



NEW YORK
CITY BAR

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REPORT ON LEGISLATION

A.309

M. of A. Lancman

AN ACT to amend the judiciary law, in relation to directing the commission on judicial nominations to forward to the governor all well qualified candidates for associate judge and/or chief judge

THIS BILL IS OPPOSED

The New York City Bar Association opposes A.309, which would amend the statute implementing the constitutional provision for selection of Court of Appeals judges to require the Commission on Judicial Nomination to submit to the Governor “all well qualified persons”.

Currently and since its inception in 1978, the Court of Appeals selection process provides that the Commission on Judicial Nomination select the best candidates from among those that apply for a vacancy on the Court, and submit only a limited number of candidates – three to seven for an Associate Judge and seven for Chief Judge – to the Governor for appointment, with the Governor required to choose from among those candidates.

The limitation on the number of candidates from whom the Governor can choose is a crucial feature of the selection process. The goal of the process is to remove the selection of Court of Appeals judges from any one official and provide for a more broad-based method of selecting nominees. The Commission itself is carefully crafted so that of the 12 Commission members, four are selected by each branch of Government. No one branch can control the results of the Commission’s work, and the names recommended to the Governor represent the culmination of a process in which all three branches’ representatives have a decision-making role.

Removing the limitation on the number of names will in practice remove the Commission from the selection process. The term “well qualified” will in fact become a baseline level of qualifications, and the Commission will be hard-pressed to refuse to transmit candidates unless there is a substantial problem with the candidacy. As a result, the Governor would have virtually unfettered discretion to choose whomever he or she wants. What would look like an open process would in fact be more closed than the current process, since once it is known, or surmised, who the Governor wants to choose, there would be little incentive for others to apply because once that person applies he or she is highly likely to be reported out by the Commission. This process might look attractive to some when a person they support is Governor, but they

should anticipate a time when someone they do not support is sitting in the Governor's chair, able to pull the strings to assure appointment of the person the Governor, and perhaps only the Governor, wants.

The legislation also leaves the door open to the Commission reporting only one candidate to the Governor, an unlikely, but highly inappropriate result. Thus, the proposal risks giving the Commission too much, as well as too little, authority.

We agree that the most recent list of candidates submitted to the Governor by the Commission on Judicial Nomination did not have the diversity it should have. However, at the time the Commission was formed, the Court of Appeals consisted of seven white men. It now has only three white men, with three women, an African American and a Hispanic judge serving with distinction. The Commission has indeed fostered diversity and has been responsive to concerns about diversity. We believe it also will do so in the future. The Commission has already responded to other criticism it received after the most recent selection process was completed, by establishing a website, providing more detail on its selection of the candidates it recommended, and describing in more detail its outreach. Those efforts should be bolstered. In addition, whoever is Governor at the time when future vacancies must be filled should make clear, in public statements, that he or she has an open mind and encourages a widely diverse applicant pool.

We fear that A.309 will be a setback both regarding the quality of the selection process and its diversity, by turning the process from a broad-based effort at achieving a high-quality bench to a one-person show. We urge that this legislation not be passed. We would be pleased to work with the Commission and all other interested parties in developing procedures and rules for the Commission that will encourage enhanced outreach, more widespread interest and diversity with regard to the State's highest court.

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