

**FOCUS:
NEW YORK STATE
JUDICIAL SELECTION
PROCESS**



Thomas McKeivitt

In January, the Judiciary Committee of the New York State Senate failed to approve Governor Hochul's Nomination of Justice Hector LaSalle, the Presiding Justice of the Second Department of the Appellate Division, to be the next Chief Judge of the State of New York. The following month, the full Senate rejected LaSalle by a margin of thirty-nine to twenty.¹ This is the first time in the state's history that the New York Senate has rejected a governor's nomination to New York's highest court.²

There may be significant consequences for years to come from this action. After all, it concerns the relationship between the executive and legislative branches over the

A Historical Perspective on Selecting the Chief Judge

appointment of a judge to head the state's judicial branch. This may be an appropriate occasion to examine how New York State adopted and arrived at the current system.

New York's original 1777 Constitution created the Court for the Trial of Impeachment and Correction of Errors as the highest court in New York. It was composed of the entire New York State Senate, the chancellor, and three judges of the State Supreme Court. This court remained in place until the Constitution of 1846 created the Court of Appeals. One of the motivations for creating this Court was the fact that under the prior system, judges were allowed to hear a case in a lower court, and then participate in the appellate proceedings as well.³

The new Court of Appeals consisted of eight judges, four of which were popularly elected, and four were selected from the class of Supreme Court justices.⁴ By 1870, all judges were elected, which continued for over 100 years.⁵ Even Benjamin Cardozo, regarded as one of the greatest jurists in New York history,

was elected to the Court in 1917 and elected Chief Judge in 1926.

Although the judges were technically elected, this was not the actual practice. A system developed where the Democratic and Republican parties would cross-endorse candidates to the Court. This was enabled by the fact that statewide candidates were chosen in conventions where party leaders were able to designate the nominees. The title of Chief Judge would be assigned to the senior associate judge, notwithstanding the political affiliation of the person.

However, this system imploded in 1972 when state law was changed to allow for party primaries.⁶ In 1973, Chief Judge Stanley H. Fuld retired. Under prior practice, the next senior judge interested in the position, Charles D. Breitel, who had served on the Court for twelve years, would have become the new Chief Judge.

However, he only received the Republican nomination. There was a six-way primary for the Democratic nomination, which was won by Jacob D. Fuchsberg. Breitel and Fuchsberg engaged in a bitter election which was won by Breitel. The next year, Fuchsberg won the primary for an open seat as an associate judge of the court, defeating the Court's only African American judge, Harold A. Stevens. Fuchsberg won election to the Court, but the functioning of the court was strained by having both Breitel and Fuchsberg serve at the same time.⁷

It was also at this time that candidates for the Court started airing more aggressive television commercials when campaigning for judicial office. One of the most well-known was when then Nassau County Supreme Court Justice Sol Wachtler ran an advertisement where he shut a prison cell door promising to "get the thieves and muggers and murderers into these cells."⁸

Chief Judge Breitel and Governor Hugh Carey then advocated for changes to the court system. The New York State Legislature passed resolutions in 1976 and 1977 to amend the New York State Constitution to reform the judicial selection process. The proposition was on the general election ballot in 1977 and passed by the voters by a margin of 1,508,258 to 1,311,621.

Under this new system, a Commission on Judicial Nomination would be responsible to nominate judges for the Court of Appeals. The

commission would consist of a total of twelve members who would be nominated in the following manner:

- Four by the Governor, no more than two of whom shall be enrolled in the same political party, and two must be members of the bar and two shall not be members of the bar.
- Four by the Chief Judge of State of New York, no more than two shall be enrolled in the same political party, and two must be members of the bar and two shall not be members of the bar.
- One by the Speaker of the Assembly.
- One by the President Pro Tempore of the Senate.
- One by the Senate Minority Leader.
- One by the Assembly Minority Leader.⁹

In addition, no member shall hold or have held any judicial office or elected public office for which he or she receives compensation during his or her period of service, except that the Governor and the Chief Judge can appoint no more than one former judge of the unified court system. No member of the commission shall hold any office in any political party, nor shall any member be eligible for appointment to judicial office during the member's period of service or one year thereafter.¹⁰ "This elaborate distribution of appointment power was meant to prevent any one branch of government from dominating the commission, to prevent it from becoming partisan, and to ensure confidence in its independence and impartiality."¹¹

When a vacancy arises on the Court of Appeals, the Judicial Nomination Commission shall make its recommendation to the Governor within one-hundred twenty days of the notice from the clerk of the court that there is a vacancy.¹² The Commission must evaluate the qualification of candidates and prepare a written report to the Governor of those who by their "character, temperament, professional aptitude and experience are well qualified to hold such judicial office."¹³

For associate judges of the court, the Commission must recommend at last three but no more than seven

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individuals,¹⁴ but “in recognition of the unique responsibilities of the chief judge,” the Commission shall recommend to the Governor seven persons.¹⁵ Once the list is generated, the Governor has between fifteen and thirty days¹⁶ to make an appointment “with the advice and consent of the senate.”¹⁷ The only other qualification the Constitution requires for a judge of the Court of Appeals is that the person is a resident of the state and admitted to practice law in New York for at least ten years.¹⁸

For the most part, this nomination process has been without controversy and nominees have generally been

quickly confirmed. As an example, Michael Garcia was nominated by Governor Andrew Cuomo on January 21, 2016, and he was confirmed by the Senate immediately after his confirmation hearing before the Judiciary Committee on February 8, 2016.¹⁹

In the thirty-five vacancies which have occurred from 1977 to 2021, no nomination was ever defeated. This includes twenty-five nominees where the Governor and the majority of the State Senate were from different political parties. However, in 2021, Nassau County District Attorney Madeline Singas was confirmed by a

rather narrow vote of 37-26. Her nomination was opposed by many progressive senators on the grounds that she had the background of being a prosecutor.

As for the future, the rejection of Judge LaSalle by first the Judiciary Committee and then the full Senate may be harbingers of things to come. A once routine process has become more contentious. Only time will tell if the semblance of the orderly method which has served New York State for more than forty-five years will be allowed to remain in place. ↴

1. Brian Lee, “NY Senate, in History-Making Vote Rejects Chief Judge Nominee”, NYLJ, February

16, 2023.
 2. Jimmy Vielkind, “N.Y. Gov. Kathy Hochul’s High-Court Pick, Hector LaSalle, Fails in Committee Vote,” Wall St. J., January 18, 2023.
 3. PETER J. GAILE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 105-106 (1996).
 4. N.Y. Const. of 1846, art.VI, §2.
 5. Frederick Miller, “New York’s Judicial Article: A Word in Progress,” in DECISION 1997 116 (Gerald Benjamin & Henrik N. Dullea eds. 1997).
 6. *Id.*
 7. *Id.*
 8. Frank Lynn, “The 1972 Campaign,” NYTimes, October 30, 1972.
 9. N.Y. Const. art.VI, §2(d)(1).
 10. N.Y. Const. art.VI, §2(d)(1).
 11. PETER J. GAILE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 166 (2012).
 12. N.Y. Jud. Law §68 (2).
 13. N.Y. Const. art.VI, §2(c).
 14. N.Y. Jud. Law §63 (2)(b).
 15. N.Y. Jud. Law §63 (2)(a).
 16. N.Y. Jud. Law §68(2).
 17. N.Y. Const. art.VI, §2(e).
 18. N.Y. Const. art.VI, §2(e).
 19. Associated Press “Michael Garcia Confirmed as Judge on the New York Court of Appeals,” N.Y. Times, February 8, 2016.
 20. State of New York Commission on Judicial Nomination, Candidates Nominated to the New York State Court of Appeals. 21. Yancy Roy, “State Senate OKs Singas for NY’s Top Court After Testy Hearing,” Newsday, June 8, 2021.



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