TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

Alan Rothstein, General Counsel
The Association of the Bar of the City of New York

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Thank you for the opportunity to testify before you today with regard to issues involving how judges are selected in New York. We recognize that the thrust of the hearing relates to legislation to improve the way judges are elected. While we will be making comments on the elective system, we note at the outset that the Association of the Bar, the State Bar Association, the Committee for Modern Courts and many civic groups and editorial boards have long called for the implementation of a merit appointment system for selecting New York's judges. Under this system, similar to the one through which Court of Appeals judges are selected, commissions appointed by a broad range of public officials designate a limited number of potential nominees to the appointing authority, who then nominates a candidate from that list. This nomination would be subject to confirmation by the Senate. The organizations supporting this system believe that a merit appointment system of judges will provide for an overall more qualified judiciary that is less tied to the political leadership of the State.

In addition to the advantages cited above, a system of merit appointment would avoid a number of the flaws in the electoral system which the bills that are the subject of today's hearing are designed to address. However, neither of the bills, as well-intentioned as they are, corrects the fundamental flaws in the process. Under the elective system, judicial candidates must raise funds to run for office, frequently from lawyers who appear before them. Though judges are not supposed to know who contributed to their campaigns, there is widespread skepticism as to how consistently that rule is followed. Pending reforms proposed by the Feerick Commission will

increase disclosure, and we believe that disclosure is the better way to go, making the system an open one for all.

Most judicial candidates, including sitting judges, are not well known by the electorate, and though the degree to which they are known varies among different areas of the state, voters are basically in the dark as to who is running and what they stand for. Indeed, appropriate limitations on judicial campaigns rightly discourage judicial candidates from stating how they would decide cases. Many voters simply do not cast ballots in judicial races.

The election process also puts tremendous power in the hands of a few political leaders around the state. In many areas, endorsement by the county leader of the dominant party is tantamount to election. The nomination may be more a reward for party service than a search for the best qualified candidate. In return for this support, there is the expectation that the candidate, once on the bench, will provide appointments and patronage to the party which supported him or her, particularly if the judge wants another term in office.

We recognize that there is insufficient support in the Legislature to eliminate judicial elections. In that vein, this Association issued a report in 2003 which included several recommendations that we believe would improve the elective system. Our main thesis is that the system would work best where the nominating process has a built-in mechanism to not only screen candidates, but to select those best qualified.

Our proposal is for screening committees to be established to screen potential candidates for a party's nomination to a judicial seat. These committees would be comprised of members of community, civic and bar organizations that are selected by the political leader to be broadly reflective of the diversity of the jurisdiction in which the election is taking place. They would serve short terms, to avoid entrenchment. While the political leaders would select the groups involved, the groups themselves would select the person who will sit on the committee, and these people would function independently of the groups that named them. In addition, the committees would function independently of the party.

The committees would conduct outreach to encourage candidates to apply. They would carefully scrutinize the qualifications of the candidates, by reviewing their backgrounds and legal writing and interviewing lawyers and judges (including adversaries) who are familiar with their work. The committees would then select the three most qualified candidates for each vacancy, and the political leaders would either pledge to support only those candidates recommended by the committee or, if possible, these candidates would be the only ones by law who could reach the ballot. We believe this would create a more appropriate pool from which candidates would be elected, and provide the elected judges with more insulation from the political leaders. A system somewhat like this one exists in New York County, where the Democratic Party rules have provided for a similar commission for over two decades.

Bill A.7-A would set up screening committees in each judicial district for Supreme Court candidates, but would not limit the number of candidates who would be eligible to be placed on the ballot. There is a significant question as to whether such a limitation can be established in

law. Indeed, there are those who question whether the proposed bill would establish an additional qualification to those set forth for judicial office in Article 6 of the state constitution, and thus might be unconstitutional. There is also the broader question of whether limitations on the ability of a party to select its candidates from among those who meet basic qualifications run afoul of the First Amendment of the federal constitution. We have not identified any cases on point in this area, but believe further research is necessary.

Constitutional questions aside, we are concerned that A.7-A may replace systems that work well – such as the New York City Mayor's Judiciary Committee and the New York County Democratic Screening Committee – with a system that is not as effective. Both of these systems allow the screening committee to limit the number of persons considered per vacancy. Therefore, we recommend that the bill provide that political parties may limit the number of candidates it would consider for ballot positions. .

Other aspects of A.7-A, such as a ballot pamphlet for judges, a commission on judicial diversity and limitations on certain campaign expenditures by judicial candidates, are good improvements. In addition, A.8, its companion bill, is worth serious consideration, as it sets forth a system for publicly financing judicial races. We believe that is money well spent, as it removes the influence of private money from judicial campaigns. Public financing is particularly important in judicial races, as judges are not elected to be our advocates but to be fair, unbiased and independent.

The issue of judicial conventions for Supreme Court nominations is currently in the courts, and we hope that Judge Gleason will soon issue a decision. We have no doubt that, whatever the decision, it will be appealed as far as the appellants can take it. Eliminating judicial conventions, which is the thrust of S.55, would reduce the enormous leverage of political leaders in selecting the candidates. As noted above, in many areas of the state, selection by the dominant party's judicial convention, generally under the control of the political leader, is tantamount to election. However, eliminating judicial conventions would also throw the candidates into direct primaries, which have their own set of ills. We are continuing to study the proposal to eliminate the conventions, as well as the recommendations in A.7-A, and the possible interplay between the two and the proposed OCA rules, which were based on the Feerick Commission recommendations. Perhaps some package of reforms that involve aspects of both bills would be useful steps forward. But we remain skeptical that such changes would greatly reduce the concerns we have regarding judicial elections in New York, and would hope that the Legislature, as it did in 1977, would consider more systemic reforms and give the electorate a chance to vote on a merit appointment system.