of your staff, and they asked me if I would come down here and testify. I said, I'd be delighted to do so.

So, I won't make a formal statement. I would be delighted to respond to your questions.

On the general subject, it does seem to me that there is no objective, objective, evidence which suggests that the time honored system of judicial selection in this State, which is by the election process, with the exception of the appointment of the Court of Claims by the Governor, and now the appointment of the Court of Appeals by the Governor, and in some instances in the City of New York, members of the Criminal Court by the Mayor --
this is a system which has been in effect for
well over one hundred years.

I'm sorry I didn't hear all of the Chief's
testimony. He's my close friend. But, I was
interested in a comment he made about a concern
on the part of a litigant, if I understood him
correctly, or a lawyer appearing in the Court
of Appeals when it was an elected court, that he
might not receive full justice for his client
because of the fact that the judges were
politically elected.

Perhaps that is not a proper paraphrase of
what he said, but I think it was.

I can't believe that the Judge really meant
what he said. If that's, indeed, what he said,
-- because, as you pointed out, Dean, Judge
Wachtler was first elected to the Court of
Appeals in a contested election. He and Hugh
Jones and Mike Gabrielli were elected in a
partisan contest State-wide, and the bench was
a very distinguished bench, as had been the
benches of the Court of Appeals in our State
for over a century. Elected judges, Charlie
Brietell, Charlie Desmond, Stanley Full, Pound,
just to name a few.

I've been at the Bar for fifty-two years, and many years ago, before I was elected to the Lieutenant Governor, my practice, 95 percent, was in the Appellate Courts as an advocate, Appellate Division, First and Second Department, and the Court of Appeals. I never discerned in those, in the Benches of those courts, any determination made on the basis of other than what was justice as discerned by the Bench.

In my judgment, shifting from our time honored system, which has stood the ravages of time very well, to an appointive system, simply shifts the politics from the political parties to the Governor.

You perhaps know, the late Judge Desmond and I strenuously opposed the approval by the people of the Constitutional Amendment which provided for the new method of selecting members of the Court of Appeals on two grounds, both of which I think are apposite in consideration of the present problem. One was that it seemed to us that it violated the concept of separation of powers. It is to the courts
that the average citizen can only go to protect himself or herself from the excesses of Governors and Legislators, and it does not seem appropriate to give the edge to the State over the citizen if the jurist is one who is appointed by the State.

The other objection which we had was that -- and I hold that view very strongly -- that to deny the people who have the right to elect Governors, Legislators, Congressmen, Senators, Presidents, Councilmen, Mayors -- to deny the citizen the right to vote for one whose decisions will affect his life, his property, his person, if he has occasion to take recourse to the courts -- to deny the citizen the right to vote for a judge is papa knows bestism in its most aggravated form.

I return full circle to where I started, and that is that those who seek to change the system, the time honored system which has been in effect in this State for 125 or 130 or 140 years, has a very heavy burden of proof. I have not seen any evidence to suggest that this burden has been met by those who advocate
the change in the system.

THE CHAIRMAN: Governor, if I can just focus on a particular facet of the subject.

I think I can say that certainly from our work over the past several months, a number of former judges, current judges, certainly feel inhibited to some extent by the threat at the end of a term in office -- now, a sitting judge at the end of a term in office -- perhaps of being denied cross endorsement, or the party nomination, so that there isn't available or in any reasonable degree the possibility of a second term.

Do your comments having to do with the elective system also extend to the elective system in the second time around, so to speak, a third time?

GOVERNOR WILSON: I would not change the system to eliminate what I think is a vice, and that is the failure of a political party to renominate a judge who has served creditably. With very few exceptions, I have consistently taken the position that a judge never again have to be a candidate for judicial office
after he or she has been elected. But, rather that the political parties, assuming that the jurist has performed his or her judicial duties satisfactorily, should unite in endorsing that jurist for many years.

One who is elected judge must surrender his or her law practice, close the office, and so on, and fear the kind of reprisal which sadly we have seen in -- the most visible recent case in that regard, of course, was the failure of the Democratic Chairman of Bronx County to re-nominate Donald Sullivan and Billy Kappelman, each of whom, in my perception, had performed his duties well.

I think that the motivation seemed to be, because of a change of the ethnicity in the constituency in the First Department, Bronx and Manhattan, that there was needed to be some recognition for Hispanics. Whatever the motivation, I feel, -- personally, I felt that was wrong.

I wouldn't change the system for that reason. Sometimes it's justified. It was justified in the case, in my judgment, of the late Judge
Hopkins, late Judge -- not Judge Hopkins, Hawkins, the late Judge Hawkins. Why do I say that? Because in the Ninth Judicial District, it has been customary to have the major political parties endorse incumbents who have served well during their terms.

In 1964, the terms of Albert Gallagher from Westchester and Bob Dosher from Rockland County, each of whom had served creditably as Supreme Court Justices for fourteen years -- each, incidentally, had previously served. Bob Dosher is the County Judge in Rockland and Rick Gallagher the County Judge in Westchester. Their terms expired, and they were not endorsed by the Democratic Party.

The reason they were not endorsed is because that was the year in which the Republican Party had as its candidate for President, Senator Barry Goldwater. All the auguries indicated that he would not do well in New York State. He lost the State of New York by 2,300,000 votes. And, so the Democrats fielded candidates against these incumbents. One of those was Joe Hawkins, who was the Democratic Chairman of Dutchess County.
Joe Hawkins was elected. Rick Gallagher was elected by a margin of about 1,000. Bob Dosher went down the pipe.

Fourteen years later, when Judge Hawkins, by that time on the Appellate Division, Second Department, was a candidate for re-election, I was one of those who felt that when you live by the sword, you die by the sword. Therefore, he was not redesignated by the majority party.

Those are rare cases.

THE CHAIRMAN: I take it from your comments that you believe that it's important that a judge who has served well should have a continued opportunity to serve?

GOVERNOR WILSON: I do. I do. I fell it's the obligation of the political parties, all the political parties, to renominate that jurist.

THE CHAIRMAN: And could you be persuaded, if the state of facts presented itself over a period of time, whatever that period of time might be, that where the parties weren't producing that result, that that might be reason to think about some kind of structural change?

GOVERNOR WILSON: If I found that the
political process which chooses candidates for Governor and all other offices in the State did not adhere to this practice of endorsement of a jurist who has performed his or her duties responsively on a State-wide basis in the 62 counties of the State and all of our judicial districts, not in isolated instances of a judicial district -- for example, the Ninth Judicial District, or First Judicial District or any other district -- if I found a pattern of political leadership which failed to do that, then I feel that would be objective proof of the need for change.

I have not found that. It's not advisable.

You were good enough to indicate that I have been related to State government for thirty-six years. I have not seen any place in the State, whether it's where my party dominates, used to in Upstate New York, no longer as it did, or Downstate, where the Democratic Party dominated and still does in most areas -- I have not found this lack of responsibility on the part of the political leadership, except in
cases of the exceptions, which only go to prove the rule.

THE CHAIRMAN: Do you have any comments on the practice, if it is a practice, that as a judge's term draws to a close, the present elective system puts a lot of pressure on him to return again to the political process to become more active, to perhaps even get a campaign chairman and do politically what one ought to do under the elective system to assert the renomination?

GOVERNOR WILSON: We are talking about renomination --

THE CHAIRMAN: Yes.

GOVERNOR WILSON: Or re-election?

I'm not aware of any sort of campaign mechanism, fundraising or giving, which is related to the nominating process. I am, as far as the elective system is concerned.

THE CHAIRMAN: Under the existing court rules, as I understand the rules, in the year the judge's term is running to a conclusion, he or she is allowed a certain degree of political participation that otherwise would
not be allowed, simply because there's a political process that's going on.

GOVERNOR WILSON: I think the -- I am not intimately familiar with the rule. I think it's that in the year in which a term expires, that year alone, a member of the Bench may attend political dinners and, I guess, make political contributions. I'm not familiar with that part.

I see nothing wrong with that. I think that a candidate -- that the people have a right to see their candidate. There's no vice, in my judgement, in contributing to -- under those circumstances, a judge making a contribution to a political party, than I see anything wrong in the appointing officer receiving contributions.

Mr. Chairman and Members of this Committee, I have seen, and maybe you haven't -- I've been around a lot longer than you have -- in other offices -- let me say, it's unrelated to what we are talking about -- in 1932, 1932, the largest single contributor to the campaign of Franklin Delano Roosevelt's first election was a piano manufacturer from a mountain state named William
H. Wooden. He was appointed Secretary of the Treasury at the time our Nation was in the depth of depression.

Governors' appointing officers, by virtue of their office, do not achieve some sort of sanctity. This simply changes, changes, the political process, takes away from the parties, which are regulated by the State, the Legislature. They're all organized and must operate under the law to the appointing officer.

I think it is not merely a fortuitous concatenation of felicitous circumstances in the case of the appointees, that in the appointing process, for example, in the City of New York, that by far the largest number of members appointed to the Criminal Court happen to be of the same political party as the Mayor, currently Democrat.

When Lindsay was here, Liberal, hence Republican. It just changes the -- and it takes the people out of the process. The people are the ones for whom this government exists.

Commissioner Hynes?
COMMISSIONER HYNES: Governor, in terms of saying that the time honored system is -- you see no reason to change it, that over the course of a hundred years it's worked, would you agree that the system requires that judicial candidates must come through the party, the political parties, and that's the only way that they are really going to have the prospect of receiving a nomination and being elected, and if they are not someone who comes from the political party, then they are really not able to really muster a candidacy for the Bench?

GOVERNOR WILSON: Well, I think I would have to deny your major, as we used to say as we talked a lot.

I think that I see nothing wrong in having candidates for judicial office pursue the same process as is pursued by the appointing authority. When you say that someone must come through the political process, for example, meaning going to the clubhouse and circulating petitions and paying your dues, a very eminent former member of the faculty of the law school of which the Dean is now the head, John Loren, one of the greatest
judges on the Court of Appeals, was not involved in politics at all. He was appointed by Franklin Delano Roosevelt to a vacancy in the Supreme Court, and very shortly was nominated for the Court of Appeals.

What I am saying, Miss Hynes, is that there are many occupants of the Bench who have not operated through the political process, have not come out of the club room.

I had the opportunity to -- a vacancy, to appoint to the county-wide judicial office in my county, when I became Governor, to make an appointment. I felt it was long past time to appoint a woman to the Bench, a qualified woman.

My counsel, Mike Whiteman, was in touch with the Judiciary Committee of the Westchester County Bar Association to ask for an opinion as to this candidate, an all-male Committee. The Committee failed to approve. I felt it important to be in touch with the Chairman of that Committee to suggest to him that, in my opinion, the disapproval was based on the fact that it was a female person involved, and that I intended to make the appointment over the objection of the
Bar Association if they intended to adhere to their decision. So, they reconvened and approved.

Now, the Bar Association politics -- we have a lot of people who are experts in this subject who couldn't find their way to a court house with a seeing eye-dog.

Bar Associations are -- I'm proud to be a member of every one there is, but, nonetheless, there is Bar Association politics, and nobody picks them.

COMMISSIONER HYNES: Governor, the examples you gave were two appointed situations. What I'm saying is, I'm not advocating that one system is necessarily a better system over another. I'm just saying, we are trying to figure out an approach where we can open up the system and not say -- and, my question is, is there a way to open up the system where we have a judiciary that doesn't only have to come through the club house politics, but that qualified candidates who have not come through that system, but still are interested in serving on the Bench have an opportunity to be a candidate in
ated and elected to the City Court of Yonkers,
and then he was elected to the Supreme Court,
and then he ran for Governor against Herbert
Lehman in 1936.

I don't think there is anything wrong with
a man or a woman becoming involved in politics
and active in politics. The two party system,
in my judgment, is basic to our whole form of
government. I don't think that anyone who is
involved in politics -- I think that person is
a better citizen than a man or a woman who does
not participate in politics.

Therefore, by pointing to cases where people,
to my knowledge, got to the bench without being
part of the process, I do not mean at all to
condone the process. It is the same process
which elects Governors and Mayors and appointed
officers, and I see no basis -- as I say again,
it is "papa knows bestism" in its most aggravated
form. Who are the people, who are the substitutes,
who are the substitutes that are proposed?

People who emerge from some sort of a pro-
cess where the screening committee is appointed
by the Chief Executive? What makes that better
or worse than the people? The people are the ones that pay the taxes, they are the ones for whom the government exists and, as I say, Commissioner Hynes, I see no objective evidence which supports the proposal.

We find exceptions, but they only prove the rule.

THE CHAIRMAN: Commissioner Emery.

COMMISSIONER EMERY: Just to take up right where you left off, because it concerns me, what you're saying in this whole process.

It just doesn't seem to me -- and I'm saying this so that you can respond to it -- that the majoritarian politics of State political activity, where the purpose of parties, that you have just expounded upon, as the appropriate mechanism for our political structure, they elect all our offices, and why not elected judges. The purpose of parties is to garner and consolidate majoritarian support, it's to pull people in and to get a consensus, and based on that consensus, through gathering money and resources and votes, elect that party's slate.
GOVERNOR WILSON: Correct.

COMMISSIONER EMERY: And what I'm suggesting to you is: Isn't that directly antithetical to the role we want the judiciary to play? Isn't the judiciary, in our system of government, with the separation of branches, at its essence, the branch which seeks to be anti-majoritarian, which seeks to protect the right of the individual against the majority when the majority is oppressive, which essentially is to check the majoritarian influences which parties have as their pre-eminent value in society and, therefore, should we not rely on parties to select the very people that they would be selecting in our government system, to check them, to keep their instincts and their activities in check.

It seems to me, the process ought to be very different, for that reason. It's an inherent conflict of interest, is what I'm saying.

GOVERNOR WILSON: With all due respect, Mr. Emery, I suggest that there is no such conflict of interest there, unless, also, you will have to make the case, and accept the premise that, therefore, we should not elect Governors who
come out of the political process, and Mayors. The fact of the matter is, the judge should be responsible to the same people that the Governor is, the people. That's one.

You see, you imply that there is a responsibility on the part of the jurist elected through the political system and the adherence of a party which put together the majority to elect him, that there's some sort of fealty that he owes to that party or to its adherence. I deny that. That's not so. And, historically, that's not the case and no one has established it except in very rare cases, which proves the rule.

COMMISSIONER EMERY: It is a case that the Mayor, a State Senator, a State Assemblyman, a Governor does owe fealty to the party that elects him, is that not true?

GOVERNOR WILSON: Well, it all depends on just what that means. I think, demonstrably, Governors who have the power to appoint judges, in the main, happen to appoint qualified people who are members of their party. Okay? There are exceptions, you know, which prove the rule.

When I had two vacancies on the Court of
Appeals to fill, I appointed Sam Rabin, and the other, Harold Stevens, the first black that ever went on the Court of Appeals, a Democrat. There are others.

My late friend, Nelson Rockefeller, was criticized, I think, for appointing, in the view of some political leaders, too many Democrats to office. If you can fight a case, a pattern, Mr. Emery, of a jurist whose decisions in matters are influenced by the political party of which he or she is an adherent and show me a pattern of that, then I'll say that's a bad apple that ought to be removed. I don't think you can do that.

COMMISSIONER EMERY: Well, let's go one step beyond that, because it seems to me that we are not only dealing with the actual patterns, which I think are very hard to demonstrate because of the nature of the judicial process, which has to go with a decision-making process which is entirely private.

Why a judge reaches a particular decision is not for us to look into, it's not for the Legislature to look into.
GOVERNOR WILSON: It's for the Appellate Courts to look into.

COMMISSIONER EMERY: Exactly.

GOVERNOR WILSON: That's our system.

COMMISSIONER EMERY: It's not a political process for us to examine. It's well beyond our mandate as well, I would think, John.

But, the reality here is -- what I'm concerned about is the independence of the judiciary, and what I'm concerned about is a process that requires people who are seeking judgeships because they want to do a good job, because they feel they are qualified and they think they are fair people and they think that they can do a good job in deciding the disputes between the litigants that come before them, that they have to go out and curry favor not on the merits of their abilities, but try to portray themselves as being able to help the party which is going to nominate them in A, B, C, D and E ways, including gathering money, including gathering support, including being a loyalist, including gathering petitions, signatures for petitions, and including evaluating petitions as lawyers,
and protecting the party in the petitioning and balloting process.

Now, we know that lots and lots of judges who get the party nominations go through this process and they do it specifically not because they really want to help the party, but because they want to become judges, and that's the only way to do it, and that disturbs me greatly, and I don't quite understand, Governor, with all due respect, why it doesn't disturb you.

GOVERNOR WILSON: It doesn't disturb me because it doesn't exist. We are talking about sixty-two counties in the State of New York. We are not talking about a State which has two counties in the First District or five counties. We are talking about sixty-two counties.

For you to say that an aspirant for judicial office, male or female, in order to get the nomination of their party, are required to collect money for the party and to -- that is not the fact. This normally happens for appointed judges; they are the ones that get that sort of reward, appointed judges. And I can tell you at the Federal level, too, Mr. Emery -- this is true
at the Federal level.

THE CHAIRMAN: Commissioner Magavern.

COMMISSIONER MAGAVERN: Governor Wilson, I'm interested in the way in which the Court of Appeals Nominating Commission works. Without asking for any details or names or anything of that sort, I wonder if, in your opinion, the process is working well.

GOVERNOR WILSON: It is. As I said, I opposed it, and then when it passed and Senator Anderson called me and asked me if I would accept his appointment, I said, "I think I'm an inappropriate person because I opposed it, but I would accept it."

It has worked well. Conceptually, it is wrong, conceptually. We have a twelve member Commission, four appointed by the Governor, four appointed by the Legislative Leader, and four appointed by the Chief Judge of the Court of Appeals, a majority appointed by the Governor and the Legislature. It is only to that forum, the Court of Appeals, that the citizen can go to challenge the action of the Governor and the Legislature in enacting a law which, in the perception of that citizen, violates his or her constitutional rights.

So, conceptually, it's wrong. It has operated
very well, but I can say, Mr. Magavern, that it would be absolutely impossible to have that sort of procedure for courts in the State or even, you know, the Supreme Court, when I know what goes into the work that is done, the screening which is done, the investigations, the interrogations.

It is a time-consuming process. It does work well. I think it has produced good lists of aspirants for the Court, some of whom were members of the Supreme Court, and other benches who had gotten to their posts through the political process, and I think it has worked well.

COMMISSIONER MAGAVERN: Would you expect it to work well if you could replicate that process on a decentralized regional basis?

GOVERNOR WILSON: It cannot be done. It cannot be done. You cannot find -- you will find the men and women who serve on that Commission, leaving me out, are men and women who cannot afford the time that they give, but they do. It's for the Court of Appeals. It would be impossible, in my judgment, to have that same process for other judicial positions.

I remind you, too, of the appointers. As I
say, the Governor appoints a minority of the members of the Commission.

COMMISSIONER MAGAVERN: I would like to ask you the same question that was asked of Judge Wachtler, and that is, whether, -- again, without naming names or details -- there have been instances in which highly qualified judges, in your opinion, have been nominated, or, worse yet, have not even been given serious consideration.

GOVERNOR WILSON: I've told you the one, the only one that I can recall. I have been at the Bar for fifty years, fifty-two years. In the Ninth District, there was Judge Hopkins. I have you the reason.

COMMISSIONER MAGAVERN: I'm referring to the Court of Appeals Nominating Commission. Have there been instances in which that Commission has failed to nominate a very highly qualified judge, or even to give serious consideration to a highly qualified judge?

GOVERNOR WILSON: Serious consideration was given, but we operated on -- there were very, very many aspirants who came before us who would have
made excellent judges on the Court of Appeals, but we operated on a comparative basis. We vote by secret ballot. After all is done, we vote by secret ballot, and those who participate, you know, on a relative -- that A is excellent, but B is just a little better. So, there were fine judges. We could have, with great comfort, sent twenty nominees to the Governor, but the law limits us, as I think it should, for an Associate, no more than seven, for a Chief, no more than nine.

COMMISSIONER MAGAVERN: Are you satisfied that there are objective criteria by which you can select out the seven best and that they really are superior to those who are rejected, so to speak?

GOVERNOR WILSON: We are as different in our judgments as we are on other things, Mr. Magavern. I believe that my fellow members of the Commission have exercised their best objective judgment.

COMMISSIONER MAGAVERN: Thank you very much.

THE CHAIRMAN: Commissioner Emery.

COMMISSIONER EMERY: Governor, what do you...
think of the proposal that, either through an
elected or an appointed system, a judge take
office for life or until some age of retirement
that's designated by the Legislature?

GOVERNOR WILSON: I do not favor that
proposal. I think that the people, who are
supreme in our society, the people, should have
an opportunity to make a judgment at the expira-
tion of a term, and if you have someone appointed
for life, then you have no choice other than to
impeach. It's a shoddy process.

There was a judge out in Nevada, there's a
judge down in Florida, appointees of an Executive,
came out of a political process, who had to be
impeached. No. I believe -- I favor short term
-- not for judges -- I'm a great person for short
terms. I think that's the way you make people
responsible. Now, fourteen years, I think, is a
long time. What is it, ten years now, or still
fourteen, I forget, for Supreme Court.

COMMISSIONER EMERY: Governor, just to pick.
up on your Judge Hawkins story about how he ob-
tained his fourteen years as a -- he was a
Supreme Court Justice in Dutchess?
GOVERNOR WILSON: In the Ninth District. He was a resident of Dutchess County and the Democratic County Chairman of Dutchess County.

COMMISSIONER EMERY: How did he perform his duties as judge, to your knowledge?

GOVERNOR WILSON: He performed well.

COMMISSIONER EMERY: Yet he wasn't re-appointed because "live by the sword, die by the sword"?

GOVERNOR WILSON: You got it.

THE CHAIRMAN: Keven O'Brien.

MR. O'BRIEN: Governor, I'd like to get your precise opinion about what you think, if you could design the system, would be the best system.

You've talked a lot about democracy and the people decide.

Would you prefer a nominating convention system where one party nominee gets on the ballot for the general election or, say, on the other side, an open primary where anyone who can meet certain petition and other requirements can get on the primary ballot?

GOVERNOR WILSON: I feel that the present
system, the convention system, where we do have an opportunity to field a slate of aspirants -- has an opportunity if he or she wishes to, to field the group of prospective delegates, is the best system.

MR. O'BRIEN: Isn't the convention less democratic in a strict sense than a primary system?

GOVERNOR WILSON: I think that would probably be a fair statement. That is so, Mr. O'Brien. It is less democratic, but that is not to say that that's a good thing, because it's one more contest of the type that you deplore.

MR. O'BRIEN: I am sorry, of the type --

GOVERNOR WILSON: The advocates of change deplore political contests. This would add another political contest.

MR. O'BRIEN: I'm wondering whether you would build into an appointive system all the benefits that you've talked about, which some of them, I think, are are very persuasive that you've talked about in connection with a convention system.

If I'm misstating you, tell me so, but I believe you think there should be a role for party
leaders with wisdom and experience to have some input into who the judges are at a local level, and that's precisely why you are probably against the open primary system, particularly when the voters at large are not well informed about the qualifications of the candidates.

Isn't it possible -- for example, Mr. Weprin, who is sitting behind you, has sponsored legislation in which screening committees have set aside a certain number of seats for people selected by the county leaders, and those designated people become part of the screening process, so that indirectly, at least in the cases of local judges, the county leader can bring to bear his experience in the selection of judges, be it for an ultimate election or selection by the Governor.

But, it is done through a screening process and not through a convention, where sometimes, as you know, problems arise, or at least the appearance of problems arise.

Couldn't that satisfy your concern that local political leaders who know the candidates well and know who the lawyers are in their communities should have some kind of role in the process?
GOVERNOR WILSON: Excuse me. It is not your failure to articulate clearly, but my inability to comprehend, which raises my problem.

The political leaders have the convention. The delegates to the convention, unless there is a contest in which those delegates, some or all, lose, all came out of the political process, so many delegates, and that convention -- sometimes there's a fight in the convention, but those fights, I think, have been limited, frankly, to the counties in New York. I'm not aware of any fight -- perhaps out in the Island, but I doubt it.

But, I don't understand -- I mean, I don't know -- let me back up a little.

There are a few, if any, outside of the five counties of New York -- possibly including them, I don't know -- political organizations which don't run through the local Bar Association the names of people who are going to be considered. I think that's good. You see, what we have to be very careful of is not to make a judgment about the sixty-two counties in the State on the basis of a few.
MR. O'BRIEN: Would it be fair to say your ultimate concern here is not so much that the people directly be able to express themselves in connection with their judges, otherwise you'd favor a primary system, but rather that this expression go through and somehow strengthen the party system, be it a two-party or one-party system?

GOVERNOR WILSON: Well, my concern -- my basic concern is eliminating the people from the process. That's my basic concern.

Under the present system, the Democratic Party nominates candidates, the Republican Party nominates candidates. The people have a chance to vote. In the case of incumbents, most of them are, you know, no contest.

Sometimes The New York Times invades against that editorially, but the people don't have a choice. It's a built in position, I might add, on the part of The Times, which is against the people participation. But, that's beside the point.

In this contest, -- well, I just spoke of the Court of Appeals. I can tell you, the
custom, the custom of the political parties on a State-wide basis. (A) Has always been -- I don't know, in fifty years, fifty years I've been there, there's never been a case where, for the Court of Appeals, an incumbent judge has not been nominated by all the political parties. Sometimes, the convention -- I have known -- when Francis Berg was nominated for the Court of Appeals, he was the only Democrat on the Appellate Division, Third Department. He was nominated by the Republicans before he was nominated by the Democrats, and he was elected, even though that changed the political balance of the Court of Appeals.

The men and women who operate our political parties are better citizens than those who take no interest in the political process. They are not venal, with exceptions, which only go to prove the rule. They're the kind of people you have for dinner at your house, you see them in church, at meetings. They're good citizens. They have no less interest in the effective functioning of all three branches of government than their fellow citizens, and, indeed, in many instances they have more, because of the dreadful indifference in the
public as manifested by the fact that, what do we get, 50 percent, 52 percent of the qualified voters going to the polls.

I think we should commend men and women who add to their other responsibilities participation actively in the political party of their choice.

MR. O'BRIEN: Thank you.

THE CHAIRMAN: I want to thank you very much, Governor, for your participation in these hearings, and say to you that it is an honor to have you with us, and we look forward to the important work of the Commission that you chair.

GOVERNOR WILSON: Thank you, sir.

THE CHAIRMAN: We will take a brief recess, and resume in about five minutes.

(Whereupon, a brief recess was begun at 10:45 o'clock a.m.)

(Thereupon, at 10:55 o'clock a.m., the following proceedings were had.)

THE CHAIRMAN: The Commission calls as the next witness, Assemblyman Saul Weprin, who is a distinguished member of the New York Bar, and currently chairs the Assembly Ways and Means Committee, is a former Chairman of the Assembly's
Judiciary Committee, and has been active, as well, in the political structure of New York State in his own county, Queens County.

It's a pleasure to have you with us, Assemblyman.

ASSEMBLYMAN WEPRIN: Thank you, Dean Feerick. I thank you for inviting me to appear before you and give some of my viewpoints.

I'd like to comment -- I have no prepared statement. I came in toward the middle, I think, of Judge Wachtler's testimony, and I heard all of Governor Wilson's testimony.

I had some thoughts as they were speaking, and if you'll permit me to, I'd like to just make a few comments, and then I'd be glad to answer any questions you may have.

First of all, I think you all have copies of my package of four bills which were introduced.

Actually, when I first became Chairman of Judiciary in 1980, I introduced a bill which was the Governor's bill on merger, as a matter of courtesy. Governor Carey at that time sent up a bill on merger, which provided for the appointment of all judges. I introduced it. It absolutely
went nowhere. It was not reported out of Committee.

In 1982, I introduced a bill at the Governor's request, which created the Nomination Commissions for vacancies on the Appellate Division, which we passed.

In 1983, which was the first year of the Cuomo administration, the Governor adopted my proposal of going with the bill of merger in place, which means, rather than the previous merger bill which had been submitted by Governor Carey, we would merge the courts, but keep those judgeships that were elective, elective, and those that were appointive, appointive.

I introduced a complete package in 1984, which consisted of four bills, which I think that you have copies of. One is my merger in place bill. The second is a bill that provided for a prescreening process, and it will require a Constitutional amendment.

Before any judge could either be appointed or run for office in any manner whatsoever, he or she would have to be pre-screened and found to be well-qualified by a broad based panel.
Incidentally, I'd like to correct one thing Mr. O'Brien may have overlooked. That panel consists of appointments made by the Governor, the Mayors and not the county leaders in the county, but the county executives of the county. In the City of New York, it would be the Mayor, or the Presidents of the Boroughs. Outside, in the other fifty-eight counties, it would be the county executive in that county that would recommend it.

The third part of my bill was the retention bill, and I would be the first one to introduce that back in 1984. That came about because of some things that happened in the Bronx and elsewhere, and I felt it was extremely unfair. I think Judge Wachtler referred to the fact that judges were out of politics suddenly have to come back into it after fourteen years.

I had judges come to me who said to me, "Fourteen years ago I was active in a political party, and I knew who the political leader was, and who the county leader was, and I was designated and I was elected to the Supreme Court. Here it is, thirteen years later, and next year I am coming up for election. I don't know who the county leader
is, I've never met my local political leader, I don't know where my local club is. You know, I can go around and start a campaign. What do I do?"

I felt this cried out for something, and I introduced my retention bill, which called for the non-partisan election one year before the end of the term. If there were no negatives, the judge would automatically be designated and elected for another fourteen year term, which would require a Constitutional amendment, of course.

The fourth bill in my package, which I introduced, which would not require a Constitutional amendment, was the elimination of the judicial conventions, which I felt through the years, both as an Assemblyman and as a political leader for many years, were just a rubber stamp for the political leaders in each copy. I felt their time had long gone, and we should do something about it.

Now, I agree with much of what Judge Wachtler says. When he says -- he was talking about his program. His program is my program. This is the
program that I introduced, that the Office of Court Administration supported completely. As a matter of fact, very many organizations interested in the court system, including the Fund for Modern Courts, which Hank Hanry so ably represents, supported my package completely. They supported my merger in place bill, and that resulted, had a lot to do with first passage of the bill, which was done several years ago, two years ago.

I agree with some of the things Governor Wilson says, too. When he says the fact that somebody is in politics should not be held against him, I think he's absolutely correct, and I think there's nothing wrong with being part of the political system or being active in the political system, but I happen to disagree in many of the aspects as to how we go about getting them onto the bench, and that's why I came up with my package, which includes pre-screening, which will result in well-qualified candidates, whatever party they come from.

Now, I'd like to touch just on one other thing, and then I'd be glad to answer your
We heard some mention, and it was very interesting to me, Governor Wilson agreed that the Court of Appeals is working very well, and the appointments are good, and it's worked well. I am very interested in that, and I think it makes a lot of sense. I, too, happen to think we have a very fine Court of Appeals, and it has resulted in an excellent procedure.

I think one of the things that has always bothered me is looking ahead. We now have Governor Cuomo, and Mayor Koch in the City of New York, county executives in various counties appointing some local people. But what happens with the next Governor or the next Mayor? Is there any guarantee to us that they would follow the same procedure?

Incidentally, when Governor Wilson stated -- he says it's -- he was Governor, of course. He says you generally appoint a capable person from your own party. Governor Cuomo has not followed that procedure.

Governor Cuomo -- if I were to say, looking at the Court of Appeals and looking at all his
other appointments, including the Court of
Claims, has been blind as to what party the
person comes from. That's been his attitude.
He takes the recommendation of his panel and
he makes the appointments based on that. I
respect him for that, and I respect Mayor Koch
for many of his appointments, too. But I think
ahead, what happens with the next Governor or
the next Mayor that may be elected in these
very troubled times. We don't know how political
they will be or what they will have to do to
get elected, and I think in many cases the
appointment of judges can be more political
and more responsive to the political leaders
when done by an executive that is elected by
the political parties than when it is done with
some safeguard of keeping the elective process,
which is why I have gone along basically with
the merger in place idea, meaning, let's reserve
the election, let's not just give it up completely
to an executive, and let's provide for these
basic pre-screening panels, which will do the
job of making sure everybody is well-qualified,
whether they're appointed by the Mayor, the
Governor, or they're elected under any system whatsoever that we have.

Now, that's been the basis of what my program has been in the seven years, I think, that I served as the Judiciary Chairman, and I think I'd be very pleased to answer any of your questions.

THE CHAIRMAN: Thank you very much.

Mr. O'Brien.

MR. O'BRIEN: Thank you. I think you offer us a unique opportunity here. You're not only a legislator who has thought carefully about some of these issues, and then sponsored legislation which you summarized for us, but you are also, I believe, a District Leader in Queens and, therefore, has had a direct role and have direct knowledge of the process of selecting Supreme Court, Civil Court Judges, as it presently exists.

If I may, I'd just like to ask you two questions about the latter part of your background, your own experience in Queens, of what conclusions and opinions you draw from that.

I think it might be helpful, to some of us, anyway, if you can explain what a District Leader is, and what he does, and what his power is.
ASSEMBLYMAN WEPRIN: A District Leader is elected by the voters in their Assembly District. It's elected by the voters enrolled in the party to which they're elected as a District Leader.

Every county has its own rules and regulations. If we talk about Queens County, where I happen to have been a Leader for quite a number of years, in Queens County each Assembly District is divided into two zones. Each zone elects a male and female District Leader. So, every Assembly District has four District Leaders. I'm talking about the Democratic Party as such.

Republican Party, under their own rules and regulations, have their own procedure. They have two Leaders in every Assembly District, a male and a female. The Democratic Party has four.

So, generally, -- I don't know the exact number, but there would be something like 60 to 70 District Leaders elected in the County. They constitute the Executive Committee of Queens County.

The Executive Committee elects a Chairman, who is Chairman of the Executive Committee. That's
differentiated, of course, from -- in the political process, we have a County Committee on a more grassroots level, where each election district elects probably at least two members, a male and female. That consists of many hundreds of people, and they elect a Chairman of the County Committee. But for all practical purposes -- and I can testify first-hand from Queens County -- most of the power is vested in the Chairman of the Executive Committee, which is empowered to take all actions when the County Committee is not in session.

MR. O'BRIEN: That's currently Mr. Mann?

ASSEMBLYMAN WEPRIN: Currently Mr. Mann, yes.

MR. O'BRIEN: I take it the Executive Committee and District Leaders, as well, individually have a role in the selection of the Democratic designees for Supreme Court and also Civil Court?

ASSEMBLYMAN WEPRIN: Yes, they have a direct role in the designation of designees for most political offices. They designate the candidates for Assembly and Senate and Congress. When it comes to the judicial positions, in a Civil Court, which is an elective position in Queens County, the District Leaders within that Civil Court District, as
it is outlined geographically, have a vote based on the number -- it's a weighted vote in that district, in that Civil Court District, and for the designation of a candidate for Civil Court.

MR. O'BRIEN: This process is a yearly process?

ASSEMBLYMAN WEPRIN: Each year, whenever there is a vacancy, the Executive Committee will meet and designate candidates for Civil Court, or Family Court, and Criminal Court, of course, you know, are appointed. Civil Court is elected by primary and by designation.

MR. O'BRIEN: Would it be accurate to say that the process begins with your receipt of names of people who want to be candidates for those various positions?

ASSEMBLYMAN WEPRIN: Yes. Various people approach me, and I am sure approach other people and indicate to them that they're interested in being a candidate for Civil Court.

MR. O'BRIEN: What is their background, by and large?

ASSEMBLYMAN WEPRIN: Generally, they're all lawyers. They come from various walks of life.

I've had many candidates come to me, who I had never seen before, and I didn't know much about
their background.

Many have come with resumes and backgrounds as to what they have done, but generally, they're active lawyers within the County.

MR. O'BRIEN: Have these lawyers worked for the club in your District, or for the organization?

ASSEMBLYMAN WEPRIN: Some have and some have not.

(Continued on next page.)
MR. O'BRIEN: Are any of them independent of the political life in Queens, entirely?

ASSEMBLYMAN WEPRIN: I recall through the years, there have been many that have been independent, right.

MR. O'BRIEN: You receive these names at some point. Do you make any determination as to the fitness of any of the candidates?

ASSEMBLYMAN WEPRIN: Well, what happens now -- this started only about eight or ten years ago -- where the County Leader at the time indicated he would submit all names submitted to him to the local Bar Association for a review and recommendation, whether they found them to be qualified or well qualified or not qualified.

So, the procedure since then has become, that when people ask for their names to be submitted, I have been much freer in submitting names because I know -- I don't know that much about each of the candidates. I feel that, at least, they deserve the opportunity to have their names screened before they are considered, and so, generally, I submit almost every name that is submitted to me that indicates to me they have an interest.
When the time comes, and the time generally is about four or five months before the primary election, I will send a letter to the County Leader recommending that the following names be submitted to the Bar Association as possible candidates for Civil Court, right.

MR. O'BRIEN: Your thinking, I assume, is that the function of screening out unqualified people properly belongs to the Bar Association?

ASSEMBLYMAN WEPRIN: Well, it starts there, yes.

MR. O'BRIEN: In addition to the Bar Association, there is also a Screening Panel in Queens?

ASSEMBLYMAN WEPRIN: There is also a Panel that was set up some years ago by the County Leader, an independent Screening Panel consisting of community leaders who these candidates must appear before and acts very much as the Bar Association does.

I've never attended one of these meetings. I've never participated in it. I can't tell you what happens at these meetings, but I do know they interview candidates submitted to them, and they, too, will make recommendations as to whether they are qualified or not qualified.
MR. O'BRIEN: Have any of the people that you have passed along to the County organization, ever been rejected by the Bar Association or the Committee?

ASSEMBLYMAN WEPRIN: I think so. I think over the years, some have.

MR. O'BRIEN: How many, over the years?

ASSEMBLYMAN WEPRIN: It's really hard to remember numbers. I recall at least two or three.

MR. O'BRIEN: Over the past eight years or so?

ASSEMBLYMAN WEPRIN: Yes, eight or ten years.

MR. O'BRIEN: Once the screening process is complete, what happens?

ASSEMBLYMAN WEPRIN: Once the screening process is complete, the County Leader gets a list from the Bar Association of which of the candidates he had submitted are found to be qualified, well qualified or not qualified.

And, generally, there's nothing in the law -- and that's one of the reasons for my Bill -- on prescreening lines, a mandatory prescreening process which says nobody can get on the ballot unless they are found well qualified by the broadest screening panel.

This is a recommendation to the County Leader
which he can or cannot follow. Generally, it is followed.

What happens next is, the names -- the District Leader is asked to submit names to be considered for Civil Court. In many cases, we have a meeting and the floor is open for nominations, and you can nominate a candidate that you want to put forward, and we proceed from there.

MR. O'BRIEN: In the case of the Supreme Court candidates, is there such a meeting of the Executive Committee?

ASSEMBLYMAN WEPRIN: No. Generally, my experience has been -- and there may have been a couple of meetings, I don't recall exactly -- generally, there's no meeting of the Executive Committee with reference to Supreme Court candidates, theoretically, because the members of the Judicial Convention that vote in designating a Supreme Court candidate, are elected by the Democrats throughout the county, they are not elected by the District Leader, theoretically.

They file petitions, they are elected, and they meet at a Judicial Convention. The members of the Executive Committee, many of them are not members -- are not delegates to the Judicial Convention, so
there's nothing, theoretically, legally, they can do.

I remember a couple of times in the past, over the years, there has been a meeting at the Executive Committee, which, at that time, the County Leader asked the Executive Committee, do they have any feelings as to who should be recommended to the Judicial Convention, and there were some recommendations made, but not very often. I would say the general procedure was, there was no meeting of the Executive Committee meeting, discussing Supreme Court candidates.

MR. O'BRIEN: Let me try to focus your attention on the period between the end of the screening process by the Bar Association, or the screening panel on the one hand and the Convention on the other hand.

I take it -- correct me if I'm wrong -- that the number of people approved by the screening panel far exceeds the available spaces for a given year.

ASSEMBLYMAN WEPRIN: I would assume that's true, yes.

MR. O'BRIEN: By what process is that list narrowed and candidates --

ASSEMBLYMAN WEPRIN: From a practical point of
view, to the best of my knowledge, what happens is, the County Leader has discussions with various of the District Leaders, I guess, who he chooses to talk to or who choose to approach him to talk to him, at which they will recommend various people who they feel should be considered for the Supreme Court, and at some time during the process, the County Leader -- and I'm going back now, having been a District Leader over twenty years -- the County Leader will indicate who his choices are for candidates for the Supreme Court, and, generally, those are the candidates that are designated by the Judicial Convention.

MR. O'BRIEN: And these decisions are discussed with District Leaders individually, informally?

ASSEMBLYMAN WEPRIN: I'm sure they are, because over the years, there have been many occasions where I discussed with the County Leader various candidates as to the qualifications of one candidate over the other.

Sometimes he would listen to me and sometimes he did not, and this is over a period of twenty years.

MR. O'BRIEN: Do you also have discussions
with other District Leaders?

ASSEMBLYMAN WEPRIN: Yes, Many District Leaders would approach me and say that so and so, who they know and who they are pushing, is a candidate, would I talk to my delegates about possibly favoring that candidate. That's true.

MR. O'BRIEN: Let me ask you, is it fair to say that the considerations which go into removing a candidate from the list or keeping him on that list don't always have to do with the judicial merits of a particular candidate, that sometimes they have to do with political concerns like ethnic balance or geography?

ASSEMBLYMAN WEPRIN: I would assume that's a true statement. I would assume that's so.

MR. O'BRIEN: Is, sometimes, political service to the organization or club, a factor?

ASSEMBLYMAN WEPRIN: I'm sure when the candidates are considered, they want ethnic balance, they want geographical balance throughout the county, and I'm sure political considerations does enter into it.

MR. O'BRIEN: Let me ask you about your experience, that you were gracious enough to tell me
about before this hearing. In 1987, I believe you forwarded four names to the screening bodies.

ASSEMBLYMAN WEPRIN: Right.

MR. O'BRIEN: All very well qualified, in your opinion?

ASSEMBLYMAN WEPRIN: All sitting judges, right.

MR. O'BRIEN: And they all were approved by the screening panel?

ASSEMBLYMAN WEPRIN: All were found to be well qualified by the Bar Association and the screening panel.

MR. O'BRIEN: I think you told me -- and correct me if I'm wrong, again, Mr. Weprin -- that you vouched for one of these candidates, with Mr. Manton, as the person you thought should be --

ASSEMBLYMAN WEPRIN: No. What I actually did, I had a problem all summer since I knew I had submitted these four names, and after I found out all four had been approved, and from a practical point of view, I felt I couldn't recommend one without the help of getting that person the designation, so I decided one of the four I would recommend, and I call Mr. Manton on the telephone and said to him, "You know, have you made your mind up on what
you're doing on Supreme Court?" He said, "No," he's wide open for discussion. I said, "Well, I would like to recommend Judge X, and I think he would be a very highly qualified judge and I would like to recommend him," and that's actually the way it happened.

MR. O'BRIEN: What factors went through your mind in recommending this particular individual?

ASSEMBLYMAN WEPRIN: Many factors went through my mind, and I will not say -- the least of which, I knew this candidate longer than the others, I've known him for twenty-five years, and I've known him as long as he's an active community person. He was an active political person before he became a judge about five or six years ago, whenever it was. And, of course, personal considerations enter into the consideration.

If you ask me did I do out and study the records of the four candidates and ask for all their opinions and check the number of reversals, the answer to that is, I did not.

I knew basically from lawyers that I had spoken to in the community -- I've never appeared before any of the four judges, it just so happens, but I
asked around, lawyers I knew, I asked among people in the Bar Association, and I really hadn't heard anything negative about any of these four. They all thought they were, all four, highly qualified, so it was a difficult choice to make.

MR. O'BRIEN: Are all District Leaders as conscientious about it as you are?

ASSEMBLYMAN WEPRIN: I have no idea about that.

MR. O'BRIEN: Did you have a conversation later on with Mr. Manton about the results of his deliberations about your suggestions?

ASSEMBLYMAN WEPRIN: Yes, I did. Mr. Manton called me a couple of days before the Judicial Convention and indicated that he was recommending seven candidates for designation for the Supreme Court, and I happened to have known each one of the candidates that he recommended.

Having been a practicing lawyer for, God knows how many years, some thirty-odd years, and having been a District Leader for twenty-five years, and a member of the Assembly for seventeen years, somehow you run into most people, most people in the County, and these are all people from Queens County.

So, I knew every one of them, I think, personally.
and I think they were very highly qualified. As I saw, looking at the cross section of people he had chosen, he had done just what you indicated. There was a good ethnic representation, geographic representation, and things of that kind, and they were all qualified, and I told him, based on that, I would support those candidates and I would -- I, personally, as a delegate to the Judicial Convention, which I was last year, would support them.

MR. O'BRIEN: Did you ever have a disagreement with the County Leader about who should be on the slate?

ASSEMBLYMAN WEPRIN: Over the twenty-five some-odd years, I've had many disagreements with the County Leader over who he should designate, where I've submitted various names and he disagreed with me. Not this County Leader. One of the five County Leaders that I have been a member of the Executive Committee under, I recall having many disagreements.

MR. O'BRIEN: Have you ever had any luck in changing his mind on a given candidate?

ASSEMBLYMAN WEPRIN: Sometimes I have, sometimes I have not.

MR. O'BRIEN: What are those discussions like,
if you can generally tell us?

ASSEMBLYMAN WEPRIN: The discussions were based on my opinion that the candidate that I presented was more highly qualified than one of the other candidates or two of the other candidates that he represented, and they went into all aspects of it, not just their judicial demeanor, but what you spoke about, the ethnic and geographies were a consideration.

I think the judicial aspect was first in my mind, and I tried to persuade him that this person would make a better judge, and sometimes I was successful, sometimes I was not.

MR. O'BRIEN: You mentioned the Convention. Do you receive any notice from the organization prior to the Convention as to who the official nominee is going to be?

ASSEMBLYMAN WEPRIN: Let me give you my background. I go back twenty-five years. The first year -- some years, I have been a delegate. Incidentally, in some, I have not. But I have been a Leader throughout all this time. But my recollection is, twenty years ago or so, when we would come to a Judicial Convention, many people would not know who
the candidates were going to be. The word had to
be gotten around as to who the County Leader was
recommending for this designation. Things changed
through the years. Through the years, it changed.

First we would find the procedure where on our
chairs would be the resumes of the three candidates
who the County Leader was recommending, so we could
at least read their resumes before they were des-
ignated.

I say this sarcastically. It improved. But
they did get better through the years. Later on,
the County Leader recommended that any Leaders that
were putting forward candidates, would circulate
the resumes in advance of the candidates they were
pushing.

So, there is a point over the last couple of
years -- I must get hundreds of resumes mailed to
my home of candidates who are being considered for
Supreme Court. And the procedure is such, with
due respect to our present County Leader, he did
discuss it with me some weeks before, he did tell
me what his recommendations were going to be several
days before, and I was aware of it. This was not
always true in the past, although it did get better,
and, with all due deference to Mr. Manes, who has
taken some abuse for other reasons, he was the one
who instituted getting out the resumes, so at least
when we walked in, we knew something about the
candidates being designated.

Not that anything changed. I don't recall a
Judicial Convention in the twenty years that the
candidates recommended by the County Leader were not
designated. There were Conventions where other
names were put in but they never were successful
in getting enough votes to be the designee of the
Convention.

MR. O'BRIEN: I take it there really wasn't
any suspense at this point about what would happen
at the Convention?

ASSEMBLYMAN WEPRIN: I'm talking about Queens,
because I reside there. I know for a fact this is
true in Manhattan and other counties in the City
and the State, where the Judicial Convention really
operates as a rubber stamp of the County Leader and
it has done so for many years, probably continues
to do so.

You're asking me these questions because I
happen to be from Queens County, but I know, having
spoken to various legislators and political people in other counties, this is true in many counties throughout the State, if not most.

MR. O'BRIEN: Yes. What is the Convention like, if you could give us a description?

ASSEMBLYMAN WEPRIN: The Convention is chaired, generally, by a former judge who calls the Convention to order, elects temporary officers of the Convention, permanent officers of the Convention, then goes to the business of the Convention, elects a Clerk of the Convention, Parliamentarian, then goes to the business of designating candidates for vacancies that exist, because that's the only business a Judicial Convention has.

The Chairperson of the Convention will open the floor for nominations for the vacancy that exists to succeed Judge Such and Such, is the way it's put, because that's the vacancy. Somebody would nominate a person and, generally, somebody else would second it and, generally, somebody else would make a motion, and it would unanimous.

As I indicated, over the years, in some cases, there was another person designated for that vacancy, and then they would go to a vote and they would
actually call the roll. There were several hundred delegates in the County, and the person who was generally the recommendation -- not generally -- the recommendation of the County Leader always won.

In Queens County where I have firsthand experience, it has almost always been by unanimity. It has been a unanimous choice.

As I say, I think that's true of other counties in the State.

MR. O'BRIEN: How do the delegates who are doing the nominating and seconding and so forth, know what to say?

ASSEMBLYMAN WEPRIN: Well, there's no secret in the fact that this is pretty well orchestrated. When people come into Judicial Conventions, someone who happens to be Parlaimentarian asks various delegates, "Would you nominate so and so?"

"Would you second?"

"Would you make a motion the Convention open?"

They're given slips of paper with a script. That's the way it's been done in other counties and that's the way it's been done in Queens County.

MR. O'BRIEN: How are the delegates selected, by the way? What are their background?
ASSEMBLYMAN WEPRIN: The delegates are selected, and that's the point, by the County Leaders, who put them on the petitions with the County Leaders.

Generally, if it's held in a year when a District Leader is run, it's on the same petition as the District Leader runs. It will be John Doe is a candidate for District Leader, and five names of candidates for delegates to the Judicial Convention, and right underneath that, five names of alternates to the Judicial Convention.

Petitions are circulated, and when a person signs his signature, he signs it for both, and their names appear on the ballot with the District Leader. If there's no other petition circulated for candidates to the Judicial Convention, the names don't even appear on the ballot, because there's no contest. They are automatically elected candidates to the Judicial Convention.

There have been cases, as recently as last year, in the Bronx, where there were various slates run for judicial delegates. You know what happened. They had a real contest there, and at that point, the County Leader was not able to control the Convention, and the Convention was split up, and they
Went ahead and designated somebody -- I think Elson was the person recommended by the County Leader.

I found it very interesting, by the way, that the new County Leader in the Bronx, George Friedman, has just introduced a bill -- I don't know if he's put it in yet, but he indicated he's putting it in this session -- eliminating Judicial Conventions and providing for the election in primaries by Civil Court districts. I thought that was very interesting. It's a significant change of the times.

MR. O'BRIEN: Making the best of it.

Based on your experience in Queens, is it the exception or the rule that delegates' races are contested?

ASSEMBLYMAN WEPRIN: It's been the exception in Queens County, I would say, through the last fifteen or twenty years.

MR. O'BRIEN: In your experience also, have there been highly qualified independent candidates who tried to get themselves nominated at the Convention?

ASSEMBLYMAN WEPRIN: Yes, there have, and I don't mind citing one example, a gentleman by the name of Nat Hentel, who served as a Civil Court Judge for some twenty-five years or so, and had been a
Republican, and was never able to get -- the Republican Conventions are run exactly the same way as the Democratic Conventions. He never got the designation of his party. He switched about five or six years ago, reregistered as a Democrat, and this year, when I think he's sixty-eight years old, he was designated by the Convention as one of the candidates for Supreme Court, and I think that was based on the basis of his abilities and his recognition as an eminent jurist.

But, that's not always true. I don't want to give you the impression that that happens very often, because it does not. There are probably very many highly qualified candidates who are not successful in getting the designation at the Convention.

MR. O'BRIEN: Has an independent, such as Judge Hentel, very gotten close to being nominated at the Convention?

ASSEMBLYMAN WEPRIN: Not really. That's the only one I really remember in that category.

There are people that have been designated -- other candidates have been designated at times when we had some challenges and there were a group of delegates who did vote for that other candidate, but
could never get the majority.

MR. O'BRIEN: Once the candidate has the Demo-
cratic nomination in Queens, I assume he or she --

ASSEMBLYMAN WEPRIN: Over the last fifteen or
twenty years, it's been tantamount to election.

What happens generally is, they run in a
general election with the Governor or Mayor, or even
a Congressman or State Senator, who is generally
Democratic in Queens County, and a lot of people
don't pay attention to who the judgeship candidate
is, but it is a check, and that's the reason I raise
it.

I go back to the process of appointment against
election. I'm not saying the elective process is
perfect or even that good, but I say it is a little
bit better than having the appointment made by a
political -- now, I'm not talking about this Governor
or this Mayor -- by a governor who has no checks on
him by constitutional provisions for a prescreening
panel of any kind, who may have gotten elected to
office on the basis of promising a lot of judgeships,
which has been true many times in the past in the
history of our State, and we could go right back
into that if we don't institutionalize the prescreening
of any candidate.

As I say, I don't think the present Governor or Mayor would do it, but we are living in very strange times these days.

MR. O'BRIEN: Let me ask you a few questions now about the participation of judges and judicial candidates.

Let me ask you now about law secretaries.

Does the District Leader or the County Leader have any role in any manner with respect to the law secretaries that a Judge on the Supreme Court, let's say, hires?

ASSEMBLYMAN WEPRIN: Yes, to the same extent that for many years, as a District Leader, when I had qualified people who were active in my club, who happened to live in my district, were not active in my club -- and that happened many times, too -- who came to me and thought they were qualified to have a particular position, whether it was a City-wide job, you know, appointed by the Governor, by the Mayor, I would submit their names to the County Leader, who submitted it to the Governor or Mayor.

Unfortunately, the County Leaders -- I don't know if it's unfortunate or not -- today, the
County Leaders are not really recognized by the Mayor or the Governor, and they don't take the recommendation of the County Leader... At least that's true in Queens County. So, we have just stopped submitting names in that capacity.

At the same time, we submit names to the County Leader for suggesting to the judge, to be interviewed by judges as possible secretaries. We had qualified lawyers in our club or in our District -- and that's happened many times, too, where people have come to me and showed me their background and impressed me. I submitted the name to the County Leader for consideration, to be put on a list to be shown to a judge, to be interviewed. That's the extent of what my recommendation went, you know, as to judges' secretaries.

MR. O'BRIEN: Did you get information back about the fate of a particular candidate?

ASSEMBLYMAN WEPRIN: Usually I would know, where the candidate would come back and tell me either he or she was very unhappy, or he or she was happy. That's the only way I got the information back.

MR. O'BRIEN: Did judges have a choice --
ASSEMBLYMAN WEPRIN: My understanding is they were, that they were given that -- I don't know this for a fact. This is what I was told, because the candidates I sent told me in the past that they were one of four or five being considered, that the judge had called in for an interview. Some of them had asked me, "Would you talk to the Judge about me?"

And I said, "No, I won't talk to the Judge about you. I submitted your name, and you're on your own now."

So, I do think they interviewed at least four or five candidates.

MR. O'BRIEN: Are you aware of any instance where a judge refused to take a resume that came out of a club or a county organization?

ASSEMBLYMAN WEPRIN: I, personally, am not aware of any such.

MR. O'BRIEN: Let me also ask you about contributions to the organization.

We have heard testimony today -- and I think it's a well known fact that to some extent, judges do buy tickets or tables at county functions, at least during the year when they're running for office.

Have you ever heard or do you have any knowledge...
of a practice by which those contributions are solicited or requested by the county organization?

ASSEMBLYMAN WEPRIN: I have heard talk of that. I mean, people -- I have never solicited any contributions.

I want to comment on something my good friend Judge Sol Wachtler said, however. He said he was very much disturbed when he found out a couple of months ago that judges can file a statement, a declaration, that they're a candidate for Supreme Court, and for that year, they can go to political events, they can buy tickets, they can contribute.

It's very simple for him to resolve that problem. Tomorrow morning, he can just change the regulation which he set, which the Office of Court Administration set, which allows it to be. I don't blame him. A lot of the judges want the opportunity to do it, and what he's really doing is answering the problem that he posed before: What does a judge do after he's been out of politics for fourteen, thirteen years? How does he go about getting designated?

So, what the Office of Court Administration really did was say, look, we'll at least give him a shot for a year to go around and let people know
he was a good judge, and campaign in that respect, and I think it's probably a good idea. But, if he thinks it's a bad idea, he can change the regulation tomorrow. It's not legislation, it's regulation of the Office of Court Administration.

MR. O'BRIEN: Are you aware of any instances, direct or indirect, whereby judges were asked to give, not that they voluntarily or unilaterally gave?

ASSEMBLYMAN WEPRIN: I'm not personally aware of any such instance.

MR. O'BRIEN: Have you ever had a conversation with any judges about such an incident?

ASSEMBLYMAN WEPRIN: I don't recall. We are talking about a period of many years. I don't recall -- I recall some candidates for judges may have said something to me about "Do I have to make a contribution or anything?" and I know my answer was, "Absolutely not. Your name was submitted by me with no reference to any contributions you would make or not make."

MR. O'BRIEN: Thank you very much.

ASSEMBLYMAN WEPRIN: You're welcome, Mr. O'Brien.

THE CHAIRMAN: Commissioner Emery.

COMMISSIONER EMERY: Mr. Weprin, I am most
concerned about the side of this process where people who want to be judges, who aspire to be judges, have to jump through hoops or over hurdles, and what I want you to describe, if you will, for me and for the rest of us is, what does a person have to do who thinks he's a good lawyer, or she's a good lawyer, and who has performed well in the community in general and believes that he or she can have a career as a judge, in the highest traditions of the bench; what does that person have to do to become a judge, realistically? I'm talking about the nitty-gritty. I'm not talking about just handing out the resume.

I mean, who do they have to talk to, who do they have to -- do they have to go around and collect signature for ballots, do they have to provide their services pro bono for the party when election controversies come up that may require a lawyer, do they have to participate in political activities as a lawyer in the community?

What are the nitty-gritty things that a person has to do as a practical matter to be considered by you and by others to become a judge?

ASSEMBLYMAN WEPRIN: Generally, you know, I would
be pretty silly not to tell you that the -- taking part in the political process is not something that's considered by a political leader when he or she submits a name for nomination for any judgeship, whether it's Civil Court, or, in the old days, when leaders used to submit names to the Mayor for appointment to Family Court or Criminal Court.

Certainly, participating in the political process was an important part of it. I'll give you an example, though, of somebody who came to me maybe ten, twelve years ago and indicated to me -- and I don't want to say whether it's a he or a she -- that he or she would like to become a judge and would like to be a Civil Court judge, and presented very good credentials, and I said, "Look, I'm impressed by your resume. I don't know what may happen in the next year or two. I would very much be happy to consider you, you know, and submit your name to the Bar Association."

And nothing happened that year. I submitted, I think, the name to the Bar Association, but that person did not get the designation. The next year, I heard that person ran for Civil Court in Brooklyn without any political backing and was elected to the
Civil Court in Brooklyn under the elective process.
I know that person never had any political activity
because that person lived in my District. I had
never seen that person through the years, and, lo
and behold, I know she or he couldn't have been
active in Brooklyn, because, certainly, they are
a candidate and they are elected and they are a
Civil Court Judge in Brooklyn.

I guess there are other ways to do it, but one
of the problems with that is, of course -- I don't
want to be simplistic. I think we understand each
other, and we understand what we are saying.

There have been cases in the past where people
ran for Civil Court who have no political activity.
They put up a lot of money, which is a bad part of
the process. I've seen them on TV advertisements,
running for Civil Court. They had to spend sub-
stantial money. They take ads in all the local
papers, hire people to go out and canvass, get
petitions. They have been elected.

I know cases where people have been elected
against the organization designee. That's one way
of doing it.

But, what you're asking me, I think we both
understand the answer. The person who is active in the political process will certainly have a much better chance to be designated, and many people who probably would be very capable judges, are probably ruled out of the system that way.

MR. O'BRIEN: I guess there are two parts to that. I really don't know the answer. I'm not asking you something I know the answer to.

ASSEMBLYMAN WEPRIN: Go ahead.

MR. O'BRIEN: I'm starting to think I might begin to know the answer and it troubles me, but I want to know for sure.

ASSEMBLYMAN WEPRIN: Go ahead.

MR. O'BRIEN: And, the question I'm asking is: When somebody comes to you who you think might be a good judge and who you think you might want to support as a judge, in an upcoming convention process and in the election process, what do you tell that person to do if they are not well-known in the community and they don't have political connections, what do you tell them to go out and do so that they can get the support of the right people and make the run?

ASSEMBLYMAN WEPRIN: Well, if a particular
person comes to me and wants to be designated for Civil Court, I recommend to them that they call each Leader in the Civil Court district, try to set up a meeting with that Leader, give them their resume, tell them their background, tell them what kind of lawyer they have been, what kind of judge they have been and ask for their support. That's what I generally tell them.

MR. O'BRIEN: Let's break it down, then. Is it going to help a candidate, a person who wants to become a Civil Court Judge, if he or she goes out and collects signatures for petitions?

ASSEMBLYMAN WEPRIN: You mean if he or she is not a judge and --

MR. O'BRIEN: If he or she is a lawyer in the community, they are going to go out when the party needs signatures, would that help?

ASSEMBLYMAN WEPRIN: I'm sure it will. It's one of the factors involved, I would say. If all other things are equal, and three people are equally judged to have the same judicial potential, in my opinion -- I can only talk for myself -- certainly that's going to be a factor, as will other things be a factor. What has been their participation in
the community? Have they been active in philanthropic organizations, specific organizations in the community? Have they been part of the community?

All of these things I have weighed in the past in recommending people.

MR. O'BRIEN: Is it going to help for a person who wants to become a judge, for that person to volunteer pro bono, to do work for the party as a lawyer in any ballot contest or any election contest?

ASSEMBLYMAN WEPRIN: I have heard of cases where it has helped. I haven't had that particular situation within my club, I haven't had that problem, but I can understand that happening.

MR. O'BRIEN: How about the situation of a candidate, a qualified candidate, is it going to help if that qualified candidate gives money to the party, makes contributions or has his or her family make contributions?

ASSEMBLYMAN WEPRIN: Help with who?

MR. O'BRIEN: Help with the party.

ASSEMBLYMAN WEPRIN: With me, it wouldn't help. I specifically make it a point.

MR. O'BRIEN: With others?

ASSEMBLYMAN WEPRIN: I can't speak for other
people. It may affect other people. Maybe a contribution would affect other people. I don't think so, generally, knowing most of the Leaders in the County.

First of all, I don't think anybody can go up to the County Leader, or anybody else -- because people do that all the time -- and say, if I get this job, -- I'm talking about a judgeship -- I would make a $5,000, $10,000 contribution. I would just walk away.

You hear people say this all the time. These people have no sense, no knowledge of what the political process is about or, you know, what the age is that we are living in; that type of thing.

I don't know if somebody responds to something like that. I've never responded to it. I don't know if anybody has.

MR. O'BRIEN: Some people continue to do that, so people think it's going to help?

ASSEMBLYMAN WEPRIN: I'm sure it does.

MR. O'BRIEN: In that regard, does it also help for a person who is a qualified candidate for Civil Court to go out and attend party functions and be active alongside party members?
ASSEMBLYMAN WEPRIN: Where they go out and meet with political leaders, there's no better way to do it, to go out to a party function, have a drink with somebody, have a chance to have a personal relationship and know them better, let them know what a great candidate you would make.

In answer to your question, I would probably say yes.

MR. O'BRIEN: Do any of these things that we've just gone through have anything to do with being a good judge?

ASSEMBLYMAN WEPRIN: No. No. Let me withdraw that and qualify my answer. I want to qualify it to this extent. I think being active in civics, politics, community organizations, religious organizations, have something to do with being a good judge, because my criterion of what a good judge is is not just a Cardozo or somebody who is a brilliant judge on the law, but a judge that can deal with people, that can sit on the bench of a trial court and deal with people, and there are many people that you might think are much better judges because they are much more knowledgeable in the law.

I think the person that sits on the bench and
deals fairhandedly with people, with lawyers and with people, and makes decisions on that basis, sometimes could be a better judge than somebody learned in the law.

With that qualification, I'll let my answer stand.

MR. O'BRIEN: Let me pursue one thing further, and that is: I must say, until I heard you describe it here, although it has been described to me in some preparation papers by the Staff, and I've had some very distant knowledge of the process, your description of the process, of the nominating convention and the election, quite frankly, makes my blood boil, and I'll tell you why.

ASSEMBLYMAN WEPRIN: It made my blood boil, that's why I introduced the legislation.

MR. O'BRIEN: I understand that, and I applaud you for it.

ASSEMBLYMAN WEPRIN: Don't applaud until it's successful.

MR. O'BRIEN: It's, obviously, a total charade, and what I'm asking you is -- and I'm talking about the convention process and the election process after the convention process, at least in these
one-party counties, as we have in the City.

ASSEMBLYMAN WEPRIN: And many places Upstate and, incidentally, in places on the Island.

When I referred to my Retention Bill in Bronx County -- and I'm glad you rekindled something in me -- the situation in Nassau is atrocious where you have a situation where you have a political party that has taken the position that they will not redesignate any Supreme Court Judge when the term expires. That's why we need my Retention constitutional amendment.

Judge Wachtler, off the record, has indicated to me that he's unhappy with it. He said so here publicly. We are losing some very fine judges who are leaving the bench because a certain party in Nassau County will not designate a person of another party. That's one of my reasons for a Retention Bill.

COMMISSIONER EMERY: Let me focus on the convention for a second. This is really a serious question.

How can people who are, themselves, specifically responsible, people who are members of political parties, people who are, in many instances, the
pillars of their community, people who take their civic duties seriously, go to a convention and read a script and have everything preordained, how can they look themselves in the mirror in the morning after a process like that takes place when they are selecting the third branch of government, the branch of government that protects our individual rights?

ASSEMBLYMAN WEPRIN: Mr. Emery, I very much admire many of the positions you've taken publicly and the many causes that I've agreed with you in, and some I have disagreed with you in; but I have often thought to myself -- use me as an example of the process -- I'm an elected delegate. I know the farce that it has been through the years, and I have a decision to make. I'm part of the political process.

Do I boycott Judicial Conventions and say I want to stay away from it completely and that's how I'll show -- do I think that will change it? No, I don't think that will change it. I think the only way we will change it is by legislation and by trying to work within the process in changing it.

I agree with you, I can understand, because I felt the same way. I've looked in the mirror and
felt the same way, feeling I'm going to a political convention, it's a rubber stamp.

At no time do I believe I've ever voted -- at some conventions, I've never voted for candidates for various reasons of my own. Many times I wasn't a delegate. I wouldn't vote for a candidate that I didn't believe would make a decent judge.

COMMISSIONER EMERY: What I'm trying to ask you, as an expert, and somebody --

ASSEMBLYMAN WEPRIN: I don't know if I'm an expert. I just happen to be doing it for a long time.

COMMISSIONER EMERY: You've taken public interest positions in trying to improve the situation, and I say that with great admiration, because I think you're in a position to really make a difference.

In trying to analyze what goes through the minds of people who go to these conventions, who have scripted roles to play, don't they have more pride in themselves than to be able to just follow through with that?

I mean, what are they thinking about their role in life, let alone in the political party, if they are going to play a game?
ASSEMBLYMAN WEPRIN: It's a philosophical answer. Most of these people that go to Judicial Conventions have no knowledge of any of the candidates, and they really -- other than what they have got in the mail and resumes, and they have no fixed opinions, and they have no reason to believe they are doing anything wrong. They don't go into the philosophical aspects that you're talking about where "Should I take the recommendation of somebody else who says this is the person I should follow?"

You know, I don't argue with you on that. I can understand your thinking on that, but I can't be apologetic for people who do that. I mean, changes have to be made.

THE CHAIRMAN: Commissioner Hynes.

COMMISSIONER HYNES: Can I ask you to flesh out for me how this prescreening process that you are recommending will impact favorably on the system? You would do away with the convention, totally?

ASSEMBLYMAN WEPRIN: Yes.

COMMISSIONER HYNES: And then this prescreening process you've described for us, in Queens, that you have the Bar Association and you have an independent screening panel.
ASSEMBLYMAN WEPRIN: I'm not talking about that. I think the Bar Association and the independent panel in many ways, don't mean anything, because they are not built into the law. These are just things that the County Leaders are doing, and they are not bound by it. I think we need something in the law, and the only way to do that, as I say, is not by statute, is by constitutional amendment.

What they would do, if I can flesh it out for you, is to provide a broad based screening panel which is selected by appointees, and State-wide by the Governor, the mayors of the various cities, the county executives.

The Bar Associations would make recommendations.

We are looking for a broad based screening panel, and it would be required, assuming we don't eliminate the Judicial Convention.

We cannot get that passed, let's say, and we are still living next year or two years from now, with the Judicial Convention system in place.

Let's assume we pass my prescreening amendment, which is part of my Merger Bill. Anyone, before they can be designated at a Judicial Convention, will have to have been found well qualified by this
broad based prescreening panel.

I've had people on the Judiciary Committee, when I was Chairman of it, who said, "Can we change, can we just make it "qualified"?

I was supported by the Fund for Modern Courts and others. They said, "We want it 'well qualified,' this is our check. If the system stays the way it is now, I would like to change the system. This is our check that these people will be found to be 'well qualified' by the broad based panel, and that's built into the law because we are doing it constitutionally, that it can't be rejected by party leaders or anybody else."

The name would not just be eligible to go on the ballot unless they were found to be well qualified by the screening panel.

COMMISSIONER HYNES: And these screening panels are State-wide?

ASSEMBLYMAN WEPRIN: They'll be localized. It's set up on a State-wide basis, but in each judicial district will be their own panel.

The executives within that judicial district would make the recommendations in that panel, where the Governor would make it on a State-wide basis.
COMMISSIONER HYNES: What is your opinion as to whether that process on the local level wouldn't be just as manipulated in terms of who is on the screening panel and who could get through it?

ASSEMBLYMAN WEPRIN: Well, it would not, certainly no less so than the Governor's appointments. I've heard people talk in the Governor's panel for Court of Claims, his panel for Court of Appeals. Many people have said it's very political. People call each other, and people have friends calling to have their friends considered, and that's certainly political. You never can eliminate that, and I'm not saying you're going to have the same thing happen. I'm not saying, if we ever get it into place, the screening panel will be a pure panel. All I'm saying is, it will be some check, because we will have broad representation on it. Appointments from all aspects of our society, not just the courts, not just the Governor, not just the mayors. It will be a broader basis. It doesn't mean it will be perfect. It doesn't mean people within the panel may not get calls from people as to, "Can't you find my friend well qualified?" The panel has to resist that.

I think the Governor's panel on the Court of
Appeals has done that very well.

COMMISSIONER HYNES: Apart from the screening panel, is there something within the Judicial Convention, itself, procedures or regulations or rules, that would improve the likelihood that it wouldn't continue to be a rubber stamp?

ASSEMBLYMAN WEPRIN: The only way you could do that, if you could encourage enough people to run as delegates, and run slates of delegates at Judicial Conventions, you could do that. But, unfortunately, in our society not enough people are willing to get involved, to run, actually go out and campaign to be elected a judicial delegate to select a candidate for Supreme Court Judge.

They probably figure, we'll never get designated anyway. That's the problem with the system. That's the problem with the Judicial Convention system.

Probably the Judicial Convention system -- just as you look at Russia, how they're made up and their government is made up, it looks great on paper. On paper, sixteen slates can run as judicial delegates, and we can have a real contest and pick out the best candidate. It doesn't happen that way, because the average person, such as you and the
people sitting in here, are not going to take a couple of months out of their lives to go and campaign, maybe even spend a few dollars to run for judicial delegate to vote for a candidate that probably won't be designated. That's the practicality of the situation.

The system is good. The system probably could work if it worked that way, but it will never work that way under our present system. Whereas, the District Leaders have to run every two years, and it's very easy to attach this list of delegates to their petitions, and the people don't have to do a thing. They don't have to campaign. They're automatically elected judicial delegates.

If you can find me enough people, and get enough people upset about it, as Mr. Emery is, and be that upset about it, and get up a slate to run in every district, in every county, fine, then the Judicial Convention system might work, but it's not going to work under our present system.

THE CHAIRMAN: Commissioner Emery, I think you had a question or two you wanted to ask about an elective system.

COMMISSIONER EMERY: Well, it's basically
along the same line, and that's that I take it that once the Convention has decided on who the candidates are, the elections also, in essence, in most of these counties, at least the counties where they are not contested or there isn't the party system, which is a true contest, it is a rubber stamp, as well -- I take it that must be some factor in your proposals for reform in the sense that even though you still ascribe to the elective system, I take it that your attempt is to get more qualified people on the ballot.

But, I guess you would agree with me that election, itself, is not really an election, it's more like a referendum?

ASSEMBLYMAN WEPRIN: In most cases, but there's some safeguard.

There have been cases in the past, and there are counties, incidentally -- in Queens County, as recently as ten or fifteen years ago, before it swung so heavily Democratic, there were contests where the Republicans would designate somebody who got the Conservative designation. We've had contests in the past, and I do think there were some cases where -- I know there are some Republicans sitting on the bench who did not get it by bipartisan. They
won in an actual election.

Going back even beyond that, Queens was not its own judicial district until eight or nine years ago. At one time, when I was first a Leader, the judicial district consisted of Queens, Nassau and Suffolk, which was one district, and in that case, we'd have a Judicial Convention meeting of all three districts, and still County Leaders would designate who the candidates would be, but they'd always lose, because the Republicans would dominate Nassau and Suffolk, and we couldn't elect any Democrats in Queens, Nassau and Suffolk until -- back in '59 it started.

There was some sewer scandal out in Suffolk, and then, for the first time, three Democrats won. It's the first time I ever remember. The reason I remember is, Harold Tessler, who was an old law partner of mine, won in those years with Judge Brennan and Jude Lavodi.

There were three Democrats who won, the first time in that judicial district. After that, it happened more and more, and there were real contests, because as Queens became more Democratic, you had to match up the Nassau and Suffolk Republicans, and
we had real contests.

It can happen, but my experience over the last ten years is, it just hasn't happened in Queens. It can happen in other counties. I think counties such as Rockland, you know, that has some kind of split within the party system, they have had contests, and many other counties that don't come to mind now.

COMMISSIONER EMERY: Isn't one of the problems with really -- let's assume for a moment you could vitalize the system so there really would be contests, and the public really would be choosing their -- they would be making their choice for judge.

Isn't one of the problems in that, that the candidates then have to engage in activities which are -- and they did in the old days -- which are very unseemly for people to engage in who are about to assume the bench?

ASSEMBLYMAN WEPRIN: Absolutely. Then the Office of Court Administration came down and set certain guidelines, where they couldn't talk about political subjects, they had to limit themselves to their judicial qualifications.

COMMISSIONER EMERY: In other words, in some sense, we're in a trap. Either we have rubber stamp
elections for people who are selected through conventions, which are really rubber stamps for the County Leaders, who, hopefully, are making choices on the merits, but perhaps are making choices for political reasons, or we have a system where there are contested elections, where candidates are engaging in unseemly activity in order to get elected?

ASSEMBLYMAN WEPRIN: Maybe -- I don't know, and I haven't made a decision. Maybe elections, what you call unseemly, can be restrained in some way, and maybe with campaign financing that we've talked about.

You know, one of the things that brought about the appointment of the Court of Appeals Judges, as I'm sure most of you remember, is some of the elections we had where Judge Fuchsberg spent a lot of money running and getting elected. Judge Wachtler spent a lot of money getting elected as a Supreme Court Judge, with television commercials, including prison doors closing.

I don't know whether you consider them seemly or unseemly. I don't think they were. I think they were trying to address the issues and trying to bring them before the people.
Maybe there's still room for elections within that process, if we can put some restrictions on the type of -- how far they can go. Not just limit them to their qualifications, but have some kind of a broad outline as to what they would do.

I haven't thought that one through. It's much beyond what I have in mind now.

COMMISSIONER EMERY: I guess if that were the issue, the question would be, it would be attention between some unseemly activity on the one hand, or whether the public would be adequately informed on the other.

ASSEMBLYMAN WEPRIN: Somewhere in between.

THE CHAIRMAN: Commissioner Magavern.

COMMISSIONER MAGAVERN: I am interested in the composition of your proposed Judicial Qualifications Commissions. It strikes me as a very interesting idea. Adapted to --

ASSEMBLYMAN WEPRIN: That's been amended several times, so I'll try as best I can to remembers.

COMMISSIONER MAGAVERN: Oh. As I understand, a typical judicial district would have a commission consisting of twelve members: Four appointed by the Governor, three by the Chief Judge of the Court of
Appeals, one by the P.J. and one by the Legislature.

What I'm not clear on is the balance of the Commission. The County Executives would also appoint members. Do I understand correctly that each county in the district would get four?

ASSEMBLYMAN WEPRIN: Well, the proposal that was made --

COMMISSIONER MAGAVERN: You have five counties in the district.

ASSEMBLYMAN WEPRIN: -- in the last amendment -- and I said we have had several amendments. My bills have been kicking around for five or six years. The amendments that we passed two years ago, that we had first passage of, I think provided within that all Supreme Court Judges in the future -- this is the Republicans' system, my negotiations with Senator Barclay and then Senator Dunn -- they wanted all Supreme Court Judges elected only from counties.

So, the Merger Bill which I presented, which passed the first time around, would have election only from counties. That's where we amended the qualifications of the screening bill to give the County Executive one recommendation on that panel if the judge is running from that county.
That was my recollection. As I say, I don't have the Bill in front of me. I'm not sure, but my belief and my thought was to do it on that basis to give as many people an opportunity to recommend to that panel as possible.

(continued on next page.)
COMMISSIONER MAGAVERN: What troubles me about it is, it's so heavily weighted to Albany. You've got --

ASSEMBLYMAN WEPRIN: Where the Governor is and--

COMMISSIONER MAGAVERN: -- the Supreme Court, the four legislative leaders and the Chief Judge of the Court of Appeals.

Then you've got the P.J., Appellate Division, which is somewhat regional, at least.

ASSEMBLYMAN WEPRIN: We intended to weigh it. It's completely dominated by Albany. The appointments are made by the Governor and the legislative leaders.

We intended to make it a little broader and let some of the localities and Bar Associations have representation.

COMMISSIONER MAGAVERN: I like that idea and I want to see it pursued a little further.

ASSEMBLYMAN WEPRIN: I will. Nothing is closed. What we are coming up with now -- I've reintroduced my entire packages and five recommendations that make sense.

I'll try to amend them.

COMMISSIONER MAGAVERN: As I read it, Bill, there was one interpretation which would permit a
district with nine counties to get as many as twenty members of a commission locally --

ASSEMBLYMAN WEPRIN: That's why it will be elected by counties. That's one of the things that the Republicans insisted on; they insisted it be done, for their own purposes, upstate.

That means only that country where the person ran.

COMMISSIONER MAGAVERN: How would you work the Bar Associations into that process?

ASSEMBLYMAN WEPRIN: Each county has its own Bar Association.

COMMISSIONER MAGAVERN: What specific role would the Bar Association have?

ASSEMBLYMAN WEPRIN: Just to appoint somebody to be a member of the Panel, just to have a voice. You're correct, it is oriented toward Albany, it is oriented toward the Governor, legislative leaders and the P.J. and Chief Judge.

There's nothing really wrong with it. Who is best judged to find well qualified candidates for judges?

We feel probably the people they will appoint would be. I think the people they have appointed for
the Court of Appeals have done an excellent job. I'm willing to look at expanding it further.

COMMISSIONER MAGAVERN: You said that it has been said -- I'm not sure you took this as your own view -- that the screening panels -- and I don't know whether you meant the Court of Appeals nominating commission -- were very political or was said to be very political.

ASSEMBLYMAN WEPRIN: Every group, whether it's a Bar Association Group, if it's a church group or it's a Jewish center -- my Jewish center is probably the most political organization I've ever seen, within the center, and I'm sure that's true in many churches, and it's true in Bar Associations.

When it comes down for election, they are all political in their own way and you'll just never change that.

So, the appointments of this will have to be, to an extent, political, but they have to realize what their obligation is, and their obligation is not in the political sense, but their obligation is what is best, how to come up with the best candidates.

COMMISSIONER MAGAVERN: Is the quality of
political consideration different in such a commission than it is, say --

ASSEMBLYMAN WEPRIN: I think so. They know what their task is, they are not dependent upon anybody else.

COMMISSIONER MAGAVERN: Would you go so far as to favor the use of such a commission for an appointive process and do away with election of judges, then?

ASSEMBLYMAN WEPRIN: Well, no. That's why I think I stated before, I would want the Commission to cover both.

I think by keeping the elective process where it exists now, we have an additional check, but everybody should be cleared by the Commission before they are either appointed or elected.

COMMISSIONER MAGAVERN: Would you favor the use of such a commission for a retention type of election for incumbent judges?

ASSEMBLYMAN WEPRIN: Well, no. My theory and my Constitutional Amendment on retention doesn't enter into the commission thing at all.

I think if anybody -- the same Commission will review them, incidentally. Yes, the same Commission that is set up, will review any judge who is running
for election, and they can find him not qualified and make the statement, and then the Judge would not be on the ballot next year.

But in the absence of that, and the absence of any particular notoriety, I think practically 99 percent of every Judge would be redesignated.

I'm sure you'll find one case once in a while where some group -- and I think Dean Peerkick mentioned it to Judge Wachtler -- you always have that problem, that pitfall, that somebody made somebody unhappy and that person is going to go out and try to organize.

That's a question of the electorate and the Bar Associations and the committees supporting who they feel is the correct choice.

You'll have to overcome that. That pitfall exists, but I think we have to live with that.

COMMISSIONER MAGAVERN: Thank you.

MS. SCHACHNER: I have one question to add on your retention proposal, and this was addressed by Chief Judge Wachtler.

How does it prevent judges from being at least affected in their decisions and, therefore, lack independence if they are concerned with how a controversial decision may be ultimately viewed?
ASSEMBLYMAN WEPRIN: With the retention. That's one of the pitfalls of the retention system. Many states, and I'm sure you're aware of it, have what they call the recall system, which goes further than a retention system, which says, after the first year in office, that judge has to appear before the electorate on a possible recall basis.

What does a judge like that do in his first five years in office? He worries about every decision he makes, will it be politically affected, will I instigate this group boycotting me.

I don't see it as a real problem, because 99 percent of the judges don't create this; one percent of the judges do, and we will have to just have to just face it, and the people have to make their decision based on that.

I'm sure a judge, under those circumstances, will give it consideration. I can't tell what goes on inside a judge's mind.

You try to create a system and do as best as you can.

THE CHAIRMAN: Ms. Gordon.

MS. GORDON: Do you have a view about campaign financing of judicial elections?
ASSEMBLYMAN WEPRIN: Yes, I have a view on campaign financing of all elections.

I voted last year on restrictions of campaign financing. I think it's a great first step, and it should go to all elections, not only Governor and legislative elections, but judicial elections.

There should be restrictions, and people should not be able to go out and buy elections.

MS. GORDON: Would you restrict campaign financing for judicial elections for the same reasons you do for the other offices, or are there any special considerations?

ASSEMBLYMAN WEPRIN: No. I think the restrictions -- it's not in the Bill, but I think it certainly should be made part of any negotiated Bill.

I know the Speaker feels very strongly on campaign financing; he helped push the Bill through this year. I feel strongly, and I think it should go a lot further.

We are now in the process of negotiating with the Senate. The Governor supports the Bill. We are in the process of negotiating with the Senate, which is not an easy thing to do, to say the least.

Mr. Emergy knows that.
THE CHAIRMAN: I would like to make an observation on that. Our Commission is on record in feeling that a key to the process of campaign finance reform is that we address the issue of enforcement structure, because without a strong, vigorous enforcement structure, it is our view that the otherwise very desirable reforms ultimately won't be effective.

That's a view we have expressed, and I expect that we are going to continue to express that through the period of our existence.

Let me put to you, if I could, one question that someone here put to me who has followed very closely the work of our Commission, and that is, why shouldn't judges just have a single term, a long term, and when that term is over, that's it.

ASSEMBLYMAN WEPRIN: You're talking about the lifetime term?

THE CHAIRMAN: It wasn't even suggested, lifetime.

ASSEMBLYMAN WEPRIN: Because you would be giving up the benefit of what they have learned through the years.

Many judges learn a lot during the years. Some judges come on the Bench probably not the best judges
in the world, but in ten, twelve years, if they are a good judge, they can learn an awful lot.

You can give away that experience. That to me is the basic argument against it.

THE CHAIRMAN: I appreciate very much your participation. Let me share with you a view of your service.

As you know, I had the honor to serve five years as a member of the New York State Law Revision Commission, and I know it was the view of that Commission, during the period that I served on it, that your leadership in terms of improvement of administration of justice and law in New York has been outstanding, and it is a pleasure to have you with us.

ASSEMBLYMAN WEPRIN: Thank you very much, Dean Feerick. Thank you.

THE CHAIRMAN: We will now recess the hearings and we will resume at 1:30.

(Luncheon recess taken.)

(Time noted: 12:05 o'clock p.m.)
THE CHAIRMAN: The afternoon session has been convened, and I'd like to call as our next Commission Witness, Justice Donald Sullivan.

I want to say thank you, Judge, for your participation in our public hearing, and I will turn the hearing over to Carol Schachner.

MS. SCHACHNER: Thank you, Dean.

Good afternoon, Justice.

JUDGE SULLIVAN: Good afternoon.

MS. SCHACHNER: I'd like you, at this point, if you would, to give us a little background, explaining how you first got involved politically, and eventually you were elected to the Supreme Court, and eventually were not reelected at the end of your 13 years.

JUDGE SULLIVAN: Well, at the outset, being on the threshold of Alzheimer's, I am hard-pressed to recall the first day I got involved in politics, but it was down in the South Bronx, and I was a law student at the time.

At the outset, I come here with mixed emotion, and I am here primarily because of the invitor and the credibility of the individual who has extended this invitation.
Of course, that is the Dean, and the quality of the panel which I am making this presentation before.

Over the years, since approximately 1984 to the present date, with rare exception, I have refused invitations to appear before panels who wished to study this issue, an issue which I respectfully suggest has been studied, and studied, and studied.

The problem that I saw and I still see, of course, is the failure to accept certain basic realities, that progress in this particular area can only be made and through the political system, the Legislature and the electorate.

Now, about myself. I have experience in both areas. Prior to going on the Bench in 1976, I was a member of the New York State Legislature representing the South Bronx in the Assembly.

So, therefore, I have a hands-on working knowledge of the essential elements which are necessary to put a piece of legislation in place and to eventually have it placed on the books or the laws of the State of New York.

On its face, it always seems very simple, but we also are aware that there are many facets and
considerations that surface during the course of even the most worthwhile project.

Now, let me talk a little bit about myself and, in particular, what happened in September of 1985.

As I indicated, I went to the -- I was elected to the Civil Court in 1966, after having spent five years in the New York State Assembly. I ran in a primary. I ran as a Democrat, and I was, for the lack of a better description, a product of the regular Democratic machinery in Bronx County.

The mantle of leadership at that particular time was Congressman Buckley.

I spent four years on the Civil Court, and thereafter received the nomination through the Judicial Convention as a Justice of the Supreme Court of the State of New York for the First Department, which in those days, encompassed Manhattan and the Bronx.

That becomes important when you consider the fact that for the Judicial Convention to nominate a candidate, there had to be an input from two county leaders as far as the Democrats were concerned and all other parties.

Two county leaders had to sit down in conjunction
with the duly elected delegates, with an eye towards proposing candidates for the vacancies that may exist in the Supreme Court.

But, in 1982, I believe, as a result of legislation, the First Department was split off and a new department or a new district was created known as the Twelfth.

Bronx had its day in the convention, without any fear of further negotiation with any other duly existing political entity.

I became a Supreme Court Judge in 1970, and I sat until December 31, 1983. In that tenure of service, in my closing years, I was a member of the Appellate Term, having sat there for three years.

I was also very active in all of the various peripheral organizations representing judges and their interests.

I was a member of the Judicial Conference, having been elected by the Judges of the First Department, and I also was the Vice-President of the Supreme Court Judges of the City of New York.

I was also the Judicial Delegate from the First Department to the Supreme Court Judges of the State of New York.
I believed that I was performing creditably, and that belief was substantiated by the fact that in or about August of 1983, pursuant to the procedure that had been set in place, my qualifications were reviewed by the various recognized Bar Associations, and I was found qualified, and they recommended that I be reelected.

In September of 1983, while in my Chambers performing my responsibilities -- the exact date, I don't remember -- I received a call from Stanley Friedman, the County Leader of Bronx County.

Mr. Friedman is an individual who surfaced after I had ascended the Bench. In fact, the County Leader in existence when I was nominated to the New York Supreme Court was Patrick Cunningham.

So, I never really had much to do with Stanley Friedman, other than that I knew he existed as the County Leader. In that I was proscribed by the Code of Judicial Conduct, I complied and had severed all political connections with the party from approximately 1966 to 1983, except for that brief interlude when I was nominated for the Supreme Court in 1969.

Mr. Friedman indicated to me that the Convention, which was meeting that night, was not going to
renominate Justice Kappelman and myself. I was sort of taken aback, but not -- I wasn't that naive to believe I had a Civil Service job, but I pressed Mr. Friedman with an eye towards listening from him why.

He was very brief. He indicated, "For political considerations."

That was the extent of my communication with the Bronx Democratic County Leader, and I thereafter contacted Justice Kappelman with an eye toward subjectively determining what route we should take.

Of course, it became very obvious to us that the Bronx Democratic County Leader had done his homework before he decided to take this particular path, because as it turned out, thereafter, when Judge Kappelman and myself solicited support from the Republicans and from the Conservatives, although we were not directly informed, but it was not forthcoming.

We were eventually nominated by the Liberal Party, and that put us on the ballot.

We then became involved in this exercise of futility, which to this very moment I never regretted, because as a result of the year 1983 being a very
wide political year, that is, no offices were up other
than the Supreme Court and the District Attorney,
who was unopposed, Mario Merola, the press gave us a
substantial amount of coverage.

In fact, as I recall, the day after we were
nominated by the Liberal Party, one of the reporters
from one of the local TV stations, indicated that
they were very thankful for our activities, because
they were of the opinion that they didn't have much
to write about, but now that something has surfaced,
they appreciated our efforts.

Of course, we appreciated their efforts, too,
because they gave us substantial coverage.

I respectfully submit to this Commission that
by the time it was over in November, I began to believe
the editorials in the various papers which had nothing
but good to say for Justice Kappelman and myself.

The bottom line -- and, of course, which is
the subject of this particular study -- is the question
of the independence of an elected Judge.

When he assumes his responsibility as a duly
elected judge, can he look forward, without having to
be fearful, that his decisions will be effected and/or
affected by his mental process in knowing full well
that sometime in the future he may be called upon or contacted by some individual who may have something to say about his renomination.

With that, of course, goes the lack of independence.

As I sit here today, and as I recall -- and, of course, I have many good friends still on the Bench -- I am proud to say that those individuals, in spite of the fact that they're aware that there is always this possibility, exercise excellent independent under the fact situation.

They're good judges, and I cannot say that the appointive, as opposed to the elective, will produce a better judiciary, because we have prudent judges through the appointive and also through the elective system.

Now, there have been many studies in this area, and I am old enough to go back to what was known as the Missouri system. That, of course, is in the nature of a non-partisan election, because I am also realistic enough to know that in spite of the fact that you would be of the opinion that the electorate would be more an appointive system or an appointive judiciary, the truth is that is not the truth.
They have been polled over the years, and they've clearly indicated by a majority that they prefer to have their say as to who shall be their judge. They are in favor of the elective system of creating judges.

But I think that once a judge has been created, and thereafter has a record to expose to the public, he should be permitted to stand as an individual without party, but with a record, and the electorate should be given an opportunity to say yea or nay as far as their continuation is concerned.

It's a solution which I think is realistic within the context of the political system, and that is the procedure that I would recommend, if the Panel is interested in any recommendations.

You have your responsibilities. You will hear from various facets of the legal community and the community as a whole.

You will hear pro and con as far as appointive and elective is concerned, and as I indicated to you, I take no position as to the initial creation of the judge, but I think that it is a viable alternative if presented to the electorate, that they would be willing to accept a retention election procedure.
Now, it's not my intention to burden you any further. I'd be more than happy to entertain and attempt to answer any question that any member of the Panel may have.

THE CHAIRMAN: Thank you very much for your statement, Judge.

Are there any questions?

MS. SCHACHNER: Yes.

Chief Judge Wachtler spoke earlier this morning and presented two possible approaches on the issue of retention, one very much like you've suggested, where there would be a non-partisan election and the electorate would decide "yea" or "nay," on whether a sitting judge would continue and sit for another term.

As an alternative proposal, Chief Judge Wachtler suggested perhaps a non-partisan reviewing body would endorse a sitting judge and that, in effect, would be the end of it, and there would be no electorate voting "yea" or "nay."

Do you have any opinion about the latter?

JUDGE SULLIVAN: Well, of course, to start with, Judge Wachtler is a product of both systems. He was elected a Supreme Court Judge and he was appointed
to the Court of Appeals.

I think that if you're interested in accomplishment, I don't think that the removal of the voting process from the electoral will fly as far as the electorate is concerned.

I believe they do want to have a say as to who their judge will be, but I think that if it was presented in a retention election mode, that they could and would be willing to give up that particular partisan facet of election procedure.

I would be for a situation where once you're a judge and your ability has been reviewed by credible committees, that he or she should be continued, because we do have a system where if an individual does not measure up, we do have procedures for the removal of that individual.

Now, I'm aware that these commissions are reticent to use this power, but I think it would be -- and that atrophy may have set in -- but I think that if you have a situation where once the judge will not be subjected to an electoral review, they will feel a greater responsibility to delve into each particular individual with an eye towards determining whether they are meeting the criteria that should be met of
an individual possessing of occupying this lovely office.

MS. SCHACHNER: If we went with a retention system where there is a non-partisan vote by the electorate, do you believe that sitting judges will feel that they must still consider some of their decisions if they are in particularly sensitive areas with an eye towards concern about what happens at the end of their 14-year term?

JUDGE SULLIVAN: The answer is, of course, obviously, yes. Any individual who has to subject himself to the electorate, has to be aware that there are some decisions which may not be the most popular.

But, I submit to those individuals that they review the profiles in courage that they are expected to perform under that situation, and most -- withdrawn -- all of the judges, with rare exception, are trained lawyers who accept precedent, and in spite of the fact that the decision may not be the most popular, they do what they have to do, and they do it correctly.

MS. SCHACHNER: Do you have any position on the issue of public financing in connection with judicial races, be they the initial election, or if
there is, in fact, a subsequent recampaigning and reelection?

JUDGE SULLIVAN: At the outset, of course, I'm sure you're aware that when an individual -- that when an incumbent judge stands for reelection, the rules and regulations guiding his conduct prohibit him from being informed as to who is contributing to his campaign and to what degree.

I can talk from my experience. I will say this: that when I stood for reelection in 1983, the Bar Associations and individuals within the Bar Association, and some of the pivotal law firms, did play an active role in raising money.

I had to dig into my own pocket for a substantial amount of money just to keep the -- for lack of a better description -- the show on the road. You must also remember that a judge who has been on the Bench for 10 or 14 years, as the case may be, is basically a W-2 person, so he's not putting away any substantial amounts of money.

He's just living based on his salary, so if he has to mount a campaign, he is certainly financially not in a position to do so. For that reason, it would really be competitive.
There should be some type of restrictions based on the amount of moneys that can be expended in a particular campaign; it's the only realistic way to put everybody on an even keel so that they can all compete.

So, the answer is yes.

THE CHAIRMAN: Kevin O'Brien.

MR. O'BRIEN: Justice Sullivan, did you ever learn what political considerations led Mr. Friedman to drop you from the ticket?

JUDGE SULLIVAN: No. Well, to start with, he was very brief, but, of course, he made a statement to the press which the press did, in fact, to a great degree, give most coverage, and that was that he was of the opinion that Justice Sullivan and Justice Kappelman were not ethnically representative of the Bronx in 1983, and that he wanted to nominate an individual or individuals who were more representative.

MR. O'BRIEN: How many people did he nominate who were new candidates in 1983?

JUDGE SULLIVAN: I was coming to that.

MR. O'BRIEN: I'm sorry.

JUDGE SULLIVAN: There were two vacancies before
he decided to dispose of Kappelman and Sullivan. When he disposed of Kappelman and Sullivan, he had four vacancies, and the vacancies were filled by a minority -- two minorities and two -- and I really don't know in this day and age what is a minority -- but, two other than Spanish and black.

So although he indicated the reason he did that, namely, removed Kappelman and Sullivan, was for the minority representation, in fact, that's not what happened at all.

MR. O'BRIEN: You mentioned there was quite a bit of press exposure concerning this incident.

Did you get any calls or have any conversations with other judges around the City about the events that befell you?

JUDGE SULLIVAN: Well, it had a sobering effect on everyone, because in spite of the fact that statutorily we were not Civil Servants and that we had no claim to the office other than the tenure pursuant to the Constitution, history had made it so that we began to believe that we were divorced from politics, and based on history, I guess we had a right to, at least to some degree, feel that was so.
But once this occurred, there certainly -- for those that may have been coming up within the next couple of years, they had to look around and say, my God, what is this.

And I'll tell you this: that I feel that I have-- and this may be a selfserving declaration -- I feel that I did, to some degree, make it easier for those that followed.

Because of the publicity, the spotlight on this particular issue in 1983, political leaders have to think twice about whether they want to be subjected to this type of exposure, and for that reason, I believe they may step back and take a page from '83 and say, well, maybe we should not rush to judgment here.

I would like to believe that. Whether it's true in fact, I don't know. It has not happened since '83.

MR. O'BRIEN: Do you have any reason to think, based on your conversations with these other judges and your general experience, that this lightning bold had a negative impact on judicial morale or might deter qualified candidates from becoming involved in running for elected judicial office?
JUDGE SULLIVAN: No, I really can't say that I found anything -- I will say, that implicit in the fact that the issue was raised, as a finding, that there was a subjective awareness that this possibility could also befall them, but as to specifically any particular judge mouthing any position, I would have to say no.

By the way, it's not something that you go into the highways and byways and talk about. Everybody likes to believe or is egotistical enough to believe that they are strong enough under any particular fact situation to do the right thing.

THE CHAIRMAN: Commissioner Emergy.

COMMISSIONER EMERY: I take it from your introductory remarks that, notwithstanding this experience, at least in some form or another, you still believe in an elective system?

JUDGE SULLIVAN: Yes, I believe in an elective system, because I would like to see something done in this area, and I don't believe that you can accomplish -- you must, as they say, you must -- what is it -- crawl before you walk.

I believe that at this particular juncture, the only viable way to accomplish or make inroads
into this particular problem is through the retention system and the electorate should have their opportunity to also have a say as to who the judge will be.

COMMISSIONER EMERY: IN the best of all possible words, would you still believe in an elective system, given your experience here?

JUDGE SULLIVAN: I really haven't given it much thought.

But, I will say this: that we are all finite beings of -- be it the Governor or the Mayor or a committee or the electorate. If there are certain safeguards put into place where a reviewing committee will review the qualifications of the individual and that he meets the minimum requirements for the position, I see no difference between an elective and an appointive judge.

COMMISSIONER EMERY: You were a Supreme Court Justice for 13 years?

JUDGE SULLIVAN: 14 years.

COMMISSIONER EMERY: You served a full term?

JUDGE SULLIVAN: Yes.

COMMISSIONER EMERY: During that entire period of time, you were a part of an elective process?
COMMISSIONER EMERY: You were originally elected and you knew that you were going to have to stand for election as an incumbent, assuming the party had appointed you, which it didn't?

JUDGE SULLIVAN: Yes.

COMMISSIONER EMERY: During that period of time, what did you do in your capacity as a Supreme Court Justice to maintain your political ties so as to help yourself get reelected when 1983 rolled around?

JUDGE SULLIVAN: Nothing.

COMMISSIONER EMERY: Absolutely nothing?

JUDGE SULLIVAN: That's why in 1983 I met the situation, and the results speak for themselves. And, I will say this, also, as an extension, that most of the judges on the Bench do adhere to the rules, they do sever their relationship with the political party, they do not participate.

I know that Judge -- we have situations -- you know, by the way, when you think about it, the law is really -- it just doesn't make sense.

You have a law that says -- or the rules say that you must stand for election at the end of your term, be it ten or fourteen years.
You have rules and regulations that say you may not participate in the political vinyard during that particular period of time.

And, at the same time, they say that in your 13th year or your 9th year, you then go back to the political vinyard, build up your connections and run for election on a partisan basis.

I respectfully suggest that it's very difficult to do, and, as the result of precedent, judges feel comfortable in that system because they have not been put upon in a truly political sense.

I don't think anybody can recall prior to '83 what happened to myself, and it has not happened since '83.

COMMISSIONER EMERY: Do you have any information about other judges with whom you sat in the Bronx undertaking political activity so as to reassure their renomination or their retention?

JUDGE SULLIVAN: Other than what they were permitted pursuant to the rules, no, and the rules, of course, you're aware of. It's approximately nine months to the end of the term you indicate your desire to stand for election.

COMMISSIONER EMERY: Is it your testimony here
that you did not even undertake to avail yourself of the opportunities to involve yourself politically as allowed under the rules?

JUDGE SULLIVAN: Of course, I notified the duly constituted party in Bronx County that I was standing, that I was interested in standing for election.

I don't recall, but I probably went to one or two political affairs. I did not associate with any particular club, because those clubs that existed when I was -- when I went on the Bench in 1966 did not exist in 1983.

So, to the degree that I participated in politics and that I notified the County Leader I was interested in standing for reelection and probably went to the County dinner and maybe one or two other affairs, but other than that, no.

COMMISSIONER EMERY: In your opinion, is there anything that you could have done in terms of engaging in political activities that might have changed the result that this lightning bolt hit you with?

JUDGE SULLIVAN: That I could have done?

COMMISSIONER EMERY: Any other political activities you could have undertaken to not have been the judge's judge selected to be substituted for by
minorities or the other two that were substituted for?

JUDGE SULLIVAN: Well, I would have to say no. There really isn't that much I could have done.

COMMISSIONER EMERY: So you were at the whim --

JUDGE SULLIVAN: Let me say that the reason, of course, is because of the way a Supreme Court Judge is created. He cannot stand in an open election. He is nominated through the Judicial Convention, who are delegates who appear in a primary, so it's almost like a vicarious way of election.

You cannot go to the people directly with your case. You must go through the convention system.

COMMISSIONER EMERY: So, in essence, through that convention system and through the political party system that controlled it, you were at the whim of the County Leader in this process, as is demonstrated by the results?

JUDGE SULLIVAN: Yes, absolutely. And, by the way, you know, I want this to be perfectly clear. You know, we use the word "politicians." We use the words "County Leaders." They are not nefarious faces and/or words.

I mean, the County Leader that brought me down, for lack of a better description, I don't say was
indicative of all County Leaders.

COMMISSIONER EMERY: Let me ask you this: Do you have any explanation why you and Judge Kappelman were selected for this special treatment?

JUDGE SULLIVAN: Yes. Political considerations.

COMMISSIONER EMERY: What were the political considerations?

JUDGE SULLIVAN: I never got a Bill of Particulars on it, but I'm sure they were there.

COMMISSIONER EMERY: You have no opinion as to what they were?

JUDGE SULLIVAN: No.

COMMISSIONER EMERY: And notwithstanding --

JUDGE SULLIVAN: When I say opinion, it is obvious that Mr. Friedman had candidates who he was interested in promoting, and it was not Sullivan and Kappelman.

COMMISSIONER EMERY: And notwithstanding all of this history and all of these factors, you still think that the elective system is essentially the same as the appointive system if merit selections are prescreened people who ultimately become judges?

JUDGE SULLIVAN: With all due respect, Mr. Emergy, I think that if we were to take a position
that we throw out the baby because the water is dirty, then I don't think that's the way to go, and I've already indicated to you, sir, that I would like to see something done in this area, and based on my experience in the political system, the way to do it is to make it palpable to the political leaders, the Legislature and the electorate.

COMMISSIONER EMERY: What I'm asking you, really, is, if you can, to be as specific as you can. How do you take the politics, in the way that you've described it, as it happened to you, out of judicial selection in an elective system?

JUDGE SULLIVAN: Are you talking about as it happened to me or --

COMMISSIONER EMERY: As it happened to you.

JUDGE SULLIVAN: Well, of course, remember that I was an incumbent judge.

COMMISSIONER EMERY: Well, even in that situation, how do you take the politics out of judicial selection in an elective system?

JUDGE SULLIVAN: Do you want to talk about an incumbent judge or do you want to talk about an individual standing for the first time for election?

COMMISSIONER EMERY: In either case, as you've
described the situation, the County Leader has made a political judgment which has worked to your detriment, whether you were an incumbent judge or a person seeking a judgeship, that would have worked to your detriment if you had not been chosen.

What I'm asking you is: Under those circumstances, where the selection process is at the whim of the County Leader, as confirmed by a sham convention and a one-party election, how do you take the politics out of that process, out of the elective process, how do you inject merit selection into that process under circumstances where no one controls other than the County Leader?

I mean, how do you get more control in the process?

THE CHAIRMAN: Let me just -- I am not clear on the question, only because the Judge has indicated his strong opinion in favor of a change in how a Judge is reelected.

He has suggested in his earlier remarks that that part of the system should be changed, that partisanism be removed in terms of an incumbent judge, and that's, perhaps, part of the difficulty in the communication.
JUDGE SULLIVAN: Dean, I'd like to answer the question though.

As to your first facet, namely, the creation of the Judge, you don't take politics out of it. It's a part of the system, and as long as the individual is qualified -- and I am of the opinion that there should be some type of a committee that would review the qualifications of an individual, a statutory committee, as opposed to the voluntary committees, that a number of the County Leaders have created.

As to the second facet of your question, an incumbent judge, retention, you don't run as a member of any particular party.

You run on your record.

I would just like to say also, now that you opened the door on that particular point and you've refreshed my recollection, as the result of the human cry of the press and representatives of the Bar, political leaders have, as the years have told, indicated they are willing to set up committees that will review the qualifications of individuals who will be candidates for vacancies, be they Civil or Supreme, and they have further indicated that they will be bound by the decision of those committees.
So, in spite of the fact that we have not any legislation mandating it, the political leader, the responsible political leaders, has accepted his responsibilities and is as interested as all in maintaining and creating a competent judiciary.

THE CHAIRMAN: Commissioner Hynes.

COMMISSIONER HYNES: Judge, the statutory committee that you made reference to, who would that committee be made up of?

What would be the makeup of that committee?

JUDGE SULLIVAN: There are so many committees floating around out there for particular purposes or similar purposes, Chief Judge of the Court of Appeals, Appellate Division P.J.'s, members of the Bar Associations, members of non-legal fraternities, to have a certain credibility in the community.

There are many ways of putting it together.

COMMISSIONER HYNES: Is it your view that there are certain necessary components to such a committee to give it the credibility that it should have in terms of passing on the basic qualifications of a judge?

JUDGE SULLIVAN: Well, I think at the risk of being provincial, I am of the opinion the committee
should be weighted toward the lawyer or legal profession. That doesn't say that the non-legal professions or other than the legal profession should not have input into the committee, but the lawyer and the legal profession have probably a better working knowledge of what the essential work elements of a good judge should be.

For that reason, I would probably weight it toward the lawyer or legal profession.

THE CHAIRMAN: Commission Magavern.

COMMISSIONER MAGAVERN: I'd like to pursue the working of such a committee a bit farther.

First, what would be the criteria for such a screening committee, first for incumbents and secondly for candidates for a vacant position?

Would it be well-qualified, or simply qualified, or something else?

JUDGE SULLIVAN: Well, I was a Judge for twenty years, and it's never ceased to amaze me or to befuddle me, the difference, except for reasonable doubt, preponderance of evidence, clear and convincing. They're all phrases which conjure up subjective criteria in the mind of the maker of the statement.

Highly qualified? It's almost like, as the Dean
knows well, when you mark, you mark on a curve, and highly qualified will be qualified if there is no such animal as highly qualified.

I don't think the wording means that much. It's the results that count.

COMMISSIONER MAGAVERN: Do you think it's feasible to set up such committees throughout this State on a localized basis for every Supreme Court or County Court, any judicial vacancy?

The background of my question is, Governor Wilson testified this morning and thought it simply wouldn't be feasible. He said the workload would be too much.

That, his experience on the Nominating Commission for the Court of Appeals indicates that it would not be feasible to set up similar commissions throughout the State for every judicial election.

JUDGE SULLIVAN: Well, I am reticent to disagree with the distinguished former Governor, who resides in White Plains, like myself, but I think to some limited degree, we have it already in place.

Every Bar Association has their committees. In the City of New York, you also have similar committees that are recognized and in place already.
Now, to give them the blessings of statute, of course, that would be something the Legislature would have to deal with, but I think if you're going to set up committees, they would have to be localized.

Of course, the Court of Appeals is the entire State of New York.

While it's the First Department or Twelfth Department, they would set up their own committees. When I say "they," maybe under the aegis of the presiding Judge of the --

COMMISSIONER MAGAVERN: You suggested the makeup of such a committee might be made up of appointees of the Governor and the Chief Judge of the Court of Appeals, among others.

I am wondering whether it might be possible to place the appointing power in the County Executives or other locally appointed officials, rather than the State-wide officials?

JUDGE SULLIVAN: I have no particular position on it. I mean, whatever it means is proposed, with an eye towards presenting and reviewing the qualifications of an individual, I would feel comfortable with it, be it the County Exec, or the Borough President, or the Chief Judge of the Court of Appeals.
COMMISSIONER MAGAVERN: Thank you very much.

THE CHAIRMAN: I just would like to thank you, Judge, for your participation in the hearing, and I can't let you go without saying that as one who was active at the time in 1983, at the time that you were seeking election, reelection to the Bench, that while the voters may have not supported your Liberal Party line for perhaps partisan reasons, I am sure you're aware that the Bar, the practicing Bar, who knew you best, held you in their uniform esteem, and we are certainly delighted that you are very active in that practicing Bar today.

So, thank you for being with us.

JUDGE SULLIVAN: Thank you.

THE CHAIRMAN: The Commission calls as its next witness, Judge Joan Carey.

Thank you for being with us today, your Honor.

MS. SCHACHNER: Good afternoon, Judge Carey.

You're currently sitting as a Court of Claims Judge in Manhattan?

JUDGE CAREY: Yes.

MS. SCHACHNER: Would you tell us a little bit about how you first came on the Bench, beginning in 1978?
JUDGE CAREY: Yes. In 1978, in May of '78, I was appointed -- I was one of the first wave of the Merit Selection Committee judges that came out of the Koch panels.

I think there was one group of judges appointed before my group, and I think they were appointed -- I think he came into office around January, in January, obviously, and I think the first wave was -- I would say the first group, they were appointed in April, and I was appointed in May.

That was a system where I just put an application into the Mayor's Committee, that's really what it came down to.

I was called before the Committee. I was asked whether I would take a Family Court judgeship, if one was offered, and I told them that I would not, I was only interested in the Criminal Court.

And there were a series of interviews, and there came a time when I received a notification that I was going to be appointed by the Mayor.

There was no one speaking at the time on my behalf. I had no one lobbying for my candidacy or for my appointment.

And that's how I became a Criminal Court Judge.
of the City of New York.

I might say that the Chairman of that Committee was Bill Liebovitz who, back in 1981 -- the only connection between he and myself was, we were adversaries, we tried a murder case, and he was the defense lawyer and I was the prosecutor, and he ultimately was the Chairman of the Committee.

I had not seen him in those intervening years, but I heard that, you know, he had some very nice comments to make about me before the Committee.

But that was the sum total of what I've learned about that appointment.

MS. SCHACHNER: Then following year, 1979, you were designated as an Acting Supreme Court Justice?

JUDGE CAREY: Yes. I sat for approximately a year in Manhattan Criminal Court when I was appointed as the Judge in charge of the Criminal Court in Manhattan as the supervising Judge and again that was by designation of the Administrative Judge at the time, who was Leo Malones, who sits down on the Appellate Division, First Department.

And by virtue of that position, being a supervising Judge of the Criminal Court, I was named as an Acting Supreme Court Judge but didn't in actuality
sit in Supreme Court. I supervised 23 judges in the Criminal Court. And then there came a time that I did sit upstairs, after I asked to be relieved of the supervisor's job.

MS. SCHACHNER: At some point in time in the early Eighties, did you decide to try and obtain the Democratic Party's nomination for a Supreme Court judgeship?

JUDGE CAREY: Yes. Well, it didn't first come about -- maybe I was naive in that regard. I was told that judges were submitting applications to an independent screening panel to sit -- obviously, to be elected to Supreme Court in Manhattan, and I submitted my name to that panel, and I was called before the panel, and that year, I believe, there were five vacancies.

Of course, I know how the process works now. Maybe I'm not as sophisticated with respect to it as some other people, but I have a general working knowledge of it.

The panel reports out three people for every position, and that year there were five vacancies, and I was reported out along with other people, such as Irving Lang in Manhattan, who is now deceased, and
Irving Rothblatt, and other people who have a good reputation in this County.

There came a time after I was reported out that I received notification that I had to appear at a convention and if I would like to, I could make a speech, and so forth, and I received that notification from the Democratic organization.

I didn't understand the combination of the two and why I had to do that, but then I realized this Committee was different, certainly separate and apart from the type that I had been used to.

In any event, I went to the convention. Obviously, I was not a serious candidate, and I might have spoken about something in terms of judicial reform.

I don't even remember now. And, that was the end of it.

And then the following year, I was more or less informed by other judges that if I intended to seriously consider a Supreme Court judgeship in Manhattan, you more or less have to -- you have to meet District Leaders and you have to go around to different clubs and you have to explain, you know, give your qualifications, and things of that nature.

And so the second year, the second time I did
it was -- the first year I didn't do that at all, in '82.

In '83 there were no vacancies. In '84, I went to, I think, a very small group -- very few group meetings and really, again, I was reported out of the Committee.

It was the second time that I was reported out of the independent screening panel, and again it wasn't really a true candidacy, because I had really -- I mean, no one really knew me, that's what it really came down to.

The third time, I thought I would do it again, and I went to the -- they had the cocktail parties, and you meet people and they get to know you, and so on, and, basically, there were three vacancies -- there was one vacancy that year, and I was one of three judges reported out for the third time from the independent screening panel.

Again, that year, I withdrew my candidacy at the convention.

The next time, this would be the third time, I had gone to about 65 percent of the meetings and parties, and so on, and introduced myself to people, and that year, five people, I believe, were reported
out. I was one of the five.

This was the third time.

Again, I did not get the votes at the convention because I did not really know most of the people, still.

And then, finally, the last -- I had no intention of doing it again the following year, and one morning Peter McQuillan, who is the Administrative Judge in Manhattan, called me and said, "I understand from some very good Government people that you do not wish to pursue the Supreme Court."

And I said, "Well, I just can't stand the process," and he said, "Well, you know, I went through that process and no one, you know, really disliked it more than I did," and so on, "but no one has asked you to do anything that you would think, obviously, was improper, so why don't you just stay with it because really good Government people are interested in you."

I had a tremendous amount of respect for Peter McQuillan and I thought I would do it again, and that's when I did it the last year, I think '84, and I think I was shy about eleven votes.

I went to about 80 percent of the cocktail
parties, still doing very poorly at them, and, basically, again did not get the nomination, and then I was appointed to the Court of Claims at the end of that year.

MS. SCHACHNER: Let me ask you a few followup questions on the several years you attempted to get the Supreme Court nomination.

In '82, you tried the first time. Had you had much involvement at all up to that point in time with any local Democratic clubs?

JUDGE CAREY: No. Years and years ago, you know, in the Sixties, when I was, you know, young and really interested, it might have been a shorter period of time. I was interested, but certainly not within the last fifteen, seventeen years.

MS. SCHACHNER: You mentioned you went before the independent screening panel several years?

JUDGE CAREY: Yes.

MS. SCHACHNER: Did you find there to be a good diversity of membership on the panel?

JUDGE CAREY: Yes.

MS. SCHACHNER: And did you find that your appearances before the Panel were effective in terms of exploring your merits?
JUDGE CAREY: I would be hard pressed to say that the panels were not good panels because I was reported out four times, and also I -- I'm the only judge that's been reported out four times. I thought, you know, you had a good group from different Bar Associations and I thought the questions came from people -- from people who understood what the process was about.

I thought the panels were comprised of people who were interested in good judges.

I'm only talking about the Manhattan panels now. I know nothing about the process in the other boroughs at this point.

I would say that the Manhattan panel was interested in having, you know, reform type good judges, scholarly type judges on the Bench, and I think that the questions and so forth, were questions that you, obviously, knew that the people appreciated what the judicial process was all about.

The panels were a good thing.

MS. SCHACHNER: In 1984, when you went in for the second time and didn't clear the panel, did you know sometime in advance of the convention that you were not going to be nominated?
JUDGE CAREY:  Oh, sure. Oh, sure. You go into the convention knowing whether you have a block of votes or you don't, and you know that by virtue of the fact that, you know, obviously if you don't know half the leaders in Manhattan, how can you possibly garner the votes of their delegates.

It's impossible if you don't know them so you know that.

And there's also a great deal of scuttlebutt that X or Y has X number of votes, or this block of votes is carrying the West Side or this area, whatever. Obviously, you know all of that and you go in knowing that you're going in to withdraw.

MS. SCHACHNER: Did you go in knowing that the person who would receive the nomination had the backing of the Manhattan County Leader at the time?

JUDGE CAREY: I don't think you always know that for sure. We certainly knew that in that year, you know. The thought was, certainly, that there were three of us, and that one of the three candidates had a solid block of votes.

We knew that and we appreciated that.

MS. SCHACHNER: On your third attempt in 1985, did you, in addition to attending the functions,
personally canvass the delegates trying, as you say, to garner votes, garner groups of delegates?

JUDGE CAREY: Yes. Once you're reported out of the Committee -- and I will say this about the Committee in Manhattan, or at least, certainly, to the credit of the Democratic Party in Manhattan: There's one thing about this process, that you cannot be considered unless you come out of the independent screening panel.

So it's not a situation where some political leader likes X and X may not be qualified and it makes no difference what the Committee does, X is going to be the candidate.

That doesn't happen, because unless you're reported out, the convention will not even consider you.

So, in that respect, you know, that's a good thing about the process here.

What was your question again?

MS. SCHACHNER: Did you personally canvass the delegates?

JUDGE CAREY: I'm sorry. Yes. When you're reported out of the Panel, they give you a list of delegates so that you can then send your resume and
materials to a particular delegate, and then you call that delegate.

If you get into the process, you call people to ask them, "Have you read my literature? Did you receive it?", and so on, and it's all toward the expectation that the person will be impressed with your candidacy, and you do call delegates.

Now, the problem that I have with that -- there are a couple of problems, not the least of which is that many times delegates include lawyers who appear before you, and so, obviously what one must do, you must have to excise the names of the lawyers, if you're disposed to do that.

I don't know if every candidate does that. But, obviously, you're hard pressed to call people who are litigants before you and ask them if they would be interested in your candidacy.

MS. SCHACHNER: And you drew the line at that point?

JUDGE CAREY: Absolutely. I really didn't call all of the delegates, either. I found that a terrible process.

But, in a way -- you know, it's the only game in town, I mean, that's the point. People present
that to you. I mean, I talked about this with certain judges in Manhattan when I found the process distressing, to say the least, and they said, look, we are people -- we don't stay still on a job, and if you want to sit on the Supreme Court, not always by virtue of designation from the Administrative Judge, you have to get your name before the convention, and this is the way that you have to do it.

So, it is a very, very difficult process. It's a very demeaning process, as far as I'm concerned, but it's the only way to go to the Supreme Court.

MS. SCHACHNER: Now, you drew a distinction between canvassing lawyer delegates and non-lawyer delegates.

Do you believe that other candidates similarly draw that distinction?

JUDGE CAREY: I don't know that. I don't know who called who, really, because no one really talks about who they are calling, and so on, during that period of time because to a certain extent you're adversaries.

MS. SCHACHNER: But you were personally uncomfortable with that?

JUDGE CAREY: I absolutely refused to do that.
MS. SCHACHNER: In that year, 1985, you knew in advance of the convention you were not going to receive the nomination?

JUDGE CAREY: Yes. I mean, I knew that because, you know, there were Judges who had been long-time supporters of the Democratic organization, to the point of being actively involved for years, and I just knew that they basically certainly had a block of votes superior to mine.

MS. SCHACHNER: Now, the next year, 1986, you thought you had some chance of coming out of that convention?

JUDGE CAREY: Yes. Well, it was represented to me. That was the year that -- again, when Judge McQuillan spoke to me about it, and when I went before the convention, it was represented to me that, you know, this group is for you, and that group, and so on.

So, I felt I had a solid block of votes.

MS. SCHACHNER: What was the outcome of that convention?

JUDGE CAREY: I really don't know. I think I lost by maybe 11, 15 votes, something like that.

MS. SCHACHNER: Did this end your interest in,
you say, playing this political game?

JUDGE CAREY: Oh, I told everyone who had called me to do it, "Don't call me again. It's out of the question. I absolutely refuse to do it, absolutely refuse."

MS. SCHACHNER: And that's because you found it, as you say, demeaning?

JUDGE CAREY: Yes. It's a disgraceful process, as far as I'm concerned.

MS. SCHACHNER: Did you believe that if you continued to play the game, you would eventually be successful?

JUDGE CAREY: I think so, sure.

MS. SCHACHNER: You mentioned that in 1986 you were appointed to the Court of Claims.

Would you take us a little bit through that, how you came to apply for that position, what was involved, and when you received notification.

JUDGE CAREY: It was reported in the LAW JOURNAL that applications were being accepted for the Court of Claims.

I submitted an application. I did not hear anything. There was no response to my submitting that application.
I ultimately had my law clerk call Judge Gabrielli's commission -- he was Chairperson of that Committee -- to ask whether they had received the application and whether or not they were going to accord people interviews.

I was told that they did receive the application, and that unless an interview -- I think between the last time we spoke, I said to you there were no interviews. I believe now, when I remember back, that there were some interviews, but only if you requested an interview.

I think that was the tone of the conversation, and that was the end of it.

Then, there was a certain amount of conversation around the Courthouse that A was getting it, or B was getting it and so forth.

This is approximately a week before there was talk that the Governor was going to make the appointments.

I tell this story over and over again. People don't believe it, but I keep telling it. I went to the opera on Thursday night. I came in at approximately a quarter to 1 in the morning. I received a call from one of the Governor's -- a member of his staff, who
said that he was considering my application, and would I submit a financial questionnaire and submit to be fingerprinted and so on, and an investigation by State Police.

I said yes and agreed to do that, and told them that I would -- asked them were they going to be sending me the form to effectuate all of that. They said, "No, you have to go to the Trade Center tomorrow morning. Be there at 9:30," and so on.

Then, when I got off the phone, I thought possibly it was a crank call. I mean, it was just absolutely ridiculous. I thought, before I do all of this financial questionnaire -- I didn't go down, I didn't do anything in terms of looking up anything -- to go down to make sure my name was on that list, and it was.

Then I left there, came back at 4:30, filed the questionnaire, was fingerprinted that morning, and got homethat night, and got a call from one of his counsel. I don't even know the name. I believe Mr. Davis. Davis called me and said, "The Governor is going to name you tomorrow morning to the Court of Claims," and that was it.

MS. SCHACHNER: Let me clarify a point.
Did you ask to be interviewed?

JUDGE CAREY: I didn't, no.

MS. SCHACHNER: And you were not, in fact, interviewed?

JUDGE CAREY: I was not, in fact.

I somehow -- I somehow recollect something about now thinking about it, that a number of years ago, I think just before -- there were a series -- I think there were approximately 23 or 21 openings just before Carey went out of office, and I had applied then, and I was interviewed by that then committee, and I think -- I'm not sure, but I think the position of this Committee was, if you had been interviewed at any time for a Court of Claims application, there was no need for you to be interviewed again.

So, I don't know if they had -- you know, if the first Committee had memorialized anything by virtue of any writings or whatever. That I don't know.

MS. SCHACHNER: Was it approximately two months from the point you put in your application to the point you received the phone call saying that you are going to be appointed?

JUDGE CAREY: I would say approximately two months, maybe less. I would say two months, yes.
MS. SCHACHNER: Now, as a sitting Court of Claims Judge, do you feel in a more independent position, having reached the Bench that you are now on through the process you went through?

JUDGE CAREY: No. I never did not feel independent. There is a -- you know, a certain feeling, a philosophy that people who sit as Acting Supreme Court Judges, because they're sitting as designated by the Administrative Judge, for some reason that has a chilling effect on you.

That may be true with certain people. I just never felt that.

MS. SCHACHNER: Let me ask you a more general question.

Based on your personal experiences, do you have an opinion on whether the appointive process is a more desirable way to go than the elective process?

JUDGE CAREY: I think the appointive process is a more desirable process, so long as there are certain built in safeguards.

You could have an appointing authority who could just be the politician, who is then deciding who will become a judge and who will not. I think along with the appointive process, you have to have something
very similar, and I am not endorsing that in any respect, that particular committee.

But, the only experience I've ever had was with the Koch committee in those early years. I don't know what happened in the later years, but in that early year an independent committee that basically is looking for judicial reform -- and I must say that that Committee, in its early years, put some very, very good judges -- you know, it may sound selfserving. I am referring to other judges.

There are very good judges that were appointed way back then, who would never be considered for Supreme Court, because they just will not get involved in the elective process.

But, they're superior judges, and they are judges who are selected to try the heaviest and the most difficult cases.

MS. SCHACHNER: Do you believe that women and minorities have greater access to the Bench under the appointive system versus the elective system?

JUDGE CAREY: You would have to look at statistics for that.

I know there are quite a few women and minorities appointed by the merit selection committees, as I knew
them to be, but I really don't know. You'd have to look at -- you really would have to look at statistics. So, I couldn't say.

MS. SCHACHNER: How would you answer arguments raised by people who feel the electorate should be given a chance for an initial selection of judges?

JUDGE CAREY: The electorate has nothing whatsoever to do with the selection of judges. The electorate is forced to receive one or two or three candidates, and they just put their mandate on the person who the party people, so to speak, the delegates, select.

The public has nothing to do. I mean, there's no mandate from the people whatsoever.

MS. SCHACHNER: What about on the issue of retention of the judge at the end of his or her initial term?

Do you believe there should be retention elections of non-partisan vote where the electorate can say yea or nay to keeping the Judge on the Bench or do you believe there should be some type of a screening panel reviewing the track record of the judge?

JUDGE CAREY: I think when you come up for
reelection, especially with respect to Supreme Court, and especially there aren't many people that do go on the Bench when they are older, I think there has to be a total and complete reevaluation of those people to determine whether or not they still are highly qualified to sit on the Bench.

MS. SCHACHNER: And would you believe that there should be that evaluation and a vote on their retention?

JUDGE CAREY: Yes, if that's the situation, or a reevaluation for the purposes of the appointment, if it's an appointive type system.

MS. SCHACHNER: Thank you.

THE CHAIRMAN: Thank you.

Commissioner Emery.

COMMISSIONER EMERY: At the risk of bringing up bad memories, we ask you, as concretely as you can remember it, when you went to those cocktail parties and you were asked to make those phone calls, which you found degrading and humiliating -- and I can certainly understand why -- what was the liturgy of it?

What were you supposed to say to the people at the cocktail party when you met them, and what were
they supposed to say to you?

JUDGE CAREY: There's very little you can say, obviously, as a sitting judge, but you would just say, you know, "Hello. How are you? I am Joan Carey. I am a candidate for Supreme Court. I am placing my name before the panels. If I do come out of the panels, I will be sending you some literature," or words to that effect.

That's pretty much basically it.

If you are reported out of the panel, you just basically call people and say, "I understand you're a delegate. As you know -- I don't know whether you do know --" -- obviously everybody knows, because they're been told by one person or another -- "-- that I've come out of the panels, and I'm going to be sending you some literature about myself. I would appreciate it if you would just take time to look at it," and that's it.

I am not saying everyone said that. I mean, some people may say something more, some people may say something less, but that's all I said.

COMMISSIONER EMERY: I understand. How --

JUDGE CAREY: You don't get too far with that kind of a hello, would you like to look at my
literature. I will tell you that.

You know, that's --

COMMISSIONER EMERY: You didn't find that to be very effective?

JUDGE CAREY: I was doing it, and didn't know why I was doing it, because I knew it wasn't effective.

Of course they got the literature. What was I calling them for? But you have to say something, because the idea is, you should at least introduce yourself.

COMMISSIONER EMERY: What did you find their responses to be, what sampling of responses; can you remember?

JUDGE CAREY: Well, most people were really very nice, but it's the type of situation where, when you get a call at home at night, and somebody says, "Hello, I am taking a survey. I'm from the Midwest, and, you know, how many credit cards do you have?", do you feel like answering that type of call?

Obviously not. So, many people, I think, who were delegates did not understand their responsibility, but the real responsibility, the awesome responsibility that they were charged with.

I mean, they just didn't understand that. They
would say, "Oh, yeah, I remember you. You're the lady with the blond hair. You had this kind of a dress on."

Some responses were ridiculous, some were inane, some just said, "Oh, I heard very nice things about you."

But, I never really got any kind of an in-depth -- no one ever said, "I read your literature, and you tried the case of XYZ."

You knew the people didn't read the literature, except for a few people very interested in the process.

COMMISSIONER EMERY: Now, in that regard, you were at that time that you had to have these cocktail party conversations and you had to make these phone calls -- at that time, you were a sitting judge?

JUDGE CAREY: Yes.

COMMISSIONER EMERY: You were engaged in this kind of conversation that you've just described, I guess, in some kind of quasi-judicial capacity, because you were a candidate to be a judge and a sitting judge?

You weren't just an ordinary citizen seeking the office of Judge or the position of Judge?

JUDGE CAREY: Correct.

COMMISSIONER EMERY: Did that enter into your
emotional response to this circumstances?

JUDGE CAREY: Absolutely. In fact, from the day I first sat on the Bench -- I love sitting on the Bench, and anyone who knows me knows I love sitting on the Bench.

I began to dislike the Bench intensely, and I think I began -- you know, I would be selecting juries and I just didn't like the job any more, and I think the reason I didn't like it was I was beginning to appreciate that there were many people sitting in different boroughs and different counties throughout the City and State and throughout the nation that very possibly didn't get the position the way I got it, and I all of a sudden began to look at the position of judge with a very different perspective.

I really wasn't enjoying the position at all, because I began to see how -- you know, I began to learn the process with respect to how many people got to the lower courts in a fashion other than the way I had gotten there.

COMMISSIONER EMERY: Was there anything at all, any one single thing at all, that you can remember or think of in that process that had anything to do with your actual judicial functions?
JUDGE CAREY: You have to rephrase. You mean in terms of having a chilling effect?

COMMISSIONER EMERY: No. I am asking you if there was anything about that process of going to political cocktail parties, or having to make the phone calls, or doing whatever was necessary on the repeated occasions that you attempted to be the nominee of the convention, in that whole process, and in your reactions to it and in your life during that period in dealing with those problems -- was there anything at all about that process that in any way enhanced your ability to be a judge or was related to your ability as a jurist?

JUDGE CAREY: No.

COMMISSIONER EMERY: Thank you.

THE CHAIRMAN: Commissioner Hynes?

COMMISSIONER HYNES: I was wondering, were you given any roadmap when you came out of the Independent Screening Committee? You told that there's a shock, that these delegates might even be independent and have an open mind?

JUDGE CAREY: Oh, yeah. I do think -- I mean, really, when you consider the short period of time -- I talked about doing it a couple of times, but I
really -- the first two times, I mean, I didn't do any of it. I hadn't gone to any of the parties. All I did was submit my application to the Screening Panel. It was only the third or fourth time that I really began to, you know, go around and introduce myself to people.

You would never have a process like that, I think -- although I don't know the process that goes on in the other boroughs -- but I don't think you have a process that is similar to that in the other boroughs, that in that short period of time you did have a lot of independent people. I mean, I didn't belong to a club, I didn't have a District Leader.

There were a lot of independent people who were, you know, interested in my candidacy. There were certain delegates who -- there was one who was a District Attorney. There were various number of delegates who were Legal Aid attorneys and so forth. There were certain people who were interested in judicial reform in Manhattan and who wanted good candidates.

So, I do think you do have that in Manhattan.
COMMISSIONER EMERY: Okay. So you weren't told that if you didn't have the backing of the County Leader -- you know, you're just doing this for the first few times, to show your face around?

JUDGE CAREY: Well, first of all, I think it's kind of a given that if you have the backing of the County Leader, it helps.

I'm not sure it always helps everybody. But, the point is, that I think that certainly something--I mean, you're talking about the Democratic Party. The County Leader has something to do with judicial selection, obviously.

There's no question that in Manhattan you can be elected and have the County Leader not like you, I mean, that can happen in Manhattan, because you have reform type people, people who are very interested in good judicial politics, and you really have enough of them.

It's just that certain times, certain years, things happen, and sometimes it doesn't work out that way.

And, also, by virtue of the fact that there have been some very good people nominated at conventions in Manhattan, it speaks well to that
extent for that process.

COMMISSIONER EMERY: So, in your view, in Manhattan, the convention is not the rubber stamp of the County Leader?

JUDGE CAREY: You see, you would have to get somebody more sophisticated with respect to the politics to really be able to answer that.

All I can say about that is, I am sure sometimes that occurs. Whether it's 80 percent of the time, 25 percent of the time or 90 percent of the time I can't say.

All I can say is that I didn't have the support of the County Leader, and I came very close to getting the nomination because I had some very, very good people interested in me.

So, it can be done outside of, you know, getting the so-called blessing of the County Leader, but I'm sure support from the County Leader helps, because he, obviously, is elected by the District Leader, and I would imagine, you know, that he certainly has some control over a good many of them.

THE CHAIRMAN: Commissioner Magavern.

COMMISSIONER MAGAVERN: Judge Carey, I would like, for the sake of discussion, to take an opposing
perspective from Mr. Emergy, and I may exaggerate for
the sake of discussion. Forgive me if I do.

The process you described as demeaning, degrading
and a terrible process could be viewed somewhat
differently.

First, in your meetings with the delegates,
there was no attempt to impose any undue pressure?

JUDGE CAREY: That's correct.

COMMISSIONER MAGAVERN: Secondly, the people are
people who have chosen to become active in politics,
and all things being equal, it's probably a good
thing, and they are probably well informed citizens,
generally.

They may not be the same as a Bar Association
Committee, who know about the courts and judges,
but they are public-spirited and reasonably well
informed citizens.

You indicated that had you continued the
process maybe through another cycle or two, you
probably would have succeeded, and that, indeed,
many of the delegates were good Government people and
conscientious people.

Now, with that process, I can understand why
a particular human being would dislike having to do
it, to campaign, and the like, but, inherently, as you've described it -- and I say this for your comment, not as a firm conclusion -- it doesn't sound so bad. It sounds like a legitimate process and one that you could argue does keep judges in touch with the people, provides some vehicle for the electorate and the people through their political party to have a voice in the process and to maintain a sense of legitimacy of the courts so that they are not entirely apart from the people, and I wonder if it's fair, then, to describe the whole process as demeaning.

JUDGE CAREY: Well, it certainly doesn't put candidates -- candidates, in terms of being connected to the public, that is as far removed as I am from the Pope in Rome.

I mean, there's just no connection with the citizens and the people who are running. I think, in fact, if you question people, if you were standing outside of a polling booth and you asked people who are they going to pull the lever for and said to them, "Do you know anything about Emergy or Carey or Hynes?", they wouldn't know anything other than the fact that, "I always vote Democratic."

And, maybe it's Manhattan. "If there are women
on the ballot, I'll pull the lever for them."

The public doesn't really know who is running because, obviously, you're not campaigning before the public.

You haven't sent out your resume. You haven't sent out your brochures, or whatever, or whatever you send out, your literature, to the public.

Secondly, what you're talking about, as far as the delegates being good Government people, some of them are, many of them may not be, No. 1.

And, No. 2, no matter what, you don't have people who understand anything or very little about the administration of justice or the courts or law.

You're talking about people who -- and I'm certainly not putting down any occupation -- but you're talking about people who may be doctors or people who may be plumbers or electricians and they don't have any idea as to what their responsibility is, what they should be doing singularly in terms of casting a vote for A or B.

It's more or less a collective process and they make -- there's no accurate estimate of who this person is, what has she done, what do we know about her, what does she do when she's on the Bench. They have
no idea with respect to that.

They just know they may have met you, or maybe they like you, maybe they don't, maybe their leader told them they should cast their vote for you.

So, there is no way in which a person can really--a delegate really examines the qualifications of the particular candidate.

I would suggest that if you question the delegates at the convention and ask them whether A or B sits in Criminal Term or Civil Term, or whether they have ever sat in Family Court or do you know anything about this person's educational background, they would not be able to answer or respond with any degree of significance with respect to any of the people that they are casting a vote for, and they are deciding --

And, I might say this, also: I guess I am a little prejudiced toward the office of judge. I mean, I always respected that position. It's a truly impartial position. I just think it's one position where you have to be impartial and where you have to bring the best to that position.

I mean, you're deciding cases of life and death, obviously, you're deciding cases where people lose their limbs and so forth, and then you have a category.
of people selecting those people who have no idea what
the system is all about, and that is a disgrace, an
absolute disgrace, and there is no way to, I think,
say that any type of benefit comes to the public and,
obviously, not to the litigants, by virtue of that
process.

THE CHAIRMAN: Judge, I want to thank you very
much for participating in this hearing and,
particularly, sharing your personal experiences. I
would just say that it makes a very strong statement
about you, and we are approaching our own work in this
area without an agenda, trying to understand the
system, and in order for us to do our job, we need
judges and former judges who are willing to come
forward and share with us their perspectives, and you
have been most helpful.

Thank you.

JUDGE CAREY: Thank you.

THE CHAIRMAN: We will now have a Panel
Discussion. Let me suggest a two-minute recess, and
then we will pick up with the Panel Discussion.

(Short recess taken.)

(Thereupon, at 3 o'clock p.m., the following
proceedings were had:)

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THE CHAIRMAN: We are pleased to have with us this afternoon, Robert Kaufman, President of the Bar Association of the City of New York; Frances Zemans, Vice President and Executive Director of the American Judicature Society; and Joseph Bermingham, President of the Erie County Bar Association.

I am going to turn it over to Carol Schachner, but I do want to note that Mr. Bermingham has a flight, and I think we have the Panel Discussion set so that you have the first opportunity to make a statement.

Please keep in mind the schedule that you have this afternoon.

Carol.

MS. SCHACHNER: Thank you.

Why don't we begin with Mr. Bermingham. Perhaps you can spend a few moments addressing your views on methods of judicial selection in New York State, what works best in your opinion, what results in the best judges getting to the Bench, and then we'll proceed with the other two panelists, and perhaps have questions from the Commissioners after your statements.
MR. BERMINGHAM: Thank you for the courtesy, which I appreciate.

It seems to me that what we are talking about is really the same debate that has gone on in this Country since its inception.

Certainly it was of great significance during the Constitutional Convention, and that is the extent to which we are going to trust important decisions to the electorate.

I think that it is certainly fair to say that the selection of judges is an important decision in every case. Having said that, and telling you that it is the position of the Erie County Bar Association, which has been affirmed on several occasions, that we favor in general a system of election of judges, let me go on to say that we have never, as a body, endorsed any particular process for arriving at judicial candidates for election, and we certainly have not studied or come up with any position on the question of judicial candidates should be permitted to campaign.

I think that both of those questions of process are legitimate questions that need to be addressed.

However, in terms of what is the best selection
process in the final analysis, I think that it is certainly in the best American tradition, and I think also wise to opt for election by the electorate.

There is a danger sometimes that we look upon judges simply as decisionmakers, intellectuals. We look at their background, and we forget that at the very core of the judicial office, is the exercise of discretion, and that that discretion needs to be informed, not merely by understanding of the law and the logical process, but by a deep and abiding feeling for humanity.

That, justice has its roots in an understanding of the those things which are human. I get very concerned with any judicial candidate who has difficulty dealing with people, difficulty meeting people, difficulty asking people to endorse his or her judicial candidacy.

Not necessarily conclusive one way or the other, but I don't look on it as a very hopeful sign.

So, all things taken together, I would prefer to see a process of judicial selection that ends up in a choice by the greatest number of people, rather than one which ends up in a choice by the fewest number of people, which seems to be where most of the
other plans ultimately lead us.

MS. SCHACHNER: Let me ask you this: You mention that you believe the greatest number of people ought to be involved in the election of these judges.

Would you suggest remaining with the nominating conventions for the Supreme Court Justices, or perhaps going with a direct primary as we have for Civil Court in New York City?

MR. BERMINGHAM: Well, I am always very leery about commenting about anything in the context of what they do in New York City.

This is a very different place than Buffalo, and I think than the other major cities of the State.

You have problems here because of scale that we simply do not have elsewhere. But, in the context of our own community, where the City Court Judges, the County Court Judges, the Surrogate, are all chosen by election and through the primary system, while the Supreme Court Judges, of course, are not, I must prefer, personally, the primary system.

MS. SCHACHNER: Even with the Supreme Court Justice?

MR. BERMINGHAM: I see absolutely no reason to differentiate.
MS. SCHACHNER: Looking at your region of the Country, do you believe there's an adequate voter interest and participation in judicial elections?

MR. BERMINGHAM: I think that there is at the County Court level and at the City Court level, and I think that there surprisingly is at the Supreme Court level, where the candidates, after all, do come to us through judicial conventions.

I was very, very interested in an election -- it was just ten years ago -- in which a former partner of mine was running for the Supreme Court, a white Irish Catholic, running in a district which is pretty even between Republicans and Democrats.

He was Republican, and he was the second highest candidate in a field of about ten, and easily won one of the five spots.

The highest vote-getter in the Eighth Judicial District, which has small cities and rural areas and one large city, was a black judge, now sitting in the Appellate Division, who was a Democrat.

So, it seemed to me that -- who, by the way, was the high vote-getter. It seemed to me that was a very good example of the kind of independent interest that the people did have in the election and the
kind of selectivity that people exercised.

MS. SCHACHNER: What about rating by the Bar Association in Erie County?

Are you actively involved?

MR. BERMINGHAM: We are, and we're very proud of the way we go about it. It's a well-respected process.

We have the attention, I believe, of the community, and we have certainly the ear of the news media, who reflect and give attention to our ratings, both in news articles and in their editorial comment, and I think that the voters, consequently, have paid attention to our activity, and by and large we are very pleased with it.

MS. SCHACHNER: What about the issue of re-election? Has that been much of a problem? Can you explain what has gone on in Erie County?

MR. BERMINGHAM: We have had a number of situations where judges who have served with distinction, full term, have received bipartisan endorsements.

We had -- we have seen judges who have served with distinction for fourteen years, for one reason or another, not receive bipartisan endorsement and do very well.
I can remember one situation in which a judge served for 14 years with less than distinction, and who was defeated at the polls.

I think in all of those cases, that pretty well reflected the view of the trial lawyers, at least as to what the proper outcomes were.

MS. SCHACHNER: Do you think there would be any benefit to having a system with retention elections?

MR. BERMINGHAM: Again, it's not something that we as an association have taken up, but it certainly seems to have some merit.

MS. SCHACHNER: Can you explain what merit you see in it for your locale?

MR. BERMINGHAM: A judge who has served well for a substantial period of time really is in -- should be in good stead to go forth in the community for an up or down, for them to say yes, your tenure has been as you think it has, or no, it hasn't.

At that point, I think that it's appropriate to confirm, assuming the electorate agrees with the Judge's assessment, to confirm the Judge in an additional term.

MS. SCHACHNER: What are your thoughts on an alternative where you would have a non-partisan review
both evaluate the track record of a sitting Judge and determine whether this Judge will go for a second term?

MR. BERMINGHAM: As opposed to an election, what you do when you do that is you reduce the number of thousands to a very few. I just don't think that that's a very appropriate choice in a democracy.

MS. SCHACHNER: Do you see any benefit at all to an appointive system for selecting the judges in your area?

MR. BERMINGHAM: Do I see any benefit?

MS. SCHACHNER: Yes.

MR. BERMINGHAM: Well, if by that -- are you asking do we have appointed judges who have served well? The answer, of course, is yes, they have.

I see no efforts being made to change the manner of selection of the Federal Judges. So, we're going to continue to have appointed judges.

Hopefully, all of them will be the top flight people, but the appointive process being what it is, there's no guarantee that that will be so.

It's simply that given an opportunity to make a choice, I think we're better off electing them.

MS. SCHACHNER: One final area of questioning.
Do you have a positioning on campaign finance in judicial elections?

MR. BERMINGHAM: We don't and it's not something that I have studied at length. I am aware of the many problems that can arise. That's a problem, of course, with elections generally, and, indeed, many of the procedural process kind of problems that affect more than the judiciary.

MS. SCHACHNER: Thank you.

THE CHAIRMAN: Thank you very much.

I appreciate your participation. You feel free to leave whenever you think the taxi is available.

MR. BERMINGHAM: Thank you.

THE CHAIRMAN: Mr. Kaufman.

MR. KAUFMAN: I wonder if I might take three or four minutes of the Committee's time with a prepared statement, because I think it might perhaps anticipate some of the questions that are going to be asked.

I want to interject one item before doing that.

My good friend from Erie County, with whom I spend time now and then, made reference to the Founding Fathers and the Constitution.

I just want to point out, the Founding Fathers did not opt for election of judges. They decided very
clearly that democracy requires the selection of the best in that particular area of Government, and that the selection of the best was by the process of appointment.

MR. BERMINGHAM: Did it not for the Bill of Rights either.

(Laughter.)

MR. KAUFMAN: There is no single issue more central to the goals of our Association than that the people of New York have confidence in the justice delivered by their courts.

We agree with those who believe that the quality of our judges is the quality of our justice, and the best method of picking the best judges is through merit selection.

The public perception of the judicial electoral process, never very high, has suffered greatly in recent years with major scandals surrounding the officials who actually choose judges in the elective process, local county leaders.

I had a meeting many years ago, when I was involved in Government, when Senator Javits sent me to see the State Chairman of the Party, and the conversation started with the State Chairman saying
to me, "I understand you're one of those crazy
who want to do away with elected judges. How can you
possibly justify that?"

I said, "That question presumes that we now
have election of judges. What we have right now is
appointment of judges, but by the County Leader and
not by the Governor or the Mayor."

He said, "Well, County Leaders are elected."
I've always remembered that as being an indication
of the attitude toward this process. It is in very
few places a real elective process, and I think we
have to have that in mind when we talk about election
versus appointment.

The fact is that today service to the political
is to a large extent, in many areas of the State,
including the City, what makes a candidate qualified
for judicial office.

I am not saying that service should make a
candidate unqualified, but a County political leader
may feel, and has reportedly felt, that a number of
instances, that party loyalty far outweighs the
factor of merit, that should be the primary factor
in choosing a judge, whether for first term or for
reelection.
There are three basic flaws in the electoral system. Number one, the original selection process, the choice by County Leaders.

The next problem with partisan elections for judges is the length of the ballot in most areas of the State.

With so many candidates and, often, questions on the ballot each year, it is impossible for most voters to be sufficiently informed to make intelligent choices.

Also hampering effective choice, as you know, is the character of judicial campaigns.

Ethical rules make traditional campaign disclosures and debate impossible. You can't say, "This is how I am going to act when I am a judge, this is how I am going to vote."

It would probably undermine the public's confidence in the judicial system if judges did make rulings in individual cases based on campaign promises.

Added to the inappropriate power of County Leaders, and the inability of voters adequately to judge the merits of a judicial candidate, is a third major problem with the electoral system for
judges: The need for candidates to raise money through campaign.

Because most candidates cannot afford personally to finance their election campaigns, they have to raise most of the money they need. I certainly don't think we intend to have one of the qualifications for running for judge to be that you can afford to pay for your own campaign.

Unfortunately, most of this money comes from attorneys who appear before these judges. This is a situation rampant with the possible appearance of impropriety, if not more.

I don't have to describe to you what the merit selection process is. The fact that it is the selection of a limited number of people from whom, in fact, then an appointed authority has to make the choice.

It is not without political characteristics. But, it is, as far as I know, the way of selecting the most effective candidates, the most qualified, not only eliminating the lease qualified, and it is with a balance commission membership the system that has gotten us the best judges.

The Association of the Bar strongly urges you
to conclude and advocate that the time has finally come for this necessary reform.

IN this State, every single major civic group that has brought an objective view to the issue of judicial selection, has concluded that merit selection is the best way of choosing judges -- not perfect, but the best that's available.

The intransigence of the New York State Legislature, particularly in recently reported disinterest of the Assembly Judiciary Committee, on which two prominent members also hold the post of County political leaders, should not dampen the enthusiasm of those who are convinced that merit selection will improve the quality of justice in New York.

Indeed, the one time that this issue was put on the ballot in this State, merit selection for the highest court of the State, the public supported this change despite opposition from every political party.

The people of this State deserve no less than our best efforts to bring about the end of partisan political campaigns as a method of selecting those that administer justice in New York.

I was very heavily involved in one of the last campaigns, two of the last campaigns, that took place
from the Court of Appeals, the campaign for Chief Judge, in which Judge Breitel was elected, and then the subsequent campaigns in which three judges were elected.

The entire process is directed at issues which have nothing to do with the qualifications of the Judge.

The issues that were raised in the Chief Judge campaign, frankly, on the side of the candidate who won, or that he was the Senior Judge on the Court of Appeals, and the Senior Judge had always gotten that position, and that it was improper to have challenged that prerogative.

The issues with respect to the other candidate, who was not a judge, were basically that there should be somebody on the Court of Appeals who represents defendants in personal injury cases.

Those were the issues on the basis of which the public was asked who should be the Chief Judge of this State.

That has been gotten rid of.

In that particular case, because it was at the top of the ballot, there was more attention paid to the particular election than there is with respect to
any other election where the judges appear at the bottom of the line of other elected officials.

I think it's a very unsatisfactory system, and one which does not even have the characteristics of democratic election, which the President of the Erie County Bar has spoken so eloquently for.

THE CHAIRMAN: Thank you very much.

Frances Zemans not only has listened to all the witnesses who appeared here today, but has studied and examined and spoke of systems throughout the Country, and spoken to judges throughout the Country.

I would be interested, in addition to whatever opening statement you make, in any reactions to different issues that were raised today that you might have.

MS. ZEMANS: Thank you. I'd like to, first of all, thank you for the opportunity to appear here.

The American Judicature Society, which I represent, is a strong advocate of merit selection, and I won't try and pretend we aren't.

I do at the outset want to reiterate what Bob Kaufman made reference to, and I repeat it only because it is so often misunderstood, and that is, that merit selection is not just an appointive system.
We are not talking here about choosing between appointive and elective per se, although that is part of it.

We are talking about an appointive system with significant restrictions on the power of the appointing authority, and that is something that all too often is neglected in these discussions.

I was asked to give a bit of a historical and national perspective, so I have tried to write down a few notes in that regard and, indeed, had some reactions to this morning's testimony.

The first idea of merit selection was proposed in 1917 in an article by Albert Kales, who was at that time a Director of the American Judicature Society and Professor at Northwestern Law School. What he talked about in that article, and it had a curious ring of familiarity as I was listening here today, was that party elections are really appointments by party leaders -- this is 1917 -- party leaders who are not qualified and have the wrong motives.

It seems to me, that based on what we've heard today, very little has changed since 1917 in places where partisan elections still hold the day.
In 1931, at an AJF annual meeting, a proposal was made to have a commission system, a commission made up of judges, lawyers and important laypersons, and that would then be followed by selection, and that was the beginning of what we know today as merit selection.

In 1940, it was first adopted in Missouri, and many people preferred to call it the "Missouri Plan," thinking that "merit selection" is too value-laden a term.

I'm happy with the "Missouri Plan," if that is anyone's pleasure.

This method of selection is now used to select some or all judges in 34 States and the District of Columbia.

In 20 of those States, only the Supreme Court, that is, the top court of the State, is selected that way, and, indeed, that is a typical historical development.

That is to say, New York follows that pattern, which is to say you first try it at the appellate level, see how it works, and then an attempt is made to apply it to other levels of the courts.

From 1950 to 1980, all changes, nationally,
in judicial selection have been toward merit; none
have been away from it.

Since 1980, the one exception is that Georgia
changed from a partisan election system to a non-
partisan election system.

So, we are talking about national trend toward
merit selection over a very significant period of
time.

In the context of this historical record, I
was also asked to make some reference to the record
of women and minorities in merit selection around the
Country, and I don't want to go into that at great
depth here.

Let me say a couple of things.

The first is: It seems to me it's not so much
do minorities and women do better in merit selection,
although I think I can argue that they do, the data
shows that they do, but do they do any worse.

Are they going to do as well under merit
selection as they do under a selection system. That's
an even easier one to answer.

The second thing is: I think it needs to be
recognized that we are in an era of affirmative action,
and, hopefully, whatever selection system is used,
there will be increasing sensitivity to the need to have both women and minorities represented on the Bench.

Having said that, the reality is, looking at the Supreme Courts around the Country, that the record for partisan election has not been very good.

There are now eleven black Supreme Court Justices in this Country. Only two of them were selected by popular election, the others by appointment, half of those by merit appointment, and all of those States, not surprisingly, have a significant black population.

On the Supreme Courts, there are currently twenty-six women sitting. Again, only two were selected by popular election.

Fifteen or fifty-eight percent of the women currently sitting on the highest courts in the States were selected by merit selection panels, selected by an executive after merit selection panel.

So that at that level, at least, the record, it seems to me, is quite clear that not only don't minorities and women do worse under merit selection, they, indeed, do considerably better.

It has been mentioned here by a number of people
that the quality of our judges determine the quality of our justice, and I certainly support that view.

As Mr Bermingham pointed out, we have a system in our Country, a judicial system in which an enormous amount of discretion is given to the judicial officer, and it is precisely because of the enormous discretion given to that officer, that the quality of who fills that position, is so important.

It is also important to consider the role of the Courts in our Governmental scheme. The Courts are supposed to be different, and they are supposed to be perceived as different.

Unfortunately, under the political system, they are not perceived as being terribly different.

And, why is that important? It's important not only because that makes them not different, but also because -- and I might even argue moreso -- because of the public's perception.

As Judge Wachtler pointed out this morning, public trust is critical to the judicial process, and public trust is simply diminished by the extent to which the average citizen going into a Courtroom believes that the judges are going to be influenced in their decisionmaking by the party leaders who have
put them there or who will keep them there or who will
influence the elective process.

What we are seeking, and I think what everybody
is seeking here, is a fair and impartial judicial
process and it is our view that the best way to get
that, and the best way to make sure that we have
independent decisionmaking and decisionmaking that is
perceived as independent is by selecting judges by
merit selection.

Around the Country, judicial elections are
becoming only more politicized and more costly. They
are increasingly becoming part of -- that is to say,
they are becoming issues in other political elections.

Judges that are being elected at the same time
as legislators and governors are being made part of
those legislators' and governors' campaigns. That
further politicizes it.

With respect to the campaign financing issue
that has been raised, one of our favorite examples
is the $300,000 contribution by the winning lawyers
in the Penzoil -- Texaco case to the Supreme Court
Justices in Texas.

Did that influence their decision? I don't
know. Did it influence public perceptions about that
decision? You bet.

Anecdotally, judges who operated under both systems, universally, to my understanding, prefer the merit system.

Judge Wachtler is certainly a case in point. They will tell you that when they try to be independent, they are still concerned that they are being influenced, even if unconsciously, and many will tell you that their decisions tend to -- they are afraid -- be different when an election is approaching.

Litigants should not be burdened by when in the electoral cycle their case just happened to be heard.

There are many who do not approach political leaders for the very reasons that Judge Carey articulated here.

They do not enter the pool. When merit selection is brought into the system, you find a new pool, an increased pool of people who become interested in serving in judgeships, and there are a number of cases as well where judges decline to run again because they simply do not want to put up with the folly of the inappropriate promises that
need to be made in order to maintain their judgeship.

Governor Wilson pointed out that appointed
judges have to raise money in order to be appointed,
and he included the Federal system in that.

With all due respect to Governor Wilson, it is
a classic failure to distinguish the uninhibited
appointment process, without any limits, with the
merit selection process, which puts severe limits
on the power of the appointing authority.

The commission is required to present only the
best candidates, and it is at that time when the
political process appropriately operates.

It's at that time that, given only the limited
number of very best candidates, that the appointing
authority can say, given the politics of the State of
New York, is this the time to consider putting a
minority on the highest court or putting a woman on
the highest court or whatever else happens to be
appropriate at that point in time.

It was curious for me to hear Congressman
Weprin appraise the role of the people in elections,
while then testifying that party endorsement is
tantamount to election since most people don't pay
any attention to it, anyway.
I think he's quite right and, indeed, his comments have a strange familiarity to the very things that Albert Kales spoke about in his 1917 article.

It is not an issue, I would submit, or losing the baby within the bath water, as suggested by Justice Sullivan.

Partisan elections are fatally flawed by the control imposed by party leaders.

As I mentioned before, New York fits the national pattern of first experimenting with merit selection at the appellate level to see how it works, and then, as here, to consider applying it throughout the State.

I listened this morning to a whole array of candidates sing the praises of the current New York Court of Appeals.

Indeed, they have gained a very significant reputation among state high courts. Yet having praised the court, still, they don't want to apply it to the other courts.

Why? Well, the next Governor might not be as good as this one in who gets selected, but the next Governor will also be limited, just as this one has been limited, and although I have great respect for
Governor Cuomo, I would argue that the quality of his judicial appointment to the Court of Appeals has been very much influenced by the quality of the nominees that have been provided to him by the Judicial Nominating Commission.

Another criticism that was made was: Well, it works fine at the highest court but it can't work State-wide.

I think it was said that it takes too much of the peoples' time. Well, I can tell you that having gone around the Country and having done educational programs for nominating commissioners all over this Country, that simply isn't true.

The way it works is, that there are separate nominating commissions at each local -- in each local district, and the people who are charged with picking candidates for that particular court system devote their time exclusively to the selection of those nominees.

It's not as if you have one commission that's trying to select all judges in the State of New York. I would certainly agree that such a system would be ridiculous.

My experience in observing these commissions in
operation is, that they are filled with people who
are extremely devoted to trying to get the very best
judicial candidates that they possibly can, and they
do an extraordinary job.

It is important not to confuse these nominating
commissions with screening commissions that have been
mentioned here a number of times.

Screening committees function only to eliminate
the least qualified. There is nothing wrong with
eliminating the least qualified. It is simply nowhere
as good as seeking the very best.

And, I, frankly, don't understand why you all
don't want to get a system that will bring to
New York the very best. The party leaders here speak
of protecting the people, but one could argue that
what they are protecting is their own power.

If you believe in the wisdom of the people,
which I do, when they have an opportunity to focus
on issues and to be informed about them, then why not
choose the route of letting them decide how to select
their judges.

The discussion, as I understand it here, is not
whether or not the Legislature ought to change the
method of judicial selection, but whether or not there
should be a Constitutional amendment put on the ballot
to let the people decide.

If that's the case, then why not let the people
decide?

The last time that occurred in the State of
New York, the result was clear. The people decided
that they wanted to choose their judges, to seek
the very best, and that was through a system of merit
selection.

Thank you.

THE CHAIRMAN: Thank you.

MS. SCHACHNER: I suggest we begin questions
with Mr. Bermingham since he must leave in about
ten minutes.

(continued on next page)
THE CHAIRMAN: Mr. Magavern, since you spent a lot of time Upstate --

COMMISSIONER MAGAVERN: To confirm all prejudices, which I share with him.

One obvious question I think, is whether the system you describe as functioning well in Western New York, will function well in an area that's dominated by one party, such as New York City, and the question whether, therefore, consideration should be given to having possibly different systems in different regions of the State.

MR. BIRMINGHAM: Well, that's something I really have not thought about. I have some concern about going away from uniformity, where we can have it. So, it would certainly require some strong reason for doing it differently down here.

But, traditionally, many things have been done different in the City. We have whole sections of our laws which apply to only cities of more than a million people.

So, in any event, I don't know whether that would be good or bad. We don't have a position on it, and I'm not really prepared to bite on whether we should do it differently down here.
COMMISSIONER MAGAVERN: Let me ask you your views on a subject that has come up again and again today, and that is the possibility of a retention election subject to a review by some commission. There has been various ideas suggested as to how that commission could be composed.

Now, you've got a lot of experience with judicial ratings and even judicial evaluations. I wonder if you've got some thoughts on how such a retention election with a review board every ten or fourteen years, would review a judge's performance and then make recommendations to an appointing power, how such review board might be composed and how it might function.

MR. BIRMINGHAM: Well, first of all, I think the retention election is, as I indicated earlier -- might be a good idea. Review bodies -- I guess it depends on what their power is.

My real problem with what people in favor of appointment like to call merit selection is that it may only be elitist, rather than truly merit. I'm not all that sure that we improve people's view of the judiciary and their respect for it by giving them the perception that they have been picked by
some blue ribbon or silk stocking group.

When people have to vote for judges and are conscious of the fact that they have at least had that opportunity, it gives them much -- it inhibits their ability to distance themselves from the judiciary and to disclaim any responsibility for it.

So, if the panel is advisory and is well constituted, and has procedures that get to the merits of the judge's performance, and which then simply becomes a fact for the electorate to know at a retention election, that might serve us well.

COMMISSIONER MAGAVERN: How would you compose such a body, and what procedures would you look to meet your criteria?

MR. BIRMINGHAM: You're at too fine a point for me at this point.

COMMISSIONER MAGAVERN: Let me ask more specifically, how much of a role would you give the Bar Associations in the process?

MR. BIRMINGHAM: I think in any rational process of selection of judges, the Bar Association has got to be heard. So, whether it's heard through its rating system, such as we have, we use today for the elections, or is integrated into some broader
political group or panel, or citizen group or panel, if political disturbs you, I don't know. You're looking for procedures that really require a good deal of thought and consideration that I, frankly, have not given to those specific areas.

COMMISSIONER MAGAVERN: Thanks.

THE CHAIRMAN: Mr. Emery.

COMMISSIONER EMERY: I've just been wondering what part of your argument for the elective process in Western New York goes beyond the proposition that if it ain't broke, don't fix it.

In other words, what about the elective process, what stages of the elective process, what aspects of the elective process, do focus us on merit, and how is merit, in the selection of judges, assured by the elective process?

MR. BIRMINGHAM: I'm inclined first to turn the question, because I don't know that the panels necessarily assure us of merit, either.

COMMISSIONER EMERY: That's not my question. That's a separate question you and I will look at later on.

I think that Ms. Zemans' point has demonstrated very strongly that there are bigger pools, more people
come into the process, there are a lot of other arguments with that. Put that aside for a second.

What I'm asking you is: Please tell me any aspects of the elective process which focus on the issue of merit.

MR. BIRMINGHAM: Well, surely the Bar Association ratings focus directly on merit.

COMMISSIONER EMERY: But that has nothing to do with the elective process, really.

MR. BIRMINGHAM: Only from the sense that everything has to do with the elective process that has to do with the candidates.

COMMISSIONER EMERY: What else besides the Bar Association?

MR. BIRMINGHAM: It depends very much on what we decide to permit candidates to tell us about themselves, and what they're permitted to tell us about themselves.

COMMISSIONER EMERY: Talk about the system as it presently exists in Western New York.

MR. BIRMINGHAM: I think the system as it presently exists in Western New York, has worked well, surely, which is where we started.

COMMISSIONER EMERY: That's if it ain't broke,
don't fix it?

MR. BIRMINGHAM: Which, by the way, is not an unwise approach, and surely the elective system fits us well in -- I'm surprised to hear people say we get the best judges through an appointment, when the New York Court of Appeals, through judges like Cardozo and Pound, has been one of the best courts in the nation consistently.

COMMISSIONER EMERY: Back to the point. What about the elective system focuses on merits besides the Bar Association analysis?

MR. BIRMINGHAM: I find that, obviously, a difficult question to answer, because, (a) the restrictions on judicial campaigning, which may require some looking at, and which I am prepared to defend in their entirety, although certainly judges cannot mortgage themselves for such decisions as Bob Kaufman so aptly pointed out, something by the way which apparently they're being asked to do in the appointive system by federal judges in this Administration -- the process seems to work. It focuses on merit to the extent that people are allowed to talk about merit in the same way every election does. It's always easier to say we could
focus on the merit of the appointment of a Governor, or a Senator, of whomever, by getting a group of people who are best qualified to choose. That's the fundamental choice, the fundamental argument that we've had for centuries.

THE CHAIRMAN: Commissioner Magavern?

COMMISSIONER MAGAVERN: Maybe you could describe the process by which the Bar Association rating is -- the relationship between the Bar Association rating and the actual nominating process.

MR. BIRMINGHAM: Well, every candidate who seeks nomination or who seeks consideration by the Governor's screening panel or whatever they're called now, obtains a Bar Association judicial -- applies for and obtains a Bar Association judicial rating.

As I told you earlier, it's my impression that the electorate pays good attention to them.

I think also that the judicial nominating committees, commissions, conventions, have paid a good deal of attention to them, not always as much as we'd like. Certainly the so-called merit selection commissions have paid attention to them, not always as much as we'd like.

It was shocking to me to find that when
Judge Jason retired from the Court of Appeals -- and we've had a Court of Appeals Judge in Buffalo for quite a long time -- that the presiding Justice of 4th Department, who was a Buffalonian, was not recommended to the Governor, and it seemed to me that that was a very difficult decision to make, adversely to the Judge on the merits, and so I had to wonder what other considerations were involved.

THE CHAIRMAN: I'd like to put to the three of you this question: --

MR. BIRMINGHAM: Could it be to the two of us?

THE CHAIRMAN: Thank you very much.

It probably is more a question to the other two right now. We've heard this morning from the Chief Judge and others that there's no possibility of any significant change in New York State in terms of the elective system in terms of the lower courts.

Put aside the question of retention, which seems to be a different subject.

I have an impression which may not be borne out by the facts that organizations that espouse, say, the appointive system, such as the Association of the Bar and the American Judicature Society, can be more active than they've been with reference to
how to make the elective system, particularly if it's not going to be changed, particularly better. We certainly have issues concerning fund raising, we have issues concerning screening committees that work to some extent, depending on where we are. Shouldn't there be a greater effort made by those who are so devoted to improving the administration of justice to how we can make the elective system better?

MS. ZEMANS: You're looking at me. You want me to answer?

THE CHAIRMAN: Either one.

MS. ZEMANS: It's an interesting point you raise, and it's something we've struggled with at the American Judicature Society.

In some ways, it's the old saw about, do you want to improve the legislation so it can get passed, or keep it as bad as it is so you can kill it altogether.

Historically, the American Judicature Society's position is that elections are fatally flawed, which we still believe, and that, therefore, we shouldn't try to do patchwork improvements.

We have, however, had a bit of a change of heart
lately, not only about the former -- that is, we still consider them fatally flawed -- we don't want to keep our heads in the sand either. I don't believe, unfortunately, in my lifetime, we will eliminate elected judges in the country. As a result, we've just actually begun to embark on a major project on trying to limit at least some of the most extreme campaign abuses, and that includes issues of financing that were presented here, but also issues of advertising in judicial campaigns and the like.

THE CHAIRMAN: This morning the Chief Judge of New York State said that there is a practice going on that he thinks is disgraceful, he doesn't know how to deal with it, that's the practice of sitting judges indicating that they are candidates for a higher judgeship when, apparently, there is no serious possibility of that happening in a particular year, but it enables the sitting judge to participate in partisan activity.

The Chief Judge said to us, it should be changed, he feels very strongly about it, but he's not sure how he can deal with that and shouldn't groups like the Association of the Bar and other
groups in New York State lend more assistance to that kind of reform.

MR. KAUFMAN: Well, you know, you have to start with a particular premise, what's been described as a function of the electoral system, and that's the problem.

With all due respect to the Chief Judge, I don't accept this premise about no significant chance. We have had before us this year, and in other years, an awful lot of things just having to do with the judiciary in which there was "no significant chance" of doing anything, and it happened. It happened with respect to the merit selection of Court of Appeals judges a number of years ago, which both parties opposed, and there was a sufficient -- I can only describe it as an uprising by the people to pass it, nonetheless.

They had to be given the chance to pass it by having it put on the ballot.

I might say personally, that there was a very strong feeling in this country that there was no chance of getting a Supreme Court Justice other than Judge Bork, and that turned out not to be the case.

I think if the attitude of those interested in
this process is that there is "no significant chance," then it's going to be a self-fulfilling prophecy, and I think that would be very unfortunate.

I think there ought to be a major effort, and there is, certainly, going to be a major effort by us and others to get a merit selection proposal passed by the Legislature and onto the ballot, and I don't think it's an acceptable position, to me, that we have to make our primary effort in fiddling with aspects of the existing system.

That doesn't mean we shouldn't try to fix them, because if you get it on the ballot, if you get it passed by the Legislature, it's a two and three year process.

I think the first effort has to be to get the best. That's number one.

Number two, I think in the process that we are involved in, we have to do things about the electoral process to the extent it continues, whether it's for two years or five years or ten, and to fix those holes in it.

There are an awful lot of problems with fund raising and the basic political financing system which goes far beyond the issue of judicial elections.
and while you may have to fine tune some of the
things that ought to go down for judicial elections,
what you have to deal with, basically, is the entire
problem of political fund raising, and that's an
issue not limited to the subject of today's hearings.

The third thing I want to say in terms of the
questions that have just been asked, is on the subject
of retention elections.

Does anyone like retention elections or not.
There's an old story to which the punch line is,
"Compared to what?"

If the only choice presented is that it is
better to have retention election than the present
system in which a County Leader's disapproval means
that a sitting judge who has done a good job, doesn't
even get renominated, then I would say yes.

If my choice is to have the retention election
system which, for example, exists in California, in
which a series of unpopular decisions, which may or
may not be right on the law, become the subject of
a state-wide confrontation in the retention election,
then I don't think retention election is such a hot
thing.

Ask me about retention election compared to
merit selection with a limited panel, and so on, and my choice is no. Retention election compared to what you have right now, my answer is maybe. It's not even strongly yes there, because one of the problems with most retention election systems is that it is not a fresh look as to whether after ten years or fourteen years, or whatever the term is, that person ought to be the judge.

The premise of being entitled to reelection, to redesignation, to continuation, is really a function as to whether we have chosen at the same time to create life term appointments in the State judiciary with some possibility of removal, or whether we have a system by which we have a fixed period of time long enough to remove short-term threats of stability and not being subject to question on individual cases, and whether you then want to have something which takes away some of the local political leader function.

My basic problem is, that local political leader function is the problem in this system, and I'm sorry that Joe couldn't stay. When he compares it to the federal system in terms of where the problems are, I think it points specifically to why
a system of a limited panel from which the choice
must be made is the right system.

We have got both in the federal system right
now at the level of, probably, as I understand it
at this point, perhaps -- in close to half of the
states, the Senators are the nominating body by
practice, and that's a fact in terms of federal
judicial selection.

The Senators have, in many cases, a process
which is very much a merit selection process.

I mentioned to the Chairman that I spent three
hours this morning at a meeting of the Moynihan
Committee, which sends to the Senator a short list,
one, two or three candidates for each vacancy from
which the Senator picks, and he has committed -- not
a legal commitment, but it's a commitment that he
will not pick outside of that list.

The same thing is true of Senator D'Amato. The
same thing was true of Senator Buckley. The same
thing was true of Senator Javitz. The same thing
was true -- I'm missing a Senator in there -- who
was the predecessor -- I guess it was true of
Senator Kennedy at the end.

That is, in effect, a merit selection system.
It is taking a small panel which has been prescreened in a non-partisan way, and the appointing officer, "nominating officer," picks from that group. And what happens from that point on today, in the White House and Justice Department, is not a merit selection system because, in fact, whatever names are sent up, they don't feel bound to pick from or to appoint. If they don't like the politics or the attitude, or whatever else, of the candidate, they don't make the appointment.

If they had a merit selection system, they would have to pick from the list that was submitted, and you wouldn't have the very problems that Joe was referring to.

COMMISSIONER MAGAVERN: Mr. Kaufman, it occurs to me that there is another function that really hasn't been identified fully and discussed for a retention election or at least a review, perhaps not an election, it could be a reappointment process, but at the end of a fixed term, so that the incumbent judge would have to go before a body and be accountable, and that is, there's a check against the natural tendency of people to become arbitrary and arrogant if they are given -- if they are not
otherwise held accountable.

MR. KAUFMAN: I'm rather in favor of having a periodic review. I think that happens when you have seven year terms or ten year terms, or whatever choose, and have to have a reappointment with the screening panel.

My problem is, how do you run for election? If you have been sitting for a number of years, what is your campaign? Did I give long sentences? Did I usually vote for the tenant? Or it's very troublesome as to what that election is about.

The California election was: Do you give death sentences? I don't know that that's a basis on which judges ought to be retained or reelected, whichever it is.

The concept of having a fixed term after which there is an appropriate review by whatever the merit process is, I don't have any problem with. I rather favor it.

COMMISSIONER HYNES: Questions have been put to other panelists about whether they favored, in effect, lifetime appointments or appointments until retirement age for a judge.

Do you have any point of view on that?
MR. KAUFMAN: Yes. If the review process is a process in which the proper criteria are used and people who are in that process can judge that process, the intellect, the things based upon "Did you decide on the merits?"

Of course, I don't criticize the federal system. I think the federal judiciary, in terms of lifetime tenure, has a great deal to say for it. I'm not sure it applies to judgeships at all levels. I think with a merit process on the reappointment, there is something to say for it. I don't think the Association has a position on it, but it's certainly my view.

COMMISSIONER MAGAVERN: I have a question for Ms. Zemans.

Given your knowledge of systems throughout the country, I wonder if you can give us some examples of highly decentralized commissions, regional commissions or local commissions, and the like, where power to appoint the commission is not -- or most of the appointees don't come from the state capitol, something of that sort.

MS. ZEMANS: Well, where you have merit selection at the local level, you mean, who does the
selecting of the commissions?

COMMISSIONER MAGAVERN: How are the commissions composed, who appoints the commissions, how wide is the jurisdiction, is it difficult to get people to serve on them? As Governor Wilson suggested, it would be. And, what is an appropriate meritiorial basis for their jurisdiction?

MS. ZEMANS: Let me say that we have gathered actual statistics on that, and data, and the Commission's Staff has received those. So, the long answer would be to take a look at the materials.

The short answer is, that in states where you have commissions around the state, Colorado, for example, -- and some states have twenty commissions, some states have thirty-five commissions, it depends on how the judicial system is divided and, basically, it has to do with if your court system works on a county basis, then you would have a commission for each of those county court systems, and the people who would serve on those commissions would all be drawn from that county.

So the commission members are all local people.

COMMISSIONER MAGAVERN: Who appoints them?

MS. ZEMANS: The appointment varies from state
to state. Typically, the appointment of -- and, very typically, the non-lawyers are selected somewhat differently than the lawyers.

The lawyers are, most typically, selected by the Bar, in some places by the organized Bar, where the Bar is not an integrated -- or, as it is now called, unified Bar -- then it is done, often, by an election by the local Bar so that the members of that local Bar select the lawyer members of that commission.

The non-lawyer members do tend to be appointed by the Governor, most typically.

COMMISSIONER MAGAVERN: Can you give us one example to look at as one that's working well?

MS. ZEMANS: I think there's more than one. I think in Colorado, for example, the system works very well, and I mention that one because that's a state which has a large city, and many of the other states that have merit selection state-wide, do not have a major city, and, so, are less comparable to the New York situation, but in Denver, it seems to work very well.

COMMISSIONER EMERY: Ms. Zemans, I just wanted to ask you if you have statistics or are they
available to you at some point, statistics on the
issue of the relationship between a broadened base
for selection in an appointive system as opposed
to the elective system that you mentioned in your
statement.

MS. ZEMANS: As a social scientist, it's hard,
to get balanced statistics would be extremely
difficult. All we really have is the kind of anec-
dotal evidence of people who don't apply, and once
there is a shift to a merit, you get a greater pool.

You do attitudinal questionnaires and, yes, you
can get people to say "I would be more willing to
do it."

I'm more interested in looking at where the
behavior really changes, as a social scientist.

I should add another comment about the com-
missions because I thought it was implied in
Mr. Magavern's question, and that is, who are the
commissioners, and I thought of this when Mr. Birming-
ham was speaking.

Often the charge is made -- he used the "silk
stocking" term. There's no evidence that that
occurs particularly, because at the local level,
these tend to be small units where the word
"silk stocking" doesn't quite apply.

In addition, we are at the moment in the process of developing a survey questionnaire of several thousand commissioners around the country, and there are somewhere between 2700 and 3,000 nominating commissioners, and I know of no commission where there has been a difficulty in getting commissions to serve.

I do know of situations where it has been difficult to find judges to serve, but, usually, that's in an area where the number of lawyers is so very, very slim, very rural areas, and that's a different issue.

But, in terms of getting nominating commissions, that hasn't been a problem, and we will know -- once we complete our survey, we will have a better sense of who these commissioners are and what walk of life they come from.

COMMISSIONER EMERY: Just to be clear, if you do have any evidentiary or any evidence of any type with respect to the pool issue, I think it will be good for our staff to have.

MR. KAUFMAN: Just to make the comment as to the experience in the committees that have been
advising the Senators, and that is, the moment
there was announced -- announced, number one, and
there was creditibility, number two, to the fact
that the process was going to be an open process,
the number of applicants skyrocketed. The pool
from which it is now possible and has been for the
last ten, twelve years in New York, to select
federal candidates, is a direct result -- and I
think that each of the committees -- I've served
on both the Javitz and Moynihan Committee, and
serve on the Moynihan Committee now -- the experience
of all of those committees have been a startling
increase. People who did not want to put themselves
through the process on the appointive side, of
going to the State Chairman, et cetera, et cetera,
suddenly become available, and I think if one looks
in any sort of an objective manner at the generality
of the selection of the federal judiciary in the
State, and it's a large enough pool, I think one
would see a remarkable change.

We used to get everybody new. There was one
great judge that picked, under the old system,
Judge Weinfeld, and there were some good ones. If
one looks at the level that has gone to the bench
in the last ten years, as compared to the pools available previously, one really notices what you directed your question at.

THE CHAIRMAN: I'd like to go back to an area Mr. Kaufman commented on. It's an area I put to the Chief Judge, and that's the retential election where the question goes out to the voters, yes or no -- it's not a partisan election -- yes or no, based on the performance of a sitting judge.

We have the experience in California that certainly does suggest as a consideration, that is there a possibility of a different kind of system being developed under a system of retention elections, namely, groups who might feel very strongly about particular decisions that were correctly decided, according to the conscience of the sitting judge, are going to be brought into question in terms of that retention election, and that has a potential of weakening, certainly, the independence of the judiciary.

Also, if there is a system of retention elections, I would assume there would be a burden on the judge to raise money or have money raised on his or her behalf in order to be effective in presenting
one's record.

Do you have comments on those thoughts?

MS. ZEMANS: Let me say, generally Mr. Kaufman made reference to the fact that there tends to be a benefit to incumbency in a retention system, and that is generally correct.

Given the extent to which it is correct, it seems to me curious that if you don't select the best at the very outset, why would you want to give them the advantage of incumbency by adding to a system that doesn't select the very best one, that gives those that are selected an extra advantage.

There are two states in the country -- I looked this up on my charts after this morning's testimony -- that have partisan elections like New York, and then have retention elections following them.

California is not one of them, because California's judges are pure appointment. The two states are Illinois and Pennsylvania. Those happen to be the two states which are, at the moment, more scandal ridden than any of the courts around the country.

I live in Illinois, and I remember the time when we switched from partisan reelection to retention. I can't see any really significant
difference that has taken place as a result of that.

So, I can understand, given the experience
that was expressed here by Justice Sullivan -- and
we're all victims of our own experience -- that the
experience here has been the failure of the political
leaders to renominate, and that there's a desire to
protect, a legitimate desire to protect, elected
judges from that political dumping, so to speak.

The question is whether or not retention
elections, which might protect that, don't also
protect other people who you really don't want
protected, and whether the hazards that are involved
in that process are really worth the benefit.

The other aspect of that that I think you need
to consider -- and this is in some ways you and
those groups some represented in the testimony who
are in favor of merit selection -- quite frankly,
is whether or not it is appropriate to spend political
capital on that kind of tinkering -- and I would
call it tinkering, even if it was to benefit the
system, because these issues take, as displayed here,
enormous amounts of energy and time to consider,
and they will come before the voters only rarely.

I feel strongly enough about merit selection
that I would think that I would urge you to think carefully about where you want to weight whatever influence you have, because I don't -- my guess is, if New York is like other states, merit selection is up, and it seems there's a bill floating around, and so on.

These times don't come every year. Those who are in favor of improving the system have to decide how they want to -- what they want as the result, and how they want to use their energy.

THE CHAIRMAN: I want to thank you both very much for your participation and help we have received from both organizations in terms of material for our Staff.

This afternoon's session is now closed. We will continue these hearings on March 9th at 9:00 o'clock at the Association of the Bar of the City of New York.

(Time noted: 4:07 o'clock p.m.)

* * * *
STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

PUBLIC HEARING
ON
JUDICIAL SELECTION

Association of the Bar of the
City of New York
42 West 44th Street
New York, New York

Wednesday, March 9, 1988
9:15 O'clock a.m.

B E F O R E:

JOHN D. FEERICK,
Chairman

RICHARD D. EMERY,
Commissioner

FOR THE COMMISSION:

NICOLE GORDON, ESQ.,
Counsel to the Chairman

KEVIN J. O'BRIEN, ESQ.,
Chief Counsel

CAROL SCHACHNER, ESQ.,
Staff Counsel

DIANE ARCHER,
Staff Counsel

EMILY R. REMES,
Staff Counsel

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Judge Nat Hentel 4
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Terri Austin 93
Robert Levensohn 106
Justice Frank Torres 129
Archie Spigner 161
Judge Stuart Namm 202
Dr. M. L. Henry 225
Anthony Palermo 225
Dean David Trager 225

* * *
THE CHAIRMAN: Good morning. Today begins the second of two days of hearings by our Commission on the subject of judicial selection.

The Executive Order which created the Commission charges us with investigating weaknesses in the existing laws, regulations and procedures regarding the selection of judges in the New York State court system and determining whether such weaknesses impair public confidence in the integrity of government or create an undue potential for favoritism or corruption.

Witnesses will be testifying today about political influence on judicial selection as well as the responsiveness of various methods of selecting judges who are members of minority groups.

Last week, Chief Judge Sol Wachtler, former Governor Malcolm Wilson, Assemblyman Weprin and other witnesses gave their views on the advantages and disadvantages of both the elective and appointive systems.

We received testimony that the independence
of the judiciary was being jeopardized by certain aspects of the elective system. Witnesses described as atrocious the failure of the political process to renominate a judge who has served credibly. The Judicial Convention system of selecting Supreme Court justices drew harsh criticism with witnesses stating that conventions simply rubber-stamp the choice of the county Political Leaders who have limited, if any, knowledge of candidate selection.

Chief Judge Wachtler described as deplorable and a distortion of the Ethical Canons for judges in the lower courts who are seeking a higher judicial office, to file a notice each year with the Chief Administrator of the courts which enables them to continue to and participate in partisan political activities.

We also heard strong views that the electorate should have a direct say in the selection of judges, no less than in any other public office.

It was also strongly suggested at our hearings that taking the power of selecting judges away from the voters would not
depoliticize the process but would simply shift the politics from Party Leaders and the voters to members of nominating commissions and committees and appointed officials.

The testimony from these hearings, together with the results of our investigations over the last several months, will form the basis for our Commission's recommendations to improve existing laws relating to judicial selection.

I would like to call as the Commission's first witness today, Supreme Court Justice Nat Hentel.

Good morning, Your Honor.

JUDGE HENTEL: Good morning. It feels strange sitting on this side of the bench.

THE CHAIRMAN: It's good on this side.

Let me recognize Emily Remes of our Staff.

MS. REMES: Thank you, Dean. Good morning, Judge.

JUDGE HENTEL: Good morning.

MS. REMES: Would you begin by telling us a little bit about your background prior to becoming a Judge, and then in greater detail, about how you became first a Civil Court Judge.
and then a Supreme Court Justice in Queens County.

JUDGE HENTEL: Well, we will start with law school, New York University. After spending some four and a half years in the military service where I also served as a Military Judge and a prosecutor, I came back to NYU Law School, went to work as assistant to Arthur T. Vanderbilt who was then Dean of NYU Law School. Through him, I met the Surrogate of Queens County, Anthony P. Savarese, and this was in the late '40's and 'early 50's, and at the time, he was President of the Law Alumni Association, I was its Secretary.

After spending 1946 through 1951 at NYU, I sought to go out and strike out for myself, and I went to my friend and mentor, Surrogate Savarese, a Republican incidentally, with ALP backing, who had won the Surrogacy as a Republican in Queens County, a very unusual thing at the time, and I asked him where he thought I should look for a job, and he said, "How about working for me?" I said, "Well, I'm not of the Republican Party." He said, "Partisan politics doesn't make
any difference to me. I choose my own law assistants."

Well, I went to work for him, and I worked for him from 1949 to 1954.

I discussed the situation with my wife, and we decided to switch our politics from Democrat to Republican in order not to embarrass Surrogate Savarese at any future time he ran for re-election, not to be a political hinderance to him in any way, and it wasn't at his request. We did it, and as I told your associate counsel yesterday or the day before, I thought that there were too many of me in the Democratic Party and I should be active in another party at the time for competitive purposes.

From there, I became active in politics, and on the Republican level, and I ran for the State Assembly in 1956 as a Republican-Liberal and was defeated by the Democratic candidate.

And then in 1965, I ran for City Council against Matthew J. Troy, who was then the incumbent City Councilman, and loss by a hair in that election, a hair being some 2,500 votes, and that was in 1965 and I was running then with
John Lindsay on his ticket. At the time, he was running for Mayor.

And after that, the vacancy occurred in the District Attorney's Office of Queens County. Frank D. O'Connor then became President of the City Council, and I asked the Leaders of the Republican Party if they would at least advance my name for District Attorney -- I had just come out of a widely recognized political struggle with Matt Troy -- and I was told that I wouldn't have a chance, and I asked if it would bother anybody if I went out and sought the position independently, and they said, well, you'd never get any place doing it, so go ahead and try.

Well, through Arthur Vanderbilt and through Surrogate Savarese, I had met the likes of Senator Javits, Attorney General Louie Lefkowitz, John Lindsay, Harrison Marden, Herbert Brownell, and I asked those people if they would back me with Governor Rockefeller, who was then the Governor and had the right to appoint the District Attorney, and apparently the backing that I received was recognized and the Governor appointed me as District Attorney for the year 1966.
I then ran for re-election in that same year as a Republican-Liberal-City Fusion Party Candidate, and Tom Mackell, State Senator Tom Mackell was the nominee of the Democratic Party. I lost, of course, in Queens County which, at the time, was about five to two, Democrat against Republican and I went back to private practice.

I should say that in the interim, between the Surrogate's position and going to the District Attorney's Office, that I -- I just lost my train of thought -- in any event, I served as District Attorney -- yes, I was in private practice from 1954 through 1965, until I went in as District Attorney.

In the interim, I became Chairman of the State Division on Human Rights for Queens and New York City. I was President of the Queens County Bar Association; President of the NYU Law Alumni Association; and I was quite active in a great many Bar Associations, including the one in whose premises we now sit, having been a member of the Judiciary Committee of this Bar Association, in fact, I think the first non-Manhattanite in such a position.
In 1969, seeking to nurture my ambition to be on the bench, I spoke to John Lindsay and indicated I was interested in being on the bench, and, lo and behold, he appointed me as an interim Civil Court Judge for three months, October to December, 1969. In the year 1970, he appointed me to another interim appointment for a year, and at the end of that year, I had to run, and I ran as a Republican-Liberal, at that time and, I believe, also as a Conservative, because when I was District Attorney, I had the good fortune to appoint two of my assistants, one Steven Maller and the other Sarafin Maltese, and after they left the D.A.'s Office with me, Maltese became Chairman of the Conservative Party or Executive Officer of the Conservative Party, and Maller became Chairman of the Queens Liberal Party, and so I asked for their support, and they supported me, but I never would have made it if I didn't have Democratic support.

I was not a Democratic candidate in 1970 for the ten year term in Civil Court. It happened in that year, again strictly by fortuitous circumstances, an insurgent Democrat
beat the Democratic District Leader in Queens for the nomination to the Civil Court, and at that point, I was approached by several Democratic Leaders, and it was indicated that I might be acceptable and I might receive support without being an official nominee.

As a result of that, I went around and visited various Democratic Leaders directly and asked for their support and, in fact, Matt Troy, who was still the Democratic County -- was a District Leader, later to become Democratic County Leader, came out as Chairman of Democrats for Hentel in that election, and Tom Mackell, who had defeated me for District Attorney, came out for me, and their support was invaluable, because out of eight hundred thousand odd votes cast for the County-wide position, I won by 836 votes. I don't think I would have made it without Democratic support.

Then during the intervening years, I sought positions on the Federal bench, and later on on the Court of Claims, and later on as an Associate Judge of the New York Court of Appeals on several occasions during the ensuing ten years, and in
one of those, advancing my own name and seeking
to be recognized for whatever track record was
attained in the intervening years.

Also, I might indicate that I also became
a teacher and spent -- and I am on my sixteenth
year on the senior faculty of National Judicial
College at the University of Nevada where I teach
every year, and as an adjunct professor at Queens
College where I teach courses on courts and the
community.

1980 rolls around. The ten year term is
up. During that ten year term, I had asked
several times for recognition as a Supreme
Court nominee, and I visited with the Queens
Democratic County Leader, at that time Donald
Manes, and asked him if he would support me.
I was still a Republican. I was not a Democrat.
But I knew that unless he would approve of my
candidacy or give me some support, that it would
be useless to have the Republican backing.

So, I was unsuccessful.

In 1980, I, however, received quadra-
partisan endorsement for return for the next
ten years in the Civil Court. I had all parties'
blessings except the Right To Life Party, which I did not seek because of personal reasons. I, of course, was elected without opposition.

I again sought several times to be a Supreme Court Justice, advancing my name, making the announcement so that I could actively participate in political activities in order to advance my name and, in fact, in 1978, -- I will have to backtrack -- I did run for the Supreme Court as a Republican-Conservative, and in 1979, the next year, I did run for the Supreme Court as a Republican-Conservative-Liberal and, as I explained to your associate counsel, I did that, even though I knew it was a futile gesture, to keep my name alive, because being a Judge on the bench for ten or eleven years at that time, I was out of the public eye, and I wanted to keep the name viable, at least to try to make the Supreme Court.

Well, those did not pan out. I was told, on the Federal bench, that I was too old by that time, that they were looking for younger people. If you're interested in my age, I'll be sixty-nine at the end of this month, and that means
that I'll be off the bench in 1989 unless I'm certificated as a Supreme Court Justice, which I hope to be, on up through age seventy-six, if I last that long.

Now, with respect to my current Supreme Court Justiceship, which is not an active one, I also served as an Acting Supreme Court Justice for almost five years in Brooklyn, Richmond County and Queens County, Second Department, and then on an off as an Acting Supreme Court Justice from 1982 to 1987 when I went back to the Civil Court in 1982 as part of the Judge Cook rotation plan, if you recall.

Knowing that age was creeping up on me and that the last hurrah was probable, I thought I would take another crack at the Supreme Court. I should mention that, incidentally, in 1984, I switched my politics. I switched from Republican to Democrat, which I had originally been, in any event, and I felt that this I should have done a great many years ago. Many of my very good friends and colleagues had urged me to do so because I was being stymied, and I know it may sound strange, but I really did it
for another reason, for my own personal reason. I just did not feel that I could relate to the leadership in my particular party at that time any further, nationally or locally. Lefkowitz was gone. Javits was gone. Rockefeller was gone. Lindsay was gone. These are the people I felt in the moderate Republican area that I could relate to, really. It was gone. I just wanted to do it and I did.

Now, we have seven vacancies coming up in Queens County as of last year for Supreme Court, and I sounded out several of my very good friends who were Democratic Leaders in the community and held positions of prominence, and they encouraged me to go after it. I had not known Congressman Manton at all, except fleetingly at the Bar Association, and I would say hello or, meet on the street, good morning, Judge, and, good morning, Congressman, and that kind of thing, and City Councilman. But, I asked for an appointment to see Congressman Manton, and I told him of my interest in becoming a Supreme Court Judge, and he said to me, "I know of no one who has higher qualifications or has put in as much time as you
have on the bench."

In fact, at the time, I was the next Senior Judge in the Civil Court and probably was senior to most of the Queens Supreme Court Judges, having seen over the years many of my junior colleagues going up to the Supreme Court, many of them, in fact, and the only ones who were left behind at that time were Judge Cohen, a Republican, who was an Acting Supreme Court Judge, and myself, and Judge Savarese in the Criminal Court, Judge Beldock in the Criminal Court. We were then the only Republicans on the bench, as I recall.

Manton said, "You have all the qualifications and I think that you ought to seek Democratic Leaders' support," and, he said, "I'll do whatever I can for you and, hopefully, I'll be able to support you." He also said to me that he wanted to establish for himself -- it being his first exposure to judicial selection on a political level -- that he wanted his selectees to be good and he wanted them all to have records, track records.

And, if you noted, all seven of the nominees were promoted up from the lower bench rather than
from taking anyone from outside of the bench. There were Family Court Judges, Civil Court Judges, Criminal Court Judges.

As a result, I went around and I made appointments with District Leaders, some of whom I knew, some of whom I didn't know because I hadn't been active in politics at all for eleven, twelve years, and met them, asked for speaking engagements, went to their political clubs, was interviewed, sitting in situations like this, at the opposite side of the table. I wrote letters. I got support.

I asked prominent Democrats for support and that they should communicate with the leaders and that they should communicate with the County Chairman. I went to dinners, shook hands, I drank cocktails, not to excess, of course, and prepared a brief, even, like a good lawyer would, to extol my virtues and the reasons why I should be selected, and sent that around to everyone, including all of my biographical material.

Incidentally, I should say that I was the only lower court judge ever selected to chair
the New York State Bar Association's Judicial
Section by election. I was Chairman of that.
I was elected, also, by my colleagues as President of the Board of Judges of the Civil Court
back in '74 and '75 and '76.

So, I had ample professional recognition
and ample professional credentials. I was
selected as a nominee, and I also went and obtained the Conservative and the Liberal Party backing again. The Republican Party would not endorse me. There was no foregone conclusion that I would win the election, which I did, as did all of the seven people, or six others who were running with me.

I don't know if this background is of any interest to the Commission. It's strictly a personal tale that I'm recounting. If I can be of any assistance, I would like to be of assistance.

MS. REMES: Judge, you sat on the Civil Court bench for seventeen years?

JUDGE HENTEL: Eighteen.

MS. REMES: Eighteen years. What, in your view, does a Civil Court Judge in Queens have to
do to become a Supreme Court Judge before the seventeen or eighteen year period is up?

JUDGE HENTEL: Well, I think, number one, you have to be a member of the right political party, because it's very hard to win elections unless you get cross-endorsements. That way, there's a heavily weighted electorate on one side.

MS. REMES: Anything else?

JUDGE HENTEL: Well, I think you should be a good Judge and make yourself a reputation as being a good Judge and be active in the community. If there is one thing Arthur Vanderbilt taught me, it is that judges and lawyers are molders of public opinion, and should be out there in the community, working.

MS. REMES: Well, do you think that most of the other Civil Court Judges who had less seniority than you did, who moved up, moved up because they were of the right Party?

JUDGE HENTEL: Well, there is no -- you can draw any inference you wish, but most of them went up because they were in politics before as Assemblymen or Senators, City
Councilmen. They were active in the community and were active in the political life of the community before they went on the bench.

MS. REMES: Is there a correlation between activity in the community or political activity and the qualities that make a good judge?

JUDGE HENTEL: I'm not going to deny that activity in the community would broaden a person so that that person could be more sensitive to what's going on in the community and what the aspirations and goals of the community are. It's high sounding language, but I don't think it hurts a bit to do that, to be active in the community, not just purely on the political level, but doing things to assist people, legislatively, even with the assistance programs in the courts, being spokespersons, being community activists.

MS. REMES: Is it fair, though, that other judges who are not active be held back?

JUDGE HENTEL: For me personally, it always was unfair, but I can't say that they didn't deserve it or that they hadn't earned their spurs. I would think, though, like anything else, that's why I was an opponent of Judge
Cook's rotation plan. You don't get rid of your most senior people. If they are there and they are doing a good job and they have the experience, you don't push them aside. And, the same thing here in the selection of judges, past experience is very important. I think that judges should be brought up from the lower courts. Eventually, I hope to see a truly unified one trial court system where all of these distinctions are set aside.

Everybody says, well, you have to have experience in order to be a Supreme Court Judge. Well, lots of judges who go on the Supreme Court, who have no experience, turn out to be very good judges. Some don't, but some do. So that experience alone is not a factor, but I think it should be an important factor. Against a person who has five or six years experience sitting on the bench and a track record with lawyers and a track record at the Appellate Courts, then, certainly, someone who has had one year or two years should wait their turn. Their time will come. They are younger in point of service.

MS. REMES: I have one question on the Nominating Convention. I believe you said that
it was a foregone conclusion that you and the
other, I guess, six candidates would win. How
was it a foregone conclusion?

JUDGE HENTEL: By sheer numbers, the sheer
habit pattern, voting records of our City. Not
one of us -- well, a few of us had an opponent,
a Republican opponent. I didn't. The Republican
line was blank opposite me, but several of my running
mates did have Republican opponents. They didn't
bother to go out and campaign. I was in many
campaigns where I've had to go out and really beat
the drums and go night after night to numbers of
meetings just to say hi, and how are you, with
very little to say, because they are not in-
terested, really, on the club or, you know,
political constituent level in what the judge is
or -- what they want to try to get at is the
judge's advanced commitments, which are very
emotional to them, which, of course, can't be
done or shouldn't be done.

But you just go in and say, "Hi," and, "I'm
running for judge," and, "I hope you'll support
me." You can't say, oh, yes, I'm a graduate of
this law school and I have been President of the
Queens County Bar, and things of that kind. It doesn't mean anything. People on the club level, the political club level or district level are rather unsophisticated about that. Who knows good judges best?

I have to go back to my advocacy of what was known as the Queens Plan for the Improved Selection of Judges when I was President of the Queens Bar, and it was reported in full in the New York State Bar Journal in February, 1962, so you get an idea how far back at least my opinions go with respect to the appointment, merit appointment of judges. Who knows good judges best? It certainly isn't the public. The public doesn't focus attention.

Getting back to answering your question. There was no point in anyone going out to campaign and get to the public and say, "I'm a better candidate than he is", or "I have better background because ..." Again, it was a foregone conclusion that they would win. The mere fact that you had the Democratic endorsement in Queens County insured your winning.

MS. REMES: I guess what I want to know is:
When you went into the Nominating Convention, did you know that you would be nominated out of the Convention?

JUDGE HENTEL: Let me say that you never count your chickens before they hatch. I've lost too many political campaigns. My wife has always advised me, "Don't count on it until that first pay check comes in." So, yes, I had heard rumors that I was under heavy consideration, that I might have a good chance, and so I kept praying.

MS. REMES: You knew that you had the backing of certain District Leaders or the County Leader?

JUDGE HENTEL: Indeed, I had, who were out publicly for me, yes.

MS. REMES: Judge, you mentioned before that you attended some functions in the years that you announced your candidacy, and as we spoke previously, you're aware of this Office of Court Administration rule that permits judges that announce their candidacy for higher office to participate in these political dinners or activities.
What do you think of this rule?

JUDGE HENTEL: Well, let me preface my remark on that by saying first, that I would like you to know that I also teach judicial ethics at the National Judicial College and on occasion for OCA at yearly seminars. I think it's a very good rule, because as long as we have the political system, you have to work within the political apparatus. Very few independents ever get any place politically, judicially, executively, legislatively, in this State or in the Nation, for that matter.

As long as we have the political method of selecting judges, the Judicial Nominating Convention, you're going to have to allow judges to go to dinners and go to meetings and shake hands and introduce themselves, or, potential judges.

MS. REMES: Is there anything that strikes you as distasteful about that, that is, judges going around, drinking cocktails with people, back-slapping, and that sort of thing?

JUDGE HENTEL: No, no. Let's say it's onerous, but I can't say that it's distasteful.
It's something that you have to do if you want to get recognition, and that doesn't mean that it's crooked or it doesn't mean that it's corrupt. It means that you're seeking some kind of support from some base in the community, politically, communally, or otherwise.

There are times when I would say I would rather stay home and watch television and put my feet up on the coffee table instead of going out night after night. It's very debilitating. You work a full day on the bench, go home, gobble down your dinner and go to such diverse places as Long Island City and Far Rockaway, and you've got a way to go, and it's very tiring, but it has to be done.

I would prefer not to have a political method of selection of judges.

MS. REMES: You would prefer an appointive process?

JUDGE HENTEL: I'm a product of both. I told you that Mayor Lindsay appointed me twice. Surrogate Savarese appointed me to a law assistantship. I was appointed to District Attorney. I like the appointive system. How can I say I
can't like the elective system?

THE CHAIRMAN: Judge, can I go back to something you said?

Last week, the Chief Judge raised some serious questions with the ethics of judges in a lower court seeking a higher court, putting their name in when there wasn't any reasonable likelihood that they would be a successful candidate that year, and, at least, the Chief Judge suggested that there was a perversion of the rule and the Canons of Judicial Ethics that, in a sense, discouraged judges from partisan activity except during a certain period of time.

I gather from your earlier comments, you don't share that view.

JUDGE HENTEL: It's a very difficult thing. The appearance of impropriety has always got to be foremost. That's probably the most important of the Canons of Judicial Conduct, to avoid the appearance of impropriety. You're a sitting Judge. But, we also have to face the reality of the fact that you get no place unless you make calls.

Chief Judge Wachtler himself said it two or three years ago. He said, "I have been out of
politics for eighteen years now..." -- as long as he's been on the bench -- and, he says, "...
I have no particular clout any more." If we have a political system, you have to have some place to have clout. You just can't come up like a mushroom overnight. There has to be a base from which you can operate and a base of support.

If you want to abolish the political system, I say, fine, but as long as the political system is there, I think lower court judges should have the right, as a matter of self-preservation of their ability, to serve on a higher bench and to seek a higher bench is to be able to attend these meetings.

THE CHAIRMAN: Commissioner Emery.

COMMISSIONER EMERY: Judge Hentel, let me ask you a little bit about the process that you've already described in some detail.

Did you ever have any information during the course of the many times in which you were evaluated by the various political groups and forces and leaders which, ultimately, either put you in office or defeated you in the various campaigns of your long and distinguished career, did you have any
information, did any of those people ever really analyze your opinions, your written judicial opinions?

JUDGE HENTEL: I'm sure they didn't except when I was up for a Federal appointment, then I had to produce my decisions, and you know the process.

COMMISSIONER EMERY: Right.

JUDGE HENTEL: And it was checked out, and I know all the lawyers who argued cases before me on those were called. For the Court of Claims, I believe it was done, and, certainly, when I was seeking Associate Judge of the New York Court of Appeals, that it was done, but not for Civil Court, not, in my experience, as far as the Criminal or the Family Court is concerned and, certainly, not for the Supreme Court.

Another basic thing was, none of us ever had any, as far as we know, police check or a State police check, much as they do for the Federal, on the FBI investigation of the background of the individual, but I think for the New York Court of Appeals, I did have a State Trooper checking around.
COMMISSIONER EMERY: In other words, you're saying that that sort of analysis only occurred when you were up for an appointment as opposed to when you were up for an election?

JUDGE HENTEL: Yes, absolutely.

COMMISSIONER EMERY: What about the process of -- did any of the politicians or any of their groups or any of their constituency that were evaluating you for elective judicial office, did any of them ever have representatives or themselves sit in your court room and observe you as you were a judge?

JUDGE HENTEL: Not that I know of.

COMMISSIONER EMERY: Do you have any information that they actually went out and interviewed -- other than in casual conversations that might crop up just as people may come before them -- did you have any information that they went out and interviewed lawyers or actual litigants that had come before you to see how you had performed?

JUDGE HENTEL: Just in this last election, it was my understanding, and I was so told, that a Manhattan lawyer was asked by the Leader of the County to work up an opinion with respect to the
various candidates for nomination, as to what lawyers thought of them in Manhattan and other places other than just in Queens. Of course, actually, you can't be too parochial about this, because it's a court of State-wide jurisdiction. I had heard that that was done. Now, if you ask me what that lawyer's name is, it escapes me at the moment, but he was a prominent trial lawyer. That's the only time I had heard of that being done.

COMMISSIONER EMERY: I take it that was for an elective position.

JUDGE HENTEL: That was for the Supreme Court.

COMMISSIONER EMERY: So, in other words, some of the things that were done, to your experience, with respect to those appointive judicial offices that you were seeking, were done, at least, in this last occasion, in the elective process, there was -- there is a role for that sort of thing even in the elective process, is there not?

JUDGE HENTEL: There was a checking about background outside of the normal, say, Queens County Bar Association opinion or the Association of the Bar opinion or the Citizens Union opinions. This is the first time that I've heard that a County
Leader had actually asked someone independent of the political process to give him an insight as to the reputations of the various people who were seeking nomination to the Supreme Court this last fall.

THE CHAIRMAN: Was that information after the nominations had been secured or before?

JUDGE HENTEL: Before, before.

COMMISSIONER EMERY: Do you want to say something?

JUDGE HENTEL: Yes. As to rumors or whatnot, even the Chief Judge said to me, "I hear good things may happen to you."

COMMISSIONER EMERY: Let me shift to a slightly different subject because what you're saying is very interesting in the comparison between the processes. You were a Republican for all those years after you switched in order not to embarrass Mr. Savarese or Surrogate Savarese, and I understand your reason for the change, and I think you very articulately described the reason for the change, other than your ambitions, which is what some people might naturally infer, given the long period of frustration, and then your change of party, which might
help you in the process of your own career, but you also articulately, I think, described your ideological reasons for changing.

But, my question is: During all those years when you knew perfectly well that your success or failure in your much desired career as a judge, to move up in that career, was dependent upon the elective process and the political process, how did you feel when a tough case came in front of you that you knew might make the newspapers, that you knew wasn't just going to be in the confines of that court room, and you knew, as a person who is a good judge and who has been a good judge, and I know that personally -- how did you feel, given that you were the product of an elective system and that your future was based on an elective system, when you knew that if it hit the papers, somebody, or a good portion of the people out there, who were determinative of your advancement, might not like what you felt you had to do? I mean, tell us about that, the inevitable pressure between your career advancement and your judicial independence.

JUDGE HENTEL: That's why I'm also a firm advocate of lifetime tenure as long as your health
holds and as long as there is no criminal or
corrupt activity going on. I had this happen
to me. I remember this very well because it came
right before the 1970 election that I was running
in for Civil Court Judge after being appointed.
It involved a temple with a rather large congrega-
tion and a lot of voters. The people who belonged
to that temple were mainstreams and political
pillars of the community activity and had high
voting records, and it came up that their temple
was being sued and I was the Judge getting the case,
and it was non-jury, so I could have done several
things.

I thought very seriously of postponing this
or asking to recuse myself or asking that the
matter be sent elsewhere, and I said that wouldn't
be proper under my oath of office, and I realized
that if I came out with a decision that might be
unfavorable to the temple, that I might lose friends,
who knows, and these thoughts occurred to me, and I
to think about them, but eventually it worked out.
I held against the temple, and it was unanimously
affirmed, no opinion by the Appellate Term. So, I
felt good about that. But, it is a consideration.
I had that experience not only on the bench, but off the bench when I was District Attorney. You wonder sometimes what the public reaction is, how it's going to affect the operation of your office if you do something unpopular that may be right, but, unpopular.

These are things that judges should not have to face and they should not have that burden, that they shouldn't have to be looking around at who is gaining on us for the next nomination by not going to dinners, et cetera, and we shouldn't have this business of staying in line or cavilling because possibly it may interrupt your judicial career. I think the Federal judges have the best of all worlds on that, and I think, also, in a few of the States where they have lifetime tenure.

THE CHAIRMAN: Do you, from your conversations with other sitting judges, that they have been exposed to the same kind of pressures that you described and that you've had to deal with in decision-making?

JUDGE HENTEL: I can't say that I have had that. I would think -- and I have been on the bench now -- I'm on my nineteenth year on the bench. I would
think that they have had situations like that. You can't help it. There is always recusation and, very frankly, I militate against recusations because I take it as a personal affront that I couldn't be a fair and impartial judge on the facts and the law and that people would think that I would decide a case in their favor or against their favor depending upon that kind of thing. That has to be recognized, too.

I'm sure there are judges who have recused themselves just to avoid the appearance of impropriety, but I always seek to make a record that I think I can handle this and be fair on the law and on the facts and judge it impartially.

COMMISSIONER EMERY: I would like to go one step further with this, because I guess there is even a more difficult situation that you must have faced and other judges in your situation have to face daily, and we have to consider this in figuring out the scope of our recommendations and what our recommendations are going to be, and that is -- the way you've described the process and the way we've heard about the process on this Commission is, that it's quite tightly controlled, not totally
tightly controlled, but it's controlled essentially by District Leaders and by the County Leader. It's a process where, especially in a one party situation like Queens, like the one you're experienced with, a relatively small number of people control the nominating process and, ultimately, the elective process.

Many of those people, or, often, those people are lawyers, often they are litigating lawyers. What if one of them or one of their partners comes before you with a case and you know that your next nomination that you're seeking, for all the right reasons, is in that person's hands or largely in that person's hands, how can you be fair under those circumstances?

JUDGE HENTEL: I'm human. I'm human, Commissioner. I would think about it. I would struggle with it. I would ring my hands about it.

COMMISSIONER EMERY: After all, you're the person that just testified that you gobbled down your dinner and you ran to five meetings and it was extremely onerous, and you had put all that time and effort into it and, all of a sudden, somebody appears before you who's got the whole ball of wax in their hand.

What I want to know is, what's the right thing
for an elective judge to do, what did you do, how do people handle that who are human, as you say?

JUDGE HENTEL: Well, the rules, of course, are that you don't recuse yourself unless you've had an interest in the case or unless you are related by consanguinity to the litigants or the lawyers involved or it's a former partner, let alone an associate. Associates are excluded. I have not had the political situation as such. I've had District Leaders appear before me as lawyers and argue cases, and they have lost their cases and they have won. It depends on what the right call of the shot is.

I always reveal to the opposing party that: Look, I have lots of friends. You meet lots of lawyers, thousands of them during your career and lifetime. You can't recuse yourself because you're a friend or you know someone, even intimately. The point is, on the district leadership, I know what you're getting at. I would say yes, I would think about it. It would cross my mind that this is a delicate situation for me, but I'm there not to worry about delicate situations for me, I'm there to worry about doing justice and I'll seek to do that one way or the other. At least I never had
anyone accuse me of putting a case on the line or
throwing it one way or the other because of politics.

Yes, I'm human. I'll think about it, and I
shouldn't have to think about it. I shouldn't have
to have my energies dissipated in wondering what the
reaction is going to be or how I'm going to kill my-
self for the next election. It takes some courage,
it takes some guts, but that's the system. It should
be changed.

THE CHAIRMAN: Nicole Gordon.

MS. GORDON: Judge, you described earlier these
discussions with Party Leaders, and so forth. I
think you said it was not a very sophisticated way
of evaluating a judge, these weren't people who had
a lot of information that was relevant in choosing a
judge.

Would it be fair to say --

JUDGE HENTEL: May I interrupt? I'm often
heard someone say, "You know, I'm not a lawyer,"
if I'm talking to them, they are a leader, "but
I'm going to ask my lawyer about you," or, "I've
asked my lawyer about you and he's told me thus and
so about you." They do go back to the source. They
can get a lawyer's opinion, or from their club, the
lawyer who is there, they will say, "What's the reputation?"

MS. GORDON: Speaking from a point of view of a voter who goes into cast his ballot, would you agree that the nomination of a judge as a Republican or Democrat is virtually meaningless information?

JUDGE HENTEL: It is meaningless, but it is there and it is followed. You can stand outside of any polling place or voting booth come next Election Day, and you hear click, click, click, click, click, click, click, and you know that's a straight Party line vote. If you're on that line, you've got the vote whether they know you or not or whether you're good or not.

MS. GORDON: Would you agree that voters, generally speaking, are making a determination about who should be a judge based on information that is totally irrelevant to whether the person could be a good judge or not?

JUDGE HENTEL: Principally. Yes. Most of the public have no contact with judges or lawyers at all. So that I think the non-partisan or the retention idea of Judge Wachtler is worth being considered very strongly, but political party and political
party label is irrelevant because there's no way of being a Republican Judge or a Democratic Judge. If you're there, you take the oath of office to support the Constitution and administer the laws properly, and there is no political party way of doing that, despite what's going on with the Federal judiciary on the United States Supreme Court level.

THE CHAIRMAN: Judge, you have, obviously, given a lot of thought to the ethical rules applicable to judges, and you mentioned that you teach in the area and you're also, obviously, somewhat consulted with reference to rules.

I take it from your responses to the questions that so long as we have the elective system, you see no real infirmity with a judge being allowed to put in a notice of candidacy for a higher court, even if there is no reasonable chance of success, so as to engage in partisan activities, to put his or her name before the voters, you see no problem with that?

JUDGE HENTEL: No.

THE CHAIRMAN: What about the rule with reference to the contributions that a judge can make in the sense of going to party functions? The rule is
very restrictive right now in terms of a certain period of time.

JUDGE HENTEL: Nine months before and three months after.

THE CHAIRMAN: Do you feel that that rule has the right balance to it at this point?

JUDGE HENTEL: Well, I'm not so sure that it's necessary to have that three months interlude after an election, but, before an election it may be rather vital to keep your name alive and keep your face before the people who influence votes, leadership, those who are active in politics.

If we have that system, we really owe it to the judges to let them keep their name alive and their good will. That's really what it is, it's a matter of good will.

THE CHAIRMAN: But you can see the rule ending on Election Day?

JUDGE HENTEL: I think it should.

THE CHAIRMAN: It should?

JUDGE HENTEL: Yes. The theory was that it gives the candidate an opportunity to go around and say thank you to everybody. You can say thank you to everybody in other ways, by, again, participa-
ting in dinners and other functions where there's an admission fee. I think it's important to allow a judge to do that, because otherwise, he's left defenseless when it comes to the next election or at the time his or her tenure is up.

It's like the Chief Judge said, "I've lost my clout."

THE CHAIRMAN: Do you have any view with reference to the political participation rule concerning law secretaries?

JUDGE HENTEL: No, I have no reservations. I think that's your alter ego. And, again, where the judge might eschew the appearance of impropriety, so must the law system, because the law system is a satellite of the judge, and represents the judge to the public as well. So I think that that should be strictly enforced.

COMMISSIONER EMERY: It just struck me in listening to you and thinking about all of your testimony, Judge Hentel, that isn't there a fundamental conflict, in a way, between the interests of those in the political process, the County Leaders and the District Leaders, and those of the judge?

What I mean is this: Isn't there something,
fundamentally, about this political process, with
the District Leaders and the County Leader, that
loyalty and consolidation of support, based on
loyalty, is the underlying ethic which dominates
all considerations in that process on the one hand
and, on the other hand, with respect to a judge,
Isn't the fundamental principle, independence and
playing by the rules?

JUDGE HENTEL: Experience.

COMMISSIONER EMERY: And not letting loyalty
of any sort affect any process of the judiciary?

JUDGE HENTEL: No question about it.

COMMISSIONER EMERY: What I'm saying is: How
can a judge properly operate within a system where
the fundamental principle on which that system
operates is countervailing to the fundamental
principle of being a judge?

JUDGE HENTEL: I would dare say, by trying to
do the same thing that I have been trying to do over
the years. First of all, be a good judge. Be active
professionally so that your reputation comes known,
and then ask to be selected. It's like Oliver
Twist. "Please, sir, may I have more? Yes." That
may be demeaning, but that's the system.
Now, you want to change the system. I would be very happy with it because at this point, now I have no further axe to grind because of age, et cetera. But a judge, if he is seeking a higher post or seeking advancement, must constantly think about the political ramifications, and the political leaders aren't thinking that much about it, except if they are a rarity, about what is good for the bench. It's what's good for the organization, what cements greater loyalty, what will advance and consolidate our ability to govern.

COMMISSIONER EMERY: Isn't what you're saying in some ways, then, what a good judge has to do, somebody who wants a career as a judge and wants to be respected as a judge, is somehow, through reputation and through --

JUDGE HENTEL: Hard work.

COMMISSIONER EMERY: -- hard work and through the associations with the proper organizations, proper judicial organizations, somehow is to rise above the political fray and be considered a good judge, notwithstanding the fact that he or she might decide in a way which is contrary to the organization's interests?
JUDGE HENTEL: In fact, it has bothered me over the years that a great many of my colleagues on the bench are not active in Bar work or the American Judicature Society or the Institute of Judicial Administration or supporting the things that improve the administration of justice. It may be because we have to lead such a sequestered, cloistered life and that we have a lot of work to do. Last night I was working up to one o'clock at home, and when I leave here, I'm going to be charging a jury, and you have to put that work in.

Yes, that's the way you develop a reputation, and that kind of reputation, it seems to me, is better recognized through the appointive system or the non-partisan selection or retention of judges. I'm perfectly happy with what's going on in the New York Court of Appeals on the selection of judges, and I think that's what should be done throughout the State. A judge shouldn't have to have any consideration other than following his oath of office and adhering to the Code of Judicial Conduct. Our present system, though, intervenes and causes problems. Not that they are insurmountable, but a judge shouldn't have to face that kind
of thing.

If the public is to see judges being truly independent, then I don't think we can have this present system, although judges can be independent, but it is hard, harder. It shouldn't be harder.

THE CHAIRMAN: Thank you very much, Your Honor, for your participation in our hearings.

JUDGE HENTEL: Thank you for listening to me. I hope I didn't take too much of your time.

THE CHAIRMAN: Thank you.

The Commission calls Justice David Levy from Bronx County.

Good morning, Your Honor.

JUDGE LEVY: Good morning.

THE CHAIRMAN: I recognize our Chief Counsel, Kevin O'Brien.

JUDGE LEVY: I recognize him, too.

MR. O'BRIEN: Good morning, Justice Levy.

JUDGE LEVY: Good morning.

MR. O'BRIEN: Thank you for making the trip from the Bronx this morning to appear here. You have been good enough to share some of your experiences with those of us on the Commission's Staff, and I would like to ask you to share them...
again with the public at large at this hearing.

Just by way of background, I believe you were first elected to the bench in 1974, is that correct?

JUDGE LEVY: That's correct.

MR. O'BRIEN: And that was a Civil Court seat.

JUDGE LEVY: That was a Civil Court seat in the Bronx, a County-wide seat.

MR. O'BRIEN: Could you just briefly tell us your background that led up to that post?

JUDGE LEVY: All right. I don't think my background led up to the post, but I'll you about it.

MR. O'BRIEN: Okay.

JUDGE LEVY: I am a graduate of Columbia Law School in 1951. I was a practicing lawyer, a general practitioner until 1974, 'til January 1st, 1975, actually.

My political background, which may have led, to some extent, to the Civil Court seat is, that in the Bronx, I was the funder of the Reform Movement. I ran against Congressman Buckley in 1962, lost by about 2,700 votes out of 40,000. Two years
later, we won the Congressional seat. I did not
run. I was active in the Roosevelt-Lehman-Findlay
Reform Movement for about five years. We elected a
number of people in the Bronx, then I went back to
raising a family and practicing law during this
period as well, but concentrated on it.

In '74, I ran for the Civil Court and won for
the County-wide seat.

MR. O'BRIEN: Did you have the backing of the
Democratic organization?

JUDGE LEVY: Absolutely not. What happened in
'74 -- this is politics -- I had no intention of
running -- there were two County-wide seats open
and two District seats open. I had not been active
in the Reform Movement by then for about ten years,
something like that. Two of the candidates chose
the District seats. We had won one of the District
seats before.

MR. O'BRIEN: Those are smaller areas within
the County?

JUDGE LEVY: In the Bronx, it's half the
Bronx. One is one half, the eastern half, and one
is the western half. Each candidate chose that
and one candidate -- nobody wanted to run County-
wide. Finally, one candidate did, he was a regular candidate, he ran as a Reform candidate as well, and then another seat opened up, and that's when I decided to run. I was not the regular candidate. I was the Reform candidate. There was a candidate for the seat.

In those days, you ran for three -- three candidates ran for two seats. There was no designation of numbers. And I won in the two out of three races.

MR. O'BRIEN: You came in second?
JUDGE LEVY: I came in second.
MR. O'BRIEN: How were you able to overcome the organization candidate or candidates and come in second in that particular race?

JUDGE LEVY: Well, I could give you two explanations. One is, the organization made a mistake. Although they had drafted the Election Law, the people who were then in power were not aware of it, and they made the mistake of putting their two candidates on the same petition. Since that law had been enacted, we had the rotation of candidates in a primary. The law was, and somebody put it in accidently, I'm sure -- that you rotate
slates and one candidate. So they had two candidates, and it said, "For public or Party office." It had never been done for public office before. There were two candidates that were on one petition. The law said that if they appeared on one petition, they were treated as one candidate. So, one of their candidates was always in first or second. The other candidate was never in first, always in second and third. I was in first or third, never in second.

MR. O'BRIEN: So that was an accident of the petition process?

JUDGE LEVY: I think that helped.

MR. O'BRIEN: What was the other factor in 1974?

JUDGE LEVY: I had run for Congress. I was still known in the County, and we campaigned, spent money, and I think I did a fairly good job in '74.

MR. O'BRIEN: Can I ask you how much money you spent in that race?

JUDGE LEVY: I'm not sure because part of it -- a client in the computer business owed me a lot of money, and I wiped it out with what he owed me. If I value that at what it would cost me, that's probably most of the campaign. I would say somewhere
around fifteen or 20,000, that's about all, in those days.

MR. O'BRIEN: In your opinion, do you think it would have been possible to win this election without the accident that you talked about and the spending of that kind of money?

JUDGE LEVY: It would have been very close.

MR. O'BRIEN: And this was for a County-wide seat?

JUDGE LEVY: Yes.

MR. O'BRIEN: Which would be, in some cases, anyway, more difficult than running for a Municipal District seat?

JUDGE LEVY: Yes, because we had won the Western District twice before but never won the Eastern District, and we had not won County-wide very often for any seat, never for a judicial seat.

MR. O'BRIEN: I take it there came a time when you became interested in running for Supreme Court, is that right?

JUDGE LEVY: Yes, about the time that I got elected to the Civil Court.
MR. O'BRIEN: When did you first actually seek the Supreme Court nomination of the Democratic Party in the Bronx?

JUDGE LEVY: Well, it wasn't the Democratic Party in the Bronx that made the nomination in those days. From the time I was elected to the Civil Court until the time that I was elected to the Supreme Court, the Bronx was part of the First District, which was Manhattan and the Bronx, so the candidate for the Supreme Court came from Manhattan and the Bronx. It was a combination.

MR. O'BRIEN: So if I'm not mistaken, the convention included delegates both from the Bronx and Manhattan?

JUDGE LEVY: Manhattan and the Bronx.

MR. O'BRIEN: Okay.

JUDGE LEVY: Actively, let me say, as I remember, the first Reform candidate in the Bronx to get elected was in '76, as I recall. That was Judge Rubin. Reformers lost in the Bronx in '77, and in '78 -- I'm sorry -- '77.

'78, Judge Bernstein won. '79 was my first race, yes. That was when I first ran, first tried to get the nomination.
MR. O'BRIEN: What happened to you at the Convention that year, 1979?

JUDGE LEVY: Well, I did the usual campaigning. Since it was Manhattan and the Bronx, I had to get to know the people in Manhattan, many of whom I hadn't seen in years because I hadn't been active in politics. I had the support of a lot of people in Manhattan. We had very few Reform delegates in the Bronx. We did have a handful, and the rest belonged to -- I have to think. Who was the County Leader then? That was Stanley Friedman, I think, in '79. And, of course, all those votes were to the candidate of the Bronx Democratic Organization.

MR. O'BRIEN: But you had a sector of support in Manhattan?

JUDGE LEVY: Manhattan had their own screening committee for the whole First District, and I went into the screening committee -- I had gone in from '75 or '76 on, somewhere -- came out of that screening committee six different times, as I remember.

I had come out of the screening committee and I was really the only Bronx candidate who had come out of the screening committee, and the rules of
Manhattan provided they could not support a candidate who was not recommended by the screening committee.

Of course, they had elected somebody before that without the screening committee. That was a rule, and so I did have the support of a number of delegates.

MR. O'BRIEN: Based on that and other knowledge that you had, did you think, going into the Convention, you had a good chance?

JUDGE LEVY: We underestimated it. We thought we were ahead by eight votes in the Convention.

MR. O'BRIEN: What happened?

JUDGE LEVY: The ultimate result showed that we were ahead by fifteen, up until the last date, the date of the Convention. I'm not going to name names, but a public figure decided to take an interest. He decided -- what happened is, Manhattan had been trying to get support, ineffectively trying to get support, and they had pretty much given up. They tried to get help from all kinds of sources, and then this public figure asked some friend to make phone calls, and I suddenly found that I was losing votes that afternoon.
MR. O'BRIEN: How did you discover this, without naming names?

JUDGE LEVY: One person came to me and told me she had received a phone call, she was a District Leader, and she apologized, but she had to give her two votes to -- she didn't tell me who -- to the person who made the call, is what she told me, and she had her friend, who had two votes, also, and her friend gave her two votes. That was four.

When we began to add them up, I began to see what was happening.

MR. O'BRIEN: What was the final tally at the Convention?

JUDGE LEVY: I lost the Convention by one vote that year.

MR. O'BRIEN: Did you learn -- and I want you to take as much time and detail as you need -- about what happened to one particular delegate at that Convention.

JUDGE LEVY: We had one delegate -- I don't know if you're familiar with the Judicial Convention. You have delegates and you have alternate delegates. We had elected in one district, one delegate, not the alternates at all. That delegate
had run at one time for New York State Senator, and he had lost, and in his campaign, he had used a union printer for his literature. This was about a year later, an Information was filed against him. In his literature and subsequent to that, a printer had copied the same printing but the second printer was not a union printer and inadvertently copied the union bug. They charged him with a crime under the label of using a union bug illegally. The case was adjourned to after the Convention, the Judicial Convention.

MR. O'BRIEN: There was an Information filed?

JUDGE LEVY: Yes, there was an Information filed against him charging this as a crime, a violation of the label law.

MR. O'BRIEN: What happened to this charge eventually, after the Convention?

JUDGE LEVY: Actually, after the Convention, of course, it was dismissed, but the candidate did not show up at the Convention, the alternate voted.

MR. O'BRIEN: And he voted against you?

JUDGE LEVY: Yes.

MR. O'BRIEN: Was the original delegate someone
who had been committed to vote for you?

JUDGE LEVY: Yes, he was committed to vote for me. He was a Reform candidate.

MR. O'BRIEN: Did you ever learn any explanation for this?

JUDGE LEVY: No. I do know that the public figure support was not for Stanley Friedman, which had been refused before. There was another candidate. What Manhattan did -- Manhattan and the Bronx, some of the people in Manhattan and the Bronx got together. Friedman latched onto a candidate, Judge Torres, who is now a Supreme Court Judge, and he had his own candidate, Judge Mercarelli, and they packaged those two.

So, the votes really went for Judge Torres and Judge Mercarelli.

MR. O'BRIEN: Let me follow up with respect to this particular delegate.

Did you ever learn any explanation for why he didn't attend the Convention and vote on your behalf?

JUDGE LEVY: Well, his lawyer indicated, and people who knew him, that he was afraid, period. He was afraid that he was going to be convicted of a crime, as his lawyer explained to him, and many
people did.

First of all, he had no knowledge of what took place. It was kind of hard to see how he would be guilty. He was not a lawyer. He was not familiar with criminal law and he was frightened, and I think that was it. It was safer to stay away than go.

MR. O'BRIEN: And the net result, as you explained, is, you lost by one vote at that Convention?

JUDGE LEVY: Yes. I can't tell you which one, but I lost by one.

MR. O'BRIEN: Let me ask you about 1980. Did you seek the nomination of the Democratic Party in that year?

JUDGE LEVY: I didn't seek it, no. What happened, I had heard through various sources that Stanley Friedman did not like what happened the year before, he did not want to have this kind of battle again. There were only two seats in the First District the first year. One was for the Bronx and one was for Manhattan. He finally worked out a deal with the County Leader of Manhattan at that time, that the Bronx would get one and Manhattan would get one and Bronx would choose its candidate
and Manhattan would choose its candidate.

Manhattan insisted that his candidate go through the screening committee. In turn, Stanley Friedman insisted that he have a voice in picking the screening committee. The net result was, his candidate got all the votes from the screening committee and came out. I had heard that.

And Manhattan's candidate, of course, was nominated.

MR. O'BRIEN: So the Bronx Organization, out of the two slots, had one candidate and the Manhattan group had the other candidate.

JUDGE LEVY: I also came out of the screening committee, but I knew that there was no chance of my winning because no Manhattan people who were part of this package, were going to vote for me. There were people in Manhattan that wanted me to run, anyway, and there were people in the Bronx who wanted me to run, and that's pretty much how I can confirm this story.

MR. O'BRIEN: Your Honor, did you find out who the identities of those designated people were some time before the Convention?

JUDGE LEVY: Oh, yes, sure. In fact, I knew
the Bronx candidate before the screening committee met.

MR. O'BRIEN: Did the Convention activity bear out the advanced information?

JUDGE LEVY: Oh, sure. What happened at the Convention -- to confirm it, I had been called by some people in Manhattan because they heard, and it was true that some of the Bronx people were going to nominate me. I had told them they could nominate me, make whatever speeches they wanted, but I would decline because the candidate from Manhattan was a friend of mine, a qualified candidate, and I didn't want to jeopardize his chances.

Manhattan was concerned that if I were nominated, Friedman might think that the Reformers were trying to take both seats and, therefore, might work something out where he got both seats.

MR. O'BRIEN: In other words, they were concerned that he might think they were reneging on the arrangement?

JUDGE LEVY: He would think they were double-crossing him. That's what they were concerned about.

MR. O'BRIEN: Did you have a conversation with
Mr. Friedman in that regard?

JUDGE LEVY: They asked me to please call him. I said, all right, because I knew Stanley for years. I called him and said, "They are going to nominate me," and his comment was, "What are they going to say, nasty things about me?" I said, "Yes. It's not going to change anything. I will decline after the nomination."

At the Convention, he asked me, "Are you going to be nominated?" And I said, "Yes," and I declined.

MR. O'BRIEN: Not trying to change anything?

JUDGE LEVY: "I'm going to decline. They are not going to take two seats."

MR. O'BRIEN: His response was?

JUDGE LEVY: He didn't really say anything. He smiled when I said it, and that's it. He just laughed when I said it. He made his comment and I took that to mean it was perfectly all right, and it was.

MR. O'BRIEN: Would it be fair to say that this conversation was a confirmation of sorts of the arrangement which you had learned about between Manhattan and the Bronx?

JUDGE LEVY: When I spoke to him, I assumed
the deal had been made and spoke that way, and he
didn't deny it at all. He talked as if exactly
what I knew was true.

MR. O'BRIEN: Let's turn to the next year now, 1981. This was the year you, in fact, received
the nomination, is that correct?

JUDGE LEVY: Yes.

MR. O'BRIEN: Can you tell us what happened in 1981?

JUDGE LEVY: Well, this time I was tired of
going through what I had gone through in '79 and
I figured the only way -- we had less votes by then,
in '79, in the Bronx -- I figured by then I was
going to have difficulty. Stanley Friedman was
trying to separate the Bronx from Manhattan. The Bill had been in committee for many years. Many
of the Reformers in Manhattan were supporting the Bill, and I was concerned that '81 would probably
be the last chance for a Reformer to be elected.

MR. O'BRIEN: That's because you stood a
better chance with a combined District?

JUDGE LEVY: I figured after that, it was going
to be one District, and with that, Friedman con-
trolled the Bronx at that point.
MR. O'BRIEN: What did you decide to do in 1981?

JUDGE LEVY: Well, I knew part of the problem in '79 was that some of the delegates elected sold out to Stanley Friedman for various reasons. I had heard rumors and guessed about why and who, and some of it was confirmed. I heard about an Assemblyman being made as part of the package in buying delegates in '79. That was confirmed, I think, the following year, in '80. I heard -- I suspect -- I didn't hear this, really -- that part of the deal that Friedman made, since the delegates were black, was to put a black candidate on the Civil Court. This was a suspicion of mine.

MR. O'BRIEN: This is in '81?

JUDGE LEVY: This is in '81. Now, I had about three more years to go on my Civil Court seat. There were, at that point, two Civil Court seats, both in the Western District where we had one twice now.

MR. O'BRIEN: "We," meaning the Reformers?

JUDGE LEVY: The Reformers had one, that District, twice. So I said I would run for one of the seats before my term was over, since that
seat could be won and the County-wide seat was pure luck the first time.

MR. O'BRIEN: In other words, just to keep up with you now, you thought that the District-wide seat would be a safer seat than the County-wide seat that you held?

JUDGE LEVY: Really, that's what I thought. What I really thought was, if I could get that nomination, Friedman would have a problem running a black candidate against me. He was always afraid of me as a candidate.

MR. O'BRIEN: How many seats were open in the Western District that year?

JUDGE LEVY: Two. The Reformers nominated two people, myself and another. At that point, I gathered what happened is, Friedman decided -- there were also two Supreme Court seats in the Bronx -- decided to make a deal with the Reformers and give them on Civil Court seat and one Supreme Court seat, and he would take one and take one Civil Court seat, as well, Supreme and Civil.

MR. O'BRIEN: Was it the fact that you were going to run, at least originally, for that District seat --
JUDGE LEVY: I would assume so, because I was asked by the Reformers to not be on the petition, not run for Civil Court.

MR. O'BRIEN: So that Mr. Friedman could assure a place for his candidate?

JUDGE LEVY: The black candidate would be substituted for me.

MR. O'BRIEN: What did the Reform group, to your knowledge, get in exchange?

JUDGE LEVY: They got a Civil Court seat and a Supreme Court seat. I was the Supreme Court nominee.

MR. O'BRIEN: So that's how you became a Supreme Court nominee?

JUDGE LEVY: At that point, Friedman supported me. We supported Friedman's candidate. Manhattan made the deal, supported the Bronx candidates, whoever they were.

MR. O'BRIEN: Did it work out as planned at the Convention?

JUDGE LEVY: Yes, plus it -- there were five candidates. I was the last one nominated.

MR. O'BRIEN: What was your margin of victory in the Convention?
JUDGE LEVY: The Convention was overwhelming. They did nominate a candidate against me, there was a little deflection in the Bronx, but he declined the nomination.

MR. O'BRIEN: Would it be fair to say, then, in 1981, you were the beneficiary of a political deal, whereas in earlier years, you had been on the receiving end?

JUDGE LEVY: I think that's fair to say.

MR. O'BRIEN: Okay.

JUDGE LEVY: I'm not proud of what I had to do, but --

MR. O'BRIEN: Let me ask you a little bit about the subject of law secretaries, Justice Levy.

To your knowledge, does the Democratic Organization in the Bronx have any kind of role in the assignment or placement of law secretaries?

JUDGE LEVY: If we speak as of the beginning of the last year, I can answer. As of this year, I can't really tell you. Yes, up until then, yes, very much so.

Occasionally there were deflections and, probably, nobody really knows, that was one of the factors, I'm sure, although maybe an excuse, but it
was used, for replacing Donald Sullivan and William Kappelman. Both had secretaries who were not the choice of the organization.

MR. O'BRIEN: This was that incident that happened in 1983 - 1984 --

JUDGE LEVY: Yes.

MR. O'BRIEN: -- where two sitting judges were not renominated.

What is the practice, insofar as you know it, and what is your evidence for it?

JUDGE LEVY: The practice was that the County Leader named both secretaries, both what we used to call the confidential and the law assistant.

MR. O'BRIEN: Are judges given any kind of choice?

JUDGE LEVY: I can tell you Stanley came to me and asked me, "Would you hold it against anybody if they were members of my organization?" I said, "Stanley, to be fair, I would say no, I can't hold it against them." I said, "I wouldn't be thrilled by having somebody from your organization in my chambers, but," I said, "if you have somebody qualified, I'll consider him the same as anyone else."

He went that far. He asked me. He did send
me one candidate, a nice young fellow who didn't have any experience and I didn't hire him.

MR. O'BRIEN: Were there any adverse consequences?

JUDGE LEVY: No. He only asked me. He knew better.

MR. O'BRIEN: Is that because you were a Reform candidate?

JUDGE LEVY: I would not make a deal for the secretary. He didn't even ask me to.

MR. O'BRIEN: To your knowledge, and just try to think as precisely as you can about this answer -- were other judges treated differently than you as far as law secretaries were concerned?

JUDGE LEVY: Everyone who came out of the organization was, sure. They are told who their secretary is. They have nothing to do with it.

I'll tell you a funny story if you're going on secretaries. I seem to be one of few people, probably the only one interested in the Law Library in the Bronx Supreme Court, which is terrible, and there's a provision of the law that says the Supreme Court Justices are the trustees of the Library in each County.
I called a meeting of the Supreme Court Justices -- I was elected Chairman of the Committee -- and I started looking over the Library, and I discovered our Librarian, who doesn't belong there, is a product of the organization, did not know what books were in the Library. He had no inventory, no catalogue for the Library, so I decided we would make one, because half of the books in our Library should have been thrown out one hundred years ago, literally.

I asked the Judges to help, to lend me their secretaries to do this, because it's a big job, to go through a library inventory. We started, and I wasn't getting too much help, so I called some of the Judges and I said, "Can you help me?" and they said, "We can't make these guys work for us. What makes you think I can get them to work for us?"

So I picked up the telephone and I called the County Leader, Stanley Friedman. I said, "It's bad enough that you control all patronage in the Bronx Supreme Court, you put these guys in and they don't do anything." I told him what I was doing and I wanted help. I said, "The Judges tell me that they are busy working for you on Election Day, things like that." He said, "That's funny. They
tell me that they are working for the Judges." And he made the phone calls, and I got the inventory done in the Library.

So, if you want to know about the secretaries, maybe that story helps.

MR. O'BRIEN: Have you had discussions with other judges in the Bronx about this law secretary situation?

JUDGE LEVY: No. There is no real reason for me to discuss it.

MR. O'BRIEN: Forgive me for a lawyer-type question, but on what basis do you state that in the case of organization judges, they have no choice as to which law secretaries they must hire?

JUDGE LEVY: It's common knowledge. I've heard it said by many of the judges. I mean, it's no secret in the Bronx. It may be to the outside world, but it isn't in our County. I don't think it's a secret in most counties. Manhattan is somewhat different. You're in a different world down here since the Reform Movement became successful.

When I started in practice, the Reform Movement didn't exist or had just really begun, and you didn't have that in Manhattan. You had
Carmine DeSapio. You had the same problems we had. It's changed in Manhattan. I watched it change. It has not changed in most other counties.

MR. O'BRIEN: I see. Let me ask you your opinion now. Based on these experiences that you have recounted and others that you have had, do you prefer the elective system to a possible appointive system, and if so, why?

JUDGE LEVY: I have great trouble with any system, really. Let me start with the appointive system.

There are good points and bad points to each one. The appointive system will, undoubtedly, eliminate unqualified or incompetent judges, but I think that's done somewhat in the elective system, at least in many with the screening committees.

The appointive system will be, probably, more political and more difficult than the existing convention system, and the appointive system will be a closed circle for most people, because the way the politics works, the same people who are now, probably, in control of various counties, will be the one the Governor has got to turn to for counties, and he's going to have to satisfy some
of them some of the time, and the only people he's going to appoint are people he knows about and he's going to find it out from political connections or others having really nothing to do with the merits of it.

Some of it will, some of it won't. It's going to create a judiciary which, I think, will be one dimensional. You're going to have a certain kind of candidate, that's what you're going to get.

For fun, I went before the Court of Appeals screening committee. Now, they have their own criteria that are not in the statute, obviously, because nobody has been nominated or comes out of that committee who has not been either a professor, a U.S. District Judge or an Appellate Division Judge.

Obviously, that's their criteria. Anybody else is not considered for the Court of Appeals. No matter how good a lawyer he might be anywhere else, he's not going to be considered.

It's true of the Appellate Division, too, in various ways. What you're going to lose is the ability to pick up the independent judge, the maverick who can contribute something to the judiciary. You're not going to find them under an
appointive system. He won't have any -- what we call rabbis in politics that will help him.

MR. O'BRIEN: Would you put yourself in that category?

JUDGE LEVY: Sure. I don't think I have a fighting chance to be appointed.

MR. O'BRIEN: Doesn't your nomination virtually an accident?

JUDGE LEVY: You want me to talk about the elective system?

In the elective system, voters, number one, don't know what they are voting for. No question about it. Anybody that says anything else, is kidding themselves. They don't know one judge from another; they have no concept of them. The only point about the elective system is, it does allow for mavericks to win, people who are not part of any system, organization, any establishment.

The Bronx is a prime example if you want to look at it. You have Judge Rubin, who was elected to the Supreme Court. You have Judge Bernstein. You've had on the Civil Court, Judge Rosen, who lost by one vote, by the way, in the Convention, also, for Supreme Court. We have about three other
Reform candidates who never would be elected -- never would be appointed by anyone. They have won through the elective system one way or another. It's not a good system for picking judges, I agree, and it has the defect of being able to pick unqualified judges, as well.

There's no requirement at this point to have the screening committee, such as Manhattan has. The problem with screening committees is, they do not come from Mars; I don't know why anybody things screening committees are not political. They are.

MR. O'BRIEN: Assuming we have an elective system, such as you prefer, although it's kind of a backhanded compliment that you pay it, --

JUDGE LEVY: Yes, it is. I agree.

MR. O'BRIEN: -- Justice Levy, do you prefer, based on your experience, some kind of nominating convention system or a more open primary type system?

JUDGE LEVY: No. I would say a primary would be fair. I mean, the voters still won't know anything about who they are voting for, but a candidate would have a better chance in the primary. I'm not thrilled with having people vote for something they
don't know anything about, and I would like to eliminate the unqualified candidates, because elections can cause that. If people don't know what they are voting for, they can elect somebody who is incompetent. I think the law should require some kind of screening committee of some sort.

What happens in Manhattan is this. Manhattan screens out the unqualified and incompetent; they have accomplished that at the screening committee, and then the politics start, because you now have all these qualified candidates. They nominate three for each position, and the jockeying, politically, is among competent candidates, so the public is not terribly disserved if one is elected over another, but then the politics really begins, first to get out of that committee, and once they are out of that committee, the screening committee, I know, in Manhattan, everybody gets phone calls from everybody under the sun, everybody is politically connected.

I'll tell you a funny story. I go back, as I said, a long time in the Reform politics. I was active, as I said, in the Reform Movement, along with Lloyd Garrison, we established the first screening committee in the State of New York; it was
in '61, with Mayor Wagner, and we thought it would be a great idea, so the Mayor would have people qualified to appoint to Criminal Court.

Well, what we found, after setting up the committee, was that Mayor Wagner always appointed the men he wanted to from the screening committee. There were four candidates in those days nominated and one of the four was always the candidate he wanted, and he always picked the one he wanted, anyway. The screening committee served absolutely no purpose in that situation.

I'm not familiar with what's been going on since, because I haven't been involved in that selection, but that was the first one we set up, and it was kind of discouraging, to say the least. We thought we were setting up something that would help, and it really did not change the thing one bit.

So, you have to be aware that screening committees can be influenced. They do not come from nowhere. People come from somewhere and they have friends, they are influenced, business, relations, and it's very difficult to find people who are that independent to do what they think is right.
You may get rid of the unqualified candidates because nobody wants to be accused of nominating somebody who is incompetent, but the politics will still exist.

I'm not thrilled with any system we've come up with. I'm not trying to defend the elective system particularly. I'm trying to point out that it has that ability, and it has happened in Manhattan and elsewhere, to allow somebody who is not part of the existing complexion of the judiciary -- the federal judiciary is pretty much of one kind.

I tried cases for a long time, and there is something to be said for elective politics, not a hell of a lot, but the judges who came out of it may not be great lawyers, and it was my feeling, all the years I practiced, they weren't, but they did know how to deal with people and situations and they learn from politics to accommodate, and this is part of the job of a judge, as well.

MR. O'BRIEN: Do you sit in a Criminal Part or Civil Part?

JUDGE LEVY: I've sat in both. Right now, I'm in Civil. I spent about seven years in Criminal.

MR. O'BRIEN: Can you explain just a little
more, before we throw the floor open, about this idea that judges should be able to relate to people and have common sense and how that affects their abilities as a judge?

JUDGE LEVY: Well, it's like having common sense anywhere. Most of the products of this system, existing system, do not. Not every one. There are exceptions to the rule, too. But, by and large, they have good common sense. The exception is, when they have been a good lawyer as well, and there are some. I won't say the elective system has not produced some good judges. It has. It's purely by accident, because it's not intentional. It never was intentional.

The qualifications of a candidate have never really been considered by organizations, such as in the Bronx. In Manhattan, you do have the screening committee, so some qualifications are considered.

I remember when I was out of law school, I thought, well, there's one hero I have, that's Judge Cardozo, he got there on merit. Later on, when I got involved in politics and found out his father was a District Leader in Manhattan, I was
kind of disappointed. I don't think there has ever been "politically on the merits" in New York. And so the elective system that exists, at least in the Bronx, and probably in the other Counties, except Manhattan, because there is no real Reform Movement elsewhere, and the Bronx is pretty well destroyed now -- and I can tell you, you've got a problem there now, as last year indicated.

The County Leader did not control the Convention last year. It was obvious that this was going to happen sooner or later, and what happened is, the black and Puerto Rican minorities got together, and with some Reformers, managed to take over the Convention, and so different people were nominated than the ones the County Leader wanted.

What's going to happen from now on, nobody really knows. So, the County is changing. The convention system may backfire on the organization at this point, but I don't think that's enough reason for not changing it. I think there should be a change.

If you go to the appointive system, I wouldn't be too upset with it if, somehow, you could manage to look around other places, where we usually look,
with a screening committee. I think that's the difficulty. I really don't have any axe to grind. I mean, I've worked within the existing system -- if you talk to the organization, I did not work within the existing system -- but within in the democratic system, I worked, and it's difficult, it's very hard, but I think there are solutions to the problems.

I would try a primary if we could have some means of screening some of the candidates so that they are not completely unqualified, so the voters get a chance to vote for qualified people, see how it works, and think about appointive, but I think you have to think of problems in an appointive system.

It's not as black and white as THE NEW YORK TIMES makes it. I have seen it in operation, and I'm not sure it's the best of all worlds.

In terms of the public, at least you would get qualified candidates. If you can insure that for the elective system, I think I might try it. I hate to suddenly find myself in agreement with George Friedman, the County Leader. I don't think he's ever said anything about the qualifications
of candidates. He thinks he can be saved by a primary. He's certainly not looking for the qualifications of candidates.

I'll answer any questions you have.

MR. O'BRIEN: Thank you, Your Honor.

COMMISSIONER EMERY: I take it that if the bedlam which is taking place now in the Bronx replicates itself in other counties or continues in the Bronx, we might see the County Leaders being the first ones to call for merit selection or the appointment process through merit screening, as opposed to the elective process, either that, or those District Leaders will no longer be District Leaders.

JUDGE LEVY: I would suspect that if the Governor had been friendlier to George Friedman -- if the Governor had been friendlier towards him, that might not be the case.

COMMISSIONER EMERY: Your suspicion is that he's on the fence on that issue?

JUDGE LEVY: I think the Governor is not going to deal with George Friedman, not going to deal with anybody that's a product of the organization that Stanley Friedman headed; I think that's clear, and
that was clear when Friedman nominated whom he did for Surrogate last year. The Governor did not support him. He was an independent, not tied to the organization, and it didn't happen. I think that was the overture to the Governor and the Governor didn't pick it up.

COMMISSIONER EMERY: Now, I know you are voluntarily here, but I want to ask you as much as I can about 1979 without putting you in a compromising position.

JUDGE LEVY: All right.

COMMISSIONER EMERY: The 1979 Convention, even though, in some sense, it's old history, as these things go; what was your understanding of the process which led to this delegate being removed, was he indicted by a Grand Jury?

JUDGE LEVY: No, he wasn't indicted by a Grand Jury. It was an Information that was filed. I think it was a prosecutor's Information. That was my information.

COMMISSIONER EMERY: And was that in the Bronx?

JUDGE LEVY: Yes, in the Bronx.

COMMISSIONER EMERY: And that prosecutor's Information was dismissed subsequent to the
Convention?

JUDGE LEVY: Subsequent to the Convention.

It took -- I think it was adjourned a few times.

It was probably close to a year afterward.

COMMISSIONER EMERY: Do you know on what basis it was dismissed?

JUDGE LEVY: No. All I know is, it was dismissed. I don't know on what basis.

COMMISSIONER EMERY: Do you know of the prosecutor moved for dismissal of the Information?

JUDGE LEVY: I don't think so. I don't think he ever did.

COMMISSIONER EMERY: Do you know if there were any motions filed?

JUDGE LEVY: I could find out. I know the attorney who handled it, but I never asked him how it was dismissed. I know it was dismissed. It was never tried, I know that.

COMMISSIONER EMERY: Do you know what the timing was, how long prior to the Convention was the prosecutor's Information filed?

JUDGE LEVY: You're going back to '79. It's hard to remember.

COMMISSIONER EMERY: I understand.
JUDGE LEVY: I can't give you an exact date. I can give you my impression at the time. It was more than enough time to try the case, if it was going to be tried. It had to be a couple of months before the Convention.

COMMISSIONER EMERY: That the Information was filed?

JUDGE LEVY: Yes.

COMMISSIONER EMERY: So, going into the Convention, you knew that this delegate, who was in your favor, had this Information, this Information had been filed against him?

JUDGE LEVY: But I did not know he wasn't coming until he didn't show up. He refused to return any phone calls when we found out he wasn't there, and he disappeared out of sight for a while.

COMMISSIONER EMERY: Do you have any direct information that his disappearance -- direct or indirect information that his disappearance at a crucial time had anything to do with this pending charge?

JUDGE LEVY: Yes, yes.

COMMISSIONER EMERY: What is that?

JUDGE LEVY: Well, friends of his who are
friends of mine, told me. That's what he told them, that he was afraid and he wasn't to go.

COMMISSIONER EMERY: Was he afraid because somebody would say something to him, or was he just generally afraid?

JUDGE LEVY: He was afraid he would be convicted of a crime.

COMMISSIONER EMERY: If he went and voted for you?

JUDGE LEVY: Yes.

COMMISSIONER EMERY: Was there any question, was there any information that anyone had threatened him that they would pursue the prosecution more vigorously as opposed to less vigorously if he did show up?

JUDGE LEVY: Now you're getting -- politics is peculiar. It's not like a court of law or the way lawyers operate. You do not get admissible evidence. You do not operate on that kind of evidence. You pretty much operate on what we call hearsay.

Yes, I heard stories about him being threatened. I don't know whether they are true or not, but I heard the stories, sure. I heard the names of people, who, supposedly, had called him. It was
more than one. He got two phone calls, I understood.
I heard that, sure.

COMMISSIONER EMERY: Now, you said that there
was a prominent politician who called delegates.

JUDGE LEVY: He had the delegates called. He
didn't make the calls himself.

COMMISSIONER EMERY: He had the delegates called.
And, you would rather not name his name here at
this proceeding?

JUDGE LEVY: Well, in politics, what you find
is, even though you know somebody told you something
personally, they are going to deny it if you name
the name.

COMMISSIONER EMERY: It's hearsay, it's hear-
say as far as you're concerned, in any event?

JUDGE LEVY: This particular one is hearsay,
would be hearsay, anyway, except -- yes, it's second
or third, depending on who. I can tell you this,
though. The Leader who was supporting me before
the Convention, apologized to me that day that she'd
received the phone call and she was going to switch
the votes, and her friend was going to switch, as
well. That much I can say. She told me that
directly.
If I name the name, of course, she's going to deny it, and I don't think I want to put her in that position.

COMMISSIONER EMERY: Do you know what was behind that persons making these phone calls or having these phone calls made?

JUDGE LEVY: Yes. Well, there are two different questions there. The person making the call was calling because he had an obligation from these people he was calling, he, personally.

COMMISSIONER EMERY: So he was just owed a political debt?

JUDGE LEVY: He owed a political debt and he was collecting on that political debt. The reason the person who asked him to make the phone did, I really don't know.

COMMISSIONER EMERY: Was that because that person was in alliance with Stanley Friedman who was opposing the nomination at that point?

JUDGE LEVY: I really don't think so. I really don't. That's why I mentioned there were two candidates. I think he was trying to help the Manhattan candidate, not particularly the Bronx. They were tied together. So, in effect, he helped
the Bronx candidate, but I don't really believe he helped the Bronx candidate or Friedman.

COMMISSIONER EMERY: So the vote against you was really a vote for a Manhattan candidate and not so much --

JUDGE LEVY: Yes, it was packaged with a Bronx candidate. I ran against the Bronx candidate, not the Manhattan, but the deal was, they would vote for the Bronx candidate and the Bronx would vote for the Manhattan candidate. It was all part of a package.

COMMISSIONER EMERY: I take it that all of these political machinations that you have described over the years, especially over the three convention periods that you have described, that -- is there anything in those events that helped you become a better judge?

JUDGE LEVY: I can't think of anything.

THE CHAIRMAN: Do you have any views on the rules that are currently applicable to judges with respect to partisan activity in the elective process?

JUDGE LEVY: I have some thought. I haven't really focused on it. I think the rules indicate
the problem with the elective process for judges, I think the rules don't really deal with the problem. I mean, you can't have elective judges and tell them that they can't campaign.

In effect, the rules now -- or, at least in my County, for example, we preferred to County Leader over an independent trying the run against him. If the judge does nothing, the candidate does nothing, the organization does all for him. They circulate the petitions, they do the campaigning, they do the printing, they collect the money or they spend the money for the candidates. He has a whole organization at his command.

For example, one of the rules is, the judge is not entitled to know or should not know where the money comes from for his campaign. Well, that assumes you've got an independent treasurer who would know something about the people who were giving the money and can keep track of all this and is willing to do this kind of work, somebody who's not getting paid for it and not getting anything out of it.

The worst part of it is, if the judge doesn't know who's contributing, what do you do when lawyers
start to contribute to the judge's campaign, lawyers practicing in front of him. He wouldn't even know about it under the existing rules. The treasurer might know, but he would have to be somebody knowledgeable about the people who practice before that judge.

I made it a rule that I had to find out who the people were, to return the money. I would not take money from lawyers who were going to practice before me. I knew the practice. I had been in practice for years. I knew judges that, supposedly, run for reelection without opposition, collecting money from lawyers all over town. I thought this was disgraceful. I didn't want to be in a position of collecting money from a lawyer who would assume that I knew he contributed to my campaign. That rule is asinine.

For example, if I wanted to run for Supreme Court and wanted to run a slate of delegates myself, could I do it under the existing rules? I'm not sure you can under the existing rules, and if you can't, then what sense do the rules make? You're prohibiting anybody but the organization from running delegates for that position. I think the
rules do not cope with the problem that exists in an elective system.

The rules talk about, really, an appointive system where the judge doesn't have to do anything, but if you have an elective system, you have people who have to go out and campaign. It's a problem. Some of the rules do make sense. Rules about expenditures, I think, do make sense. Reformers around town have always made it a point not to spend anything but what they can on their campaign and not contribute to anybody else's, and I know I discussed that with Stanley Friedman, and he said, "Forget the whole thing." He didn't want to divide up what it would cost to print the petitions and give me my share. They just tell everybody, give me 500, a thousand dollars, round numbers, and you give it to them, and I refused.

Aside from that, I think that part of the system is good. But, the other things about prohibiting campaigning, et cetera, theoretically makes sense, but practically don't. You prohibit judges from campaigning. If you tell me I can't go to political dinners until the year I'm running, of course you're going to have me running every
year because I have to be active. People are going
to forget about you. In politics, it's "What have
you done for me lately?" or, "When did I see you
last?" and that's a problem with elective politics.

I think the Chief Judge has some idea that the
judge be renominated by a "yes" or "no" vote, but
that's difficult, too.

California tried this and lost thirty-three
Supreme Court Judges in that system. I'm not sure
that would work. You would have to mount a campaign,
if there was opposition to you, and you would have
the whole election process all over again.

I'm not trying to suggest a solution. I'm
trying to show you where the problem areas are.
I think the rules do have problems; they don't cope
with the actual situation as it exists. That's my
concern. It's not realistic enough.

THE CHAIRMAN: Thank you very much, Judge.
We will take a short recess.

(Short recess taken.)

THE CHAIRMAN: The Commission calls Terri Austin,
who appears here in a representative capacity as
a member of the Board of Directors of the Metropol-
itan Black Bar Association.
Good morning, Ms. Austin.

MS. AUSTIN: Good morning, Mr. Chairman and members of the Commission.

My name is Terri Austin and I am a member of the Board of Directors of the Metropolitan Black Bar Association. We appreciate this invitation to appear before this Commission.

The Metropolitan Black Bar Association (MBBA) welcomes this opportunity to express its opinion on the process of judicial selection, specifically the election of judges.

We note at the outset, that while there are numerous deficiencies in the current judicial electoral system, our Association strongly believes that the electoral process is, to a large degree, responsible for the number, albeit limited, of black Justices currently on the bench in New York State. We, therefore, urge that a system for the election of judges be preserved.

The number of blacks and minorities on both the federal and State bench has not kept pace with the large number of qualified black and Hispanic lawyers who are members of the Bar, nor does it reflect the sizeable minority community which these
courts serve. This is a matter of utmost concern to the MBBA.

Currently, no black judge sits on the Federal District Court for the Eastern District of New York, since the retirement of Judge Henry Bramwell. In the Southern District, only one black judge, Mary Johnson Lowe, remains on active status. The only other black judges, Robert L. Carter and Constance Baker Motley, are both on senior status. The number of black judges in the Supreme, Civil, Criminal and Family Courts in New York, can be described as "token" at best. Only in the Supreme Court, where judges are elected, are there approximately eleven out of a total of thirty-eight black judges in New York City and not certified, that is, over seventy years of age and continuing to serve for two-year periods, until age seventy-six.

Can the number be considered more than "token"?

One of the reasons for the small number of black judges is the inadequate minority representation on committees responsible for judicial selection. We are unaware of any black who has ever served on one of the panels appointed by Senators Alfonse D'Amato or Daniel Patrick Moynihan for
screening applicants to the Federal bench.

Black appointees to the several screening panels for the State Court of Appeals and Appellate Divisions, have been either few or non-existent. Similarly, the representation of blacks on the Mayor's Committee on the Judiciary and on the Judiciary Committees of the Association of the Bar, committees which approve or disapprove of candidates for the Civil, Criminal and Family Courts, has been woefully inadequate.

Another reason for the underrepresentation of blacks and other minorities on the bench is the current system of nomination known as the Judicial Convention. Prior to a general election, judicial aspirants to the Supreme Court in some boroughs must make their intentions known to the party leadership. The names of such individuals are then submitted to a screening panel which interviews each candidate and makes recommendations to the Democratic or Republican District Leaders. The political Leaders, as a matter of course, select those candidates who have been approved by the screening panel, and only their names are placed in nomination at the Judicial Convention which
determines the party's candidates for the general election.

It is no secret that delegates elected to vote at the Judicial Convention invariably follow the wishes of the political Leaders. Black and other minority candidates who are not associated with the established party Leaders in their county, therefore, have little hope of becoming their party's candidate, and often must run in the general election as independents.

The Metropolitan Black Bar Association, therefore, makes the following recommendations for changes in the current system of judicial election which, we believe, will improve access by qualified minority candidates to judicial positions:

Recommendation No. 1: Abolish Judicial Conventions.

The elimination of Judicial Conventions as a vehicle for the nomination of candidates for judicial positions will greatly reduce the opportunity for abuse of the political system by political bosses. Rather, Supreme Court Justices should be nominated via the petitioning process and elected directly by the general public.
Recommendation No. 2: Enact legislation to limit campaign spending.

The enactment of legislation which would control campaign spending will open up the electoral process to candidates who otherwise could not hurdle the impediment of campaign spending. Legislation which would place specific limits on campaign financing coupled with providing eligible candidates with matching public funds similar to the federal system, should create an environment in which more persons will seek elective office.

Recommendation No. 3: GIVE GREATER AUTHORITY AND SUPPORT TO THE JUDICIAL SCREENING PANEL SYSTEM PROVIDED BY THE COUNTY AND ETHNIC BAR ASSOCIATIONS TO MINIMIZE THE POSSIBLE ELECTION OF UNQUALIFIED JUDICIAL CANDIDATES.

The current electoral system offers a window of opportunity for unqualified candidates to be elected as Supreme Court Justices. By following Recommendations No. 1 and No. 2, and by giving greater authority to the informal judicial screening process provided by the Bar Associations, the likelihood of an unqualified candidate being successful in a bid for judicial office would be minimized.
In conclusion: The Metropolitan Black Bar Association believes that both an appointive and an electoral system should coexist, in order for qualified blacks and other minorities to receive a fair share of the available judicial slots. The Association is prepared to work with the Commission and with the State Legislature to develop specific legislation which will ensure the fair, equitable and more representative election of judges.

THE CHAIRMAN: Thank you very much. I recognize that you're here in a representative capacity, and as I understand, your views today are representative views, and I would like the record to reflect some additional information about the Metropolitan Black Bar Association.

What is the size of your Association in terms of membership?

MS. AUSTIN: I believe there are currently about 600 members. Dues paying, I'm not positive, it's somewhat lower than that. The coalition has been in existence for the past four years, I believe. It's a coalition of the Harlem Lawyers Association and the Bedfor-Stuyvesant Lawyers Association, and that comprises the Metropolitan Black Bar Association.
It's the largest Black Bar Association in the City.

THE CHAIRMAN: What process do you follow in terms of taking a position on a subject such as the positions that are expressed in your statement today?

MS. AUSTIN: In this particular position, the Board of Directors, of which I'm a member, met and discussed the issues and drafted a statement which was subsequently revised after spoken to some of the other members of the Association who are judges in the current system. One of those judges is Appellate Division Judge George Bundy Smith, who is the Chairman of the Board of Directors of the Metropolitan Black Bar Association.

THE CHAIRMAN: He is also a member of the Adjunct Faculty of the school of which I'm currently Dean. Are you a member of the Bar?

MS. AUSTIN: Yes, I am. I'm a member of the Bar and on the Board of Directors of the Metropolitan Black Bar Association.

THE CHAIRMAN: One of the panelists this afternoon is the current Chair of the Mayor's Committee on the Judiciary, and that Committee has shared with our Commission statistics as to the number of
minority applicants, as well as appointees to the Family and Criminal Courts of the City of New York, and in going through this statistical information provided to us, it does appear, in terms of the Mayor's Committee on the Judiciary, that there has been significant progress made by members of minority groups in terms of appointment to the Family and Criminal Courts of New York.

I don't know if you have a view on how that system is working.

MS. AUSTIN: I have some informal statistics for the number of blacks who are currently serving in the Family, Civil or Criminal Courts. I don't know how current they are. I think these numbers were derived from looking in the Green Book and determining by recognition, those members which were black, and the figures that I have are -- in the Criminal Court system, there are a total of 103 judges.

THE CHAIRMAN: That corresponds with my figure, by the way.

MS. AUSTIN: Okay. Eight of whom are black, and in Civil Court, we have a total of 116 judges, eight of whom are black. In Family Court, we have
a total of 42, four of whom are black.

Now, we understand that the numbers have risen from the past, but we still think that those percentages are extremely low. The highest number of blacks that we have are in Supreme Court where we have 38 total Justices, eleven of whom are black, and that's in Manhattan.

In the boroughs, the figures are not as good. In Brooklyn, I think there are 48 total Supreme Court Justices, six of whom are black. In Queens, I think we have 37, three of whom are black. In the Bronx, I believe there are 23 Justices, three of whom are black.

As I said, I want to reiterate, that those numbers are approximations, and those numbers for the black Justices are just name recognitions, so that's not an official tally.

But, we believe that the minority community is much greater than that, obviously, and that the representation is totally inadequate.

THE CHAIRMAN: I haven't studied these statistics, but do I take it from what you just said, that if you remove many in terms of black Supreme Court Justices in Manhattan, the percentage in the
other Counties is low, according to your information?

MS. AUSTIN: Extremely low. That's correct. I don't have the numbers for the number of candidates who have run for various positions.

THE CHAIRMAN: The information that was provided to us by the Mayor's Committee on the Judiciary, if I'm accurately stating the information, looking at the period from 1978 to 1987, almost a ten-year period, there are some -- they gave me the information that, in terms of applicants, black applicants to the -- I guess it would be the Criminal and Family Courts of New York, and it's not clear to me if that wouldn't also extend to the Civil Court when the Civil Court is part of the appointive process, when there's a vacancy to be filled -- but the figures that were provided to us by the Mayor's Committee, shows, in terms of total black applicants, female - 16, male - 15, and in terms of appointments, four female and fourteen male. Have I accurately stated that information, Kevin?

MR. O'BRIEN: Are you quoting from the Mayor's Committee?
THE CHAIRMAN: Yes.

MR. O'BRIEN: If you're quoting from the letter, I assume those are accurate official figures that we received.

THE CHAIRMAN: And, obviously, one of the areas that we are going to be looking very closely at, in terms of our own thinking on the subject, is the function of the Mayor's Committee dealing with the Courts, Civil Court, to some extent the Criminal and Family Courts, and if you have any additional views, if your Association has any additional views on the function of the Mayor's Committee, we certainly would be grateful to review those views.

MS. AUSTIN: Okay. I will take that back to the Board of Directors and to the body, as well, and express your desire for more information on that.

THE CHAIRMAN: Are there any other questions from anyone?

MS. GORDON: Yes.

THE CHAIRMAN: Nicole Gordon.

MS. GORDON: Are you aware of any statistical studies that have been done outside New York State
under both systems, do you know whether there is any information available?

MS. AUSTIN: I'm not aware of any.

MS. GORDON: On the question of whether an electoral system as opposed to an appointive system would be more responsive to the needs of minorities, do you have any sense of whether the minority community, as a whole, has a perception one way or the other?

MS. AUSTIN: I don't know what the minority community, as a whole, believes. I think that it's fair to say that the Metropolitan Black Bar Association favors elective in certain situations, but I think the bottom line is, that whether you have an elective system or an appointive system, that, in the first instance, screening panels or Mayors' Committees or Bar Association Committees on the Judiciary must have a number of individuals who are blacks or minorities or individuals who are simply sensitive to the needs of the minority community so that names are selected to eventually be nominated for judicial positions. I think that that would help.

MS. GORDON: I was wondering, in the bigger
picture, of course, in New York State, the first black to sit on the New York State Court of Appeals was an appointed position, and I suppose it's hard to predict whether the electorate, as a whole, or as individual politicians is going to be more responsive, and so -- is that why your statement seems to acknowledge both, an appointive or elective system?

MS. AUSTIN: If we have an inroad to the Governor and his listening to our needs and he selects individuals that happen to be black, I think that would work out just fine. I don't think we would want to exclude an appointive system, because sometimes it works.

On the other hand, I think an electoral system can work, also, if minority views have an inroad to the final nominating process.

THE CHAIRMAN: I take it that your Association has strong objection to the present elective system insofar as the Judicial Conventions go?

MS. AUSTIN: Exactly, and I think that the primary concern is, that in certain instances, and I would exclude Manhattan, minority viewpoints aren't heard where we have District Leaders who are
selecting individuals and we have no say, and it is very difficult to get your viewpoint in.

MS. GORDON: In the statement, it points out that on some of these screening panels there is "woefully inadequate" representation from the minority community. Is that based on a percentage of minority representation on these committees as compared with the general population?

MS. AUSTIN: I think that's correct. Exactly.

THE CHAIRMAN: Thank you very much.

MS. AUSTIN: Thank you very much.


Good morning and thank you for being with us.

MS. SCHACHNER: Good morning, Mr. Levensohn. You are the Co-Chair of the Law Committee of the City Bar, is that correct?

MR. LEVENSOHN: No. I'm Co-Chair of the Law Committee of the New York County Democratic Committee.

MS. SCHACHNER: All right.

MR. LEVENSOHN: I'm a member of the Committee on Election Law of the City Bar.

MS. SCHACHNER: We have asked you to come here
this morning to talk to us about the screening panels which have been set up in Manhattan.

MR. LEVENSOHN: Yes.

MS. SCHACHNER: Can you, first, give us a general understanding of the structure of these panels and the creation of these panels?

MR. LEVENSOHN: All right. I might also go a bit into the history. I must apologize for being relatively unprepared in that I did not expect to be coming here today, so I'm speaking pretty much extemporaneously.

Ms. Schachner asked me to come over at the last minute, and I will try to give you the benefit of what I can tell you just from my general knowledge.

I might say that, personally, I have been much involved in the Reform wing of the Democratic Party here in Manhattan for the last third of the century, and it is at least twenty-five years ago that we became concerned with the manner in which judges were being selected judicially, more or less, in back rooms, by political leaders with the public being given very little to say and simply ratifying the choice of the political leaders in a general
I think the first use of a screening panel was on the East Side of Manhattan in the Sixth Municipal Court District in 1963 when a panel was organized consisting of three prominent members of the Bar who selected a candidate who turned out to be Edward J. Greenfield, who ran as the Democratic candidate for Civil Court in the Sixth District in 1963 and was elected.

(Continued on next page.)
I think he was the first candidate chosen by a panel.

Subsequent to that, there was a lot of discussion as to the best method of choosing a panel, and the final outcome was a feeling that it was better that the members of the panel not be selected directly by the political organizations, but that there be what we call a double blind system under which the political organization would select heads of organizations who, in turn, would select the members of the Panel so that the membership of the Panel was not directly chosen by the political process but by what would, hopefully, be a broadly based group of community organizations and Bar organizations who, in turn, would select the members of the Panel, and the members of the Panel would then recommend the candidates.

There was also dispute as to whether what we were looking for was a selection panel or a screening panel.

There were those who felt that the process should be taken completely out of the political arena by having the panel select the candidate, so if there was one vacancy, the panel would bring in
one name.

There were others who felt that the political process still had a part to play, that there should be some room for choice among highly qualified candidates and that the panel should be a screening panel, that it should not, however, be an open screening panel which simply brought in every name qualified, because the feeling then was that that would really leave very little change in the existing system since it was felt that a panel might well find almost every candidate appearing before it qualified and that would leave room for judicial maneuvering on the part of political leadership.

So, the system that evolved was one in which the panel would bring in a limited number of candidates for each vacancy, and the figure that was settled on was three so that the panel would be required to bring in three times the number of vacancies as highly qualified candidates.

There was still some support for the selection panel process.

In fact, it was used on the West Side of Manhattan, at least until about ten years ago, and
what happened in the Fifth Municipal Court District, up until about ten years ago, the candidates generally were chosen by selection panels which picked one candidate for each vacancy, and that was the end of the process.

The Democratic Party there, then endorsed that candidate, and that was the end of it, since in most of Manhattan, the Democratic nomination is tantamount to election.

Initially, the then County organization resisted this process, and there was an independent organization formed called the Committee to Reform Judicial Selection, which was under the Chairmanship of Stanley Geller, which organized panels independently, and the Reform Wing of the Party generally supported the candidates brought out by those independent panels, and sometimes they were successful in primaries, sometimes not.

Around the early Seventies, we pressed to have this system imbodied in the rules of the party, and we were successful in the early 1970's.

I don't remember exactly when.

It was probably around '73 or '75. Initially, the process evolved.
Initially, there were imperfections which we felt had to be remedied. For example, in one year, in the case of the Supreme Court -- and this was back at a time when the Bronx and Manhattan were part of the same judicial district -- the Bronx organization was supporting the then District Attorney of the Bronx as a candidate, and the panel reported out a group of names that did not include that individual, and whereupon, the party leadership, in effect, ordered the Panel to reconvene, reconsider, and the Panel did so and brought out the name of the District Attorney, that's how Burton B. Roberts became a Supreme Court Justice.

A lot of us felt that was not a proper way of proceeding, and one of the things we put into the New York County's rules is, when the Panel reports, that's the end of it, and they can go no further.

The members of the Panel, as it now works under the New York County rules, are chosen -- that is, the organizations would select the members of the Panel -- are chosen each year by the Judiciary Committee of the County Democratic Executive.
Committee which is composed of District Leaders appointed by their chairmen, the co-chairs of the Law Committee, ex officio, and also representatives of the New York County and the Democratic Coalition, which is the Reform Organization in Manhattan, and the effort is to have a group of organizations that are broadly representative of the community both in terms of gender, minorities and Bar and lay organizations.

I can read from the Guidelines for the selection of the panel.

I think I have submitted this material earlier when I was interviewed.

"The organizations chosen to designate panel members and the panel members themselves, should represent a broad range of bona fide professional economic, academic, social, racial, ethnic, sexual and other groups consistent with the Panel's purpose of selecting the most qualified individuals to act as judicial officers for the community. The Panel generally consists of between 11 and 17 members, of whom two-thirds should be professional organizations and one-third non-professional organizations, defining a professional organization
as one primarily consisting of lawyers and performing activities associated with the legal profession or primarily engaged in performing legal service to the community."

By way of example, in the 1986 Civil Court panel, the organizations of selected members were Project Greenhope, the Women's City Club, Bar Association for Human Rights, a gay organization, the New York State Bar Association, the Metropolitan Black Bar Association, the New York Criminal Bar Association, the Association of Legal Aid Attorneys, the Association of Puerto Rican Directors, the Association of the Bar of the City of New York, the New York State Trial Lawyers Association, and the Association of Black Women Attorneys.

These were the groups that accepted.

Actually, we had invited a number of other groups which, for one reason or another, were unable to make selections, and the membership tends to rotate from year to year.

We try not to keep coming back to the same organizations.

One of our problems has been the lack of any great number of broadly based bar associations to
include as people to be invited.

The New York County Lawyer's Association will not participate because they obtain a tax exemption from the Internal Revenue Service which they interpret as prohibiting them from involving themselves in the political process even in this remote and indirect way.

That leaves us with the New York Association of the Bar and New York State Bar Association as broadly based associations who we can invite.

The Association of the Bar did participate for some years, and then they didn't, and they have again been participating during the last two years.

My partner, Bob Kaufman, is the Chairman, and I think they have found it successful, and we hope that presently the Association will continue their association.

THE CHAIRMAN: How do you respond to the argument which we have heard in hearings last week, that screening committees and nominating commissions really is politics in a different area, that if you change or modify the elective system, you're removing whatever the politics might be before the
change and modification to a new forum, the forum being the screening committee or the nominating commission?

I would be curious as to any comments that you have on the partisan nature of screening committees and what you do, if you do anything, to minimize it.

MR. LEVENSOHN: Well, I don't know that the criticism is so much as to the partisan end of it. Obviously, the independent panel, although non-political in the sense that the members of the panel are chosen by non-political organizations -- we have no control over whom they appointed -- nevertheless, this is part of a political process.

This is a procedure which the Democratic Party chooses to follow in selecting its candidates. Once the screening panel brings out its names, that is, the three for each vacancy, then the political process operates and the party decides which of those candidates it will support.

IN terms of the Civil Court, that simply means the party will support that candidate in his or her effort to get on the ballot by filing petitions and then supporting that person in the primary.
That doesn't automatically mean that that person will be nominated. Last year a candidate who was not endorsed by the panel went into the primary, anyway, and was nominated and elected.

In terms of the Supreme Court, where the selection is made by a judicial convention, at least for the last dozen years, the majority of delegates chosen for the Judicial Convention in Manhattan have been pledged to support the panel process and to limit their choice from among the candidates recommended by the panel.

So that as the process has been working, only candidates recommended by the panel have been placed in nomination to the Judicial Convention, and then, of course, the political process operates in terms of which of those candidates will ultimately be chosen.

As to politicking within the panel, I have heard the charges that it goes on.

I suspect it may, to some extent. I think, in part, that may be because of the inability to rotate the appointing authority sufficiently in terms of what I've spoken of, as to the limited -- in terms of trying to get representation from
black, Hispanic, women's, professional, and so on, organizations.

There is some tendency to keep coming back to the same organizations, and I think when organizations expect to participate every year, they may come to be politicking, and candidates who wish to be considered may politic among those organizations to, hopefully, get somebody on the panel, maybe, friendly with them.

I don't know whether that goes on or not.

In part, I think the answer is the strength of the administrator. The key person on the panel is the person selected as administrator who is a non-voting member, generally an attorney, who has to sacrifice an enormous amount of time, because the panel sometimes has to interview from 40 to 50 candidates either for the Civil Court or the Supreme Court, and in the spring for the Civil Court and in the summer for the Supreme Court.

That means devoting many evenings to the process of interviewing and considering the candidates.

The administrator is the one member who has to be there at every meeting, and it's really up to
him to enforce the Guidelines which require impartiality, which really are intended to disqualify any member of the panel who comes in with a preconceived agenda for any particular candidate.

If the administrator is strong, he generally can detect if there is any effort to bias the panel in favor or against any candidate who would otherwise be considered on their merits and to ferret that out.

If it's a weak administrator, that may not be possible.

One of the problems is, the job is so time-consuming that I don't think anybody has ever served more than once as administrator of a panel.

THE CHAIRMAN: What effort is made to find out about the candidate in terms of if one is a sitting judge?

MR. LEVENSOHN: There is an extremely detailed questionnaire, which I believe we submitted a copy of.

Did we not? It runs to many pages which the candidates are required to fill out before they are required to appear before the panel, listing their entire curriculum vitae, if they are sitting judges,
cases they are involved in.

If they are practicing lawyers, they are supposed to list a certain number of recent cases they have been involved with and who the opposing attorneys were, and so on.

Members of the panel are supposed to be assigned to interview people who are given either as references or people who have been on the other side of litigation so that they can get a picture of what kind of a lawyer the person has been.

If the person is a private attorney or -- if the person is a sitting judge, I believe they interview attorneys who have appeared before the judge to get a reading on how he has performed on the Bench.

I might say that in the case of sitting judges who are up for reelection, the process is slightly different.

It's a non-competitive process, and if the Panel finds that the Judge merits reelection, then only that one name is brought out for that vacancy.

He is not placed in competition with other candidates, but if it is, let's say, a Civil Court Judge seeking promotion to the Supreme Court, he would still be among a group of three for each
vacancy that is being chosen.

THE CHAIRMAN: Thank you.

COMMISSIONER EMERY: Mr. Levensohn, how long ago was this panel established?

MR. LEVENSOHN: Well, as I said, the initial effort to select independent panels was in the mid-1960's.

The rules requiring this as a process by the party organization were early in the 1970's or mid-'70's, I would say, '71, '73.

I haven't had time to go back and check. Did I give that to you when you interviewed me?

MS. SCHACHNER: I believe you said '76.

COMMISSIONER EMERY: I take it you're talking about Manhattan.

MR. LEVENSOHN: This is only in Manhattan -- well, initially -- it is only in the rules in Manhattan, as far as I know.

I don't know whether any other County organization has it. As long as the Bronx and Manhattan were part of the First Judicial District, at least during the latter part of that period, it did control the selection of the Supreme Court
candidates in the First District.

Once the Bronx was cut off into a separate District, they went their own way, and I do not believe they follow any, or, at least, have been following any panel process.

So, at the moment, it's limited to the First Judicial District, and the Civil Court candidates County-wide in Manhattan.

I might say that the District's Civil Court in Manhattan is not directly controlled by the County rules dealing with the panel process. That is a voluntary matter for the District Leaders in the District, as to whether they choose to use the facilities of the County Panel or to choose to follow their own process.

IN the more recent years, many of them have chosen to use the County Panel, so that where there are vacancies in any of the ten Municipal Court Districts in Manhattan, there has been an increasing tendency to have those candidates selected by the Panel.

Some districts continue to prefer to select their own panels, which occasionally has been done.

They are, more or less, on the same model as...
we have been following County-wide, that is, selecting organizations which, in turn, select the members of the panel, and there may be some districts where they just go along with the old system without a panel.

COMMISSIONER EMERY: Let me ask you a couple of questions, and I want to try and limit this to the origins of the panel:

What were the politics behind the change, in other words, how come it happened in Manhattan and not in other counties, which particular County Leader relinquished the power over the selection of judges, that we've heard so much about in other counties, and gave it over, at least in this regard, to the panel, and how did that occur?

MR. LEVENSOHN: Well, I think it happened in Mahattan because this was the one County where the Reform Wing of the party managed to achieve dominance.

COMMISSIONER EMERY: Do you remember who the Leader was at that time?

MR. LEVENSOHN: Well, Frank Rosetti was the Leader at the time the change in the County Rules was effected.
It was before 1967, during the time he was the Leader, but I don't think it was something that he embraced.

I think it was something forced on him because the majority of District Leaders -- even though he had continued as County Leader -- were members of the Reform Wing of the party, which he was not.

But the reform of the judicial selection process had been an article of faith among Reform Democrats for many years.

As I said, the first effort to use a panel was on the East Side of Manhattan where the Reform Club had been in control.

COMMISSIONER EMERY: What happened in 1976, who was the Leader then, and how did it come to reach its present --

MR. LEVENSOHN: I think Rosetti was the Leader until 1977 when Miriam Bachman became Leader after Mayor Koch was elected as Mayor.

COMMISSION EMERY: What happened in 1976 to have this panel reach its present form where three candidates emerge?

MR. LEVENSOHN: Well, I think the rule establishing a panel that would bring three names...
for each vacancy was earlier than 1976.

It was earlier, either '75 or '73. Did I give you anything to indicate exactly when that was?

MS. SCHACHNER: We discussed yesterday early to mid-Seventies.

MR. LEVENSOHN: I mean when I was interviewed before.

COMMISSIONER EMERY: But the fact is, that the party has never acceded to that to the degree that it does now, until the mid-Seventies, acceded to the extent that they have committed themselves not to elect or nominate anyone but one of the three?

MR. LEVENSOHN: Well, I might say, as I said, I think it was before -- at least not later than 1975 that the New York County Organization adopted these rules.

That has controlled the selection of Civil Court Judges, at least County-wide, from that date forth.

As far as the Supreme Court is concerned, initially we were locked with the Bronx. The Bronx did not adhere to this process, so there was a battle as to who would control the process.

The Manhattan delegate might support candidates
reported out by the panel, the Bronx delegation might not, and how the majority would come out would depend on the break in terms of the Reformers and Regulars in the Convention as a whole.

I think 1976 was the first time the Reform judicial delegates from both Manhattan and the Bronx achieved a majority in the Convention and were able to select a full slate of panel-endorsed candidates as the candidates for Supreme Court in that year.

Of course, once the Bronx was cut off, that problem was no longer present, and from whatever date, the First Judicial District became limited to Manhattan, which I guess was about a half a dozen years ago.

The selection of Supreme Court candidates in the First District has been wholly as a corollary of the panel process.

THE CHAIRMAN: Are there any other questions?

MS. SCHACHNER: Yes, I have a couple.

Would it be fair to say that if we stay within the context of the elective system, that you would be in favor of some type of statutorily imposed prescreening before names are placed on a ballot in a general election?
MR. LEVENSOHN: Yes, I would.

Obviously, the traditional organization, from all experience, will resist this kind of a process, which clearly takes away from party leaders a great deal of control over the method by which judges are chosen.

We have been able to achieve it simply because of the dominance of the Reform Wing of the party.

Despite a third of a century of effort, we have not been able to achieve dominance in any other County in the City and, certainly, nowhere else.

Short of Constitutional change, which it might require, I don't see that the process is likely to be adopted in the near future anywhere else.

I think it has worked well in Manhattan. I think it has certainly increased the representative nature of the Bench in terms of minorities and in terms of women.

I will just quickly look at some statistics. I only have the Green Book from two years ago, so it's not completely up to date.

But just in terms of the number of women on
the Civil Court, out of 52 Judges of the Civil Court in Manhattan as of two years ago, 33 percent were women.

Out of the 33 members in Brooklyn, only 18 percent were women.

And in the Bronx, only one out of 16 was a woman.

In Queens, only one out of 25 was a woman.

In Staten Island, four were men.

So there's a very dramatic difference in terms of the number of proportion of women on the Civil Court, at least, and I think it is generally -- proportions are similarly different on the Supreme Court as we have moved people up from the Civil.

I might say, also, that since we have been using this process, I don't think anyone has gone on the Supreme Court directly from private practice, but it often did happen in the old days.

But we have turned this into more of a -- as part of the merit selection process, we have used -- the pool of candidates that we have chosen from for Supreme Court has been wholly limited to sitting Judges of the Civil, Criminal and Family Courts, and I think that's desirable, because it
means that you're making Supreme Court Justices from persons who have already had to prove themselves as judges.

THE CHAIRMAN: Thank you very much, Mr. Levensohn.

MS. SCHACHNER: Thank you.

THE CHAIRMAN: The Commission calls Supreme Court Justice Frank Torres from Bronx County.

Good morning, your Honor.

JUDGE TORRES: Good morning, Mr. Feerick.

THE CHAIRMAN: It is nice to have you with us.

JUDGE TORRES: It is nice to be here.

Mr. Feerick, I had prepared what I considered to be essentially a short statement, and if there is no objection, I would read it, unless you have other procedures that would dispense with the reading of the statement.

THE CHAIRMAN: I suspect there probably will be some questions from the Panel here.

Maybe I just would suggest that you synthesize it as you go through it and give us a little more time on some questions.

I'll leave that in your hands.

JUDGE TORRES: I think that I can possibly
summarize it.

First of all, I would like to make sure that it be allowed to be incorporated as part of your record.

THE CHAIRMAN: Absolutely.

(The following is a prepared statement written by Justice Frank Torres, dated March 9, 1988.)

"STATEMENT TO COMMISSION ON GOVERNMENT INTEGRITY:

"I thank the Commission on Government Integrity for the opportunity to be heard on the subject of judicial selection. I focus my remarks on the question of which selection process contributes most to make our judiciary representative, i.e., inclusive of minorities, and particularly the Hispanic segment of our population.

"New York State, and New York City in particular, has a gigantic Hispanic population.

"There are more Puerto Ricans in New York City than in San Juan, the capital of the Island of Puerto Rico. There are persons of Cuban, Dominican, Mexican and other Hispanic descent numbering in the hundreds of thousands.

"New York is one of the three principal areas
of Hispanic concentrations in the United States mainland. Hispanics make up 40 percent of the case-load of the New York City Criminal Court, of the Family Court, of the Civil Court, and of the Supreme Court.

"A review of the daily calendar of any sitting judge in New York City, whether it be a City, State or Federal Court, evidences the Hispanic presence and the extent to which this minority constitutes the workload being serviced by these courts every day.

"If we review the corresponding judiciary that presides in these courts, we find that there are:

"Approximately: 100 Criminal Court Judges.

"40 Family Court Judges.

"10 Civil Court Judges.

"175 Supreme Court Judges.

"50 Court of Claims Judges.

"6 Surrogates.

"85 Federal Judges and Magistrates.

"For a total of approximately 650 Judges.

"Of this number, there are only 16 sitting Hispanic Judges, a pitiful representation, hardly
reflecting the size of the Hispanic population itself. A cursory review would distribute the Sitting Judges as follows:

"0 in the Criminal Court.
"2 in the Family Court.
"3 in the Civil Court.
"7 in the Supreme Court.
"4 in the Court of Claims.
"0 Surrogates.
"0 Federal Judges and Magistrates.
"Total - 16.

"We could conclude that the Hispanics are either not seeking judicial positions, or that if they are seeking them, they are not succeeding in getting appointed or elected, depending upon the applicable process.

"It appears that what inclusion is being achieved can be credited to the merit selection process.

"It is significant that of the mere 16 sitting Hispanic Judges in the New York City area, at least 13 of them, or 80 percent of them, became judges initially by virtue of the merit selection process, in most instances, the Judiciary Committee
of the Mayor of the City of New York.

"Of 7 readily identifiable retired judges, all 7 also reached the judiciary through the merit selection process of the Mayor's Committee.

"My survey of the 16 sitting Hispanic judges, based on my personal familiarity with them, through association of many years, and my relationship with them as Secretary/Treasurer of the Association of Hispanic Judges, leads me to the conclusion that 13 of the 16 sitting Hispanic judges did not have political networks and connections, and that they achieved being appointed to the judiciary in spite of their lack of political connections.

"Of the 7 retired judges considered, 3 had no network or political connections.

"I conclude that what inadequate representations the Hispanic segment of the population has achieved is due principally to the merit selection process which minimizes political network and connections.

"I would say that without the merit selection process, Hispanic representation in the judiciary would be non-existent.

"Though it would appear that this justifies an
endorsement of merit selection, as the process to
provide for opportunity and increase of Hispanic
representation in the judiciary, I must point to
that process as being in place and responsible for
the total absence and exclusion of Hispanics from
the Federal judiciary in this area.

"Though there are an estimate 85 judicial
positions in the Southern and Eastern Districts, not
one is filled by a Hispanic.

"The merit selection process which calls for
recommendations by the two United States Senators
from New York, and the consequent nomination by the
President, has been in place for generations.

"The merit selection process has been employed
to exclude Hispanics from participation. It has
been employed to nurture and perpetuate that status
of de facto exclusion.

"The Senators of New York have never found
one Hispanic lawyer or Judge to be worthy of
recommendation to the President for nomination to
fill a Federal position.

"Many Hispanic lawyers have been recommended
and appointed to the Federal judiciary in other parts
of the Country, especially in the Southwest of the
United States. The Senators of the State of New York, and the merit selection process have not served to meet the aspirations of Hispanics of this State.

"Thank you."

(End of prepared statement of Justice Torres.)

JUDGE TORRES: Essentially, my appearance before you is from a very narrow perspective in the sense that I'm not treating all the issues of the judiciary, quality and everything.

I'm more specifically concerned with the extent to which the processes allow the judiciary to become representative, and, more specifically, representative of the Hispanic population of the City of New York, not only the City, but also beyond the City, also outside of the City.

The statement that I have prepared puts our presence within the judiciary in somewhat of a perspective in the sense, for example, that it lists the fact that if you were to add all the judiciary positions that exist within the City of New York, including the Federal, that there are approximately 650 positions, of which the Hispanic population only is filling 16, so that what processes have existed up to the present has allowed
development of participation only to that extent. Now, of those 16 that are sitting judges, almost all of them with only two or three exceptions, became judges through the process of having to appear before a committee, in most instances, the Mayor's Judiciary Committee, and being selected on what he thinks should be properly called the merit selection process.

The two or three exceptions, and I think that they are principally in the Bronx, would represent individuals that did not go through that process but were nominated through the political process and that are now sitting judges.

Reviewing the judges that had previously served, Hispanic Judges that previously served or are presently retired or who have died, I can state that my review of those individuals, those persons, also puts them in the same category as essentially have entered the judiciary through the panel merit selection system and, principally, that of the Mayor, and then proceeding from the initial appointment to whatever other positions they were either promoted to by appointment or by election.

Now, the political process which is in
existence in Counties like Brooklyn and Queens, have not resulted in the entry of any Hispanic into the judiciary.

However, there are judges sitting in those Counties, and they are sitting in those Counties by virtue of having been appointed through the Mayor's Judiciary Committee.

So that if you analyze the extent to which positions have been gained, essentially it reflects the opportunity presented by the merit selection system, not by the political process of nomination and election.

Now, I, myself, entered the judiciary through the merit selection, through the Mayor's Judiciary Committee, and I can say, without any doubt whatsoever, that I did not have at that time the necessary political connections, or what have you, to have gained entry into the judiciary if it had not been for the Mayor's Judiciary Committee, and I would say that that applies to most of the Hispanics.

So that it would tend to point to the merit selection system as the system that provides opportunity rather than that of the political process.
It would almost be logical for me to say that this would be an endorsement of that process.

The exception, and the point that I have to make, however, is that that same merit selection system is in effect for the selection of Federal Judges and the Federal Magistrates, et cetera, and, in the history of this area, there has never been, as far as I know, a Hispanic Judge sitting in the Eastern District or the Southern District on the appellate levels or magistrate positions, and that reflects on the process and, apparently, those that utilize the process, the United States Senators, et cetera, State Senators, et cetera, have not seen fit to give recognition to any Hispanic lawyer or Sitting Judge, to nominate him.

That's an example of where the system has not worked for the benefit of Hispanics.

MS. REMES: If I could, I would like to turn you for the moment to your own personal experiences with the judicial selection process.

Maybe you can begin by telling us a little bit about your background prior to becoming a judge, and then, in greater detail, how it was that you came to sit first as a Family Court Judge and then
later as a Supreme Court Justice in the County of Bronx.

JUDGE TORRES: Well, as a younger person, I was active politically in the Bronx.

I came to be identified as part of that form of politics that is sometimes referred to as Reform.

I was essentially seeking greater representation for minorities, and that categorized me in the Reform because I was opposing the organization, and approximately twenty years ago, I was successful, as well as unsuccessful, and after having been unsuccessful, I decided to withdraw from politics itself in the Bronx because I felt that it simply did not provide me any opportunity.

That was after I had been an Assistant District Attorney through the regular political organization and after I had been elected to the Assembly as a Reform Anti-Organization Candidate.

But, having been defeated for reelection, I withdrew from politics in the Bronx.

I recognized that there was no opportunity, no chance that I might be able to successfully pursue a political career and, certainly not a
judicial career.

My father had been appointed a Family Court Judge by the then Mayor Wagner, so I had a sense that a Hispanic could be a judge.

I had that example, but I didn't think that there was any chance for myself.

I left the Bronx. I became active in Government service. I worked for the United States Government in the United States Department of Housing and Urban Development for almost twelve, thirteen, fourteen years, and by so doing, I had removed myself from the scene of the Bronx.

I had cut off all political affiliations and ties, and I became what might be considered somewhat antiseptic as a political entity.

I no longer had any identification as being politically one side or the other.

After having been away from the Bronx for about twelve years or so, I did apply to the Mayor's Judiciary Committee for consideration for appointment to the Family Court, and I was selected, and I was appointed.

Now, I have no doubt whatsoever that had that been more political in the sense that I would have
had to have the endorsement of the political structure, that the appointment would not have been forthcoming, and I had a sense that selecting me was principally to fulfill an agenda that the City Government had to try to make the judiciary more representative.

I had qualifications, they needed Hispanic judges and, in turn, therefore, the two things coalesced, so I was made a Family Court Judge.

After that, I served, as most Family Court Judges serve, in different capacities.

I was switched to the Criminal Court briefly, and then when the law was changed which allowed Family Court Judges to be designated Acting Supreme Court Justices, I was designated an Acting Supreme Court Judge.

I was one of the first two or three that was so appointed.

I would say that that designation as an Acting Supreme Court Judge reflected an attitude which I sensed from the administration of the Courts, of the Office of Court Administration, to bring more Hispanic presence into the Supreme Court in the Bronx.

So, I was designated an Acting Supreme Court
Judge, and I served in that capacity for two years.

In the meantime, I realized that a fully elected Supreme Court Justice was possible and I was examining the road to the nomination and to the election as a Supreme Court Judge.

Without being specific as to all the details and all the manipulations and all of the involvements that one has to get into in order to make the political connections to influence those that you recognize are key towards the development of support at the Judicial Convention, I did everything that had to be done in 1987.

I attended every single gathering, every kind of activity that established me as a candidate, and contacted and spoke with every person that I considered to be essential towards providing support at the Judicial Convention in 1987, and I did so successfully, and that's the reason why at the Judicial Convention, I was able to gain the nomination, and the nomination, of course, was tantamount to election.

I don't know if that answers your question.

MS. REMES: If I can just go back and ask you some specifics about some of the things you've
said.

You went to previous Supreme Court Nominating Conventions?

JUDGE TORRES: I was under the impression that nominating conventions were open, that there was actually a chance that you could go in and present yourself and, possibly, come out of the Convention.

So I did go in, I think it was in 1984 or so, and I presented myself, naively, very foolishly, and one of the Leaders of the Bronx in the Reform Movement offered to nominate me, and I was delighted that he should do that, because we hardly knew one another, but he needed a candidate, and he nominated me, and as the nominations were taking place, I realized that the Convention was totally and completely controlled, following a script, and that was the convention which resulted in the ouster of Judge Sullivan and another judge whose name I don't remember.

THE CHAIRMAN: Kappelman.

JUDGE TORRES: Kappelman, right, and the nomination of others in their place.

Once I realized what was taking place, that
the situation was a completely political controlled situation, when my name was put into nomination, I immediately withdrew my name.

I declined the nomination because I realized that considering me was not part of the script and that I would have been eliminated just as effectively as Sullivan and Kappelman were, but what would be worse is, that I would incur the hostility and enmity of others that were there who could, possibly in the future, favorably considered me.

So, I declined, I withdrew, and that was the end of that.

Then I recognized that in order to get the nomination, I would have to meet people within the political process that would ultimately give me the necessary support in order to get what I accomplished in 1987.

MS. REMES: Did anyone ask you to withdraw your name?

JUDGE TORRES: No. I was not asked to withdraw, but I did, and, actually, I was -- I received all kinds of favorable responses to the withdrawal because it avoided conflict that they would rather not have had, and it still maintained
me as a viable future candidate.

MS. REMES: Favorable responses from District Leaders?

JUDGE TORRES: From political persons.

MS. REMES: Can you tell us a little bit more about the specifics of the process of getting to know, as you put it, who the "whos" are in networking the community as well as the political leaders?

JUDGE TORRES: Well, I recognized that the convention I think, has a total of about 65 delegates that ultimately cast their votes.

You know where they come from. They are divided among Assembly Districts.

You know who the Assemblymen are in those Districts, you know who the District Leaders are, so, actually, you are able to calculate that there are a few dozen key people who control those delegates and who control the outcome of the convention.

The important thing is to identify those people, is relating to those persons that make you acceptable, et cetera.

I did make that analysis at the beginning of 1987.
I calculated who they were, and then I made
the necessary appearances at different kinds of
functions, not necessarily purely political
functions, because political clubs and political
functions themselves are not as frequent and not
as popular as they were many years ago, but, rather,
they are social activities where those people
participate, and you relate to them, and you
recognize that this is a must that you have to
experience in order to get their support eventually.

MS. REMES: How did you feel about having to
go through this process?

JUDGE TORRES: Well, it is not a pleasant
experience having to attend so many socials, and
there are expenses, incidentally, in attending these
socials, and the time that it consumes, and
recognizing that you are subject to the whims, and
everything else, of people that are not lawyers,
they are not judges, who are purely essentially
political persons.

But I did these things, as was necessary,
because there is no alternative. That is the
political process, and either you go through it and
do it or you cannot expect to be nominated.
I did not enjoy it, but it was necessary to do it.

THE CHAIRMAN: Did it take away from your judicial duties since at the time you were a sitting judge?

JUDGE TORRES: Well, it doesn't interfere with your daily work, but it certainly takes up a lot of your energy, your time.

You cannot help by pay the price of that kind of activity. It has an effect on you, there's no question about it.

COMMISSIONER EMERY: Let me ask you a little bit about some of these politics in the Bronx, because I, for one, am fairly naive in these matters and, undoubtedly, through -- by necessity, from the necessity you described, you've had to go through a good deal of politics in the Bronx.

To what extent, as a Reformer, did you have to deal with the entrenched political powers that existed in the Bronx to obtain your nomination?

JUDGE TORRES: First of all, I'm not identified as a Reformer at the present; I may have been twenty years ago.

COMMISSIONER EMERY: You were in the past?
JUDGE TORRES: Right. I think that the current identification would be essentially that of an antiseptic judge who has no specific identification. As far as having to deal with the entrenched and non-entrenched, absolutely.

COMMISSIONER EMERY: You did?

JUDGE TORRES: They are the forces and entities that control.

COMMISSIONER EMERY: One of the more notorious and well-known Hispanic leaders in the Bronx is Ramon Velez.

To what extent you have knowledge of him playing a role in the selection of judges in the Bronx?

JUDGE TORRES: I would say that Ramon Velez plays a very important role because he is a charismatic leader that generates -- not support -- he stimulates movement and he's influential.

He is influential. I would say without his support, it would be very difficult to be nominated.

COMMISSIONER EMERY: Would that be true for a non-Hispanic as well as an Hispanic?

JUDGE TORRES: I would say so, because the
Bronx has been developing with a very large Hispanic population and, therefore, a large corresponding political segment and political force.

Who influences that force and who gives direction to that force and who is able to negotiate and utilize that force is very important.

I would tell you that even though he is criticized, and sometimes looked upon in a negative way, his attitudes in terms of gaining representation for the Hispanics is very sound and it certainly can be helpful to me and was.

COMMISSIONER EMERY: Can you describe what role he played in the process of your obtaining a Supreme Court Judgeship?

JUDGE TORRES: Well, for example, he indicated his personal support, which in and of itself, has a certain persuasive value with other Hispanic leaders and has the effect of solidifying and coalescing Hispanic forces, you might say, which then becomes a force that has to be dealt with and has to be negotiated with.

He, himself, is not a delegate, I don't think he is, and he doesn't even think he has a political position in and of itself, but his persuasiveness
and his influence, I think, brings a lot of Hispanics together.

If the Hispanics as a group did not politically express themselves as a group, it's not likely that you would have Hispanic candidates emerging in the Bronx because it would be some other group of some other segment that would be doing that.

COMMISSIONER EMERY: Is there any other Hispanic politician in the Bronx who has the sway and force and clout of Ramon Velez in this process?

JUDGE TORRES: Well, my opinion is, that there is no other person, but that doesn't mean that there are no others that are developing.

I think there is an emerging new leadership in the Bronx in the person of the Borough President, for example, who will be very influential; he will be a force in the community and he will also be very persuasive.

MR. O'BRIEN: Justice Torres, at the outside, you mentioned two goals that you were eager to advance.

One was merit selection and the other was increased representation for minorities, such as Hispanic Judges.
Aren't there situations where those two goals come into conflict or tension, and if so, which has to give?

If, for example, playing party politics would increase the number of Hispanic Judges, who could get nominated and, therefore, elected in the Bronx, would you be in favor of that system in dealing with people like Velez, or even under those circumstances, do you still favor a merit system which takes the selection of judges out of the hands of political leaders in the Bronx?

JUDGE TORRES: Well, I'm trying to see the picture in a larger scope, and I'm trying to not just think in terms of the legal judicial aspect, but the total social aspect, and perhaps I can call it "social justice," and distinguished from "legal justice."

I don't believe that having a system, for example, that has forty or fifty Family Court Judges, and you don't have one, or maybe you only have one or two, I don't believe that that's appropriate, for so many reasons, and I favor any process that will bring in an Hispanic to that Court.
So, I'm not trying to compromise with quality, but the presence of Hispanics in the judiciary is crucially important and that to me is much more important than going after the greatest legal mind.

Let me just say that increasing the number of Hispanics within the courts, I think, is of the greatest importance.

MR. O'BRIEN: Would it be your position, then, that if the Hispanics could gain control over the Bronx Democratic Organization, that you would be in favor of keeping that machine in place for the selection of Supreme Court Judges?

JUDGE TORRES: First of all, I don't think that they will gain control, because even though numerically they may be the largest population, which they aren't, but assuming that they were numerically the largest population, all the other social factors that are involved in terms of education, lack of resources and everything else, will not give them control.

They will not have control of the Bronx. They will always be negotiating.

As long as the political process continues,
they will simply be negotiating for a slice of the pie.

IN the Bronx, that's where they have been most successful, and all we have succeeded in doing in the Bronx is to gain three or four or five judgeships out of approximately 65 that are in the Bronx, but in other Counties, Queens and Brooklyn, they have zero.

So I'm not convinced that the political process is to be counted on for the benefit of progress for the minority.

It just has not happened. We have had it all these years and it hasn't worked for us.

THE CHAIRMAN: Judge, you're in, I guess, the first year of a 14-year term; is that correct?

JUDGE TORRES: Yes.

THE CHAIRMAN: Has it ever entered your mind, since you started your term, that 13 years from now you will be in a political process once again, has that been a subject that you have reflected on since you started the term?

JUDGE TORRES: No. I don't have to. By the time that my term ends, I will be required to leave the Court, to retire, so that's not a problem.
THE CHAIRMAN: I see.

JUDGE TORRES: But, assuming that it were, assuming that I were only 50 years old and I would have to go for reelection or reappointment or whatever, I think that our situation -- now I'm talking about the Hispanics -- our absence from the Bench and everything else, requires that some of these things be said and put on the table.

Even though I may not have the solution or my suggestion may not be the best one, but I think they should be discussed, and I think someone has to discuss them, and I'm not hesitating to discuss them, notwithstanding the fact that one year or fifteen years from now I have to suffer the consequences.

I think that our situation is a pitiful -- it's pitiful.

THE CHAIRMAN: I was trying to draw you into a discussion as to the subject of a judge who has served credibly for 14 years being denied renomination or redesignation as a result of the political system.

JUDGE TORRES: I don't think that's proper at all. I don't think what happened to Judge Sullivan
and the other judge was appropriate.

I believe that once a judge has established himself or herself as performing properly on the Bench, regardless of what party he's from, or whatever, that Judge, in my opinion, should be allowed to continue on the Bench, and politics should not be allowed to remove him or her.

THE CHAIRMAN: Would you still hold that view if the reason for the political decision was to expand that minority representation?

JUDGE TORRES: Yes, yes, I would.

I do not think that we should put in a minority person at the expense of removing a sitting judge that is performing properly, I don't think so, because it's not necessary.

There are so many opportunities that will present themselves year after year for increasing the number that you don't have to do it at anyone's expense.

I think what was done in the Bronx, and I have no hesitation about saying it, was totally inappropriate.

THE CHAIRMAN: You, obviously, familiarized yourself last year, certainly, with the rules of the
Office of Court Administration about the partisan activities of judges, sitting judges, seeking higher judicial office.

Do you have any views on those rules that you would like to share with us, weaknesses that you see or aspects of the rules that you think should be reconsidered?

JUDGE TORRES: I don't have any views.

I have the sense that the rules are sufficiently broad or flexible to allow a judge to do what he has to do and to associate and relate, et cetera, adequately.

I don't think that during the course of my own experience that I had to do anything or participate in anything that was inappropriate and that was outside of the rules.

So that the rules, I think, are adequate.

THE CHAIRMAN: Another member of your Court who testified a little bit earlier today gave some testimony with reference to the process of hiring law secretaries and made some comments about the secretaries being hired through the operation of the political system.

I don't know if you have any comments on that.
JUDGE TORRES: I don't favor that at all.

I think that a judge should have total freedom to select. I don't like the idea of having any organization, regardless of what it is, political or otherwise, believe that they can impose a secretary upon me.

And, another reason for feeling that and believing that is, that by my having the freedom, I then have the opportunity to select, also, more minorities into the court system.

The system, the profession as it exists, does not have the minorities present in sufficient number in any category, in any level.

I want to help integrate the court system. I want to be able to make it really more representative so, therefore, I want to hire a minority person because I know there are minority persons out there that can do the job.

If I were to accept the recommendation of a political organization, the probability is that it will not be a minority person because minority persons are not politically -- sufficiently politically involved to earn through their service, and otherwise, that recommendation so I will not get
THE CHAIRMAN: What process have you followed in the selection of your secretary?

JUDGE TORRES: By inquiring of different people and indicating what my preference was, that I wanted to have a minority person, as to who the people were that were available, and that gave me the opportunity to review potentials that were in the District Attorney's Office, that were in Legal Aid, that were in private practice, and what have you, and that allowed me to make the selection and then after having made the selection, I found out that out of X number of judges, I was the only one that had a minority law assistant.

Of course, that's not true today anymore. But it just allowed me another opportunity to make progress.

I have spoken, for example, to Assistant District Attorneys and the Legal Aid lawyers who are thinking of leaving their respective offices because they are tired, they are burned out, et cetera, and I've asked them, "Would you consider being a law assistant," and they won't because it's not part of the culture, to expect that you can
be a law assistant, because there aren't enough minority law assistants around.

This is what we have to do. We have to let them know that the doors are open, they can consider that, and they can do very well.

MS. ARCHER: Your Honor, turner your attention back to the appointive system, one criticism that has been lodged against the various screening committees and nominating commissions is that they have too little minority representation, and I wondered whether you had any views on this subject.

JUDGE TORRES: It's true. I have made it a point during the years that I have been a judge to make myself available to almost any panel or committee considering persons and qualifications. I have appeared before the Trial Lawyers and associations of the Bar, and what have you. I have noticed the fact that minorities are not present very often on those panels.

Interestingly, I have also appeared before the screening committee of Senator D'Amato and Senator Moynihan, because it is part of our effort to see that one of us will be nominated for the
Federal Court.

I have appeared before these panels of magnificent panelists and magnificent lawyers, but there's never a person from a minority there.

I think the exclusion of a minority person from that panel takes away a certain ingredient that should be present.

I don't think that so many panels are sufficiently representative.

But, I've also appeared before panels, the combined Bar Associations, and things like that, where they are very represented.

So, there are just a few select panels which have been exclusive, and I don't think that's appropriate.

THE CHAIRMAN: I want to thank you very much for your participation in our hearings.

We are now going to recess for lunch and we will resume at 2 o'clock.

Thank you very much.

JUDGE TORRES: Thank you.

(Time noted: 12:45 o'clock p.m.)

(Luncheon recess taken.)
THE CHAIRMAN: The Commission is very pleased to call as its next witness Archie Spigner.

COUNCILMAN SPIGNER: Good afternoon, Dean Feerick and Members of the Commission.

MS. ARCHER: Good afternoon, Councilman Spigner.

THE CHAIRMAN: May I introduce Commissioner Emery.

COUNCILMAN SPIGNER: Good afternoon, Commissioner.

MS. ARCHER: Councilman, could you perhaps begin by describing for us, generally, the role that a District Leader plays in the judicial selection process, and in greater detail, your experience in that process as a District Leader in Queens?

COUNCILMAN SPIGNER: In the Borough of Queens -- I can't speak for the other boroughs -- the District Leader's role is, I think, as one of a sponsor of an aspirant for the judiciary and in that regard, the District Leader would submit his or her candidate's name to the County Leader for his support, and then nominate this candidate either at the caucus of District Leaders...
where the selection is being made by the -- the District Leaders nominate, in Queens County, the organization's candidate, whether it be for judgeships or for legislative posts.

That's the political process in Queens County. District Leaders are the ones to give the party's designation through the Queens County Democratic Organization.

It may very well be similar to the processes in the other boroughs, but specifically in Queens County.

And then after you nominate, make your speech, then after -- if you're successful, then that's the -- it is assumed once you're nominated in Queens, with one notable exception, you'll be elected.

Insofar as the Supreme Court is concerned, you make your recommendations to the County Leader, and then at the judicial convention, you make the speech and do all of the campaigning that you can to garner support for your candidate.

In Queens County -- I want to speak specifically as a black District Leader who has worked with black judges or candidates for judgeships--
we have not lost a borough-wide, a borough-wide race since we started electing -- or nominating black judges.

So, it is based on that experience that it is plain that the organizational aspect, political organizational aspect, does prevail.

I don't know whether we would be as successful running for, maybe, Borough President or District Attorney, but it is the same -- it's the same borough-wide constituency.

It would be interesting if we could get a black person nominated for District Attorney on the Democratic line, or Borough President on the Democratic line and win those positions.

MS. ARCHER: How do you determine whom to promote to the County Leader as a possible candidate for a judgeship?

COUNCILMAN SPIGNER: Well, it's based on friendships, relationships built up over the years.

For example, there's a young man that goes to my Church who has been -- I've known him since he was a Little Leaguer, so now he's a lawyer, and he also belongs to my political club, and I sort of look to the day when I will be able to
nominate him for a judgeship, you know.

So, that's a particular personal relationship.

If you run out of friends, then you look to see other considerations.

You don't hardly run out of friends before somebody else comes up with a friend, and rather than take another opportunity, you may have to step aside and let somebody else put forth their candidate.

Obviously, the only requirements that I know of for being a judge and I may be wrong, is having been admitted for ten years, and I don't even know of any other objective test besides that.

I don't know of any other official requirement, I guess.

So if you have been admitted to practice and you are without any experiences of a negative nature, I assume that on the face of it, that qualifies you to become a judge.

MS.ARCHER: You mentioned that there are other considerations that come into play other than friendship, sometimes.

Is the political background of the person you sponsor relevant to whether --
COUNCILMAN SPIGNER: Sure. Sure. When I say "the political background," you know, there are not that many judgeships open on a regular basis that you have the opportunity to focus objectively without some substantive considerations.

If you have the opportunity to get the support of the organization this year, it could be several years, given -- especially if it's a County-wide post, and there are 64 District Leaders, chances of it coming back to you before you have someone that you're really interested in, you know, is rather limited.

So I haven't had the opportunity to look at other considerations other than, hopefully, that the guy that I nominate, that we nominate, because it's a club process -- you have to remember, District Leaders do not operate in a vacuum.

They have a family, and that's a clubhouse, you know -- if that's not a bad word -- they have a clubhouse which they have to respond to, and you just can't maintain the support of your club if you do not reward or have some basic relationship to your judgement as to how it affects the club and its posture and position.
MS. ARCHER: When you're talking about the club, are you talking about a local Democratic Club?

COUNCILMAN SPIGNER: A local Democratic club, and most District Leaders, male and female, have a clubhouse.

You're not very successful if you don't have a club, because that's your gang, you know, that's your family, your supporters.

MS. ARCHER: Are you saying that the candidates that you sponsor are members of your club or members of some local club?

COUNCILMAN SPIGNER: Well, sometimes. Yes, I would think so.

We nominated Judge Rutledge because -- he was a member of the club, he was a peripheral member of the club.

I think he came at a very fortunate time in the process because we had an opportunity to name the Fourth Judicial District, as some of you may or may not know, covers that part of Southeast Queens, which is predominantly black, and so now we just look to the fact that it will be a black person who will be occupying those two posts when
they come up.

Our club concluded that Richard Rutledge, based on his long years as a practicing lawyer on Linden Boulevard, practicing mostly civil law, leases and closings and contracts and all of the Wills and divorces, and all those other things that he could do sitting in his office -- he had become sort of like a mainstay in the community, but we did have to run a primary, because Albert Grant, even though he was successful in getting the designation for Richard Rutledge, because the County Leader decided to go with us, Albert Grant gave us a primary and we had to win the primary.

We went out in the street, and the people in their wisdom supported Judge Rutledge.

MS. ARCHER: You described a few minutes ago a rotation process of sorts on the part of the County Leader or the Party Leader for allocating judgeships.

You said that you don't put forward a name every year because your turn only comes up every few years.

Is that an accurate portrayal?

COUNCILMAN SPIGNER: I think it's balancing
the equities.

You know, a County Leader, he has to have the support of the majority of the 64 Leaders to get elected, so in order for him to maintain his support system, he has got to satisfy the broad-based -- the majority of the leaders.

Now, before we elected black Leaders in numbers, we had no black judges in Queens County. There were no black judges.

The population was basically the same.

We elected our first black judge, I think it was in 1964, maybe '65.

Kenneth Brown was the first black judge elected to Queens County, and we have the damndest fight trying to get a Supreme Court, because the County Leader just had no need to relate to the one or two black District Leaders.

But now that our numbers have grown, while we are now only 12 out of 64, when we combine and coalesce with others -- for example, when Tom Manton was elected, it's well known that when he was looking for one and two and three votes to build his majority, when the 12 black District Leaders got together as a group and said, "We are going to
Tom Manton in," that put Tom Manton over the top.

So, Tom Manton, you can be sure, like all
people who are part of the political process, will respond, and we expect him to respond to our concerns where it relates to judgeships.

Judgeships for a political club, you know, is not a patronage position as such.

There are no jobs attached to it. After they become judges, I'm informed by the judges, that rules and regulations prohibit them from donating or purchasing or buying or attending or participating, and they are removed.

So there's just nothing really tangible to be gained for a political club in a sense.

If you go to the Mayor to appoint a Commissioner of the Department of whatever, secretaries and assistants might flow, but nothing flows from a judgeship other than that I see the need, you know, as a political club, that we have to fight for black political involvement, black political involvement.

We have nowhere near our proportionate share of black judges.

I don't know what the number is in Civil Court,
or whatever, but I can name the black judges in Queens County.

The Eleventh Judicial District must have 30, 40 Civil Courts. We have got less than 10 percent, less than 10 percent of Civil and Federal and Supreme Court, and the population in Queens is conservatively acknowledged to be 20 percent, some would say 25 percent of the Borough of Queens.

So we are not getting out our share.

So, black leaders, political leaders, have to fight for judicial posts because that's an essential part of the triangle, and if we don't do that, then we are to be criticized, and justly so, for not fulfilling our responsibility in that area.

MS. ARCHER: You said that the black leaders have to fight to get more blacks on the judiciary, and I wonder if you could describe for us what you do, how you go out and address the County Leader or other District Leaders to encourage the party's endorsement of your candidate.

COUNCILMAN SPIGNER: Well, it makes no sense to speak to other District Leaders because the District Leader by himself or herself, doesn't have the votes.
As it relates to the Supreme Court, the Judicial Convention is the only way to get on the ballot, and I don't know what the number of votes in Queens County is, 125 or 130, or something like that.

So the County is divided into 16 Assembly Districts, which are divided into Part A and B, and the vote -- the amount of delegates in the Judicial Convention, I think, are allotted on the basis of the votes in the Gubernatorial election of the past whatever, whatever, and that's how you get your number.

So in the 29th Assembly District, Part A, we might have a total of five delegates and four alternates.

All right.

So, five delegates and four alternates doesn't go very far, even if you pick up the rest of the black leadership, and they all have five or four, because most of our Districts are heavily Democratic, and so the Democratic candidate gets the majority of his or her votes in those areas -- we went with the Republican Party for a long time, until it became a choice of eating or staying with
whoever, so we went with Roosevelt, and we have been Democratic, in the main, ever since.

So what I did with Ken Brown year after year after year at the Judicial Convention, I would get on the floor, I would pass out his resume.

I know that it was just a motion. I would mail his resume out to all of the judicial delegates.

I would get the list of names from the County organization or from the Board of Elections.

I would say, "Dear Delegate: I'm pleased to submit for your consideration Judge So-and-Such who has been sitting now as a Civil Court Judge, and prior to that, blah, blah, blah, so forth and so on. I'm appealing for your consideration, et cetera, et cetera, et cetera."

And then I would get up and make my speech and they would go home, because sometimes we would pick up 20 votes and sometimes people who were mad at the County Leader, they would vote against you, and so -- but then, as we elected more black leaders and more black delegates, we started seeing that we recognized on a more regular basis.

MS. ARCHER: But just pursuing this in a little
bit more detail, how do you persuade the County Leader to recognize you, to endorse your candidate; what do you say about the candidate, if anything?

COUNCILMAN SPIGNER: Well, there are very few County Leaders that do not know a judicial candidate, because rarely do you get it on the first time that you're nominated.

Oftentimes, when I don't have -- you know, I know it's not my term or I know I'm not going to be successful, I will mail the resume around, I will make the speech, and then in the interest of harmony or whatever, I'll withdraw his name and say we will be back next year, you know.

Very rarely does a guy come out of the blue who is unknown to the County Leader or to the other Leaders as well.

MR. O'BRIEN: Are trades made, Councilman Spigner?

And that may be a bad term. In other words, it's implicit or explicit that if your candidate is supported for a judgeship, that you'll have the District Leader's or the County Leader's support on some other issue, is that part of the general political process, in other words, or are judges
treated a special way?

COUNCILMAN SPIGNER: I think the judicial aspect is treated in a special way.

Obviously, if the County Leader is mad at you, if you didn't vote for him, or whenever one voted to move to make the vote unanimous, and for some reason you refused to make it unanimous, and then throughout his or her tenure you kept raising situations, I don't think that that person is looking for a judgeship.

So, you're not looking for any cooperation.

But, over the years, as I look back, since we put in Judge Brown, we have a long period of no response from Donald Manes, a long period of no response from Donald Manes, and then, you know, he would drop us once in a while, and then there was Jocelyn Smith, and then we promoted from the -- the Mayor appointed Judge Kellem and Judge Sharp, one Lindsay, I think and one Koch, I believe, appointed Judge Kellem, I believe.

They say we can't make a Criminal Court Judge because we won't be able to fill the spot.

So, they are reluctant to make a Criminal Court Judge a Supreme Court Judge. If you make a
Civil Court Judge a Supreme Court Judge, then the organization can replace that position.

THE CHAIRMAN: Can I ask a few questions?

Sort of looking at your County as one County, and the experience in Queens may be replicated many places in the State, would it be fair to say that -- would it be possible, you know, during your tenure in the County, for a candidate to become a Supreme Court Judge without the support of the County Leader?

COUNCILMAN SPIGNER: Short of an out-and-out revolt, you know, that the County Leader had done something so unacceptable, I just can't see the majority of the leadership -- if a County Leaders becomes that unpopular, he is removed. How is he removed? The Mayor or the Governor can call Tom and say, Archie Spigner is a man I'm going to deal with in Queens County, and there will be a hurried meeting of the Queens County Organization, and someone will move that Tom Manton-- that's how Matt Troy was removed.

Abe Beame decided what he wanted, and it was in the middle of the term of office.

So everybody is responsive in a way to somebody,
Now, there's very little, if any, patronage in politics these days.

THE CHAIRMAN: From that point, the Troy point down to the present, would it be fair to say that the County Leader has been the singlemost important person in the process?

COUNCILMAN SPIGNER: Yes. The answer is yes.

Without equivocating or clouding it in any way, the County Leader is the most important person in the process, in both Civil and Supreme.

While we go back to the Fourth District, which is populated primarily by a majority of black Leaders, Tom Manton and his friends among the black leadership, so he can also say, hey, listen, we have three or four black guys running, I'll go with your candidate, and everybody seems to fall in line.

THE CHAIRMAN: Would you agree with the observation that's been made in these hearings by others, that the present elective system that you've made reference to in one area of the State does not put a premium on one's judicial qualifications but, really, other kinds of considerations,
that politics tends to be more prevalent in the process?

COUNCILMAN SPIGNER: Well, I don't know what it would mean -- what considerations did you say, intellectual, scholarly or --

THE CHAIRMAN: I suppose if you were looking at the subject of a judge, you would be probably looking at questions that have nothing to do with one's participation in, sort of, membership in a clubhouse, activities in the political area, but one would be looking more at one's judicial demeanor, one's quality in terms of integrity, one's ability to be independent when he serves a judge, one's knowledge of the law, one's, certainly, ability to communicate in terms of writing, and one's intellect.

Those would tend to be the kind of things that I think groups looking just at judicial qualifications would be interested in.

COUNCILMAN SPIGNER: Objective qualifications.

THE CHAIRMAN: I recognize that in some of those areas, you have to make a judgement that may be subjective, but that tends to be the kind of things that groups who have been involved, looking
just at judicial qualifications, focus on, and I guess what I'm really trying to draw you out on is your view as to whether those kinds of considerations play a dominant role in the process of selecting a judge politically in, say, the area that you've described.

COUNCILMAN SPIGNER: Well, I certainly would not nominate anyone who would be an embarrassment or who had displayed tendencies or who was inarticulate or who did not have the respect of his colleagues.

THE CHAIRMAN: If I can just sort of go with you on this.

This might be a minimum kind of consideration. Embarrassment is sort of a -- I think we both agree, is sort of a de minimis kind of standard.

If one were looking at these other kinds of qualities that I made reference to, trying to make a judgement of who is best able to --

COUNCILMAN SPIGNER: Well, I must tell you, I have got to support a system that's going to give us some black judges in the Civil Court, in the Supreme Court, in the Criminal Court and in the Family Court, and we have nowhere near enough.
The Mayor is making appointments, in theory, on this process, you know, and he claims he's making the best qualified and he's appointed more blacks and women.

Good luck to him.

But I do know that the Mayor is responding to the political process. He's under pressure to demonstrate a responsiveness to the black community, the black electorate.

So I'll take it either way.

As I say, it's no great gain for a political club -- it's no -- I mean, you may want to sit around and say, well, I made this judge or I made that judge or I made that judge, but that really doesn't translate into any -- you know, it may be fleeting or good for the ego, but if that's going-- you know, if that's the process that you just talked about, it's going to result in fewer black judges, I got to take my chances with a process -- whatever process gives me the best shot at electing or having blacks appointed, then I got to go with that process.

I'm not wedded to any process.

I notice that the Governor is, to his credit,
-- some say that the Italians are getting a good
shot -- you know, listen, -- I don't know how many
blacks he's appointed.

I haven't seen very many in those high levels,
and I'm not happy about that.

When he goes and run for the election, you
have to ask him. They tell me they give him two or
three or four names, but somebody is making some
subjective judgements somewhere down the line.

THE CHAIRMAN: Have you given any thought
to the subject of what should happen at the end of
the judge's term in office?

Let's take a Supreme Court Judge who has done
a good job as a jurist and served 14 years and now
he has to come back into the political process,
and we've had some examples of people not getting
redesignated for political reasons.

COUNCILMAN SPIGNER: Not in Queens County.

THE CHAIRMAN: I'm not aware of the specifics
in Queens County, but there was --

COUNCILMAN SPIGNER: In the Bronx, right?

THE CHAIRMAN: In the Bronx. Justice
Sullivan gave some testimony here last week.

I just would welcome your views on trying to
prevent partisan kind of considerations taking over in terms of redesignation of a sitting judge with respect to the very court that he's performed well at.

COUNCILMAN SPIGNER: Well, I would be reluctant, unless under great external pressures, to not reappoint a sitting judge.

But, then, again, I just remembered, we just went through it.

Judge Brown's 14 years was up, and Sidney Leviss. A guy sitting there 14 years, let him come back and say, I want to go again, take a look at me, how do you think I performed.

If the guy has been a real bad guy, if a judge has been a real bad person, maybe the Judicial Convention won't want to reelect him.

THE CHAIRMAN: We have heard here in our hearings, certainly, some of the Judicial Conventions have been described as really not very deliberative in terms of their process.

COUNCILMAN SPIGNER: That's a good description.

THE CHAIRMAN: Could you see a system where some kind of screening body that is looking at one's judicial qualifications, opining on one's
performance in office, entering in terms of the redesignation process?

COUNCILMAN SPIGNER: I could see that, Dean Feerick. I could see that.

I see the need, you know, of having people of high intellectual skills, integrity, independence. I support that. Sometimes it works to your advantage as well as to your disadvantage.

You have to call it as you see it. I don't know whether the black community, just now that we are starting to exercise some political muscle in this town and in this State -- if we want to remove the process from our direct influence at the ballot box, in a sense, by, you know -- if a judge has been there 14 years, he's done well, and he goes before the evaluating -- but we do have that, in a sense, we do have an evaluating committee, the Bar Association.

If I recall correctly, the Queens County Organization has the -- not the Civil Liberties Union -- what's that club, Joe, that we are looking for designations --

A VOICE: The Citizens Union.

COUNCILMAN SPIGNER: The Citizens Union, they
evaluate, and all of those bodies --

THE CHAIRMAN: Even with those processes, under the current elective system, as you said before, the County Chairman becomes key to whether or not you go forward in the process?

COUNCILMAN SPIGNER: But the County Leader can't swim against the tide. I mean, he has to maintain his credibility.

He will not be County Leader very long making negative decisions either in the judiciary or picking Presidential candidates.

I assure you that the fact that Gephardt didn't do well is not going to make Tom Manton the bright, shining light that he would have been had Gephardt ran stronger.

THE CHAIRMAN: Do you see a risk to the independence of the judiciary, the sitting judge being sitting judge now who has performed well for 12, 13 years, but who realizes that he or she now has to get back into the political process, because in the absence of a change in the present system, that's what must take place?

COUNCILMAN SPIGNER: But, you know -- no, I don't see them getting back into the political
process, I don't.

You mentioned the situation in the Bronx. The Bronx was, I believe -- the County Leader was under extreme pressure to respond to the black and Hispanic community that had been ignored and overlooked and abused for years and years.

That's why he had to do that, to try to gather some support in the black community. He said, well, hey, if it's Sullivan or me, or whatever it is, it's better that Sullivan goes and I appoint this black person because I want to remain County Leader and I can't remain County Leader without the support of the black community.

So, I mean, there's a tradeoff. I mean, the pure objective process may be good, but democracy is not a neat, clean structured government.

There's some sloppiness here that you have to make the best of.

THE CHAIRMAN: I take it from what you're saying, that you're not troubled by the potential in the present system of forcing the sitting judge to return to partisan activities.

COUNCILMAN SPIGNER: Dean, by partisan activities -- I haven't seen a single one return
to partisan activity.

THE CHAIRMAN: We have had testimony in our hearings and we have also spoken to sitting judges who have been denied redesignation --

COUNCILMAN SPIGNER: Because they did not return to partisan --

THE CHAIRMAN: No. Who have described the need to reappoint themselves with the political process because of a desire on their part to continue to serve as judges, and they expressed to us a pressure that they felt under the present elective system.

COUNCILMAN SPIGNER: Take Queens County, for example.

Here's Judge Hentel, who was a Republican all his life, and, certainly, Tom Manton gained nothing by making Judge Hentel a Supreme Court Judge.

He did it because he felt that Hentel was a decent guy and, not only that, he got the unanimous support of the Judicial Convention.

I don't know whether Judge Hentel measured up intellectually or with respect to integrity. I think he does."
He has a damned good reputation in our town.

There was nothing to be gained politically or otherwise for Tom Manton to pass -- I don't even know whether Hentel has a District Leader that he's had any relationship with.

I use that as an example.

THE CHAIRMAN: The Judge gave testimony this morning. I'm not sure if you're aware of that. He testified here this morning.

COUNCILMAN SPIGNER: That he was under political pressure?

THE CHAIRMAN: No. He just gave testimony here. I'm not making the statement about what he said.

COUNCILMAN SPIGNER: Okay.

THE CHAIRMAN: He just testified to his own experiences in the process, and that's part of the record of our own hearings.

COUNCILMAN SPIGNER: I think he worked long and hard. He wrote many a letter. He was a very friendly guy.

Other than that, he always extended a good hand to me.

COMMISSIONER EMERY: I think you said there are
now 12 black District Leaders in Queens.

COUNCILMAN SPIGNER: I think so.

THE CHAIRMAN: How many?

COUNCILMAN SPIGNER: 64.

COMMISSIONER EMERY: So it's about what, a little less than a quarter?

COUNCILMAN SPIGNER: Right.

COMMISSIONER EMERY: And how about through the mid --

COUNCILMAN SPIGNER: Quite a bit less than a quarter.

COMMISSIONER EMERY: L6 is a quarter, I think.

So it's something less than a quarter?

COUNCILMAN SPIGNER: Okay.

COMMISSIONER EMERY: What is the black population of Queens, what percent?

COUNCILMAN SPIGNER: I would think about 20, 25 percent.

COMMISSIONER EMERY: And through the Seventies, was that pretty much a stable number?

COUNCILMAN SPIGNER: District Leaders?

COMMISSIONER EMERY: Well, population first.

COUNCILMAN SPIGNER: I don't know. I know
there are areas that were white in the Seventies that have now gone black.

So maybe the black population has increased somewhat, but not substantially, I don't think. I may be wrong.

COMMISSIONER EMERY: How do the numbers of District Leaders vary, starting in 1970 to the present, approximately?

COUNCILMAN SPIGNER: We started picking up District Leaders in the Seventies, and then we just picked up four when we had a reapportionment.

The 33rd Assembly District gave us four District Leaders.

In the Eighties, the reapportionment of 1980 is when we picked up the male District Leader in the 34th Assembly District.

In 1980, we started getting our numbers.

COMMISSIONER EMERY: Before 1980, there were, besides yourself, how many?

COUNCILMAN SPIGNER: There was Helen Marshal, Dora Young, Tom White, Vivian Cook.

About five or six.

COMMISSIONER EMERY: Out of 64?

COUNCILMAN SPIGNER: Yes.
COMMISSIONER EMERY: So, that the number 64 always held?

COUNCILMAN SPIGNER: Yes, it always held, in recent time. It used to be more than that. It used to be A, B and C and D.

The party makes up its own rules as to how it will divide an Assembly district.

COMMISSIONER EMERY: How many black judges have you gotten appointed since 1970?

COUNCILMAN SPIGNER: Not many.

COMMISSIONER EMERY: About how many?


COMMISSIONER EMERY: That's a total of five or six?

COUNCILMAN SPIGNER: Six.

COMMISSIONER EMERY: Of those you just named, how many of them are Civil Court -- well, if you could describe their stories; were they all initially Civil Court?

COUNCILMAN SPIGNER: No. Judge Sharp and Judge Kellem were Criminal Court.

COMMISSIONER EMERY: And how many of those
graduated to the Supreme Court?

COUNCILMAN SPIGNER: They all graduated. No.
Rutledge has not gone to the Supreme Court, and Grant has not gone.
Grand was elected about two years ago, a year or two ago.

COMMISSIONER EMERY: So four of the six went to the Supreme Court?

COUNCILMAN SPIGNER: Right.

COMMISSIONER EMERY: How many Supreme Court Judgeships are there in Queens?

COUNCILMAN SPIGNER: I don't know. About thirty or forty. About forty.

COMMISSIONER EMERY: About forty?

COUNCILMAN SPIGNER: In the 11th Judicial District, about forty, forty-five.

COMMISSIONER EMERY: And how many Civil Court Judgeships?

COUNCILMAN SPIGNER: I don't know. I don't think there are that many.
The Green Book will tell us. I didn't bring it with me. We have nowhere near our pro rata share.

COMMISSIONER EMERY: Nowhere near, isn't that right?
COUNCILMAN SPIGNER: Nowhere near.

COMMISSIONER EMERY: Not even close?

COUNCILMAN SPIGNER: Not even close.

COMMISSIONER EMERY: So this process of District Leaders controlling judgeships hasn't done very much for blacks in terms of getting their fair share of judgeships in Queens?

COUNCILMAN SPIGNER: Well, that's a fair statement. Hasn't done a hell of a lot. We've gotten pieces here and there, but the white folks are still ahead.

COMMISSIONER EMERY: Way ahead, isn't that right?

COUNCILMAN SPIGNER: Way ahead.

COMMISSIONER EMERY: You're not even close to where you ought to be?

COUNCILMAN SPIGNER: Right.

COMMISSIONER EMERY: I agree with that.

And, the reality is, that this whole process of electing judges with County Leaders, the force behind the elective judges through the County Leader nominations process just hasn't served the black community well in Queens at all?

COUNCILMAN SPIGNER: Well, as compared to what
that we can say that has served?

COMMISSIONER EMERY: As compared to the population, as compared to your just due in what you should have in the way of judgeships in Queens.

COUNCILMAN SPIGNER: The answer is: We haven't gotten our share.

COMMISSIONER EMERY: Right.

COUNCILMAN SPIGNER: That means that the system has not served us well and then I have to concede that that's true.

COMMISSIONER EMERY: With respect to your personal situation as a District Leader, have you put up the nominees that you felt were good nominees and should have been selected and didn't get in?

COUNCILMAN SPIGNER: On the first and second and third and fourth time, yes.

COMMISSIONER EMERY: Repeatedly?

COUNCILMAN SPIGNER: Yes.

COMMISSIONER EMERY: You were frustrated in that process?

COUNCILMAN SPIGNER: Yes, and we just kept coming back. We just kept coming back.

COMMISSIONER EMERY: And by coming back and
coming back and coming back, you got the six that you got?

COUNCILMAN SPIGNER: Yes.

COMMISSIONER EMERY: And, obviously, that would mean, would it not, that white District Leaders wouldn't have to come back as many times as you would to get theirs?

COUNCILMAN SPIGNER: I think that may very well be true.

COMMISSIONER EMERY: That's been your observations, right?

COUNCILMAN SPIGNER: Yes, I think so. I don't believe we've been treated fairly.

I'm not singling out Tom Manton for criticism or anybody.

COMMISSIONER EMERY: I understand.

COUNCILMAN SPIGNER: I don't think the system has responded to us in terms of our equitable and our pro rata share.

COMMISSIONER EMERY: Has the fact that you're a City Councilman as well as a District Leader played any role at all in this judgeship selection process?

COUNCILMAN SPIGNER: Well, I don't know if
that's --

COMMISSIONER EMERY: I mean, I take it that as a District Leader, you owe some loyalty to the County Leader, you have to -- he controls, or she.

But, I guess it has always been a "he."

COUNCILMAN SPIGNER: I think that the County Organization is what it is, and if you're a member of the Queens County Organization, you're a member of a group of like-minded people who are there for reasons, primarily, of mutual support and for furthering what is a commonly decided upon good or goal.

COMMISSIONER EMERY: Well, in that regard, given the fact that you're not getting, as a black leader in Queens, your fair share of judgeships, are you getting anything else in turn that makes that worthwhile for the black community and you as a Leader?

COUNCILMAN SPIGNER: I think not.

COMMISSIONER EMERY: It's just a part of a pattern of discrimination against blacks in Queens?

COUNCILMAN SPIGNER: You're right. If you're black, you kind of get used to struggling and you
kind of get used to seeing the numbers skewed
against you and you just got to keep on struggling.

COMMISSIONER EMERY: And you stay in that
system, nevertheless?

COUNCILMAN SPIGNER: Well, until I have a
better system that I can get to. If you can tell me
a better system -- we used to be Republicans,
religiously, then we went to the other party.

Whatever I can find that will bring equity
and justice and fairness to our community, that's
where I'm going.

COMMISSIONER EMERY: Let me ask you about
your role as a Councilman.

Does the fact that you're a Councilman and
that the Leader of the Council, Peter Vallone, is
from Queens, does that play any role in the process
of judicial selection, to your knowledge?

COUNCILMAN SPIGNER: Well, I think not, because
Peter Vallone -- I don't remember seeing Peter
Vallone as a judicial delegate.

He's not a District Leader.

COMMISSIONER EMERY: Does he play any role in
judicial selection in Queens?

COUNCILMAN SPIGNER: None that I know of.
He may very well work on his part of town.

They do pretty good over there in terms of numbers.

But, I don't know what his involvement is with the leadership over there.

He may be connected or he may not be.

COMMISSIONER EMERY: I have no knowledge of that.

I'm just inquiring of you because I really don't know.

COUNCILMAN SPIGNER: Okay.

COMMISSIONER EMERY: Now, given the facts that you expressed here, and I presume that you have previously expressed some frustration with the fact that you as a black leader in Queens have not gotten your fair share of judgeships for blacks, did you ever express that to the County Leader or Richard Rubin --

COUNCILMAN SPIGNER: We expressed that publicly, privately, in the media, as a most loyal faction, component of the Democratic Party. That's the basis of our presentation.

COMMISSIONER EMERY: What was the response to that from the County Leader and his --
COUNCILMAN SPIGNER: Either he said yes or he said no.

COMMISSIONER EMERY: Did he say we are going to do more in the future, did he promise you, make any promises to do better in the future when you demonstrated to him that blacks had been unfairly treated in Queens?

COUNCILMAN SPIGNER: I think it was acknowledged that we had been, because we didn't elect our first black judge until the Sixties, either Criminal or Civil, certainly not Supreme.

ON the face of it, we had been discriminated against.

We are trying to catch up.

(continued on next page)
I will tell you, I get the feeling now that with our strength and the outside climate, the thrust for blacks involved in the political processes at all levels, it makes the system, whether it's the County Leader or the Mayor, or even the Governor, you know, more responsive to the black constituencies.

COMMISSIONER EMERY: Did you ever have any conversations with Donald Manes about this problem?

COUNCILMAN SPIGNER: Sure.

COMMISSIONER EMERY: What were those conversations?

COUNCILMAN SPIGNER: I can't recall offhand other than, "Let's go with Judge Brown this year. You know, there are three spots open, four spots. Let's go with Judge Brown," or whoever it was at the moment, and he would just say yes or no.

COMMISSIONER EMERY: How about Richard Rubin, did you have any conversations with him?

COUNCILMAN SPIGNER: I didn't discuss it with -- I don't recall. It was something you discussed with the County Leader. I don't recall having those conversations with Richard Rubin.

COMMISSIONER EMERY: And you don't remember
specific conversations you had with Manes about this?

COUNCILMAN SPIGNER: No, I don't recall the specifics, but, generally, "It's our time. Give us a black judge. Give us a black Supreme Court."

COMMISSIONER EMERY: Did you ever say, I'm not going to go with your judges and I'm going to put up a stink at the Convention if you don't start showing some responsiveness to our needs?

COUNCILMAN SPIGNER: I don't know if I said those words or not, but we have put up stinks at the Convention, and we have nominated our candidate, and we have gotten our twenty or twenty-two votes, and that was the extent of it. Some of the Liberals of the faction of the Party would vote with us and some of the persons angry with the County Leader, Manes, probably would vote with us, but above and beyond that, --

COMMISSIONER EMERY: Were you getting any black law secretary positions during this period of time?

COUNCILMAN SPIGNER: Well, you say was I getting any --

COMMISSIONER EMERY: I take it that many of the law secretary positions are appointive as
political patronage.

COUNCILMAN SPIGNER: I don't think there is any white judge that has a black law secretary, I don't think so, but I do know that there were instances where black judges had white secretaries. There were instances when that did occur.

COMMISSIONER EMERY: Of those six judges, do you remember, can you remember how many of them had black law secretaries?

COUNCILMAN SPIGNER: Well, I think -- ultimately, they all did. Judge Joy started out with a white secretary. I think Judge Sharp started out with a white secretary. The others, I think, started out with blacks.

COMMISSIONER EMERY: Ultimately, --

COUNCILMAN SPIGNER: Well, Judge Brown started out with a white secretary, too, as I recall.

COMMISSIONER EMERY: But, ultimately, all six of the judges that you got nominated --

COUNCILMAN SPIGNER: When you say I got nominated, I don't know if I can take credit -- I don't take credit for Judge Joy. Judge Joy, I was happy to support him, but he came out of another club.

We do feel we contributed substantially to the
others that I named.

COMMISSIONER EMERY: Of the law secretaries, of black law secretaries that ultimately got jobs with these judges, did any of those come out of your club?

COUNCILMAN SPIGNER: Well, I know Judge Brown's secretary, he hired him from some place and introduced him to us. There is only one secretary that I believe -- I believe there is only one that I can recall, and that's a young man named Randall, I think he's currently -- a rather young man, I want to tell you, he is Judge Rutledge's secretary. He doesn't maintain a membership in the club, but he's a young man -- I'll tell you how I met him. His wife invited me to her church where she was giving a party for her husband who was going to the law school in Buffalo, and that's where I met him, and then when he graduated from law school, he came back -- three years went so fast, and we became friends, and he happens to be a very able young man. That's about the only one that -- and the Judge was very happy to get him, I must tell you. Judge Rutledge was very happy to get Randall.
COMMISSIONER EMERY: Thank you very much.

THE CHAIRMAN: Thank you very much for
being with us today, Councilman.

COUNCILMAN SPIGNER: I thank you for the
opportunity.

THE CHAIRMAN: Thank you very much.

COUNCILMAN SPIGNER: I wish you well in your
deliberations.

THE CHAIRMAN: Thank you very much.

COUNCILMAN SPIGNER: If those are the appropri-
ate words.

THE CHAIRMAN: Those are the words for this
afternoon.

The Commission calls as its next witness,
County Court Judge Namm.

Good afternoon, Your Honor. This is Commissioner
Emery.

COMMISSIONER EMERY: Good afternoon, Your
Honor.

THE CHAIRMAN: Kevin O'Brien.

MR. O'BRIEN: Hello, Judge. The Staff Members
to my right are Carol Schachner, Emily Remes and
Diane Archer.

MS. SCHACHNER: Good afternoon, Judge.
JUDGE NAMM: Good afternoon.

MS. SCHACHNER: I would like to ask you if you would simply trace very briefly your career once you moved out to Brookhaven, Long Island, and went into private practice and as you moved onto the bench. Can you sort of give us that history?

JUDGE NAMM: You want me to start prior to the bench?

MS. SCHACHNER: Just about when you are out in Brookhaven in private practice.

JUDGE NAMM: I was in Brookhaven, but I was in the Federal Trade Commission for a while. I was an attorney for the Federal Trade Commission right out of law school for five years. In 1966, I went into private practice in Port Jefferson with Fred Bloch and Dominick Barinello. I continued to practice with Dominick Barinello until 1975. Dominick was the Democratic County Chairman of Suffolk County, still is.

In 1975, although I had expressed to Mr. Barinello a desire to become a judge some day, it was always my ambition, in 1975, to my surprise, I received a call from the Law Committee
of the Brookhaven Town Democratic Party to tell me that they had nominated me to run for District Court of Suffolk County.

Frankly, I had no expectation of becoming a judge in '75. Brookhaven in Suffolk County is a Republican stronghold. It so happened that 1975 was not long after Watergate and the Republican Leader had been indicted the previous year in the Town of Brookhaven.

I ran with a slate of other candidates running for local office, for Supervisor, for Town Council, and as a result of that unusual set of circumstances, the Democratic slate was swept into office. Out of 68,000 votes cast, I was elected by a plurality of 72 votes. Ultimately, after a recount, I was elected on 58 votes, and I was certified December 30, 1975. We didn't know until December 30th, whether I was practicing law on January 2nd or I would be a judge.

I was elected to District Court and served a six year term on the District Court. Frankly, I held very little hope of my getting re-elected in 1981 when I ran again, because by that time Ronald Reagan was President of the United States, and the normal tide of events changed in Brookhaven, and
Brookhaven was back to being a Republican stronghold.

In fact, in 1981, when I ran for re-election, I was the only incumbent who was left in office because I happened to have been in a six year term and the Supervisor and the Council people had two year terms. In 1981, when I ran for re-election, I received the highest qualification rating from the Suffolk County Bar Association. I was endorsed by virtually every law enforcement organization in the County, and they are very powerful in Suffolk County, and I almost began to delude myself into thinking that I could be re-elected.

In 1981, I was swept out of office by a landslide as if I didn't even exist. In 1982, then Governor Carey, nominated me to a vacancy in the County Court, and I was found well qualified by his screening committee, and I was appointed to the County Court to fill a vacancy in the County Court. Again, I had little expectation in November of being elected to office. However, circumstances were such that in 1982, because of the expanding population in Suffolk County, there were several new judgeships created in the County, Supreme Court, County Court, Family Court and District Court, and
as a result of that, the Democratic and Republican Parties agreed that all candidates for those offices would be cross-endorsed and so, fortunately for me, I received cross-endorsement, and I was elected to a ten year term in 1982, beginning in 1983, and that's where I am now, and I have been serving in the County Court since that time.

MS. SCHACHNER: Let me ask you a couple of questions based on what you've said.

Before you were appointed by Governor Carey, did you have any conversation with the Suffolk County Political Leader in the Democratic Party about the possibility of your becoming a judge?

JUDGE NAMM: Sure, I did.

MS. SCHACHNER: Tell us a little bit about that.

JUDGE NAMM: You have to understand that when you have been a judge for six years and you have given up the practice of law, and then you don't get re-elected, it's not like any other elected office, you are removed from the community, you have no affiliation with anybody whatsoever, they create a political unit. When you lose your office at that point, it's almost like being dropped.
a cliff, and, frankly, I wanted to be a judge, and that's really -- I felt I was a good judge, and I went to see Mr. Barinello. He was then the State Democratic Chairman as well as the County Democratic Chairman, and I had discussions. There was a vacancy in the County Court, and I felt that I was the logical person to fill that vacancy.

MS. SCHACHNER: What was his response?

JUDGE NAMM: Frankly, his response was that, although we had been partners, we will see about it, and he wasn't too happy with the fact that my son, who was very distressed at my not having been relected, was running a letter writing campaign with local attorneys to the Governor's counsel, and his words to me were, "I'll decide who becomes a judge in Suffolk County," words to that effect. He wasn't really happy with the fact that the letters were being written on my behalf.

MS. SCHACHNER: You mentioned that you were the beneficiary of a cross-endorsement deal which put you on a ten year term in the County Court, which you're still sitting on. Did that tradition of cross-endorsement end shortly thereafter?

JUDGE NAMM: It was immediately thereafter.
Suffolk County and Nassau County are known as the Tenth Judicial District, and there came a point where the new Republican Leader of Nassau County said that there would no longer be cross-endorsements of Supreme Court Justices who would be running in the Tenth Judicial District, and as a result, neither the Democrats or Republicans would ever agree again to any cross-endorsement of judges.

While I have been on the bench, while the Democratic Judges were a real minority of the entire bench in Suffolk County, we've lost so many of the finest judges in this State -- I'll give you a few examples -- as a result of their not being cross-endorsement.

By the way, Suffolk County, for those of you not familiar, has a population of 1,000,000 people, so does Nassau County. There are 2,000,000 people living on Long Island. I think people in New York City tend to think of Long Island as a farming county, the Hamptons. It's a well-populated place, and there are many judges in the County and many courts. Forty percent of Suffolk County is registered Democrat. Almost fifty percent is registered Republican. The balance is independent. There are
virtually a handful of judges left in Suffolk County who are Democrats.

Two years ago, we lost a man who spent fourteen years on the Supreme Court, Leon Lazer, who was, I thought, the most erudite, and I think people would agree with me, members of the Second Department. He ran for re-election. He was, obviously, found as qualified as any person would be. He was endorsed by everyone. He lost in a landslide. It was as if he didn't exist.

In the year that I lost, in 1975, a lady was nominated by Governor Carey to the Family Court, who was the President of the Suffolk County Bar Association, a woman in her sixties, Catherine England, a very fine matrimonial lawyer. At that time, she was the only female member of the Family Court. She was nominated by Governor Carey. She served until the end of the year when she ran in November, the same year that I ran for re-election. She lost.

In 1982, the year that I was appointed to the County Court, she was appointed to the Supreme Court by Governor Carey. While I received cross-endorsement, and everybody knew there was going to
be cross-endorsement that year, she was not re-
nominated by the Democratic Party because there
was a feeling that there was somebody else in
the Democratic Party who should get that nomina-
tion, and so she was out of office again at the
end of that year.

In 1983, she was nominated again to the
Family Court and ran again in November, and was
out of office again. So, there's a history both
in Suffolk County and Nassau County in the past
five years of virtually -- not virtually -- well,
except for one exception -- last year in the Town
of Huntington, every Democratic Judge had lost his
bid or her bid for re-election and, frankly, I feel
that by the time my term ends, there will be vir-
tually no Democratic Judges in the County of Suffolk,
and perhaps none as well in the County of Nassau.

MS. SCHACHNER: And your term will be ending
in '92, correct?

JUDGE NAMM: Yes.

MS. SCHACHNER: Would you tell us a little bit
about the events in the fall of 1985, while you were
sitting on the County Court?

JUDGE NAMM: Yes. In 1985 -- by the way, I
have to tell you that as a Judge of the County Court -- County Court, first of all, is similar to the Supreme Court of New York City to the extent that we have a criminal jurisdiction where we handle all felony cases and we do have a civil jurisdiction, but we don't handle them, they are handled by Acting County Court Judges. We only handle Criminal Court matters.

Of the eleven judges on that court in 1983, I became one of three judges to handle only what we call major offense cases. So, from 1983 to 19 -- early 1987, virtually all I was sitting on was homicide cases, and during that period of time, I tried, probably, fifteen murders, some of the most notorious homicide cases in the County.

In about early 1985, I had two very important murder trials, and it began to become apparent to me -- by the way, both of these defendants -- one was a contract murder of a prominent attorney in Suffolk County who was killed execution style, and the second was a horrible rape- murder of a nurse in Port Jefferson Station. In the second trial, there was a written confession. Both of the defendants were acquitted of the charges, found not guilty.
It became apparent to me during the course of these trials, and from something I had seen in a previous attempted murder trial, that there were people put on the stand by Assistant District Attorneys who were perjuring themselves, that there appeared to be missing evidence, there appeared to be doctoring of evidence, and I made certain statements during the course of the trial which were publicized in NEWSDAY, and after I completed the Corso trial, I was away, in Washington, with my wife, visiting my son, who lives in Virginia. I came back July 4th weekend.

I happen to bank in the same building where I had my office, and I ran into Dominical Barinello, and he said to me, "Stuart, did you know that there are people going into your records in the Board of Elections?" And, I don't know why anybody would want to go into my records, because, frankly, when I ran for re-election, I raised very little funds, and if they wanted, they could certainly look into my records. But, it was troublesome to me that this was happening at a time when I was becoming critical of law enforcement in Suffolk County.
I attacked the Republican Deputy Commissioner of Elections, whom I happen to know not through politics, but just -- coincidentally, his son had been murdered, and I handled the murder trial of the defendant who had murdered his son, and I sent him away for life.

As a result of what I had done, he would send me holiday cards and keep in contact with me.

I felt that he was one person that I could talk to as to what was going on.

When I called, he had a lapse of memory and his answer to me was, "Yes, there have been people going into your records, but, frankly, I don't know who they are, I think it was some East End newspaper, but I really can't tell you anymore."

In October of 1985, before my wife and I left on vacation, I wrote a long letter to Governor Cuomo and I requested the appointment of a Special Prosecutor in Suffolk County.

When I returned, or when we returned from vacation -- and, by the way, I might add that in 1985, it was an election year in Suffolk County.

The District Attorney was running for reelection and he was making statements to the press.
and spokesmen for the District Attorney were making statements to the press that Judge Namm's actions are politically motivated, that the Democratic candidate for District Attorney was Judge Namm's campaign manager.

First of all, in 1982, when I ran, I had no campaign because I had cross-endorsement, and the man who was running for District Attorney I didn't even know in 1982.

He's an attorney in Suffolk County.

So, when I wrote to Governor Cuomo, I wrote him in October of 1985 and I said, "Sir, if you appoint a Special Prosecutor..." -- and I have that letter with me, if you want to have a copy for the record ... I said, "...please don't do anything until the election of 1985 is over, because I have never been politically motivated and I don't want anybody to think that this has anything to do with politics."

When I returned from vacation in November, I learned from Mr. Kurlander, who was then his Criminal Justice coordinator, that there would not be a Special Prosecutor appointed, but, in the interim period, the State Investigations Commission...
has undertaken an investigation of the Criminal Justice System, the Police Department and the District Attorney's Office in Suffolk County.

The investigation is still going on. It's gone on for two years.

There were public hearings held in January of 1987, and there were public hearings held again in January of 1988.

I testified in January of 1987. The Chairman of that Commission is Dean Trager of Brooklyn Law School, and, frankly, I have spoken to people since the investigation has commenced.

The reporter is going to be coming out shortly, and I was very concerned that it has been two years and there has been no results of the investigation, and the answer that I've gotten -- and it was apparent from statements made by Dean Trager in the press and publicly during the hearings -- is that they found so many problems in the Criminal Justice System in Suffolk County, much more than -- what I had seen was basically the tip of the iceberg, that it was clearly symptomatic, and that it's just unfortunate that they have not been able to conclude the investigation.
at this time.

MS. SCHACHNER: Did you feel both a personal and professional obligation to go public and bring to the authorities' attention what you believed you were seeing?

JUDGE NAMM: Absolutely. I felt that what I was seeing was the worst thing that any person could see in the Criminal Justice System.

I felt I was seeing people who were sworn to uphold the law who were breaking the law, and I felt that it was necessary for somebody to come in and see what was going on in Suffolk County.

By the way, since I did write to the Governor, you may or may not be aware, there has been a Police Commissioner who was forced to resign in Suffolk County.

There is a new Commissioner that was appointed last week who is presently awaiting confirmation by the County Legislature.

The investigation that I requested involved the Homicide Squad, members of the Homicide Squad, who are the elite corps in the Department, who retired, resigned, were transferred.

None of these were ever attributed to what I
had seen, but this is what happened in this interim period.

It became, frankly, a cause celeb in the County of Suffolk, as a result of which, I've resigned myself to the fact that there is a high likelihood that as a result of what I've done in Suffolk County, I would not be reelected.

I don't think that I would have been reelected under any circumstances, but there is a high likelihood that in this County at this time, or even in the future, with powerful forces like the Police Association, the PBA against me, that there would be no chance that I could be reelected.

MS. SCHACHNER: Did you have any conversations with any other sitting judges about this issue and whether you or others would get involved?

JUDGE NAMM: Yes, I did.

After I began to talk to members of the State Investigation Commission, they asked me whether I thought what I had seen was isolated or whether I thought it was part and parcel of the system in Suffolk County, and I said I felt, frankly, that what I had seen was not -- they could not have been isolated, that the same people that were trying
cases in front of me were trying cases in front of other judges, and they asked me whether I felt any other judge would be willing to talk to them about what they had seen, and I went and -- and I said I didn't know, frankly, and I just thought there was one particular judge whom I knew, who was a Democrat or is a Democrat and who was, I felt, a very -- a kind of person I could talk to, and I went to see him.

And, I said to him, I said, "You know I have been talking to certain people."

This is before the Commission had gone public, but everybody was aware of the investigation.

He said, "Yes, I'm aware of that."

And I said, "I believe you have to have seen, because you have been doing this longer than I have, seeing what I have been seeing."

He didn't say yes and he didn't say no, but he nodded to me.

I said, "These people would like to talk to you as well."

The answer was very disappointing. The answer was, "Stuart, I can't get involved."

And, that man was up for reelection last year,
and I have a feeling that that was a factor in whether he would get involved or not.

The irony of it is, he also was swept out of office last year when he sought reelection as a County Court Judge.

MS.SCHACHNER: But you believe that a sitting judge may, in fact, be influenced in carrying out his own duties based on the fact that he may be approaching the end of his term?

JUDGE NAMM: Oh, I believe that, in a place like Suffolk County.

We are all human beings. In Suffolk County -- I was born and brought up in New York City, although I have difficulty relating to it at this time, living in Suffolk County for 24 years.

But, in a place like Suffolk County it's sort of, I guess, the reverse of New York City, where the Republican Party and where the police are so closely intertwined with the Republican Party and they are so powerful that I think that most people probably would have to have in the back of their mind what impact is this going to have upon my life.

When I got involved in this -- very few
judges have said anything to me.

IN fact, virtually, there has been silence from the judges.

Not that I'm particularly close to other judges. But people have said to me -- one judge said to me one day, "You know, everybody is going to lose as a result of this."

Yeah, I think you have to be thinking about that. I felt, in my situation, what I was seeing -- I wasn't even thinking about election at all, or politics, that didn't enter into it.

I felt that what I was seeing was so fundamentally wrong that something had to be done.

MS.SCHACHNER: But in terms of the system by which you got to the Bench, you see that under the elective system you are vulnerable?

JUDGE NAMM: Absolutely.

Not only am I vulnerable as a Democrat, that's my normal vulnerability in Suffolk County, but I'm vulnerable now.

There was a story done recently in NEWSDAY about me and my situation and the closing paragraph of that story was, "The Police Association is going to ensure that Stuart Namm is not reelected."
It may be that there are enough decent people in Suffolk County coming forward and saying, "We want this Judge in office."

If you have one strike against you to begin with, you've got two strikes against you because you're a judge. In my case, I got three.

MS. SCHACHNER: What do you think is the answer on a systemic level, retention election?

JUDGE NAMM: Some people refer to me as an ideolog. I'm an idealist.

I always wanted to see merit selection of judges.

I don't think that, realistically, our Legislature will ever adopt merit selection of judges, and I think as a compromise, at the very least, a person who is in office and who has served well, ought to go before the electorate, not politically, and let the electorate decide whether that person should be continued in office or not.

MS. SCHACHNER: Dean?

THE CHAIRMAN: I want to thank you for your testimony here today.

Are there any questions?

MS. ARCHER: You said that as an elected
judge you felt that your independence was compromised to some extent by speaking out, and I wonder if as an appointed judge you might not also feel that way if you spoke out against the appointing authority and if there's really any system that could avoid that problem.

JUDGE NAMM: No, I don't think so.

I think that under a retention system or under a merit system, you can avoid that problem.

No, I don't think so. I think that under a retention system or under a merit system, you can avoid that problem.

When you're dealing in the lowest echelons of politics, as you are in a County like Suffolk County, you're dealing with a local political leader, you're dealing with people who have local interests at stake.

If you're dealing with a system of retention election, you're dealing with the public at large, you have the media.

The media has covered this story extensively in Suffolk County.

If you're dealing with the Governor and involved in a merit selection, the Governor, I would
hope, is above that type of local politics.

THE CHAIRMAN: Do you have any views on the present rules concerning partisan activities by incoming judges or candidates for judgeships in terms of raising money?

JUDGE NAMM: Frankly, I'm all for it. I don't think judges should be involved in politics.

However, the problem that I face is that we are political animals, we are elected in a political system and there are rules which take us out of the political arena.

We are not supposed to attend functions. We are not supposed to make contributions to political parties.

We know that there is a rule which says, if you're going to run for reelection within nine months, if you announce for election, not even reelection, but for election to a judicial office, then you can attend political functions.

There are judges in my County who ever year announce for office just so that they can attend the political functions.

I have never done that. I only want to be a County Court Judge, and I don't think judges belong
within the political system.

If we are going to be in the political system, don't keep us back, don't hold us from speaking out.

When I was running for reelection in 1981, all I could do is tell the people that I spoke to that I was a judge for six years and that I have a wife and I have three children and I practiced law for X number of years.

It's unrealistic.

If we are going to be put into a political system, then give us the opportunity to speak out politically.

I don't think it ought to be that way, but I think, realistically, that's the only way you can give a sitting judge a fair opportunity to retain his seat, say, in a place like Suffolk County or for a Republican in the City of New York who is in opposite circumstances from a Democrat in Suffolk County.

THE CHAIRMAN: Thank you very much for being with us today, your Honor.

JUDGE NAMM: Thank you.

MR. O'BRIEN: Thank you, Judge.
THE CHAIRMAN: We will have a brief recess
and we will resume in ten minutes.

(Short recess taken.)

(continued on next page)
THE CHAIRMAN: The Commission will call Dr. M. L. Henry, Anthony Palermo and Dean Trager.

Before turning the questions over to Carol Schachner, I would like to say thank you to the three Panelists who are three very distinguished persons here in New York State who contribute significantly to the improvement of the public process.

I want to say thank you for participating in our hearings.

To my right is Commissioner Emery.

Carol?

MS. SCHACHNER: What I would like to do at this point is ask each of you to make a brief statement. For example, Dr. Henry, you can begin with your statement on the issue of judicial selection, and I'll follow-up with questions, and I'm sure others sitting with me will have questions, also.

DR. HENRY: Thank you, Carol. I prepared a statement that I'll just submit for your consideration. I want to say that this is a most important topic. I know that the Feerick Commission is going
to be handling many, many matters of important public policy with respect to campaign financ-
ing and ethics in government, and all of those are very high priority, and I salute the Legis-
lature for creating the Commission and the Governor for encouraging its creation, and so forth.

This is a very high priority item. The qualify of justice depends upon the quality of judges. You've heard it said so many, many times. You're not going to get, sitting here or last week, the flavor of what I think you really need to see, which is court rooms where judges are inattentive, sometimes lazy, incom-
potent, who are disrespectful of the public and the litigants and lawyers who appear before them, and that we need to improve the quality of judges, and thereby improve the quality of justice in this State.

It is a terribly high priority and to that end, the elective system, we think, has been shown to be terribly flawed, and that even if you were going to improve the electoral system, if you were going to substitute direct primaries instead of the
charade judicial conventions, and if you were going to substitute campaign financing to rid the stench of money that comes in and distorts the campaign, that even if you could do all of these things about judicial election, it would still be wrong, because the idea of electing judges is just wrong on its face. It assume that it's a government of men and women, and these men and women are supposed to be responsible to the voters, but that's not the American system.

The American system is, that these judges should be responsible for the law, and the Legislature should determine what the law is, and the judges should carry out the law and decide cases without fear and favor and not have to look over their shoulder at the voters or the District Leaders or the County Leaders.

No matter what process you come up with to save judicial elections by sanitizing them, it's still going to be fundamentally wrong. I am submitting as part of my testimony, four studies that we have done on judicial election, studies that I've already made available to the Commission, and I think in sum, all they show is that judicial
elections are a charade, that for the most part the voters have little choice, little information; they are ratifying the decisions made by political leaders. I'm not saying that political leaders are bad. Some political leaders are bad, some people are bad, it just happens. But, it's in the nature of foxes to raid hen houses, and it's in the nature of political leaders to keep the political organization going, and that is, to reward those who have contributed the mightiest to the organization, and if they happen to have some merit, if they happen to have some judicial ability, it's purely a coincidence.

Nothing has been said here about a political leader ever looking out to find who was the best in the community. By the way, I wish I had a bell during the two days of this hearing, because I would have loved to have rung it every time some factual inaccuracy were made, but I'm afraid I would have disturbed the process.

One piece has stuck in my craw more than anything else. The apologists for judicial elections continue to say, "But it has produced outstanding judges like Cardozo, like Fuld, like
Breitel." All those three judges were initially appointed to the Court of Appeals and through political deals were cross-endorsed for election. They all came initially through an appointment. Judge Cardozo would only accept an appointment if he could be guaranteed that he wouldn't have to run for the office. That's a fact. His biography is available to anybody who wants to see it.

THE CHAIRMAN: We had some testimony earlier today that his father was a political leader.

DR. HENRY: That is, indeed, true. That is, indeed, true.

Finally, I was terribly distressed to hear the testimony from the Metropolitan Black Bar Association, because I tried to communicate with them in the past about the importance of making the justice system in New York more responsive to the community. If we are going to persuade blacks and Hispanics in our City that there truly is justice for all, then the bench has to begin to reflect the community it serves.

I'm submitting a fifth study, a national study of the fifty States, every trial court,
every Appellate Court of record, and it traces
the antecedents of those judges to see how women
and minorities have done throughout the United
States through both gubernatorial appointment,
that is, no commission, where the Governor picks
his campaign managers, merit election, legislative
election, non-party election, non-party election and
judicial election.

And the study clearly shows, and has not been
contradicted in the two years since it was published,
that women and minorities do better through an
appointive process than through any elective pro-
cess, and for the Black Bar Association to come in
and say, "We prefer judicial elections because it's
going to help get more blacks on the bench," is
just not true. The experience in New York City,
with the Mayor's Committee on the Judiciary, and
elsewhere, proves that that is not true.

I would like to see the bench more representa-
tive. I would like to see the quality of the
judiciary improved. I would like to see judges
working on Fridays. I would like to see a whole
variety of things that I don't think is going to
come true in my lifetime. This is an important
assignment for your Commission. I applaud you for making this the second topic of your hearings, and I wish you all the best, and I hope you make a very, very strong recommendation to the Legislature on this subject.

MS. SCHACHNER: I would like to ask you at this time for comment on two specific proposals, Dr. Henry.

First of all, I don't believe you sat through Chief Judge Wachtler's testimony.

DR. HENRY: I did, every word.

MS. SCHACHNER: Every word. Would you comment, then, on his proposal for retention elections, either a "yes-no" vote by the electorate or a "yes-no" vote following a non-partisan reviewing body?

DR. HENRY: Well, I adore our Chief Judge, and I applaud his wisdom on all subjects. I think his proposal, which is an off-shoot of Mr. Weprin's proposal that there be a "yes-no" vote by the people after a commission has made some valuation, is a significant one. The problem with retention elections are not what has been stated here in this hearing. People keep talking about Chief Judge
Berg in California, what a terrible thing that was. They forget that on the day Chief Judge Berg was defeated in California, the Chief Judge of Ohio was defeated and sent out of office, and that the Chief Judge of North Carolina was defeated and sent out of office, and that occurred in Ohio with a non-partisan election, and it occurred in North Carolina with a non-partisan election, not connected at all to the application of the Supreme Court in North Carolina, but having everything to do with the fact that there was a very sufficient United States Senate race in North Carolina, and the Democrats prevailed.

I think that if that's all we could get, a retention election to assure that those judges who have been out of the political process can come back to the public 14 years later, 10 years later, and run on their record, unconnected with the party leaders, I think that would be a significant improvement.

I endorse the Chief Judge's proposal.

I wish he had gone further, but he's a man of considerable political insight, and he thinks this is the way to go at this period.

I think we're going to look for a little more, and not negotiate with ourselves, but if that's his
proposal, it certainly would be, I think, an improvement.

MS. SCHACHNER: I'd like to hear your comments about the Governor's program bill.

DR. HENRY: I am not sure at this point I am ready to comment on the Governor's program bill.

It has many, many admirable features.

It is, indeed, a step in the right direction.

There are some technical problems, I think, with the Bill.

There is also, based on my conversations yesterday afternoon with the Counsel to the Governor, a willingness on his part to negotiate, but I don't think that at this point we would say yes, we support it or no, we oppose it.

I don't think the Committee, Fund for Modern Courts, is at that position yet.

MS. SCHACHNER: Perhaps when you are, you will notify us.

DR. HENRY: I'd love to.

MS. SCHACHNER: Dean David Trager, maybe you can tell us a little bit about the Mayor's Committee and your Chairmanship of it.

DEAN TRAGER: I feel a little odd, because I
have to be in the position of making what some people may view as self-serving statements.

I always like other people to speak in our behalf, as the Fund for Modern Courts has.

The fact of the matter is, the Mayor's Committee on the Judiciary, under Ed Koch's stewardship, has proven that merit selection can work, and can work effectively.

I think even his worst critics on other issues acknowledge what he has done for the Criminal Court and Family Court of this City.

If I could, I would ask you to go make a poll of the lawyers who have practiced in that Court consistently over the last 15 years, and ask them what they think of the overall quality of the Judges in terms of knowledge of the law, integrity and temperment, and I think most of them would say it's like night and day.

I doubt that I would be able to persuade those who have a vested interest in the electoral system to change their position, but I have heard reports, which Hank Henry has already alluded to, which I do find disheartening in the sense that we can hear, you know, important leaders in the
minority community say that they endorse the judicial elections, because that's the only way that they can get representation of minorities on the Bench.

I want to thank the Commission, because they made certain inquiries, and they, in effect, forced us to do something we've always been meaning to do, but we've never done, and that's to really document the records of the years of the Mayor's Committee under Ed Koch, chaired by my predecessor, Bill Liebowitz, and myself.

The record is absolutely, in my view, astounding.

In the nine years, the Mayor has made 139 appointments to the Criminal Court and the Family Court.

36, or 25.9 percent, 26 percent, were women, and 26, or 18.7 percent, were minorities.

Putting it another way, to avoid duplicate counting, if you want, of the 139 appointments, 57, or 41 percent, were either female or minorities.

I suggest to you that if you compare that record with the election to the Supreme Court, in the City, to the Civil Court, if you compare it to
a record of any other appointment process, including President Carter, who got a lot of credit for his efforts in this area, there's no record that compares to this one in terms of assuring minority representation, as well as women.

The record is even more astounding, because I am aware of the fact that the pool from which you must choose, namely, that they have to be ten years admitted to the Bar of the State of New York -- I did this, I think, in 1985 or '86, at that time, and I know it's increased, but the percentage of minorities in the whole Bar of New York who were admitted ten years or more was 3 percent of the entire pool.

It probably today, as the graduates who went to law school from the Seventies, when the numbers started to increase -- it's probably up to five or six percent.

So, you're talking about six percent, compared to a 18 or 19 percent appointment rate.

I guess that's probably the most disheartening aspect of it, you know, trying to educate.

When you hear supposedly reputable people, as Bruce Wright get up and say that the Mayor has
appointed no minorities, except reappointment, it's really disheartening, because I think in the end it misleads the minority community into thinking the political process is going to give them an answer to get their representation and quality judges.

I'd be glad to respond to any questions.

MS. SCHACHNER: I have a couple of questions I would like to put to you.

First of all, in terms of membership on the Commission, itself, are minorities well-represented?

DEAN TRAGER: I think at this point, they are over 20 percent. I think there are six members. You know, it changes because of the way the process works, but I believe at this point there are six members who are minorities.

MS. SCHACHNER: And six out of a total of?

DEAN TRAGER: 27.

MS. SCHACHNER: What about the issue of how many Republican Judges have been appointed by the Mayor's Committee?

DEAN TRAGER: It's a bit of a problem in the sense that although I am a registered Republican, we don't ask people what party they belong to.

So, I mean, unless I went back and checked
the records, I wouldn't be able to tell you the numbers, candidly.

I mean, I assume there are some, as there were Republicans -- I remember there was one occasion where we sort of -- when there were 12 judges added to the Criminal Court, and somebody was screaming, oh, there aren't any Republicans.

Well, we didn't know what they were.

So, we went back and checked, and, if you want, I will tell you a humorous story.

There was a guy, Al Maris, who was Chief of Appeals in the Bronx, and he turned out to be a registered Republican.

I called him up, and, you know, I said, "Al, I hear you're a registered Republican."

He said, "Yes," and I could hear his voice drop.

He figured his appointment was going out the window.

I said, "Well, today is your lucky day, because you're going to get one of the ten-year appointments to the Legislature just created," to show that, in fact, the process was clean.

In fact, I told Mario Merola the story, and he
said, "Gee, I didn't know he was a Republican. He might not be in his position today."

I mean, Mario was kidding, but the bottom line is, he was Mario's chief lawman. We don't check, and unless the people disclose it, that's one thing, but we don't ask.

MS.SCHACHNER: What about the --

DEAN TRAGER: May I just add something?

MS.SCHACHNER: Sure.

DEAN TRAGER: We had a big debate in the Committee on the appropriateness of exploring candidates' views on particular issues, and I think there's a strong argument to ask candidates' views to see if they can -- not because there's a right answer, but to see how they can articulate positions. We've generally avoided those questions, really for the same reason that you're really asking the question about Republicans.

We don't want somebody to walk out of the room and say, they rejected me because they didn't like my views pro or con on abortion, or, you know, pretrial detention, or on any other issue.

In some ways, we lose something in the process by that, but overall I think we've added
to its credibility in the sense that someone cannot walk out of that room feeling that because they didn't "have the right views," on a particular issue that's the reason they didn't get the appointment.

MS. SCHACHNER: Some have said that in any screening or nominating commission, there's going to be some consideration by the members of the Commission or what the Executive ultimately wants.

So, for example, when you're nominating three people per vacancy, is there any consideration given to any indication either of the type of person, a certain minority, certain sex, anything like that that goes into the consideration of which three names are nominated to Mayor Koch?

DEAN TRAGER: You've put two things in there. One I consider legitimate, and one I would consider illegitimate.

If the Mayor said he wanted a particular person to whom he was close, I would consider that illegitimate.

I can tell you, in the five years that I've been Chair, Ed Koch has never done that once.

If you say to me, do I think it's appropriate that the Committee, when they're voting to draw
up the list to take into account that the list should be balanced in terms of racial, ethnic or sex on the issue of representation of women, I think it's -- we do consider it, and I think it's perfectly appropriate.

But, that's a lot different, in my mind, than the Mayor calling up and saying he wants X, and can I get X through the Committee.

Ed Koch has never done that.

THE CHAIRMAN: Dean Trager, can I just draw you out a little bit on the process, itself?

It's my understanding that the Mayor's Committee does actively communicate its existence, try and reach out to invite people to apply for judgeships; is that correct?

DEAN TRAGER: We certainly do.

We communicate on particular candidates to every Bar Association, including the so-called ethnic Bar Associations, minority Bar Associations.

We also solicit candidates.

I would say, with certain Bar Associations we have a stronger relationship.

They seem to realize and accept the good faith of the Committee.
For example, the Puerto Rican Bar Association, the former President was on the Committee.

I think right now the present President is.

So, there are lines of communication going there, but we make every effort.

THE CHAIRMAN: Does everyone who applies to be considered by the Committee receive an interview?

DEAN TRAGER: At some point, they're offered an interview, but let me clarify that.

When the initial application comes in, there's sort of an initial screening, in the sense of their background, and on the face of it, do they have the related experience.

Those resumes tend to be processed quicker, because they seem more relevant.

But, at some point everybody will get an interview.

Now, sometimes there's a backlog, so we set up what we call preliminary screening committees. We just did that. We do it every couple of years.

We did it just this summer.

Everybody who hadn't had a chance was welcome to come down, and some of the people on that group then we rate 1, 2, 3 or 4.
That's the way we did it last time, and we interviewed all the 4's and 3's, and I think one of those people was just appointed.

But, everybody gets an opportunity.

THE CHAIRMAN: I take it that your committee, through itself and its staff, makes an independent investigation of the qualifications of people being seriously considered?

DEAN TRAGER: Yes. We have a staff, we have a counsel who works part-time with the Commission, we have an office with records.

By the way, I must just add, if you're going to make a recommendation for merit selection screening, it seems to me that one of the -- it seems a minor thing, but there ought to be a requirement that the Legislature fund these Commissions with appropriate resources for a permanent staff.

Part of the problem that a lot of merit selection committees have is they have no records, they have no history.

We collect -- we go to every former employee, every reference.

If they have been litigators, we ask for the
last ten adversaries, plus independent people.

But, we make records and memos, so that if the things go out of our mind a year later, there's a record about this person.

By the way, I just don't think merit selection can work without staffing and without a history.

DR. HENRY: Dean, could I follow up?

DEAN TRAGER: Certainly.

DR. HENRY: You heard this morning a very articulate gentleman who was the Administrator of the New York County Panel of the Democratic Party, and he made allusion to the fact that nobody wants to be Administrator more than one year.

They don't get paid for it.

It's a labor of love.

They get criticized from every possible source of candidates who don't get reported out, who go to the press, and then they don't have any records.

They don't know from year to year who got approved the year before, and why, or any information that may have come to them of a confidential nature.

When he expressed his dismay at how that
that process was working, and why it didn't work better, that's exactly what Dean Trager is saying.

They need a paid staff.

COMMISSIONER EMERY: I agree with that.

Dean Trager, you said that it was improper, from your point of view, and I agree with you, if the Mayor had called you, which he hasn't done, and said, "I'd like this person reported out."

On the other hand, I am not sure whether this is improper or not, and I am asking you whether you know of instances where the Mayor has said or you learned that the Mayor has said, "If you go through the Committee—" -- said to a candidate, to a particular person, "If you get through the Committee, then I'll appoint you."

In other words, the people want judgeships, and they go to the Mayor and say, "I'd like to be appointed a judge."

As I understand it, the Mayor's particular response is, "Well, I can't. My Committee handles that. They take care of it. I have a merit selection process."

If you get through the Committee, then I'll consider it, or, in some cases, maybe he's more
positive than that.

Do you know of such instances?

DEAN TRAGER: I'm sure he's said it, but it's the kind of thing, if you get through, you'll get appointed.

The bottom line of it, I guess, is a Dr. Feelgood kind of thing.

The fact of the matter is, he hasn't done that.

If the person has gotten through, and he really knows the person, thinks highly of him, they may have been appointed.

I just had an experience -- I don't want to go into detail without breaching confidentiality.

There was someone recommended by the Committee, very good qualifications, and had a lot of support among people who are highly respected in the legal community.

He came up against two other people in the interviews. I know him personally.

I thought, in light of the recommendations, this person has it sewed up.

The fact of the matter is, that person didn't get it, much to the chagrin of a lot of people.

There was somebody who interviewed better and
did a better job.

I am sure Ed Koch has said that, but the bottom line is, he has never, as far as I am aware of, made any commitment to anybody in the sense of, "If you get through, I'll absolutely appoint you."

What he's saying is, "I'll consider you," and usually -- it may work out, it may not.

COMMISSIONER EMERY: Just one other question. Do members of the Mayor's Committee practice in the Criminal Court?

DEAN TRAGER: Do I have a list here?

I can tell you. I wish I had an exact list of membership.

Some of them do. Most of them, I do think, do not.

There are some who do.

COMMISSIONER EMERY: What do you think of that? Is that a problem for the people who have already been appointed, and they're not likely to come from the Mayor's Committee?

DEAN TRAGER: For ten years -- let me put it this way.

If the overwhelming majority of the members of the Committee were all practitioners, I think
it would be a serious problem.

On the other hand, not to have any representation from people who are there, you lose something.

So, I see the ethical issue you're referring to, that basically people who have the power of reappointment, in effect, might come before this Judge.

As long as they are not the dominant voice in the Committee -- you know, I would say it would be a terrible loss to have a rule that they couldn't, but it's a problem.

MS. SCHACHNER: You mentioned some of the process involved with the initial selection.

Would you turn for a moment to the evaluation the Committee does toward the end of a Judge's term.

How is that handled by the Commission?

DEAN TRAGER: What happens is that -- let's say a Judge is coming up in December. Most of them do.

I mean, all of them in the Criminal Court do, not all the Family Court.

They come up in December.

In June or July, the office will write, send
out a form, ask the Judge to fill an updating on the form, which essentially asks for his or her assignments.

I think it also asks for judicial opinions, and we've now, in fact, just changed the form to increase questions about health.

If you want, I'll go into the reason for that. It's sent to the Judge. Upon the return, we then communicate with the Office of Administration of the Courts, and if it's a Criminal Court Judge, the DA's office, the Legal Aid, every Bar Association, the New York County, the appropriate County where the Judge has basically sat, and minority bar associations, and ask, do you have any comments, and sometimes we do get comments negative, and usually they're favorable.

Sometimes it's very hard to get negatives, although there may be rumors, and then we try to conduct our own independent investigation.

After we've done that background check, the person is called before the Committee and they're interviewed.

I'd say most of them don't have any difficulties, but some have not been reappointed
based on the issues raised about judicial temperament, sometimes issues of residency.

MS. SCHACHNER: After you evaluate at the end of the term, if the person clears your Committee, that's an automatic reappointment?

There's no discretion again of other names being put in for consideration?

DEAN TRAGER: No. They're in effect, against themselves only, and it's up or down.

Here again, I think the record ought to be clear, because the Executive Order here might give a different impression, that the Mayor could then, in fact, on the Executive Order, refuse to appoint or appoint anyway.

Ed Koch has committed himself to appoint everybody who, on reappointment, has been recommended by the Committee, and not reappoint anybody who the Committee does not recommend.

He has, without exception, adhered to that rule, and it becomes important, because I've heard charges made that, you know, he's known to make comments about public issues, and people attack him for, you know, saying -- in effect, trying to intimidate the Judges.
He basically took the position that he will follow the Committee in order to avoid the charge that he's intimidating the Judges.

All the Judges know that our say is the final one.

He wanted to be free to speak his mind on certain public issues.

So, that's the tradeoff. He gave up, in essence, to the Committee the power of reappointment.

MS.SCHACHNER: How would you distinguish the Mayor's Committee from the operation of the various screening panels in New York State set up by Governor Cuomo --

DEAN TRAGER: I am not sure --

MS.SCHACHNER: -- both in terms of the fundamental premise for, for example, a nominating commission versus the screening panel, or the issue of whether you screen out the qualified people or whether you nominate the best people?

DEAN TRAGER: I endorse the nominating commission, not a screening panel.

It just won't work.

The process, even if it's done right -- the process won't have credibility.
I mean, that's the number one issue.

MS. SCHACHNER: Maybe we can turn to Anthony Palermo and ask you to make a brief statement.

I understand you're the Chair of the Fourth Department Screening Committee, as well as the former President of the New York State Bar Association.

MR. PALERMO: Thank you very much, Mr. Chairman, members of the Commission and staff.

I am delighted to be here, and I thank you for the invitation to express some thoughts on this very important topic.

Last time I think I was in this room, I sat on the opposite side of the table, where you are sitting, when I was a member of the Temporary Legislative Commission on Judicial Compensation, and I now find myself on this side of the table trying to get a good process for the selection of our Judges.

I guess the first thing I would like to say is I am just a country lawyer from upstate New York.

I welcome the opportunity to bring some Western New York flavor to you here.
THE CHAIRMAN: I hope your credibility is not going to be judged on that statement.

MR. PALERMO: I speak to you from a variety of perspectives.

I think that I heard Dr. Henry say, or maybe it was Dean Trager who said he was getting a little bit weary.

Obviously, those who have been in the vinyard of judicial selection know this is not a race for the timid or for the weary.

You have to be in it for the long haul.

I think back to when I first actively became involved.

At that time, I was President of the Monroe County Bar Association, which is in Rochester, and we had just experienced a Supreme Court Judge who had to run for reelection after 14 years, and he happened to be 67 years of age, and he did not get reelected.

It was a tragic loss for the system, for the lawyers, for the people that the system served.

Obviously, he had to go out, raise money and so forth, and he probably, on reflection, would have thought better about even running, but he did
run, and it was a personal shock and a great loss for the system.

That sort of turned me off, and it turned the Monroe County Bar off on the process, and we tried to rectify that in some way by seeking support of the concept of cross-endorsement of incumbent Judges who met a standard of excellence.

At that time, I went before the Committees of the Democratic Party and the Republican Party. At that time, the Republican Party was the dominant party.

They didn't elect Democratic Judges.

I got the support from the Democratic Party, but the Republicans weren't interested in the subject.

That was discouraging, but I'm happy to say that we apparently are nearing the millennium because today, in this year of 1988, the political parties in the Seventh Judicial District have agreed to cross-endorsement of three incumbent Supreme Court Judges, which to me is a tremendous move forward.

The Judges are excellent Judges. We aren't going to have the spectacle of campaign solicitation
in the Seventh District.

We've run as high as $100,000 for judicial campaigns when the salary was in the lower fifties, and all the spectacle that comes with it of seeking contributions from those who appear before you, primarily lawyers and so forth.

So, we've been spared that, and I think hopefully that will spread throughout the State.

We ought to figure out other ways and means by which we can secure detention of our judiciary who meet a standard of excellence, whether it's by a yes-no election, or some commission, or otherwise.

I favor that concept so that we don't have to go through another broad election.

At the same time I was President of the Monroe County Bar, we were faced with another experience that I think is relevant and helpful for reflection here today, and that was in the extremely important position of the Public Defender of Monroe County, a highly visible public official who represents -- I think represented at the time perhaps 70 percent of the indigent defendant in Monroe County.
There was a lot of scandal. The job wasn't being done well. There was a resignation of the existing official, and the Legislature had the power of appointment of that individual.

The Bar was an activist Bar, and we felt the public and the lawyers of the community had a right to participate in the nomination and selection of the Public Defender, because of the role that that official played in the system.

So, on the initiative of the Monroe County Bar Association, we created a nominating commission and we staffed it with ourselves, lawyers of the Monroe County Bar, three people.

I happened to have served as Chairman of that Commission.

We also had three distinguished members of the judiciary, including the presiding Justice of the Fourth Department, who was then Harry Goldman.

We also went to the community.

We had representatives from three constituencies in the community.

We met, and we publicized the existence of the group, which was spurned by the legislative body, saying, "What are you doing on our turf?"
But, we had a great deal of support from the media and public, and we solicited applicants from all over.

We published in New York and elsewhere throughout the United States, and we had, as I recall, something like 40 applicants for the job of Public Defender of Monroe County.

We had questionnaires that they filled out, that were then evaluated, and we screened down to, I believe, about the top 15 people.

We then conducted interviews of those people, and we then came up with the best three that we could determine from the applicants, and we submitted them publicly.

All this was done with the glare of the media on it, and the Legislature ultimately did send three people to participate in the meetings of the Commission and did welcome our role eventually.

Ultimately, the Legislature did appoint one of the three persons we had nominated.

His name was Peter Gellen, and he served with great distinction, and then went on to serve as one of the Assistants to the Attorney General of the State of New York.
That was a nominating commission, and basically had no authority, other than the persuasive authority of the role of the people who participated in the process.

I think that we did attracted the cream, and the public was well-served by that process.

I see no reason why that cannot be done in a similar fashion with respect to the judiciary.

Now, speaking with respect to judicial screening, I've been given the honor of chairing the Fourth Department Judicial Screening Committee as of last November, and I've gone through a rather intensive exposure to that process.

I say my first experience was very favorable. It was very time consuming, very demanding.

For the position of Monroe County Family Court, we had over thirty applicants who submitted themselves for consideration.

I don't think we would have had thirty candidates if it was a question of partisan selection or appointment even to run for election.

The existence of a screening committee that was willing to look at applications on the basis of merit, and then make their recommendations on the basis of merit seemed to me to attract some
of the finest people that otherwise just wouldn't have done that.

So, I believe there is much to be said for judicial screening.

Ultimately, we'll find out when we see the results of it. We've submitted our recommendations to the Governor, and I don't have any history yet to see what happens once the names are submitted.

There were a number of other vacancies that were created.

One happened to be in Yates County, where at the end of December a County Court Judge died, and we announced that we were accepting applications for that vacancy.

We had a total of five people who expressed interest in that position.

You have to bear in mind there are only twenty lawyers in Yates County.

That's 25 percent of the entire Bar that applied, and they were people with excellent credentials, a great deal of interest in what we were doing.

I've had communications from both the Chairmen of the Republican and Democratic Party
wondering about our process, very eager to participate in it.

I am pleased so far with what I see in the good that a judicial screening does do to attract people to the judiciary who would not otherwise be attracted.

The confidentiality aspects, the fact that you can submit your name and credentials for consideration without having to disclose that to your partners, your colleagues, and severing your ties, as you have to do if you're seeking a political nomination, and then have to run a campaign, you pretty well have to isolate yourself from what you've been doing in order to do that, and I think it discourages a large number of attractive candidates from participating in the process of seeking judgeships when you go through the partisan approach.

I've read the Chief Judge's statement of last week.

It's very articulate. I support it. I wish he were Chief Judge at the time I was going around the State in 1979, after the New York State Bar Association went on record in favor of merit
selection of Judges.

At that time, I think, Dean Feerick, you may have been in the House of Delegates of the State Bar.

We had one of the most brilliant debates I've ever seen, when we talked about court merger and merit selection, and the Governor was happy, and the Chief Judge was happy, and I started making the tour around the State promoting and encouraging merit selection and court merger, and I looked around behind me and looked for the Governor and looked for the Chief Judge, and nobody was there, because it was politically non-expedient.

It wasn't going to happy, so stop it.

We continued to speak, and I guess ten years later, we are still trying to speak and urge it.

It's a worthy thing you're working on, and I hope you will make strong recommendations for merit selection.

THE CHAIRMAN: Thank you very much.

We've heard a lot of testimony at the last two days -- I include last week and today -- about the functioning of judicial conventions and the role of party leaders in the City.
And sometimes one is led to believe that what happens here is different from what happens elsewhere in the State.

You're one of our State's most prominent upstate lawyers, and I certainly would appreciate any comments that you would have, say, in the context of election to the Supreme Court in your area with respect to the role of the political party leader and the functioning of the judicial convention system.

MR. PALERMO: I have not been an active participant in that process, although I have served to some extent on a screening committee of one of the political parties, and essentially what that committee did was to interview the applicants, much as I do as Chairman of the Governor's Screening Committee, and then make recommendations to the political party hierarchy.

I was never part of that structure, so I don't know the communication after the interviewing process.

But, eventually, I assume that the cream rose to the top, and then those recommendations were made to the political parties.
But, when you have partisan elections, one of the criteria of getting the nomination is your willingness to dig into your own pocket to fund your campaign.

So, you may be well-qualified for the position of Judge, but if you don't have the capacity to fund a campaign, the political parties don't do it, and, therefore, the selection in some respects has to do with who can afford to run as against who is the best candidate to run.

I've never participated in a convention, so I don't have personal knowledge.

THE CHAIRMAN: Are elections in your area contested?

MR. PALERMO: Vigorously.

THE CHAIRMAN: You mentioned as much as $100,000 may have to be raised and spent by candidates?

MR. PALERMO: That's correct, and what I and a few other individuals did a few years back was to try to get the judicial candidates, themselves, once they received the nomination, to enter into a campaign spending limitation agreement.

We were successful with a large number of
candidates.

Two of them would not participate.

But, we essentially offered ourselves as private citizens as brokers to bring the candidates together to say, look, the only beneficiary of the campaign spending is the media, particularly the television.

Let us look at a realistic budget that we can afford to put together and agree to a limitation.

The vast majority of the candidates for all offices in that year -- it happened to be for Surrogate Court, County Court and Supreme Court -- agreed to a campaign limitation, which I think helped a good deal to avoid some of the problems.

The two who didn't in that year, I believe, expended in excess of $65,000 or $70,000.

THE CHAIRMAN: When did that happen, that event you described?

MR. PALERMO: Oh, Dr. Henry, can you remember when I was doing that?

DR. HENRY: About five years ago.

MR. PALERMO: About five years ago, plus or minus a year.

COMMISSIONER EMERY: It would be great if all
three of you, I think, especially Dr. Henry, could comment on the process of how the appointment or screening or nomination, various options of the non-elective judicial selection process tend to broaden the pool.

We've heard some testimony about that early on in these hearings, and there is contradictory testimony on it in this record, and I would certainly like to have your opinion and any information that backs up those opinion with respect to the appointment process as the process which broadens the pool by which people get interested in judicial judgeships.

DR. HENRY: Well, if you're running for office, you have to have, as Jack Carey pointed out the other day, some realization of how the political process works, and you have to have been involved in it.

But, if you're a practicing lawyer in New York, and pick up the LAW JOURNAL one Monday morning and it says there are vacancies now, the Mayor's Committee is accepting applications, because there's two vacancies on the Criminal Court and two vacancies on the Family Court, some people are
naive enough to think that all they have to do is
send in a resume to the Mayor's Committee.

But, the funny thing is, some of them have
gotten appointed, and that's a whole system.

Some of them who never even knew where their
political club was, or what a district leader was,
and who had to have all of those sort of things
explained to them, have been able to come forth.

I think that the self-selected political pool
is those people who have spent their afterwork
hours in the political process, whereas people who
have spent their afterwork hours with the United
Way, or the Junior League, or the American Red
Cross, or volunteering to coach a softball team
in their community -- this doesn't count as
community service.

I mean, there's all sorts of people out
there who have varied interests and who have helped
their communities.

But, the political process says you have to
be a lawyer and you have to be involved only in
the political process.

That's the only criteria, whereas the other
says you can have been involved -- in the appointment
process, you can have been involved in the political process, and that isn't going to harm you, if you've been an active member of your local political club, if you've attended functions, if you raised money for a presidential campaign, whatever.

That isn't going to disqualify you from being appointed, but it isn't the sole criteria.

I think the fact that the Mayor's Committee has such an outstanding record in incorporating sections of the community that are under-represented on the judiciary is testament to how the process can be opened up.

MR. PALERMO: I can speak to the intake function.

COMMISSIONER EMERY: Are there any statistics or studies that compare the situation with respect to judicial applications before a committee process?

In other words, that demonstrate how this kind of appointive or merit selection or panel selection broadens the pool.

Do you know of any?

DR. HENRY: Well, the Panel -- let me speak
to you freely now and regret everything I am going
to say.

Before the current Mayor was in office, there
was a Mayor's Committee on the Judiciary.

I think there's been Mayor's Committees on
the Judiciary back to the Wagner Administration.

Those were screening panels, and they had the
same designations, I believe, as the Mayor's
Committee now uses:

Well qualified, qualified, unqualified.

I know of one candidate, an outstanding
Judge now, who had been on the list for so long,
but his name never got sent down, or if his name
got sent down, Mayor Beame refused to appoint.

As a matter of fact, I understood -- at one
point, somebody called me to say there were 156
names down before the Mayor, and he still couldn't
find the right name.

So, you know, you could broaden the pool
and you could accept applications -- I am sure
the County Leaders are accepting applications --
but if they're not the right one, that's not it.

The key here is that everytime Dean Trager
makes a nomination, he sends down three names, and
the appointing authority is duly bound to select
from the three people that this search committee
looked at.

MS. ARCHER: Isn't there a problem with that,
that is, there's no accountability on the part of
the Mayor?

He gets three names. It's really the Commission
members who are picking the Judge.

DR. HENRY: The accountability is that he
appoints one-half less than half of the Commission,
and if his people are sending him down bums, he
ought to throw those people off of his Committee.

MS. ARCHER: Are you saying then that if we
are to have nominating commissions, that the appoint-
ing authority should be entitled to appoint as many
as half or all -- I think the Mayor actually
appoints --

DR. HENRY: The Mayor doesn't appoint all the
members of the Committee.

The Mayor --

MS. ARCHER: The PJ designates, and the Mayor
appoints.

The Mayor has an opportunity to approve or
disapprove of the designees of these other people.
DEAN TRAGER: Yes.
In theory they do, but it hasn't happened.

DR. HENRY: In an ideal system, you should have lots of appointing authorities.

For the Court of Appeals Nominating Commission, there are 12 members, of whom the Governor appoints four, the Chief Judge appoints four, and the legislative leaders, of which there are four each, appoint one, and that gives you six different agendas, if you will, going in there.

If I was going to set one up, I'd set it up with about seven or eight or nine appointing authorities, nobody having too much clout.

MS. ARCHER: But then back to the problem of the ultimate appointing authority not being able to be held accountable for his choice, if his choice is limited to three and he has very little say on who is on the Committee.

DR. HENRY: Then you have another problem.

If you have no control over the appointing authorities, then the system can run amuck, as it has run amuck under previous Governors and Mayors and in other jurisdictions.

It's not -- merit selection is not synonymous
with appointment of judges.

That's the key that has to be said over and over again, because our critics just say that merit selection is gubernatorial appointment and it's not.

We have to have a self-limited appointing authority.

It's in the nature of Governors to have to play that sort of political game, but if you send them quality nominees, they're not going to make a bad choice.

MR. PALERMO: A couple of comments.

One, picking up on what was just said, I think there is floating around somewhere the idea that nominating recommendations from a screening nomination commission might lead to the political parties, themselves, creating a pool from which the political parties then would be restricted in selecting their candidates.

There are a lot of different options that you can use, it seems to me, to combine many of the best features of what we are talking about, which ultimately would preserve the election of judges, but at least provide a screening -- a
nominating function on merit before you get to those
who are going to go before the electorate.

MS. ARCHER: What do you say to that, Dr. Henry?

DR. HENRY: I think I'd say you'd have
meritorious candidates, who then got to hand out
nice shopping bags at the local shopping center,
because they can't talk about the issues.

We don't want them announcing their position
on taxes, and birth control, and abortion and
foreign policy.

I mean, if Judges were to be taking those
sorts of positions, they would be prejudging issues
which may come before them, and the word "pre-
judge," is simply the word "prejudice".

So, if you have prejudices, yourself, on all
these issues, when they come before you, you'd
have to recuse yourself.

We'd be setting up an intolerable situation.

Of course, legislators and executive and
candidates for those offices should announce their
positions before the public, and the public should
decide, based on those issues, who they like
best.
But, a Judge is not responsible to that. A Judge is responsible to the law.

It's not a Government -- in the Judiciary, unlike the other two branches, it's not a Government of men and women, it's a Government of law, and that's their highest and sole responsibility.

MR. PALERMO: I would like to point out, I don't disagree in philosophy with what Dr. Henry has just said.

I agree.

As a realist, however, and having been through the same area that he has been over the years, and having seen the intransigence of the Legislature to make inroads to limit the election of our judiciary, I am thinking of ways in which we can combine benefits, and still not necessarily give up the election.

Let me go back to the question that Mr. Emery raised about the screening function and how it might serve the minorities.

Again, speaking from my very limited experience, this past few months, with respect to the Monroe County Family Court, where we had over 30 applications, approximately 10 were from women.
We also had minorities, blacks, Hispanics.

I think that if you have a system that speaks to the merit, you're going to bring out the best of the candidates, wherever they may be, whether they're minorities or otherwise.

I think it does attract people who otherwise would feel they would not be part of the process.

THE CHAIRMAN: Dean Trager?

DEAN TRAGER: Someone -- the suggestion has gone beyond it, but how to demonstrate the pool has widened.

I was just going to suggest you go through the list of the Green Book of the City of New York and take every -- there are 139 appointments.

Take every tenth name and speak to these people and ask them in detail, a, how they got into the process, whether they ever were active in politics.

Most of them, I think nine out of ten, will say no.

Ask them whether they ever dreamed they would have a shot at any other process, and who did they know, if they knew anybody on the Committee.

I think if you build up enough credibility,
people will come out if they feel they're going to get a fair shot.

I have to say, again, I agree with Tony Palermo.

If you said to me today that we can't have merit selection, but maybe we can have this preliminary screening process, you know, as a first step, I guess I would be -- I would probably say, well, let's do it.

At least let's get started on the process.

But, I have to tell you that in principal, it's not just that elections are bad.

In principal, you will, again, not get people to come out, because there are a lot of good people who just will not participate in the electoral process.

The biggest negative that the Mayor's Committee has had in our experience has been the failure of court merger.

There are outstanding lawyer. I think we've done a terrific job in the quality of appointments, but we could have done even better.

There are really first-rate people known by members of the Commission, who I have approached,
asking them to serve on the Court and who have said to me, "David, I have no doubt that I'd get a fair shot and probably appointed by the Mayor, but then where do I go? I have no political connections, and I don't want to, in effect, commit myself to a year on either the Criminal or Family Court, with no chance to go ahead."

I mean, that was the most devastating blow to the Committee, the failure of court merger.

If you ask me today which is more important, from my perspective, merger or merit selection, I'd like both, but if I could have the merger today, as good as the quality is today it would be even better, and it might not even be so bad to have a little competition to prove some of these theories about which is better and where they come from.

Like the nonsense that was -- you were responding to about the ethical problems and the problems with the Judges.

I mean, almost all the problems have come from elected Judges.

It's a minority portion.

MS. ARCHER: Mr. Palermo, I'd like to hear your views on the merits of screening committees
versus nominating commissions.

Dean Trager said screening committees had no credibility, yet other people have said that screening committees are preferable to nominating commissions.

If a committee is limited to only nominating five people, they may be excluding five other people who are equally well qualified, or the converse, which is that if they're limited to five, they will nominate five, even if only three are qualified.

If you have committee members who are people of integrity, it doesn't -- people don't understand why a nominating commission would be better than a screening committee.

MR. PALERMO: That's a difficult thing to answer.

The Governor's Screening Committee doesn't have any limitations on it.

The only limitation is that the candidates we submit to the Governor are those who meet a standard of well-qualified.

We can submit ten, twelve, fifteen well-qualified people, or none.
So, to some extent, even a screening committee has a capacity to do something more than just screen. 

I think, ideally, if I were doing it, I would prefer a nominating commission, much like the Court of Appeals Nominating Commission, with sufficient flexibility, as long as it operates fairly, to provide a pool of the best.

In other words, the quest is not to find all well-qualified people, but to get into the process of selecting and prioritizing the very best who are available.

That's ideally where I would like to end up.

I don't think that's very realistic when we start talking about the entire State Judiciary.

MS. ARCHER: Is that because you don't think the Screening Committee will only refer most highly qualified if it has no limit on the number it can recommend?

MR. PALERMO: Well, I am not sure I really can answer your question.

I don't know the answer.

DR. HENRY: Ms. Archer, could I take a shot at that?

MS. ARCHER: Please.
DR. HENRY: I had some experience with screening panels.

One day I was called by the Chief Judge, Judge Cook, and asked to be a member of the Prince Panel, which was a screening committee to decide whether New York City's Civil, Criminal and Family Court Judges could serve as Acting Justices of the Supreme Court.

The first Judge came into the door to be interviewed by this august group -- and it was an august group, with the exception of my presence there -- and we talked to the Judge, and he had a pretty clean record, and we said, "You're approved."

Actually, you don't tell them that to their face, but after he left the room we took a quick vote.

Then, candidate No. 2 came in.

Candidate No. 2 didn't have quite as clean a record.

As a matter of fact, there was some talk about Candidate 2 taking afternoons off frequently.

But, oh, come on, let's be fair to the gentleman. He's been on the Bench for some time.

So, we approved Candidate 2.
Candidate 3 came in.

Well, he not only took off a little bit in the afternoon, but he was known to stop out to Forlini's Restaurant for lunch and take a couple of martinis in lieu of some pasta.

We had to talk about that a little bit, and eventually there was some dissention, but he got passed, too.

Eventually, I mean, we didn't have a standard left.

I mean, you had to come in there and insult the Commission.

You had to speak ill of everything. One Judge, the late Judge Senna, came in and pounded on the table and cursed at General Lefkowitz, and that was enough to get him disapproved.

But, other than that, we hardly screened out a single person.

I mean, you had to be practically be caught in the act in order to be found not qualified.

That's what happens in screening panels.

Eventually, you just keep lowering the standards.

Well, somebody says, "Well, I like this guy."
How come he isn't through, because we let through X, Y and Z."

You just keep lowering the standard. It's just human nature.

It's the way people operate.

But, if you have to go through that whole list and say who are the best five, or, God forbid, who are the seven or ten best, you're going to make a different decision than simply saying who are we going to exclude.

That's why admissions people at law schools or graduate schools or whatever, have to put forth the best, not to screen out the worst.

They have a limit, the limited number of seats.

MS. SCHACHNER: What about the question of where you locate these commissions.

For example, in the upstate area, I think you've talked with me about the problem of covering such a wide geographic area.

MR. PALERMO: Yes. My experience has been somewhat different. We're the Fourth Department Screening Committee.

We have vacancies in Oswego County, Lewis
County, Onandaga County and Yates County.

The members of the Committee are predominantly from Erie County, which, as it happens, this time around did not have any vacancies.

It's very difficult to get participation from the members who are not directly affected, even though I am pointing out that a Judge who gets elected as County Court Judge in Yates County will be serving as Acting Supreme in Erie County and so forth.

So, I think that if you're going to have it, you've got to confine the geography so that you get realistic, active participation of the members of the Commission.

MS. SCHACHNER: So, perhaps judicial districts, rather than departments?

MR. PALERMO: I think so.

While we serve as a departmental committee with respect to the individual vacancies this time around, we're serving as County Committees, and that means only that the full Fourth Department Committee serves, plus one representative from the County.

The County representative comes, but if
that's a problem, what happens is that you communicate by mail, by telephone.

In my instance, what I did as a practice was to have subcommittee conduct the interviews, send out the recommendations to the full Committee, and get ratification and endorsement in that fashion.

But, that is a problem.

THE CHAIRMAN: Last week, Governor Wilson gave strong testimony that we should not take the voter out of the process, and part of his case was that all you do was create a commission or a screening committee is shift where the politics take place.

You shift it from party leaders and voters to whoever is serving on those committees and their network of relationships.

Do you have any comments on that?

MR. PALERMO: I know the Governor well. I respect him greatly.

I think he's wrong.

IN my experience, partisanship doesn't enter into these screening functions in any way, shape or form.

The people I've served with, whether
Democrat or Republican, isn't the issue.

It's a question of the quality, and I suppose partisanship, in the sense of human relations, yes; partisanship in the sense of politics of a Republican or Democrat, no.

I think how a person reacts, how he responds with candor, sense of community involvement, all of those things become issues of interest and discussion, and to an extent the deliberations that take place on that are, you know, political in nature in the sense of you're advocating a position, et cetera, but not in the sense of political parties.

MS. GORDON: What about in the sense of political Bar establishment orientation?

MR. PALERMO: My personal experience is establishment "old boys club," really hasn't been a factor.

We could care less whether they're old, established lawyers, or Democrats or Republicans really.

COMMISSIONER EMERY: David, in this regard, how about on the Mayor's Committee, is there any lobbying of the Mayor's Committee during the process
of evaluation?

DEAN TRAGER: I am sure there is. If by "lobbying," you mean the people call up, make recommendations, they certainly do, and I think there's nothing wrong about it.

COMMISSIONER EMERY: The candidates call people to call the various members of the Committee?

DEAN TRAGER: Oh, sure, I have no doubt, but I don't see that necessarily as appropriate.

But, the bottom line of it is, you know, I would be a little bit disturbed if I were getting the calls from City Hall.

But it seems to me these people only carry the weight they carry in terms of the influence they have.

I think part of the problem you're referring to is the reason that most of these proposals talk about a diversity of appointing persons.

Now, if I might make a little bit of a pitch, it doesn't go anywhere, but I always make the pitch.

Hank is ready for it, and I say this not in my hat as Dean of a law school, but I will say that to the extent that perhaps there is some
caucusing within the Committee or any of these screening committees, I can say that on the Mayor's Committee, one of the most helpful aspects, helpful and healthy aspects, has been that provision which provides for the Deans of the law schools to appoint one member to serve a year.

I would increase it, if I could, from two to four, but they should only serve a year, because it's very healthy.

They bring a very different perspective. Number one, they usually have very little in the way of agenda.

They don't really know the other members of the Committee.

So, I guess the basic argument is diversity of the appointing people.

On the other hand, I made my pitch for Deans and it's not because I am a Dean, but the fact of the matter is, in terms of how I've seen the process work, you do sacrifice this little bit, element, of accountability.

I would have to say that in my experience on the Mayor's Committee, the fact of the matter is that we've had one or two problems with members of
the Committee acting in a way that I thought inappropriate.

I think we resolved those issues.

But, I would say that in each instance the appointee who caused the problem was not that made by the Mayor.

So, I mean, it cuts both ways.

I mean, Hank will probably kill me for saying this, but the fact of the matter is, there's probably no airtight system.

You try to do the best, assuming people would act in good faith. Not everyone will be like Ed Koch, who is emotionally committed to this process.

I think most elected officials would like the idea of some screening process, but I would have to say that there's probably no process you can create that would totally insulate it from somebody who wants to subvert it.

I don't care how you do it.

MS. REMES: I throw this out to you, any or all of you.

One of the criticisms that we've heard raised about the screening committees and nominating committees is this secrecy that surrounds the
deliberations.

I guess this touches on accountability. People say that good people are going, but don't come out.

Is there anything that can be done to, to some extent, open up the deliberative process so that there can be some check, other than just the quality of the Judges who ultimately end up on the Bench, to check what's going on in these deliberations?

DR. HENRY: If you had an open process, if the Mayor's Committee met in public, you'd never get a single comment, I don't think of a derogatory nature about any of the participants.

You're a Dean of a law school, and if you — every person who applies for admission to Fordham has to supply three or four letters, confidential letters, of recommendation.

When I was teaching in college, for many years I had hundreds of students who asked for recommendations, and if I was going to do my job honestly and evaluate what I thought was their academic performance, and there wasn't a waiver of confidentiality, I had Letter A, and then I put in the machine.
I said, this person is just absolutely wonderful, because I am certainly not going to have it out there that I publicly criticized them.

But, if it was a private letter of recommendation, and the student waives confidentiality, then I am going to tell the Committee what I think really about that applicant's prospects.

You will find that nobody, no practicing lawyer, is ever going to say one scintilla of negative comment about a sitting judge if confidentiality of that process is not ensured.

Otherwise, everybody is wonderful, just wonderful.

DEAN TRAGER: Can I amplify on that?

No one has a Constitutional right to be a Judge.

If the process is done right, they should not be smeared by it, and I think it's very clear, we've never made a public statement about anybody.

We don't even tell people, without their consent, that they have, in effect, come before the Committee.

It would be a disaster to any merit selection process to make any requirement of disclosure.
I would be willing to accept the notion that they would be informed whether they were ultimately approved or not, on the approved list, just to make people feel good, but I would give it to that person, the applicant, and then let them decide whether they want to publicize it or not.

The biggest problem we have on the Mayor's Committee is getting candid comments about applicants, and especially about Sitting Judges on reappointments.

MS. REMES: I see the problems with making the identities of people who appear before committees known, but it seems to me there are ways to work around that.

For instance, publishing statistics and making statistics available in terms of the number of people who come in and either do or don't come out, and a breakdown in terms of minorities.

DR. HENRY: Absolutely, and it's wonderful that you asked the Mayor's Committee to do that, because they then went and did it, and I hope you did it with the State Committee on Judicial Nomination, and I hope Stewart Summit responded in candor.

DEAN TRAGER: I would be -- this letter, I
intend, now that I did the work, to publicize it.

THE CHAIRMAN: I appreciate the comments on that.

Do you think it is useful for screening committees, nominating commissions, to periodically publish such statistics?

DEAN TRAGER: Absolutely.

THE CHAIRMAN: Do you see any compromise in terms of the confidentiality of those who are applicants through the publication of statistics?

DEAN TRAGER: I guess if you're talking about Yates County, it would be a problem.

MR. PALERMO: I'm sorry, I didn't fully understand the question.

THE CHAIRMAN: There's a view that once you get into the statistics, you run the risk of disclosure in terms of --

MR. PALERMO: I think that's routine, that you do run that risk, and I am not so sure you can start disclosing some of these statistics without really violating the whole non-disclosure provisions.

On the other hand, it certainly, in my judgment, would enhance the reputation and credibility of the screening process.
Again, I go back to the Monroe County Family Court.

If this was generally known as to number of and type of applicant we had, et cetera, I think it would have great impact on the credibility of the screening committee's work.

MS. REMES: What is the risk in disclosing just of pure statistics?

MR. PALERMO: I guess you'd have to start getting specific about what statistics you're talking about.

Number of women, number of minorities?

MS. REMES: Yes.

MR. PALERMO: With that sort of thing, I don't see any problem, but I think initially you were coming at a much broader open air meeting which would inhibit, I think, a full and fair interviewing process, if you did that.

MS. REMES: No, I am referring now to just statistics.

DEAN TRAGER: I think it's a good idea.

In fact, maybe you ought to mandate it. Maybe you ought to mandate that it's a violation of law, since a lot of the members are not lawyers.
Otherwise, I would say of ethical conduct, to then tell the results -- you know, disclose the results, without the authorization of the Committee.

I mean, we have had some unhappy experiences where that's part of the reason that it's very hard to get information, and that unfortunately one or two members of the Committee -- here again, I guess I am cutting against the argument for diversity of appointing, because I don't think any of the Mayor's people have ever been involved, and they knew that if they were involved, they would be removed summarily from the Committee.

We have had situations where Judges have been turned down for reappointment. "I hear you voted against Judge So-and-So."

Do you realize what that does to a lawyer, especially if he's in active practice?

I mean, to me, since I am not very much in practice, I don't like the notion, but for a lawyer who is practicing and trying to do an honest job, to have it known to all the Judges and all the Judges' friends in the Court that he voted against the reappointment of Judge X -- I mean, that's really devastating.
That's why I would like some part of the process --

COMMISSIONER EMERY: Wouldn't it help you to have secret ballots?

I mean, you can tell from people speaking, but, nevertheless, nobody could say with definity within your internal processes if you cast a paper ballot.

DEAN TRAGER: Perhaps.

COMMISSIONER EMERY: It seems to me, I agree with you totally, that's a disastrous consequence of a very good process.

It could be, you know, just devastating to a completely innocent person who is trying to do the best that they could the job they were assigned.

I would hope that everything could be done to protect that.

I am not sure criminalizing disclosure is the answer.

I would much prefer other processes, and, of course, the ostracization of --

DEAN TRAGER: Can I think about that?

I want to think about it. It may be an idea,
but the problem that comes to my mind throughout the matter is these times when we have turned down these judges, it usually ends up an overwhelming vote.

Whether I say it or not, the standard says they should be well-qualified for reappointment, and the fact is, they come in with a presumption of reappointment.

It really has to be pretty bad, and by the time that happens, it's all but one or two members of the Committee that are convinced.

Let me think about it.

COMMISSIONER EMERY: You don't have to announce the numbers, what the numbers were, just say the Judge is approved or disapproved.

THE CHAIRMAN: Is your process in the Screening Committee a secret ballot process?

MR. PALERMO: No, we haven't followed that process.

THE CHAIRMAN: I know in the Judicial Nominating Commission for the Court of Appeals there is a secret ballot process.

DEAN TRAGER: Has there been some claim that
that was manipulated in some way?

I have a vague recollection that somebody claimed the secret ballot process has been manipulated.

MS. SCHACHNER: I think there has been a claim about that in connection with preferential voting, and the way it's set up in the Court of Appeals, somebody can manipulate it so that somebody else definitely cannot --

DEAN TRAGER: A strong opponent.

MR. PALERMO: An adversely weighted judgement.

THE CHAIRMAN: Any other questions?

MS. ARCHER: One last question.

I was wondering -- I think you're all in favor of adequate representation or proper representation of minorities on the Bench.

I was wondering whether you would be in favor of having nominating commissions which mandated that there be a certain percentage of minorities sitting on the Commission, or do you think that's going too far?

MR. PALERMO: I wouldn't mandate it, but I would encourage it.

Our experience with the Nominating Commission for Public Defender had Hispanics, a woman member
of a Church organization, and I think it added to the credibility immensely to have that representation from the community, and, as it happened, the minorities.

DEAN TRAGER: And I think it would be a disaster if you mandated it.

THE CHAIRMAN: Can I go back to the Screening Committee in the Fourth Department?

When you get a lot of applicants, do you have any procedure whereby each applicant is given some kind of interview or minimal communication in person?

MR. PALERMO: Oh, yes, we offer each one of them the personal interview, and except for those who had previously been through the process before, the predecessor committee, they all exercise that right of personal interview, and I found it very useful.

DEAN TRAGER: Can I raise one other issue, which I would like to put on the record?

I worked very hard, and I think I succeeded in persuading the Fund for Modern Courts that the vote to be approved, as opposed to, let's say, selecting the ultimate candidate, should be only by an absolute majority, nothing more, and the
reason for my view is that I would have to say
that sometimes the screening process -- it certainly
gets rid of the bottom of the barrel, but sometimes
it has an effect of screening out some really
outstanding people who may sometimes rub people the
wrong way, people who have made great contributions
to the community, are articulate and maybe dynamic,
and in some cases scare off people.

I can think of some very able Judges who might
have trouble in a process, because if you go to
two-thirds, it becomes a bit of a veto process.

It scares people.

I think, obviously, they need the approval
of the majority, but I think it's an important
procedural protection that it not be more than an
absolute majority.

THE CHAIRMAN: Are you referring to the Court
of Appeals Commission, or any commission?

DEAN TRAGER: Any.

You get approved on the list and then
ultimately the vote.

The Mayor's Committee -- you have to realize,
we deal with so many vacancies, it's an ongoing
process.
For somebody ultimately to get approved, we have a two-thirds vote process, and sometimes I'm not happy.

Some really -- you know, it really keeps out the dregs, but it also sometimes, I think, keeps out some really first rate people who are a little bit different, who don't have the general career track.

THE CHAIRMAN: Aren't you forced into some kind of extraordinary majority requirement if you are limited in the number of candidates to be presented to the appointing authority?

DEAN TRAGER: No. Then you get to the voting.

I'm just talking about whether they're going to be in the pool.

When you vote -- let's say there's a vacancy. Let's say you get up to three votes.

Then the top people come through. I would like to combine that, if you could then with a ratification vote, because it's theoretically possible, and it has happened, that the top people-- let's assume there were two vacancies and six people.

The top three people are so outstanding, they
get 15 votes, but then you need to give the Mayor four, five and six, and they may get less than a majority of all the people who are voting, just because of the way the numbers came out.

The way it is essentially, I give the Mayor the vote, and that has, as a practical matter, solved the problem, because if he sees somebody is No. 6 on the list, and only got five out of a maximum of 15, he usually says, "Why?"

COMMISSIONER EMERY: First, about that, I don't understand why you wouldn't -- and this is important to us.

I think that's why I am going into it. I am not just going into it because it's about your procedures.

I don't understand why you wouldn't vote three and then three again if there were two vacancies.

Why will you vote six? You won't have that problem if you vote three and three, if you vote for each vacancy separately.

DEAN TRAGER: I think there are a lot of negatives to that, because what would you do, have each of them vote for just one person on the
first three?

COMMISSIONER EMERY: No, no.

I take it what you do is, when there's a vacancy, each person on the Commission, after everybody is interviewed and everything is before you, votes for three separate people, if they believe three are qualified.

If they only believe one or two are qualified, they only vote for one or two.

But, they vote up to three people. They can't bullet vote, obviously, three votes for one person.

So, they vote up to three people for each vacancy.

DEAN TRAGER: Right.

COMMISSIONER EMERY: So, what I'm suggesting is, it's more effective if you get the first position out of the way, because then you have a whole 27 people, or whoever is present, voting on each vacancy, rather than having four people voting for the six slots when you're voting for two vacancies.

DR. HENRY: The reason is, if you vote the two, you can have your three top candidates all put into one slot, and then those are your A plus people, and then three B's end up for Slot 2, and
the Mayor would then be limited or couldn't take
two from Column A.

COMMISSIONER EMERY: Presumably, once the
six -- I am not saying the Mayor has to select from
the slots.

I'm saying the way the Commission does it --
in other words, let's say you have six openings,
because there are two slots open.

You vote for 3 and then you vote for 3 more.
When it goes up, the Mayor can pick from the 6, but
at least your voting procedures have had the
Commissioner or the Committee consider each set of
3, with all people looking at each 3 as a set.

DEAN TRAGER: Why isn't that the same when you
can say they vote up to 6 for two openings?

COMMISSIONER EMERY: As you said before, if
they vote up to 6 at once, it's very likely that
the bottom 3 -- would the top 3 not get excluded,
because the first vote has taken place and is not
over with, at this point the bottom 3 are going to
be spread out all over the place and they only have
four or five votes each, and that's a problem.

But, if you have three out of the way, and
then everybody has to reconsider who is left, you
DEAN TRAGER: I see what you're saying, but for the same reason, I want the majority vote, only a majority vote, is the same reason I don't want to do it that way, because a lot of the very best people will not get the top vote.

COMMISSIONER EMERY: That's an interesting philosophy, in and of itself, that you can structure-- in other words, if you're a renegade character, but you've got talent, you're much better off when there are three or four vacancies, or two or three, than you are when there's one vacancy.

It seems to me that puts a lot of control in the fortuitousness of the circumstances of how many vacancies --

DEAN TRAGER: To amplify, I guess part of our process is that we do try -- we have consciously, although it's not in the Executive Order, tried to group vacancies.

In other words, I tried not to go one, one, one. I try to go a group of three or four.

COMMISSIONER EMERY: That's because you like renegades?

DEAN TRAGER: That is, no doubt, true.
COMMISSIONER EMERY: You're the scheduler, I guess.

DEAN TRAGER: I have control of the process.

Let's go back to the other thing.

I think, it makes -- you know, it helps us assure a perception that women and minorities are getting fair representation if we can do it in groups of four.

People see one or two women, a black, a Hispanic. It helps create the credibility of the process.

If we did it one by one, there would be a serious problem in terms of just the credibility of the process.

COMMISSIONER EMERY: I am not suggesting you report them out one by one.

I am suggesting, just in your formal voting process, but you may be right.

I'm just exploring this along with you at this point. You've had a lot of experience doing this, and I haven't.

To the extent you may get reported out more minorities and women, it may be a much more effective way to achieve the kind of cross-section
requirement you're looking for.

DEAN TRAGER: I would say -- and I shouldn't personalize, but because I love him so much, Jack Weinstein I don't think will get a two-thirds vote, but at least he will get a majority.

I want the process to make sure the Jack Weinsteins come out, too.

We're all human. We like to deal with what we know, and maybe because of who I am, I like renegades a little better, but I think most lawyers would feel more comfortable with someone who has practiced in the Court, done their ten years, knows all the ins and out.

I detect in the process -- and this is not just Mayoral appointments, but has to do with everybody -- when somebody comes with a little different resume, they've done interesting things which shows really, in my view, brilliance and ability to learn -- I think the Court needs a few of these people to bring a little different perspective.

But, my sense is that a lot of people get very nervous, and he doesn't or she doesn't quite fit the mold.
There's a twist to it.

You've got to understand that it gets easier now, but certainly in the beginning, with minority appointments, to reach out, we had to go to some very nontraditional sources, and if you do that and basically say that these people are basically intelligent, capable people, we don't have anybody who has been there with ten years' experience who is quite as able and capable, and I'd rather take my chances with that person.

People get worried.

Well, wait a minute. Is the process, the standards, being upended?

I mean, that's why I want to leave a little flexibility for the Jack Weinsteins of this world.

COMMISSIONER EMERY: When you say, "majority," do you mean a majority of the absolute number?

DEAN TRAGER: Of the absolute number, because if you do it less, that can be manipulated, too.

MS. ARCHER: When you nominate three candidates for a vacancy, and you do it in groups of five vacancies, you're nominating 15 people, and the Mayor picks five of those people.

Ten left over, I assume, you still believe
are well-qualified?

DEAN TRAGER: They go back in the pool.

MS. ARCHER: When could you next --

DEAN TRAGER: The next day they could be voted out.

There was one person that went to the Mayor four times, and finally got appointed.

I think the Mayor finally said, "I can't look him in the face again."

But, you go back into the pool and are eligible the next time.

COMMISSIONER EMERY: You're reconsidered, you're not automatically in?

DEAN TRAGER: No, you have to be voted out again.

MS. ARCHER: And the Mayor interviews everybody that you nominate?

DEAN TRAGER: I would say the overwhelming majority.

There are two instances where he doesn't. Basically, I will make a recommendation where somebody got like four votes, and clearly in no way is of the standard of the other five people.

I would say, you know, it's really taking
a lot of time, wasting time.

But, I've been told a couple of times, "No, I'd rather do it and let everybody have their shot."

He's better on that issue than I am.

MS. SCHACHNER: I have another question.

You've heard, I guess, complaints in essence that candidates will submit the applications to your Committee, go through the interview process, and then be in limbo for six months, twelve months, eighteen months, and that that very process self-selects, so that you'll have perhaps public service attorneys willing or being able to stay in their current jobs while waiting the twelve months, eighteen months, but not private practitioners.

Why does that happen, and is it a necessary concomitant of the process?

DEAN TRAGER: Well, the fact that they're in limbo is only because of our duty of non-disclosure.

My own view is that most private practitioners constitute a relatively small portion of the pool.

I mean, it could happen that they're waiting to see, but it seems to me they can continue in
private practice.

I mean, I am not sure how they're more pre-
judiced by it.

Maybe I'm missing the point.

MS.SCHACHNER: Why is there a need for the
process to stay in limbo as long as it does?

Aren't candidates considered within twelve
months for future vacancies?

I mean, there's a cutoff, according to your
rules?

DEAN TRAGER: Most of the time, most of them
will be considered within twelve months.

But, that doesn't mean -- but, there may
be two, three years before they ultimately are
appointed or merged from the process.

MS.SCHACHNER: And there's no communication
with them?

DEAN TRAGER: No, but I don't see how they're
prejudiced by that, being in private practice.

Presumably, they continue in private practice.

MS.SCHACHNER: It's been voiced to us by
people who are in the private sector that it's
an uncomfortable position for them to be in, and
it may deter them from going into a process to
which they may not merge for three years.

DEAN TRAGER: I mean, we've had a couple of instances where somebody was going through the process and sort of wanted to know whether there was -- you know, what the picture was or where their prospects are and, you know, I might, through some sort of, you know, careful wording of language, give him some hint that, you know, maybe they ought to be thinking of other -- you know, making other plans, and they shouldn't rely on it, but I don't see why they're any more prejudiced by it.

DR. HENRY: How much worse off are they if they announce their candidacy for Civil Court Judge, and their clients then see them soon abandoning their practice of law?

At least in this process, it's confidential, and their clients don't know they're about to turn heels on them.

MS.SCHACHNER: I am asking, within this process, there can't be a more finite limitation and notification to the candidate of at least where he or she stands in the process?

DEAN TRAGER: I think that on the whole -- I mean, I am willing to go with the notion that if
they request, we will give them a report, as long as that's where they stand, yes or no, as long as that doesn't become the opening door to why was I turned down, and they want a whole hearing on why they were turned down.

If they just wanted that, I would be willing to go with that.

But, the Mayor's Committee -- this is before my time -- was sued once because of allegedly some disclosure that was made.

I would be willing to go that far, to tell them where they stand.

You've got to understand, the process works in the sense that they may be prejudicing themselves in a way, because their moment may not have arrived.

We've had a number of instances where people have played, and where we've put them in our deferred category, what we call the ripening process.

That's essentially -- this is because so many of the appointments are young.

They are ten years out of law school, they've been in the DA's office, or Legal Aid, and they
immediately decide they don't want private practice, so they go before the Mayor's Committee, and everybody says he's a capable person, but somehow there's a sense that they need a little more ripening in terms of experience, maturity.

So, we defer them. We don't really reject them, even though I don't think that's quite reflected in our regulations, and essentially what happens is that after a year or two, we call them back, you know, and say, let's see whether our initial judgment was right or wrong.

So, I mean, the way the realities of it are, they may be hurt, but I'm willing to go along with the notion that they have a right to know after the year where they stand in the process, approval or disapproval, or where they stand, but that's as far as I am willing to go.

THE CHAIRMAN: The hour is late. Your presentations have been not only excellent, but very helpful to us, and I really want to thank the three of you for participating in our hearings. Before bringing these two days of hearings to a close, I also would like to say to you that this subject does have very high priority to our
Commission.

Aside from the two days of hearings we have held, our staff has been very actively at work in this area for six months.

They have pursued many investigations, conducted what seems to me like literally hundreds of interviews with judges and former judges, and I expect that at some future point, which hopefully won't be a long time from now, we will express our view on a series of issues having to do with judicial selection.

Thanks again.

(Time noted: 5:15 o'clock p.m.)