



Public Policy Forum

Filling Vacancies on the NYS Court of Appeals: Selection Under the “Nonpolitical Merit” Appointment System

Presented by

Vincent M. Bonventre

November 29, 2006

Thomas L. Gais:

Welcome to the Rockefeller Institute and another one of our series of public forums. My name is Tom Gais and I am co-director of the Institute. I'm delighted to have Vincent Bonventre, professor of law at Albany Law School, here to talk about filling vacancies on the New York State Court of Appeals and selection under the nonpolitical merit appointment system.

There is no question about the importance of the general subject of the Court of Appeals, I hope. The last time we had a forum, we had Michael Rebell talking about the Campaign for Fiscal Equity (CFE) and during the forum we all of a sudden started getting some reporters and cameras at the back end of this room. It turned out that the Appeals Court had just announced its CFE decision, the latest directive of what the Appeals Court would like the New York State Legislature to do. There is at least some possibility that they might do something, I guess, this time around. Certainly, the court is involved in many important issues, and I doubt that's going to change anytime in the future. At least it seems perfectly reasonable to assume that who's on the court is going to

be affecting what kind of decisions are going to be handed down. It might be reasonable to assume that the particular kinds of processes that are used to select people on the court might affect who's actually on the court, although the research, so far as I know it at least, has a lot of questions about that matter, and our speaker may want to address that.

But the system as a whole is certainly of big interest to the Institute. Dick Nathan, my co-director, is, unfortunately, not here. He is one of the 12 members of the judicial nomination commission, which is pretty active these days, and he's very sorry he wasn't able to come today. Fortunately, we do have a longtime observer of the court today in Vincent Bonventre, both as an insider within the court as well as an outside observer. He has a remarkably wide range of expertise in state boards and state law, as well. He received a BS from Union College and his law degree, his JD, from Brooklyn Law. He clerked for two particularly distinguished Court of Appeals judges: Matthew Jasen and Stewart Hancock. Like both of these judges, Professor Bonventre served in and practiced law in the military. He served in the U.S. Military Intelligence and the Judge Advocate General Corps.

In 1990, he joined the faculty at Albany Law School and, for the first several years, his research and writing focused on the Court of Appeals, state constitutional law, and issues and laws dealing with professional responsibility. In recent years, however, his research has shifted somewhat towards work on judicial behavior, including judicial decision making, judicial activism, and factors that influence judges' votes on the bench. This shift in focus may be somewhat related to the fact that he has completed his graduate degree and received a Ph.D. in government and public law from the University of Virginia in 2002. This man works a lot. Since then, he has been working on a number of studies by himself, as well as with students, on judicial behavior. In 2003, for example, he published "Streams of Tendency on the New York Court: Ideological and Jurisprudential Patterns" in the *Judges' Voting and Opinions*, as well as a number of other articles on judicial decision making since then. He is also now director of the Center for Judicial Process, which is "an independent, nonpartisan, nonprofit organization devoted to the interdisciplinary research and study of the courts and judges,

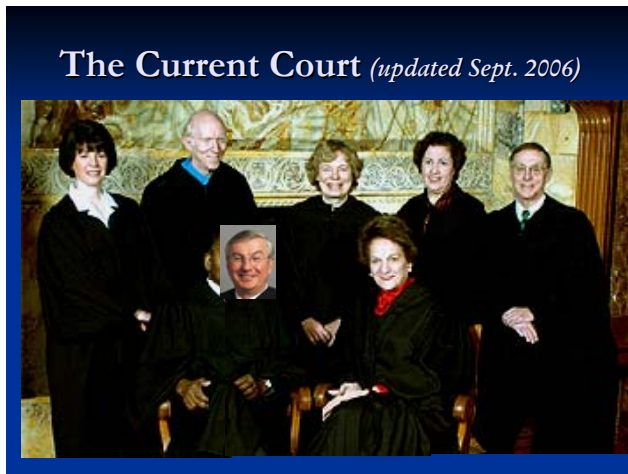
including decision making and voting, the judicial role in selection and other facets of the nature of the judicial process,” but he tells me it’s really not that big of an organization after all. In sum, our speaker is very well-qualified in discussing the New York Court of Appeals from many perspectives; legal and constitutional, institutional, behavioral, as well as up-close and personal. Let’s welcome Vincent Bonventre.

Vincent A. Bonventre:

Thank you very, very much and I’m glad to be back at the Rockefeller Institute. This is actually the third time I’ve spoken here in the last few years and I’ll be back in a few months, so this is almost like being home. I love this stuff. I am an avowed Court of Appeals junkie, actually an avowed judicial decision-making junkie. I’m sometimes asked to give a talk about the appointment system, and I think, “Great! I love to talk about this and I have an audience. What could be better?” But we’re going to talk about this so-called nonpolitical merit appointment system at the Court of Appeals, whose purpose is, the company line is, to remove politics from the selection system and to replace that with merit. Well, if you believe that politics has been removed from the selection process and that merit is the primary criterion for selecting Court of Appeals judges, you probably believe in *The Wizard of Oz* and flying monkeys. Certainly, to some extent, the appointment system has changed the way we select Court of Appeals judges. Certainly, it is somewhat more dignified. We don’t have these unseemly election campaigns. But in terms of politics, clearly what has happened is that we’re talking about a much smaller group of politicians who are involved as opposed to political parties, per se, and the voting public. But more about that later.

What I want to talk about is who’s been appointed to the courts, how they’ve gotten there, who these people are that have actually made it through the “nonpolitical” “merit” appointment system and how these appointments have impacted on the fundamental law of New York. As Tom said, and you all understand, the Court of Appeals, by and large, resolves the fundamental issues for the State of New York inasmuch as virtually anything ultimately becomes a legal issue and virtually any legal issue is a matter of state law. There are a few that get to the United States Supreme Court,

but, by and large, most of the legal issues that affect us are state issues. They're part of state law, part of our federalism system. The New York Court of Appeals is the tribunal of last resort in deciding fundamental matters for New York State. So certainly, the selection system is very important. Who's selected is very important. Let's take a look at that.



This is a photo from the Court's web site and, to tell you the truth, it's actually a composite of six different pictures. I couldn't just drag in this photo. I actually had to drag this corner, then this corner, then this. Actually if you look at poor Judith Kaye, you can see that the jaw isn't quite on her face the way it should be.

That's because this is one picture on top of another. But in any event, I successfully did it.

Judith S. Kaye

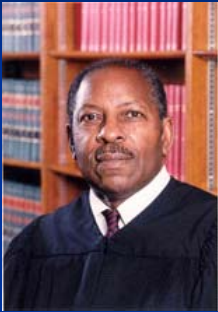
- Appointed 1983, Cuomo
- First woman on Court
- From NYC (born in Monticello)
- Appointed Chief Judge 1993, Cuomo
- Current term expires March 2007
- Mandatory age retirement 2008
- (replaced SW [Cuomo])

Starting with the chief judge, Judith Kaye — the chief was appointed by Mario Cuomo, his second selection. His first one was an upstate conservative Republican, Richard Simons. When Cuomo came into office, he was presented with a list — all white males on the list — by the Commission on Judicial

Nomination. He let it be known he was not happy with it. It seems as though he was not happy because he wanted his friend, Joseph Bellacosa, on the list. He wasn't there. He also wanted a woman on the list. There were no women on the list. But in any event, what that meant was that, for his first selection, his first appointment to the court, Mario

Cuomo was forced into selecting from a list on which he had no input. He had no input because he hadn't been governor, so he hadn't had an opportunity to put anybody on the nominating commission. In fact, in appointing Richard Simons, this upstate conservative Republican, he made one of the finest appointments of his entire governorship. Everybody understood that Richard Simons was one of the great appeals court judges in the state. Very interesting; some of the very finest appointments Cuomo made to the court happened to be Republicans. But Judge Kaye is a Democrat from New York City, actually born in Monticello, which is also the home of the late Chief Judge Lawrence Cooke. She was appointed in 1983. She ultimately was appointed chief judge in 1993, when Wachtler had to resign. Her current term expires next year in March, which means that the new governor will get the opportunity to reappoint Chief Judge Kaye until she is forced to retire at the end of 2008, because she will turn 70 in 2008. The mandatory age of retirement in New York in the Court of Appeals is age 70. So he can either reappoint her or he can pass her up and appoint somebody else. But in any event, even if he reappoints her, she has got to leave at the end of 2008, and Governor Spitzer would have an opportunity to reappoint another chief judge. One way or the other, he gets to appoint the next chief judge. She replaced, like I said, Sol Wachtler, who had also been appointed by Governor Cuomo, or at least elevated by Governor Cuomo to be chief judge.

George Bundy Smith (*retired 2006*)




- Appointed 1992, Cuomo
- From NYC (born New Orleans)
- Term expired Sept. 2006
- Denied reappointment by Pataki
- (mandatory age retirement would have been 2007)
- (replaced FA [Cuomo])

Here is George Bundy Smith, who's now retired. He retired at the end of September because his first 14-year term had expired and Governor Pataki chose not to reappoint him. He's from New York City, born in New Orleans, a liberal Democrat, I think, by anybody's definition. He would have had to retire by reason of

age at the end of next year, anyway. That's one of the reasons Pataki gave. The real reason, of course, a perfectly legitimate one, is that one of the things governors get to do is make a long-term impact on the state by appointing judges to the Court of Appeals.

And let's face it, who of us in the governor's position wouldn't have taken the opportunity to make this long-range impact on the state by appointing somebody else instead of reappointing George Bundy Smith? Why not appoint somebody who would be on the courts for a long period of time? Not only that, but George Bundy Smith's decisions and votes probably didn't make Governor Pataki too happy, especially since George Bundy Smith, again, was one of the most liberal. He was the most liberal member of the court in criminal cases and, certainly, regarding the death penalty, he always voted against it. He had replaced Fritz Alexander, the first African-American on the court, who also had been appointed by Governor Cuomo. And of course, as you all know, with George Bundy Smith gone, we have an entirely white court.

Carmen Beauchamp Ciparick

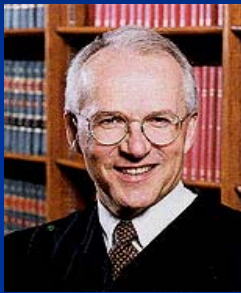


- Appointed 1994, Cuomo
- First Hispanic on Court
- From NYC
- Current term expires Jan. 2008
- Mandatory age retirement 2012
- (replaced SFH [Cuomo])

Carmen Ciparick, the first Hispanic on the New York Court of Appeals. Judge Kaye was the first woman, appointed by Cuomo, and Ciparick the first Hispanic, appointed by Cuomo. There actually is some academic debate as to whether or not she or Benjamin Cardozo was the first Hispanic. Actually, I raised that

question in an article of mine and suggested she might not be the first Hispanic, that it might be Cardozo. And I kept saying "might" because I'm just not sure how to categorize these things. But in any event, at some affair at the Law School, her law clerk came up to me and screamed at me and said, "No, she is definitely the first Hispanic." He said, "Cardozo was Portuguese, and I'm Portuguese. Don't take him away from us!" Anyway, the fact of the matter is that Cardozo's people came from a part of the Iberian Peninsula that was all Hispanic at the time, which today is Portugal. So the guy was right and I deserved to be yelled at. So, Ciparick's term expires in January 2008. So she's another one who will either be reappointed or replaced by Spitzer because she doesn't have to retire until 2012. She replaced Stewart Hancock, who had also been appointed by Cuomo. Stewart Hancock was one of several Republicans appointed by Cuomo.

Richard C. Wesley (*resigned 2003*)



- Appointed 1997, Pataki
- From Livonia [Rochester area] (born Canandaigua, New York)
- Resigned for 2d Circuit Appointment, 2003
- (replaced RDS [Cuomo])

Richard Wesley was Pataki's first pick on the court and I put Wesley here only — even though he is no longer on the court — because I'm going to mention each one of Pataki's choices for the court. Richard Wesley is an upstate conservative Republican from the little town of Livonia. That's by SUNY Geneseo if you're not

familiar with it. He replaced Richard Simons who, again, was a conservative upstate Republican appointed by Cuomo. So, when Pataki replaced Simons with Wesley it really wasn't much of an ideological change on the court at all. And Pataki, who certainly made it known that he viewed the Court of Appeals very unfavorably — especially because of its criminal justice decisions, which he felt were out on a limb, and the court was the most liberal court in the country and all that nonsense — for his first selection to the Court of Appeals, Richard Wesley, he simply replaced another very conservative Republican. So there really wasn't any ideological shift on the court. We won't see Judge Levine. But those three — Hancock, Simons, and Levine, three upstate Republicans — were extraordinary picks by Governor Cuomo. Also, it should be mentioned that Richard Wesley, Pataki's first pick, actually left the Court of Appeals to go to the United States Court of Appeals for the Second Circuit, really a slap in the face of the court. This was the first time in the history of the New York Court of Appeals that any judge left for any position other than the United States Supreme Court. To leave the New York Court of Appeals to go to the Second Circuit was probably to say something about the current stature of the New York Court of Appeals.

Albert M. Rosenblatt



- Appointed 1998, Pataki
- From Dutchess County (born NYC)
- Mandatory age retirement 2006
- (replaced VJT [Cuomo])

Albert Rosenblatt, appointed by Pataki, was an upstate Republican. Well, I'm from New York City. I think anything north of New York City is upstate. What would you call Dutchess County? Mid-state? Albany really is mid-state. It is downstate? You consider it downstate? Not in my neighborhood in Brooklyn, you don't

consider it downstate. There are cows in Dutchess County. That's upstate. He must retire at the end of this year because he'll be 70. He replaced Vito J. Titone, a Cuomo appointee. This really was an ideological shift at the Court of Appeals to replace Vito J. Titone, who was by far the most pro-defendant vote at the Court of Appeals during his entire tenure there. So by replacing Vito J. Titone with Rosenblatt, Pataki for the first time was able to move the court somewhat rightward. That's not at all to suggest that Albert Rosenblatt is a right-winger, that he's rigidly conservative, but certainly much, much more conservative than Vito J. Titone.

Victoria A. Graffeo




- Appointed 2000, Pataki
- From Guilderland (born Rockville Center)
- Term expires Nov. 2014
- Mandatory age retirement 2022
- (replaced JWB [Cuomo])

Victoria Graffeo, appointed in 2000, is from the Albany area. Her term doesn't expire until 2014, so she's on the court for a while. She doesn't turn 70 until 2022. She replaced Joseph Bellacosa, who Cuomo ultimately was able to appoint to the court. The first time Bellacosa made a list out of the commission,

Cuomo appointed him to the court. He was very, very conservative in criminal matters. She's very, very conservative in criminal matters. So once again, Pataki gets to put a conservative Republican on the court. Well, it doesn't change the ideological makeup of the court at all. Actually, when we talked about Pataki appointing an entirely white court,

you talk about any racial or ethnic diversity; this is probably the closest thing you have: an Italian American. In fact, Pataki made a big deal about that, about the fact that, “Well, let’s see; Bellacosa, Vitone, Graffeo, yeah.” Being an Italian American, she’s the closest thing to Pataki putting some diversity on the court.

Susan P. Read




- Appointed 2003, Pataki
- From Capital Region (born Gallipolis, Ohio)
- Mandatory age retirement 2017
- Term expires Jan. 2017
- (replaced HL [Cuomo])

Susan Read was appointed in 2003. Again, she’s from the Capital Region, although born out of state. She’ll turn 70 in 2017, which is when her term expires. She replaced Howard Levine, who was appointed by Cuomo. Again, upstate Republican, pretty darn conservative in criminal justice areas. Susan Read is very

conservative. There probably wasn’t much of a change when Pataki substituted Susan Read for Howard Levine. And again, Howard Levine, upstate Republican, Simons, upstate Republican, Hancock, upstate Republican, all appointed by a downstate liberal Democrat, Cuomo. Three great choices.

Robert S. Smith



- Appointed 2003, Pataki
- From NYC
- Mandatory age retirement 2014
- (replaced RW [Pataki])

Robert Smith was appointed in 2003. From New York City, his mandatory retirement date is not until 2014. He replaced Richard Wesley when Wesley left for the Second Circuit. Wesley was actually very conservative in the criminal justice area. Ironically, Robert Smith isn’t quite as conservative as Wesley, so

Pataki, in replacing Wesley with Robert Smith, actually moved the court leftward a little.

Hon. Eugene F. Pigott, Jr.



- Appointed 2006, Pataki
- From Grand Island [Buffalo Metro Area] (born Rochester, NY)
- Mandatory age retirement 2016
- (replaced GBS [Cuomo])

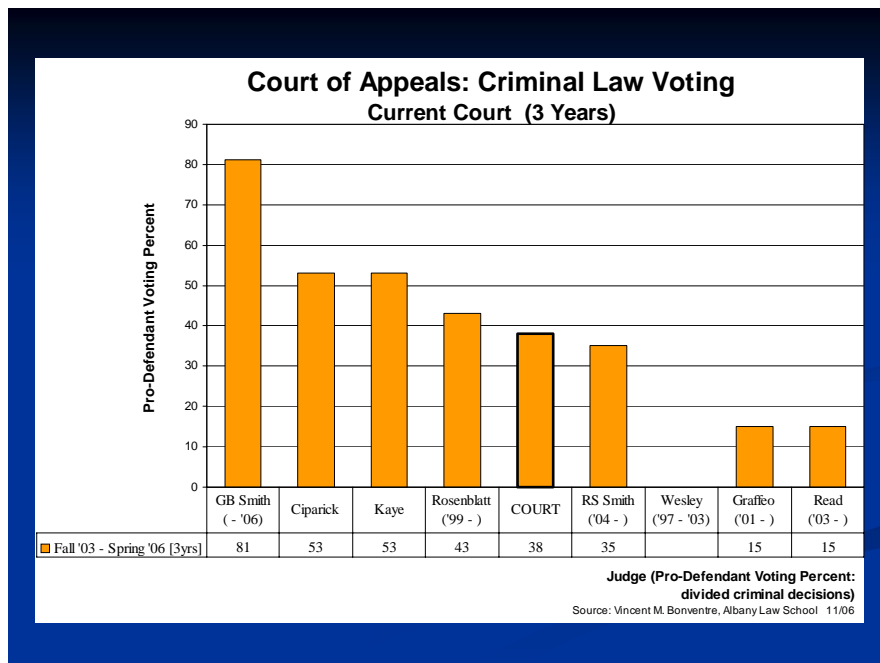
Eugene Pigott. Here, again, is the new guy on the block, just appointed. Instead of reappointing George Bundy Smith, Pataki went with Pigott from Buffalo. The first time the Buffalo area has had a judge since my judge, Matthew J. Jasen, retired from the court in 1985. Mandatory retirement for Piggott is

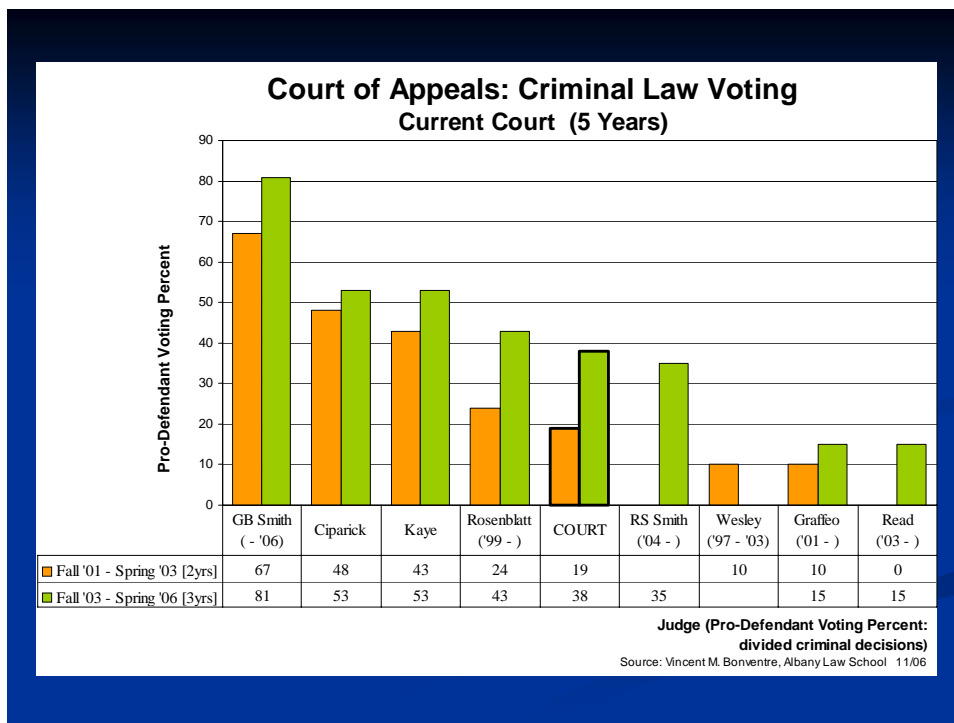
2016, so he's got 10 years on the court. So Pataki's impact, at least with regard to this selection, will last at least for 10 years. It doesn't strike me from looking at his record that Pigott is nearly as conservative as, say, Wesley, Graffeo, or Read, three other Pataki appointees. But certainly he's more conservative than George Bundy Smith. So, again, replacing George Bundy Smith with Pigott moves the court somewhat rightward.



Here we are again with the court after George Bundy Smith and Richard Wesley. We have the seven members of the court: Pataki's five and Cuomo's two. What does this all mean in terms of voting? Here's the current court. These are figures I just drummed up. No, I didn't make them up. I don't have that social science lingo down pat at Albany Law School. This is looking over the past three years. These are the percentage of times in which a particular judge voted for the defendant in a criminal case. Common parlance, the number of times the judge voted like a liberal; voted for the rights of the accused as

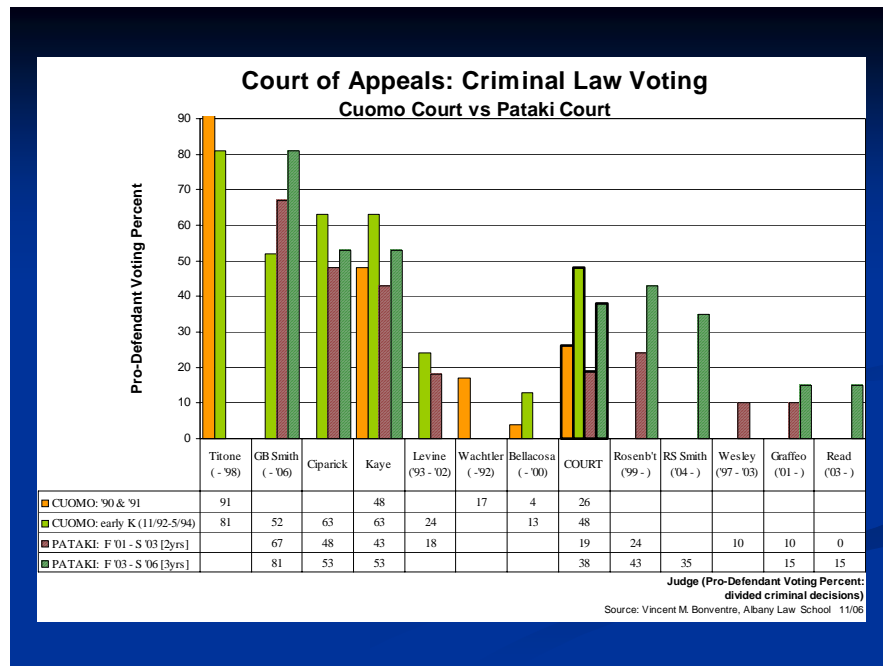
opposed to law and order; voted for due process as opposed to crime control. You'll see the three Cuomo judges that were still on the court in 2006 were the most liberal, the most pro-defendant judges on the court. Once Judge Vito Titone left in 1998, Judge Smith took over as the liberal standard bearer on that court, and he has consistently had a very high pro-defendant voting record, then Judge Ciparick and Judge Kaye. Let's go to the right. Over here you have Judge Read, only 15 percent pro-defendant. By the way, these are nonunanimous cases, the cases in which the court divided, so we could actually compare the judges' ideological patterns. You'll see Read and Graffeo, only 15 percent of the time did they find merit in the defendant's position. Wesley was on the court, but he had already left during this period of time. Robert Smith, 35 percent. You can see Robert Smith, although conservative, is not nearly as conservative as Graffeo or Read, not nearly as pro-prosecution as these two. Interesting, and this is certainly at least a thorn in the side of the Pataki administration, Rosenblatt is more liberal in the criminal realm than the court as a whole. Certainly, his voting is closer to the Cuomo judges than it is to the Pataki judges.





Just to double check, I went back another two years. This would include Wesley and it would include Graffeo from the beginning. If you go back two years, again, the Cuomo judges have Smith, the most liberal on the court; Ciparick and Kaye, not quite as liberal as they have been the last three years, which is another very interesting phenomenon. I don't want to fall into the trap of "after this, because of this," but at least if we look at chronology, certainly it seems as though as a result of the Pataki appointees, Ciparick and Kaye, as well as George Bundy Smith, have been pushed further to the left, perhaps by a need, a necessary need, to distinguish themselves from the conservatives on the court. Or there are just so many times the conservatives on the court are voting a particular way that it's just a greater number of cases in which George Bundy Smith, Ciparick, and Kaye feel they just can't go along. But in any event, look at this: They hardly ever vote for the defendant in a criminal case. In fact, these three, Wesley, Graffeo, and Read, in their entire careers on the New York Court of Appeals have never disagreed with a pro-prosecution decision, not one. You can't, for example, say with regard to George Bundy Smith, "Well, he probably never disagreed with a pro-defendant decision." That's not true at all. Several times he disagreed with pro-defendant decisions

of the New York Court of Appeals. But these three never saw a pro-prosecution decision they didn't like. With Robert Smith, that's not the case. Actually, Robert Smith breaks from the other Pataki judges. As you can see, he voted twice as pro-defendant, pro-rights of the accused, as these three Pataki judges. And Rosenblatt, look at that jump. Rosenblatt unquestionably has become increasingly liberal the last several years. I call him the non-Pataki judge. It seems that the more he hears that Pataki's mad at him, the more liberal he gets.



Let's take a look at this chart briefly. Comparing the Cuomo judges to the Pataki judges, selection matters. Who picks these judges really matters. Cuomo did not have the kind of ideological agenda that Pataki had and I'm not suggesting one is good and one is bad. Not at all. Pataki made it clear that he had an ideological agenda. He wanted to make this court much more law and order, much less pro-criminal defendant, much less protective of the rights of the accused. He didn't surprise any of us. We all knew that's what he wanted to do with the court. Cuomo never had such an agenda. As you've seen already, Cuomo appointed many Republicans. He appointed several conservatives; not all liberals, not all Democrats. Cuomo's agenda was diversity: first woman, first Hispanic, upstate, downstate, Republicans, Democrats, liberals, conservatives. If you look at the

Cuomo judges during the Cuomo era, Titone was the most liberal member of the court. George Bundy Smith, Ciparick, and Kaye were liberals. Then you get Howard Levine, only 24 percent of the time for the defendant. Wachtler, who Cuomo had elevated to chief, only 17 percent of the time. Bellacosa looks like one of the Pataki judges. And then you look at the Pataki judges; very conservative, somewhat conservative. Robert Smith is starting to look something like the Cuomo judge, Howard Levine.

Howard Shapiro:

Can I ask a question? I'm just an intern and retired. I guess I'm still digesting this correlation that you have between voting for the defendant and voting for the prosecution. I'm wondering whether your analysis includes or tries to correlate the number of times that the judges were voting to reverse a lower court or a jury. In other words, how many times in these cases had the jury who heard the evidence, found the defendant guilty and then the judges were voting to uphold that finding or not?

Vincent A. Bonventre:

That's a fascinating question, and these studies don't address that at all. What they do address are the specific legal issues, not the issues of guilt or innocence, but those legal issues such as whether or not the search that was involved followed the requirements of search and seizure protection, whether or not the right of counsel was afforded to the defendant, and whether or not the lineup was suggestive, those kinds of issues. In all of these cases, it's those kinds of legal issues, as opposed to guilt or innocence that the Court of Appeals was addressing.

Howard Shapiro:

The reason I asked the question is because for the confirmation hearings at the U.S. Supreme Court level, the last few judges spent an enormous amount of time going through philosophy in terms of stare decisis (stand by precedent). When you divert from

the ruling below and overturn that, and what it takes to overturn the ruling at the appellate division in this case.

Vincent A. Bonventre:



That's right. That's a good question and a good point, and really unfortunately, that's never addressed at our Senate committee confirmation hearings at all. In fact, virtually nothing is ever addressed. That's one of the problems with our current system. But in any event, you see that there is a huge difference between the

Pataki appointees — by and large conservatives, except for Rosenblatt, and Cuomo's selections — really, some of Cuomo's are liberal, some of them are conservative. Let me look at this thing. I had no idea what I was doing with this graphic. But in any event, these two that are shaded out are gone. These three question marks: Kaye and Ciparick are up for reappointment, Rosenblatt is going to be gone. I guess Spitzer's going to be replacing him in January.

The Process

- Background: Wachtler, Fuchsberg, Breitel, Carey
- Commission: composition, purpose [evaluate, report, recommend]
- Applications: notice, solicitation, applicants
- Interviews: prelim evaluation, in-person meeting
- Voting: ranking/no-ranking, 2/3 support, re-voting & winnowing
- Findings & Recommendations: 3-7 candidates, "report" on "character, temperament, professional aptitude, experience, qualifications and fitness"—otherwise entirely confidential

Now a little background on the process. By and large, the process was adopted in 1977 in the aftermath of election campaigns for the Court of Appeals by Wachtler and Fuchsberg. Wachtler, in 1972, the year of the Nixon landslide over McGovern, ran commercials on TV, "Let Judge Wachtler Slam the Door On Crime."

The next year, Fuchsberg ran an election campaign and spent a fortune running against Charles Breitel for the chief judgeship. Breitel won, but Fuchsberg was back the next

year running for a seat on the Court of Appeals and he succeeded then. Well, Wachtler ran kind of an unseemly campaign for New York's highest tribunal. Fuchsberg ran a couple of unseemly campaigns. Breitel was one of the victims of these. So Wachtler, who used an unseemly campaign, and Breitel, who was one of the victims, got together with Governor Carey and a few other good-government types and decided, "Let's take the Court of Appeals selection out of the election process." They hired a public relations outfit and they sold it to the people and bravo, here we go, we now have this merit selection system instead of these sleazy elections. There was a 1977 amendment to the state Constitution. What did it do? It established this commission, a Commission on Judicial Nominations. There are 12 members. One of them is the director of this Institute. Twelve members, four appointed by the chief judge, four appointed by the governor, and then there's one each appointed by the majority and the minority leaders of the Assembly and the Senate. The purpose of the commission is to evaluate applicants, to prepare a report and to recommend a list to the governor.

With regard to the applications, when there's a vacancy coming at the Court of Appeals, the commission puts out a notice, it sort of advertises. Sometimes it actively solicits. For example, three years ago I think it was Leo Milonas, a member of the commission and also the president of the New York City Bar Association, who wrote a public letter pleading with attorneys in New York State to apply for a seat on the New York Court of Appeals because the commission was getting very, very few applicants. Primarily, it was getting so few applicants because most qualified applicants understood they had absolutely no shot whatsoever of being chosen. That's because virtually everybody, except for some ostrich with his head in the sand, knew that, by and large, whoever it was that Pataki wanted usually ended up on the list and that's who Pataki ended up appointing to the court. So there were virtually no appellate division justices who were applying for the position because they all figured it was fixed — that the deck was stacked against them. So Leo Milonas put out a public letter begging lawyers in New York. Can you imagine the New York Court of Appeals, what this judicial tribunal has been historically, having to beg lawyers in the state to apply? That's how low we have sunk. Pretty pathetic. Anyway, so there's a solicitation and then individuals apply.

Among those who apply, there's a preliminary screening, and the commission chooses to interview some of them. Then there's an in-person interview, which, as John Caher of the *New York Law Journal* has pointed out in at least one of his articles, there just isn't much real probing going on. "What do you think about a Puerto Rican being on the Court of Appeals?" "Why are you applying to the Court of Appeals?" But virtually nothing about judicial philosophy, about activism or restraint, about when you should defer to the Legislature and when you should defer to the lower court. "What do you think about Chief Justice John Marshall? Is he one of your favorites? Why? What about Souter? You like him or you like Scalia? Why? Do you agree with Scalia? What about the Roberts appointment? Do you agree with that? Do you think he was a good choice or not? Why? Tell us something about what you think about the judicial role." There's virtually none of that.

But in any event, there are in-person meetings, which are rather perfunctory. And then after these interviews there's the vote, a vote of ranking, but then no ranking. It's because the voting proceeds this way. The members of the commission actually rank each applicant who's been interviewed. one through eighteen, say. The numbers are added up and then those applicants with the lowest number (like golf), who have the support of at least two-thirds of the commission, that's eight of the twelve members, remain. "Support of the commission" means that they must have been in the top seven of at least eight of the commission members. The commission then winnows those without the necessary support from the group of applicants, and then they discuss the applicants that remain. Then they vote again. They keep doing it over and over again until, finally, they come up with a list. For an associate judge, they have to come up with between three and seven, and for chief they have to come up with a list of seven.

And when I say no ranking, what I mean is that, say, a list of seven names goes to the governor, with no ranking of the individuals on the list. Actually, the list goes to the governor with no explanation whatsoever. In fact, we hear about the list and we haven't a clue how well these applicants did at the commission. We have no clue why it is that they were chosen over others; why anybody voted for any of these people. Actually, there will

usually be two or three names where you say, “How is it possible these people made the list?” So there’s voting, re-voting, ranking, winnowing, and then, finally, there’s a list that’s actually given to the governor. And according to the Constitution and the judiciary law, there are supposed to be findings. There’s supposed to be a report about character, temperament, professional aptitude, experience, qualifications, and fitness. But there is no report. The “report” is a little blurb. It looks like a schematic of somebody’s resume — much, much shorter than Tom’s introduction of me, although I kind of liked that. Where the candidate went to school, jobs the candidate had, and that’s it. Nothing about character, temperament, aptitude, or fitness. None of that stuff. Indeed, except for the list and for this schematic of a resume, everything else that the commission does is confidential. Everything else that the commission does is kept tightly secret.



The Process cont'd

- Gubernatorial Nomination: limited to list, agenda?
- Senatorial Advice & Consent: committee hearing, full senate, “advice” or just consent?
- Election vs “Nonpolitical Merit” Appointment:
 - Pros / Cons
 - Final Product, Comparisons
 - Essentials

Vincent M. Bonventre, 11/06

The governor gets the list. The governor is limited to the list. So, for example, Governor Cuomo is elected. He got his first list, about which he had no input whatsoever, I mentioned that before. There were four white males on the list, and he apparently wasn’t too crazy about any of them. He actually wanted the commission to

go back, do its homework again and come up with another list. They, of course, refused to do so. They’re not allowed to do so, so he ended up appointing Richard Simons. But anyway, the governor is limited to that list. And, of course, the governor can pick from that list for any number of reasons. He can pick because, “Well, we need another woman on the court. We need an African-American on the court. We need a downstater, an upstater, a Republican,” for any particular reason at all. And Pataki has actually, again, to his credit, made it clear why he chooses from the list. He wants to choose law-and-order judges. He goes through this “judicial restraint,” “strict construction,” and other political nonsense. But what he means, of course, is judges who are going to vote with the prosecution.

As for senatorial advice and consent, are we kidding? There is, I'll give them the benefit of the doubt, "virtually" none. Let me tell you about a scintillating Senate judicial committee hearing I participated in. It was when Chief Judge Kaye was being elevated from associate judge to chief. I gave testimony on her behalf. I must say, my testimony was not long, it was just one of these studies about how she'd voted in the past and you could make of it whatever you want. "She's not overly liberal, but she's certainly not conservative. She's either in the middle of court, a little bit to the left, there you go. Make of it what you want." Everybody else was up there testifying how absolutely wonderful she was. Then one member of the Senate judiciary committee posed this to Judge Kaye: "Years ago, we embarked on this experiment and put you, the first woman, on the court. I think that experiment has been successful. What do you think?" Can you imagine this? Can you imagine? "We embarked on an experiment" — like, you know, they had put a chimpanzee on the court. I looked at Judge Kaye, who was red, and was just smiling.

Now about election versus merit. This "nonpolitical" "merit" appointment system has pro and cons, there's no question about it. One of the nice things about the appointment system is that it does remove a lot of the unseemly campaigning that we had seen in New York prior to the adoption of this system and that we continue to see in other states. They go around on the chicken circuit. They can't actually make promises, because that would violate the code of judicial ethics. But they certainly make clear that they're going to be law-and-order judges, they're going to impose maximum sentences. They make it clear they're going to be tough and law and order. They're going to make sure your neighborhoods are safe. I never heard of anybody actually running for a judgeship on a platform of: "I believe in the constitutional rights of the accused." I never heard such a thing. But, anyway, so we get these campaigns in the election system. We've done away with that. We have done away with that with this Court of Appeals selection system. I think, to be fair, we also ensured with this system that we don't appoint total incompetents to the Court of Appeals. The screening at least eliminates the most incompetent from getting a seat on the Court of Appeals, which is not bad. Take a look around at judges who got their positions from other selection systems in this state. To weed out the incompetents is not bad. And it's really a shame if you really think this

is not political, it's a joke. Of course this is totally political. This is very, very political. It's just that it's a much narrower group of politicians who happen to make the decisions.

Russ Haven:

I'm from the New York Public Interest Research Group (NYPIRG). Within that group of twelve, how does the political leverage play out? Do you have any take on that?

Vincent A. Bonventre:

It's difficult to say exactly how it happens, the way in which politics specifically gets injected with regard to particular names on the list. But if we look at the output of the nominating commission, we know that virtually every time a governor has apparently wanted a particular individual to appoint to the Court of Appeals — and the court junkies, we talk about it. We say, “Yeah, it's probably going to be so-and-so.” And about 90 percent of the time we're right. How is it that when we figured, “OK. He probably wants to put Graffeo on the court,” she's on the list. “Probably wants to put his buddy, Wesley, on the court.” He's on the list. Same thing with Cuomo. He wants a woman. Judith Kaye is suddenly on the list. We know he wants Bellacosa. He's on the list. That happens over and over again. Remember, once a governor has been in office for a while, he's got four people on the commission. They don't have to be geniuses to know what the governor's agenda is. They don't have to be geniuses to get a sense of who the governor might want to appoint to the court. There's also at least two other members of the commission who are from the governor's party. It's hard to imagine they don't have some sense as to who the leader of their party might like to see on that list. Beyond that, there's no question about it that the governors' picks are based on political criteria. Not necessarily crass partisan criteria, but certainly political in the sense that they want to move the court a particular way or they'd like to appoint individuals who they know are politically faithful to them, individuals who they have worked with politically, their cronies. That certainly is the case.

Howard Shapiro:

A devil's advocate question for you. Without suggesting that the appointing process is not a better process, what and where is the evidence with respect to the Court of Appeals that the appointive process works better than the elective process? I ask it for this reason. Before Fuchsberg, the three judges who ran and were successfully elected were Wachtler, Hugh Jones, and Domenick Gabrielli, all, I think, universally, without going into what happened to Wachtler, viewed as competent and intelligent judges. Where can all of us go and look and see the studies that show you produce, for the highest court in the state, a better judge? And what is it?

Vincent A. Bonventre:

Without concurring with you about Wachtler, Gabrielli, and Hugh Jones, one way or the other, I think your point is absolutely correct and I've made it many times. The Court of Appeals was great when the judges were elected. Just think about it. And it's not just Cardozo. Everybody looks back to Cardozo. But it is not just Cardozo; Cuthbert Pound, Irving Lehman, Charles Desmond, Stanley Fuld, Charles Breitel. I mean, come on! We don't have a Court of Appeals like that today. Since the appointment system, we haven't had a Court of Appeals that even compares with those courts. It's not even close. Those courts were recognized as being the finest courts in the country, except perhaps for the United States Supreme Court, and sometimes they were deemed to be better than the United States Supreme Court. There isn't any serious observer of courts in America today that would suggest that the New York Court of Appeals is a particularly strong court or is anywhere near as good as the United States Supreme Court. In fact, look at who's on the United States Supreme Court, and I don't care what your ideology or your politics are, look who's on it. The last two appointees, Alito and Roberts. Do we have anybody appointed to the current Court of Appeals of that stature? And you say, "Well, do other state courts?" Yes!

I have also studied the Arizona Supreme Court. There are five members of that court. Three of them have education and career experience similar to Alito and Roberts.

Three out of the five clerked for United States Supreme Court justices. That's Arizona. We don't have anything like that on the Court of Appeals. Let's go a little further. Virtually every former Court of Appeals clerk I know would love to sit on the Court of Appeals. That's not bad training. There isn't one on the Court of Appeals. There isn't a one. This court is just not in the same league with great courts like it used to be. It was a great court. And it's certainly not in the same league with the United States Supreme Court anymore. And that's since the appointment system. I think that's actually about the strongest argument against the appointment system. But again, if you say to me, "How exactly did that happen, that the Court of Appeals slid into mediocrity as a result of the appointment system?" I don't know. I'm not really sure the exact reason. I do think that one of the possibilities — and social scientists will ultimately look at this because there is, of course, a nationwide movement to turn all the courts into an appointment system. It may be that, not only do appointment systems eliminate the most incompetent, it may be that they tend to eliminate the most brilliant, the most capable, because they may be a little too darned controversial.

Howard Shapiro:

Or not political.

Vincent A. Bonventre:

Or not political. And again, obviously Roberts, Alito, Rehnquist, Scalia, they all have strong political views. They're all particularly ideological. But nobody would look at any of them and fairly say, "These four are not extraordinarily well qualified." They are.

Russ Haven:

It also seems like the decline in the prestige of the state court also parallels the rise of the Legislature and New York State's law seems much more set by that branch, so that seems part of it. In Arizona, how are they selected?

Vincent A. Bonventre:

In Arizona it's very interesting. They have another variation of the Missouri Plan. New York is basically a variation on the Missouri Appointment Plan. Arizona's got a variation on that. One of the things that Arizona does, which I think has helped them, they limit the list to three names. Therefore, I think it may be much more likely that those individuals who aren't quite as capable, aren't quite as brilliant as the others, but might be pretty good, might be okay, might for political reasons be good to have them on the list — it may be that those names are weeded out because they just can't fit them on a three-person list. That may be one of the reasons. The other thing is that once that three-person list is given to the governor, the governor absolutely must make a selection from that list within a very short period of time. Otherwise the chief justice gets to do that. That may be one of the reasons. It may also be that, for whatever reason in Arizona, whoever is in control of politics in Arizona, the governor of Arizona, may be just a little bit more serious about the judiciary. Because it doesn't seem to matter whether we have an election system or we have an appointment system. It seems that what really matters, ultimately, is a chief executive, or whoever else is responsible for selecting judges to the high court is that they are honest, they are conscientious, and they actually care about having an extraordinarily well-qualified independent judiciary. I haven't really seen much evidence of that in New York for the last several years.

Thomas L. Gais:

There are about 23 or 24 states that have these merit systems. We've talked about the reticence of everybody, or the silence about the decision and the reasons for selecting this group, for selecting the nominees. Are there any states that require their nominating commissions to actually explain publicly and even take questions from the media or some sort of public forum about why they selected these people? They don't have any incentives for them to talk much about why they're doing this and I guess that probably accounts for why they aren't asking many questions, because they never really have to explain anything.

Vincent A. Bonventre:

Right. I don't know specifically, but, again going back to Arizona, I will tell you what happens. After the judges are appointed, I think it is two years later, they're up for a retention election and there is actually a commission that studies the justice and prepares a lengthy comprehensive report about that justice and that report is made public to the public. So there actually is a comprehensive evaluation, so you at least have that. Other than that, I really don't know at the very outset. All right, well, thank you very, very much. I enjoyed it.

Thomas L. Gais:

Thank you very much.