

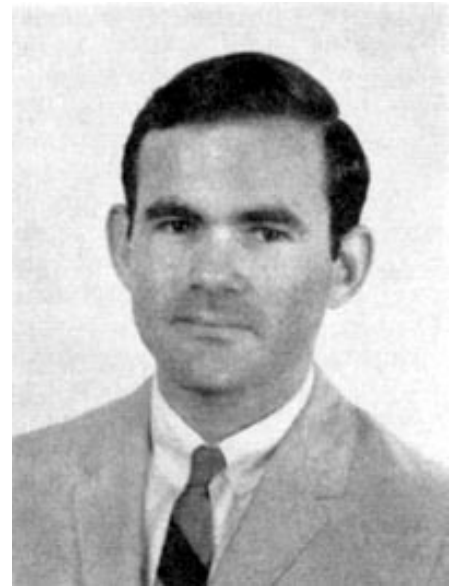
A New Judicial Article for New York

By Delmar Karlen^[*] and Joseph M. Miller^[**]

Every lawyer in New York State is interested in and affected by the judicial article of the New York State Constitution. The authors of the following material have reviewed the history of the present article and outlined their proposal for a new judicial article. Because of the impending Constitutional Convention, we are printing this exhaustive article here for the benefit of our readers throughout the State.



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SINCE the Declaration of Independence, eight constitutional conventions have been held in New York — in 1777, 1801, 1821, 1846, 1867, 1894, 1915, and 1938.^[1] Another will convene in April, 1967. One of the many difficult problems facing the delegates to the convention will be the drafting of a new judicial article.

A Brief Historical Summary

The present article, which was last revised in 1962, is the product of nearly two centuries of accretion.^[2] The state's first constitution, promulgated in 1777, had no judicial article as such, but contained several scattered provisions dealing with the courts and the judiciary.^[3] These recognized and continued in existence most of the colonial courts, established a court for the trial of impeachments and the correction of errors, provided for the appointment of judges by a Council of Appointment consisting of legislators, and prohibited judges from holding other office.

The constitutional convention held in 1801 did not produce a new constitution, but it adopted amendments

which gave the power to select judges to the Council of Appointment and the Governor concurrently.^[4]

The next constitution, promulgated in 1821, contained the state's first judicial article.^[5] This perpetuated the existing courts, and established in addition a new system of circuit courts.^[6] The selection of judges was covered in a different article which dealt with selection of state officers generally.^[7] The appointing power for all major judicial positions was vested in the Governor, subject to senate confirmation, rather than in the former Council of Appointment.^[8]

The 1846 constitution was the most radical break with the past in the history of the state so far as the judicial article was concerned. It set a judicial pattern for the state which has continued to the present day and which has been widely copied throughout the nation.^[9] The most important innovations were (1) a switch from the appointment to the election of judges^[10] and (2) a change from judicial to legislative rule-making.^[11] The article set up the Court of Appeals as the court of last resort, and established the Supreme Court as a statewide court of general original jurisdiction, vesting it, in addition, with limited intermediate appellate jurisdiction. The article also contained other detailed provisions that did not appear in the previous constitution, covering such matters as the number and compensation of judges.

The judicial article was revised and enlarged in 1869. Certain city courts of Brooklyn, Buffalo, and New York City were given constitutional recognition, the legislature was empowered to provide for the temporary assignment of the judges from certain lower courts in New York City to the Supreme Court, and a Commission on Appeals was established on a temporary basis to cope with the backlog of cases pending in the Court of Appeals. The article also directed the legislature to submit to the people the question whether they preferred the appointment or election of judges. This was done, and the people voted overwhelmingly in favor of election.^[12]

The constitutional convention of 1894 wrote a new constitution which did little more than incorporate most of the 1846 constitution as it had been subsequently amended.^[13] However, for the first time, judges of the higher courts were required to be lawyers.^[14]

The 1915 constitutional convention, aided by an expert study group, proposed numerous changes in the judicial article, but all of them were rejected by the people by substantial majorities in the November, 1915 election.^[15] In 1921, the legislature called a special convention on the judicial article, which subsequently recommended a general revision of it; but again the article was not adopted.^[16] However, many of the changes proposed in 1915 and 1921 were incorporated into a revised judicial article which was presented to the people by the legislature and adopted by the voters in 1925. The general contours of the court system remained the same, but the jurisdiction of some of the courts was altered, certain local courts were given constitutional recognition,^[17] and, in general, the judicial article became more complex. Still lacking was a comprehensive reorganization and simplification of the judicial system.^[17a]

Another constitutional convention was held in 1938, but it did not result in any changes in the judicial article.^[18]

By the 1950's, New York's judicial system was in a sorry state, with a great multitude of courts and no satisfactory system of overall administration. In 1953, the legislature created the Temporary Commission on the Courts to make a comprehensive study of the entire system, including all phases of administration, structure, procedure, and personnel.^[19] In 1956, the Temporary Commission proposed a plan which would have greatly

simplified New York's court structure, sharply reducing the number of courts and making all which remained part of a single, unified system with central administration.^[20] The plan was never approved, however, and the Temporary Commission went out of existence in 1958. The idea of court reform did not die, but was kept alive by such groups as the League of Women Voters and the Citizens' Committee for Modern Courts. Partly as a result of such pressure, the Judicial Conference of New York finally prepared a less far-reaching, substitute plan, which became effective as an amendment to the state constitution in 1962.^[21]

New York's current judicial article is a very long one, running some 31 printed pages and requiring roughly 15,000 words to cover the same general topics as are covered in 500 words on one page in the constitution of the United States.^[22] The New York article goes into great detail in almost all its provisions. It names all of the courts of the state: the Court of Appeals, the Supreme Court with its Appellate Divisions, the Court of Claims, the Surrogate's Court, the Family Court, the Criminal and Civil Courts in New York City, the County Courts outside the city, the Justices of the Peace and the Village Courts.^[23] It spells out the jurisdiction of these courts, leaving little control in the legislature. It also goes into detail on the selection and qualifications of judges, and on their removal and retirement, as well as on the number and compensation of judges, and the administration of the court system. An especially complicated section is that on finance,^[24] the net result of which is to place control of the purse strings for the courts in local communities.

Form and Substance

A pervasive problem in drawing up a new judicial article is that of form. This is not simply a question of esthetics, for the length of the article may have important practical implications. If the article is long, it means that little discretion is left to those who are to implement the provisions. A short article allows much more discretion in implementation, which can be left to the legislature, to the courts, or even to an administrative body, such as the present Administrative Board of the Judicial Conference, or to a combination of these. Essentially, the constitutional convention has two decisions to make here: (1) how much authority to delegate, and (2) to whom to delegate. These decisions require a value judgment as to what implementing body, if any, can be trusted.

In framing a constitution, change may well be the key factor to keep in mind. Framers of a constitution, no matter how wise and capable, cannot envision all the changes in conditions and needs that will occur. The strength of the federal constitution has been its flexibility. The fact that New Yorkers are constantly being asked to vote on proposed constitutional amendments and the fact that the state is now planning its ninth constitutional convention in less than 200 years demonstrate the transitory nature of detailed provisions. Under a properly drawn constitution, necessary changes can be made without the cumbersome process of constitutional revision. Consequently, the judicial article should deal with fundamentals — basic principles — not detailed regulations and prescriptions more appropriate for legislation.

What should the judicial article include? This varies from state to state, but most judicial articles cover the following areas: court structure and jurisdiction; judicial selection; tenure, retirement, and removal of judges; compensation; judicial conduct; administration; finances; and rule-making. ^[25]

For both form and coverage of the judicial article, the delegates have a wealth of models to consult — the federal judicial article; the relatively new judicial articles in such states as New Jersey, Illinois, New Mexico, North Carolina, Alaska, and Hawaii; and model judicial articles prepared by various organizations. The best known of the models is that prepared by the Section of Judicial Administration of the American Bar Association. ^[26] Another, designed specifically for New York, was prepared by the Institute of Judicial Administration in 1958 for the League of Women Voters in preparation for the last effort at constitutional revision. ^[27] The National Municipal League, in its Model State Constitution, also includes a judicial article. ^[28]

Court Structure

A threshold question for the delegates to the constitutional convention to consider is whether New York should have a genuinely unified court system, with a small number of courts and with centralized administration. Such unification is generally considered a condition precedent to more effective judicial administration.^[29]

Starting with the colonial courts, which were continued in existence by New York's first constitution, the court structure of the state grew in size and complexity until, by the middle of the 20th century, it had become almost unmanageable.^[30] There were nine different types of courts in the City of New York and 10 different types outside the city,^[31] some of which had been created by constitutional provision and some by legislative enactment. These courts had been created in response to local pressures, without reference to any master plan; and they had rigid, sometimes narrow, and sometimes overlapping jurisdiction.^[32]

The 1962 amendment to the constitution resulted in a moderate simplification of court structure. It reduced the number of courts of original jurisdiction in New York City from nine to six, created a statewide Family Court to replace the Domestic Relations Court of New York City and the Children's Courts outside the city,^[33] and it provided a vehicle by which city, town, or village courts outside of New York City could be consolidated into District Courts.^[34] Except for this provision and another that all judges other than justices of the peace were prohibited from practicing law, courts outside New York City remained virtually untouched.^[35] Today the constitution still provides for some 17 different courts.^[36]

The 1962 amendment attempts to provide centralized administrative control, but the language of its first section is more hopeful than descriptive when it says "There shall be a unified court system for the state."^[37] Administrative power in New York is dispersed among the Presiding Justices of the four Departments of the Appellate Division of the Supreme Court. While they, together with the Chief Judge of the state, act as the Administrative Board of the Judicial Conference,^[38] each individually possesses vast power.

An important issue to consider in the area of court structure is whether justices of the peace should be retained. Antedating even the first state constitution, they served an important function in remote areas for many years.^[39] Now, however, conditions have changed radically. A recent nationwide survey demonstrates that they have disappeared in many states^[40] and are on the way out in others. This has come about in two primary ways: states have abolished the office or have so reduced its powers as to make it essentially non-judicial. Most states that have eliminated the justices of the peace have replaced them with a statewide system of full time, professionally trained, salaried judges, functioning in adequate and dignified quarters.^[41]

The justice of the peace is called upon to perform a variety of judicial functions: he must fix bail, issue arrest and search warrants, hold trials, advise defendants of their rights, and he must decide small, but sometimes

complicated, civil cases.^[42] It is highly questionable whether one who is untrained in the law can adequately safeguard the rights of criminal defendants in light of such recent United States Supreme Court decisions as *Escobedo*^[43] and *Miranda*,^[44] or adequately protect the rights of civil litigants who are equally deserving of decent, modern justice.

In an earlier age, when rural areas were isolated and communication and transportation were slow and difficult, the justice of the peace system made sense. But today, when the state is covered with a system of modern highways, justice can and should be administered even in rural areas by full-time professional judges. New York has tried to improve the justice of the peace system by requiring that new lay justices take a special training course;^[45] but the course is of such short duration that, while valuable, it is necessarily somewhat superficial and not adequate to overcome the inherent difficulty of operating with untrained and part-time personnel.

Another important problem for the delegates to consider is whether New York should continue to have separate specialized courts — surrogate's courts,^[46] family courts,^[47] and the court of claims^[48] — or whether these courts should be merged into the Supreme Court, as a court of general jurisdiction. The argument for the continued separate existence of these courts is that expertise is needed to deal with probate and family work, and claims against the state. If so, how does one explain the fact that the two candidates for a recent vacancy in the Surrogate's Court in New York City were both justices of the Supreme Court?^[49] Or how explain the fact that a single individual may act as Surrogate, Family Court judge and County Court judge in counties outside New York City?^[50] Or the fact that Supreme Court judges may be assigned to sit in the Court of Claims?^[51]

While there may be some substance to the argument for judicial expertise in these courts, particularly in the Family Court, a better solution may be found in the use of specialized judges rather than specialized courts.^[52] A judge particularly fitted by training and temperament to do family court work could be assigned to such work as his primary duty, while one better fitted to do estate work could be assigned to it without precluding the possibility of his doing other work as needed. Consolidation of the three courts with the Supreme Court would allow greater flexibility in the assignment of judges, eliminate the problems of subject-matter jurisdiction that now exist, and avoid the shunting of litigants from one court to another, with the miscarriages of justice that occur when jurisdictional lines are excessively rigid.^[52a]

Another question concerning court structure is whether a single lower court in New York City should be created or whether there should continue to be a separate civil and a separate criminal court for the city. For substantially the same reasons which have just been discussed in connection with the Supreme Court, the Temporary Commission on the Courts proposed a single, city-wide court with both limited criminal and limited civil jurisdiction,^[53] but, along with other Commission proposals, this was not accepted. Since no arguments were advanced at the time against the merits of this proposal, probably the best explanation for its failure is that the civil court judges were elected while the criminal court judges were appointed by the Mayor. The Mayor was unwilling to give up his appointive power, and the other politicians were unwilling to give up their power to control the selection of elective judges. The current judicial article permits the legislature at the request of the Mayor and the City Council to merge the two courts,^[54] but this has not been done. If the problem of judicial selection can be solved, there is little or no reason for these two courts to remain separate.

Besides determining whether all the courts in the state should be specified in the constitution, the delegates must also decide whether jurisdiction, both geographical and as to subject-matter, is to be spelled out in detail in the constitution or left to the legislature. In the present judicial article, the jurisdiction of the Court of Appeals is given in great detail, while that of the Supreme Court is relatively brief; the jurisdiction of the County Courts is stated in extremely detailed terms, while the provisions on the Court of Claims is but one sentence in length; the

jurisdictional provision for the Surrogate's Court is relatively brief, while that for the Family Court is lengthy, and those for the New York City courts are only a little less so; and the jurisdiction of the local courts outside New York City is left to the legislature. [\[55\]](#)

A constitutional grant of jurisdiction need not be wordy. The American Bar Association's Model Judicial Article gives the supreme court of a state broad power to fix its own jurisdiction and that of the other courts. [\[56\]](#) Hawaii's article says simply, "The several courts shall have original and appellate jurisdiction as provided by law," [\[57\]](#) thus delegating to the legislature the power to define jurisdiction and to divide courts into geographical districts and departments. The same approach is followed in the federal constitution. [\[58\]](#)

Selection of Judges

Probably the most controversial area in the drafting of a new judicial article is that of selection of judges. That there is a fundamental relation between the quality of judges and the proper administration of justice is almost too obvious to mention. If judges are mediocre or incompetent, improvement in the other areas of judicial administration becomes almost meaningless.

Between 1777 and 1821 the judiciary in New York State was selected by a Council of Appointment, which included four legislators and the Governor, who had a vote only in case of a tie.^[59] The 1821 constitution dropped the Council of Appointment^[60] and until 1846 judges were selected by the Governor with the consent of the senate. The delegates to the constitutional convention of 1846 felt that the judiciary was not representative of the people. Riding the crest of the wave of Jacksonian Democracy that had swept the country, they switched to an elective system of selecting judges. This change was important not only for New York but for the rest of the country as well, since a great many states followed New York's lead and switched to popular election of judges.^[61]

Many of these states have since returned to an appointive system of judicial selection.^[62] New York, however, still has primarily an elective system, with some important exceptions: Court of Claims judges are appointed by the Governor with the consent of the senate; Family Court and Criminal Court judges in New York City are appointed by the Mayor; and justices of the Appellate Division of the Supreme Court are appointed to that court by the Governor from the popularly elected Supreme Court.^[63] Furthermore, vacancies in judicial office are filled by appointment, and a large proportion of judges have reached the bench initially through that means.^[64] Once a judge is on the bench, the fact of incumbency gives him an advantage in a subsequent election; indeed, he may well run unopposed.

Today, there is a widespread feeling that the election of judges has serious shortcomings, and that it has been a means for incompetent men to achieve judicial office.^[65] They fear the embarrassment of risking their professional reputations in contests where political factors unrelated to merit may control. They dislike the idea of having their photographs on posters and campaign buttons and they shrink from arranging to have their virtues extolled by sound trucks. Judicial offices are of such "low visibility" that people are scarcely aware of them and do not know for whom they are voting if they bother to vote for judicial offices at all. A poll taken in 1954 shortly after election day showed that the overwhelming majority of the voters, both in New York City and upstate, could not recall the names of any of the men for whom they had voted in judicial contests.^[66] Most people do not care about the judiciary in the same way they care about the executive or legislative branches of government, and they have little way of knowing who would make a good judge. Political bosses, rather than the people, really pick the judges.^[67] A vote for a judge is generally a vote for his party rather than for the man himself. In a safe district, nomination by the party in power is tantamount to election.

To many able lawyers, the elective system is so unattractive that it discourages them from running for judicial

office. A quieter, more discreet procedure might attract better men.

When a judge seeks re-election and spends an inordinate amount of time campaigning while his brethren on the bench carry his load, it is the public's time and money that is being wasted. Other unsatisfactory features of the elective system are: (1) a judge may feel obligated toward lawyers who helped in his election, financially or in other ways; (2) a lawyer may be subjected to improper pressure to contribute to a judge's campaign fund in the fear that a failure to contribute may prejudice the judge against him; (3) a judge may hesitate or refuse to make an unpopular decision shortly before he is up for re-election; and (4) since judges, especially on the trial level, are supposedly not legislating or representing one segment of the population against another, there are no issues upon which candidates can legitimately campaign.

Many persons contend that there is very little difference in practice between elective and appointive systems of selection, since politics is the moving force behind both.^[68] In the elective system the candidate for judicial office is nominated by party bosses or leaders, whereas in the appointive system, names come before the executive in a variety of ways, but he is almost invariably susceptible to political pressure. If both election and appointment involve politics, and if politics is undesirable in the judicial context, how can politics be eliminated from the selection of judges, or, if not eliminated, its impact minimized?

The system most frequently discussed today as a means for minimizing the influence of politics is the "Missouri Plan," also known as the American Bar Association Plan and the "merit system."^[69] It involves both an appointive and an elective process, calling for the initial appointment of a judge by the executive from a list of names supplied by a nominating commission, and then requiring periodic submission of the judge to the electorate for retention or removal on the basis of his record. Since the purpose of the plan is to take judicial selection out of politics as far as possible, the commission must be essentially nonpolitical. While it is probably impossible to make a commission truly non-partisan, it is possible to make it bi-partisan.

As experience not only in Missouri but also in New York City and elsewhere demonstrates, a nominating commission can be converted into a smokescreen to conceal the partisan political selection of judges.^[70] The chief executive, when candidates from both parties are submitted to him, may insist upon choosing a man from his own party.^[71] Or, more deviously still, he may directly or indirectly submit the name of his own candidate, and then when that name along with others is returned to him, pick it out of the hat as if by magic.^[72] Even so, a nominating commission may serve a useful screening purpose: it can eliminate grossly unqualified candidates by the simple expedient of refusing to nominate them for appointment. This is a surer device for eliminating obvious incompetents than relying upon the unofficial recommendations of bar associations and civic organizations whose advice can be disregarded with impunity.^[73] Probably the only way that a nominating commission can be made to function in the way ideally intended is (1) to give it adequate staff and machinery to actively recruit highly qualified candidates, and (2) then to persuade the appointing authority to leave it alone, restricting himself solely to the task of choosing the best candidate from among those presented to him. Unfortunately, these conditions are hardly of such a nature that they can be created by constitutional provision.

There is a wide diversity of opinion as to how a nominating commission or commissions should be composed.^[74] How many should there be? What courts and what geographical areas should each cover? Should the commissions include lawyers? Should they have ethnic diversification? The conflict of opinion is so great that it might be necessary to bypass the commission entirely and simply use straight appointment by the executive, preferably with subsequent legislative confirmation. This would be essentially the federal system.

One of the standard arguments in favor of such a system is that it places responsibility for judicial selection on a politically answerable individual — the executive — rather than some amorphous group.^[75] Perhaps so, but

what does "responsibility" mean in the context of judicial selection? If it means that the executive will be held responsible for a bad judicial appointment in the sense that he will be turned out of office by the voters at the next election, it is not a very convincing argument. How many executives have been unseated for the low quality of their judicial appointments? In how many cases has that even been a significant factor?

An element of the Missouri Plan which is the subject of lively dispute is the periodic resubmission of the judge to election. We have already examined the "low visibility" of judicial office — the idea that most judicial candidates are unknown to the electorate. If this is true in initial election of judges, it is just as true when a judge stands for re-election. It seems highly unlikely that a judge will be unseated when there is no one to stand against him unless his conduct has been notoriously, even spectacularly, bad. To say that the people will examine a man's record is absurd. What is a judge's record? Is it the number of cases he handles in a month, without regard to their size or complexity? The number of convictions that are had in his court, without regard to the facts in the cases? The size of the personal injury judgments? Even though court proceedings are matters of public record, the public knows and can know little of what really goes on in the courts. How then can the average man know who is a good and who a bad judge, and how can he make an intelligent choice in a judicial election, Missouri type or otherwise? It may well be that the re-election feature of the Missouri plan is nothing more than a political gimmick to make the appointment and life tenure of judges palatable to voters who are accustomed to an elective system and limited terms of office.

If the delegates to the constitutional convention decide to switch to an appointive system of selecting judges, they will have to decide where the appointing power should be lodged. Such power of appointing judges to major posts as now exists is divided between the Governor and the Mayor of the City of New York.^[76] An attractive compromise which is not too radical a departure from present practice might be to give the Mayor power to appoint all judges in New York City below the level of the Supreme Court and to give the Governor power to appoint all other judges. The matter of ensuring that local communities would have a voice in judicial selection could be handled by creating nominating commissions, not only in the City of New York — for judges at all levels who would serve there — but also outside of the city on a fairly local basis — tied perhaps to something like the present Supreme Court districts.

Tenure, Retirement, and Removal

Just as it is important to get good men on the bench, it is important to get unfit men off. This can be accomplished by restricting tenure, and by providing systems of retirement and removal.

In New York today, Court of Appeals judges, Supreme Court justices and Surrogates in New York City hold office for 14 years; County Court judges, Family Court judges, Surrogates outside New York City and judges of the Civil and Criminal Courts of New York City hold office for ten years; Court of Claims judges have nine-year terms. ^[77] It was not always so. Under the state's first constitution, the Chancellor and the justices of the Supreme Court held office during good behavior until age 60. Subsequent provisions introduced limited terms and fixed the age of retirement at 70. ^[78]

Are the current terms of office satisfactory? Under a political system of judicial selection, such as now prevails and is likely to prevail in the future even if its form is changed, it is probably better to give judges longer rather than shorter terms. A longer term helps to insulate judges from the pressures of the moment, freeing them from worry about the effect of their decisions on the next election.

New York's present 14-year term for the judges of its higher courts approaches the life tenure given judges in the federal courts. That is because most men are well along in their fifties when they become judges. Thus it is unlikely that a man will serve more than one term; and if he begins a second term, it is likely that he will have to retire at age 70 before it has expired. Why judges of the lower courts should have shorter terms of office is not clear. Perhaps all should be accorded the same tenure, or perhaps life tenure, as in the federal system, should be accorded to all. This could be done either explicitly and unequivocally, or it could be done indirectly and less certainly by instituting the Missouri plan system of having a judge run for re-election only against his own record. As indicated above, very few judges would ever fail of re-election under that plan, so that the net effect would be to grant them something approaching life tenure.

Retirement and removal are closely related to the matter of tenure. Workable systems of retirement and removal become increasingly important as a judge's term increases in length. According to New York's present judicial article, a judge must retire when he reaches age 70, but judges of the Court of Appeals and justices of the Supreme Court, upon certification by the Administrative Board of the Judicial Conference may be continued as senior judges until age 76. ^[79] Since permission to continue is virtually never withheld, a question is raised as to whether such discretion should continue to exist. If there is to be an arbitrary retirement age, should it not be observed strictly and without exception; and if 76 is a better age for retiring judges than 70, should not that figure be used? Such problems, however, concern details which need not and should not be frozen into the constitution. A simpler and better solution is to provide that judges shall be retired as provided by law, thus leaving to the legislature the power to fix the proper age as well as to determine the financial conditions of retirement.

Mandatory retirement deals adequately with disability which occurs by reason of old age, but it does not dispose of the problems posed by judges who become disabled before reaching the statutory age or who misbehave in office.

What can and should be done when a judge misbehaves in office, or becomes physically or mentally disabled? The present constitution provides four methods of removing judges, but three are of hardly more than theoretical interest. One is impeachment,^[80] but only one judge of a major New York court has ever been removed by that method. That was in 1872. Another method is removal by a concurrent resolution of the senate and assembly. This provision has never been used. A third possibility is removal by a two-thirds vote of the senate, on recommendation of the Governor. This method was used only once—also in 1872.^[81]

The only potentially practical procedure for removal is found in Section 22 of the judiciary article. It provides for removal for cause or disability by a specially constituted Court on the Judiciary, composed of the Chief Judge and senior Associate Judge of the Court of Appeals and one justice of the Appellate Division from each judicial department. The Court may be convened by the Chief Judge of the Court of Appeals, the Governor, the executive committee of the state bar association, or any of the presiding justices of the Appellate Division departments.^[82] It has no staff and no continuing existence as a body.^[83] The Court on the Judiciary was never convened between January 1, 1948, its effective date, and December, 1959;^[84] and since December, 1959, only three cases have been brought, all involving judicial misconduct. Though the court has power to remove a judge for disability, it has never done so.^[85] Judges below the level of Supreme Court may be removed by the appropriate department of the Appellate Division of the Supreme Court. Again there is no special staff or machinery to assist the judges in the exercise of their disciplinary powers.^[86]

California's experience with judicial removal has attracted nationwide attention and deserves consideration by New York's constitutional delegates. Since 1961 that state has had a Commission on Judicial Qualifications to deal with removal problems.^[87] The Commission has nine members, including five judges, two lawyers, and two laymen. Supreme Court justices are not eligible, since the Supreme Court in effect acts as an appellate body to review actions of the Commission. The Commission has the power to subpoena witnesses, make investigations, take evidence, and make findings, but it does not have the power to remove. Rather it files a record and recommendations with the Supreme Court, which after reviewing the proceedings and possibly taking additional evidence, then may order removal or retirement of the judge whose conduct is in question, or may reject the recommendation of the Commission.^[88]

The number of actual dismissals through formal proceedings of the Commission has been small, but much of the work of the Commission goes on beneath the surface. A number of judges in California have resigned or retired once an investigation was begun;^[89] and the mere existence of such a body is thought to exert pressure upon judges to refrain from questionable behavior and to retire when disability occurs.

When the California Commission was first proposed, many judges were opposed to it.^[90] They were afraid that they would be tried in absentia, and that they would be at the mercy of cranks. They also argued that the provision would discriminate unfairly against judges because there was no similar removal machinery for officers in other branches of the government. Finally, they asserted that such a provision was an infringement on the right of the people to select their judges. These objections appear now to have disappeared,^[91] and the California Commission seems to be giving general satisfaction.

The essential question the delegates to the constitutional convention should ask is whether New York's current machinery for judicial removal is adequate, or whether it needs improvement, possibly along the lines of the California Commission. The delegates should also determine whether it is necessary or important to have sanctions less severe than removal for judicial misconduct; these could include measures such as reprimand or temporary suspension from office. Finally, the delegates must determine the extent to which removal procedures

should be included in the constitution or left to legislative discretion.

Other Provisions Pertaining to Judges

There are other matters pertaining to judges which may be appropriate for inclusion in the constitution, depending upon the degree of detail that the convention finally decides on. Such a matter is salary. It would be a mistake to fix salaries in the constitution because of the difficulty of changing them quickly enough to respond to changes in the cost of living, but it might be possible to state a flexible formula based upon cost of living indices. This, however, would neglect other relevant factors, such as changes necessary to make judicial salaries comparable to those paid for similar work. The American Bar Association Model Judicial Article ties judicial salaries to those at the higher levels of the executive branch.^[92] On first glance, this seems attractive, but executive salaries may not be a fully relevant yardstick for judicial salaries. On balance, it seems wiser to leave salaries to the legislature. It would be entirely appropriate, however, to provide that no judicial salary shall be diminished during the judge's term of office, as is done in New York's current judicial article and in other state constitutions.^[93]

Another area for the delegates to consider for inclusion or exclusion is that of judicial ethics or conduct. In New York, under the present provisions, judges are prohibited from (1) holding other public office or trust, (2) running for office, other than judicial office or as a delegate to the constitutional convention, (3) holding office in any political organization, and (4) practicing law or acting as an arbitrator, referee, or compensated mediator in any action or proceeding or matter or engaging in the conduct of any other profession or business which interferes with the performance of their judicial duties.^[94] These are useful provisions and consistent with the American Bar Association Model Judicial Article. The problem is whether they are comprehensive and detailed enough and whether they have sufficient flexibility to cope with changing situations.

That a sitting judge should be prohibited from practicing law or engaging in activity which interferes with the performance of his judicial duties is self evident. So also is the proposition that he should be prohibited from running for or holding other political office or otherwise engaging in politics, for political activity tends inevitably to raise conflict of interest problems. But barring a judge from political activity does not completely solve the problem, as was demonstrated in a recent New York election, when the wife of a candidate for judicial office was an active and influential political leader.^[95] Should the husband's candidacy have been proscribed? Problems like this are so numerous and so difficult to foresee that it would probably be impossible to deal with them in the constitution even if it were to contain a detailed code of ethics. The best solution may be to provide in the constitution that the legislature or some body like the present Judicial Conference should promulgate a detailed and binding code of judicial behavior, or to incorporate in the constitution by reference the American Bar Association Canons of Judicial Ethics. Either formula provides flexibility and comprehensive coverage, but the latter has the disadvantage of making the regulation of judicial behavior dependent on factors beyond the control of the state. To a limited extent, the Judicial Conference is now implementing by detailed regulation the general ethical provisions of the constitution.^[95a]

Should the constitution deal with the number of judges in the state? The present judicial article allows the legislature to increase the number of Supreme Court justices, "except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as

shown by the last federal census or state enumeration."^[96] This sets a maximum limit on the judgeships that can be created, rather than fixing the minimum number required, as is done in the constitution of Florida. In that state, the number of judges is tied to population, with an additional judgeship being automatically created every time the population increases by a certain figure.^[97]

Better than either of these provisions might be one which would attempt to equalize judicial manpower throughout the state. It is now widely disparate, some communities having badly clogged calendars and others being substantially up to date. Possibly this could be done by applying the basic idea of *Baker v. Carr*^[98] to the judiciary, as has been suggested in recent litigation.^[99] If a citizen has a right to equal representation in the legislature, does he not have a corresponding equal right to be heard in the courts?

Administration

As the late Chief Justice Vanderbilt of New Jersey said:

The most surprising paradox in the whole field of judicial administration is the contrast between the high degree of efficiency in the administration of most large business corporations, many of them with lawyers as chief executives, and the almost complete lack of administrative efficiency in most judicial systems. The courts of this country have become notorious for their reluctance to accept and put into effect even the most basic and simple principles of business administration.

[\[100\]](#)

New York has taken important steps in recent years to improve the administration of its courts. In 1934, the legislature created the Judicial Council, which was nothing more than a statistical and procedure-studying body.

[\[101\]](#)

In 1955, the legislature replaced the Judicial Council with the Judicial Conference, giving it the functions which had been exercised by the earlier body, but, in addition, empowering and equipping it, through its

Administrative Board, to do the job of supervising the courts. [\[102\]](#) The Judicial Conference is composed of the Chief Judge of the Court of Appeals, four presiding justices of the Appellate Division, four Supreme Court justices, one surrogate, and one judge each from the County Court, the Court of Claims, the Family Court, the

New York City Criminal Court and the New York City Civil Court. [\[103\]](#) It is an advisory body whose function is to assist and advise the Administrative Board in the performance of its supervisory functions. The

Administrative Board, now given constitutional status, is composed of the first five judges indicated above. [\[104\]](#) It establishes general standards and policies to govern the court system, which are carried out and administered in each of the four judicial departments by the Appellate Divisions thereof. The Administrative Board appoints a State Administrator to carry out its policies, and each Appellate Division appoints its own Director of Administration. Finally, there are administrative judges of various courts, such as the Civil Court of the City of New York and the Criminal Court of the City of New York. [\[105\]](#)

From this description, it is apparent that there is a substantial dispersion of administrative authority in New York, with the balance of power being placed in the hands of the presiding justices of the four Appellate Divisions. That a delegation of power to many officials is necessary in a system as complex as New York's is clear, but should there be so much splintering of authority? According to recommendations of the American Bar Association and the practice in many states, administrative authority ought to be concentrated in a single man, preferably the chief judge of the state's highest court. While he should have the benefit of the advice of a committee and should be able to delegate part of his authority to other judges and to administrative assistants,

the ultimate power should reside in him. [\[106\]](#) Since New York departs from this recommended pattern, the constitutional convention delegates ought to consider whether it might not be wise to concentrate additional power in the Chief Judge, particularly with respect to the assignment and transfer of judges.

Another important problem concerns the geographical division of administrative authority, particularly within the City of New York. The City is split administratively between two judicial departments of the Appellate

Division, the First and the Second. ^[107] This makes little sense in view of the fact that some of the courts in New York City exercise city-wide jurisdiction — for instance, the Criminal Court and the Civil Court of the City of New York. Whenever anything is to be done administratively in the city, the presiding justices of the two departments have to get together and agree. The fact that they are getting along well at present does not mean that future presiding justices will always be as fortunate. But even today, decisions are impeded, frustrated and delayed by a setup which is indefensible administratively, however feasible it may be in terms of appellate review. Every matter affecting any city-wide court is a subject for negotiation rather than prompt unilateral decision.

Finances

A serious administrative problem is that of finances. The court system in New York costs about \$137,000,000 a year, not counting capital expenditures for new court houses and other physical facilities.^[108] In general, this money comes from three levels of government — the state, the counties, and some of the cities. Some of the local expenditures are made directly, while others are made initially by the state and then charged back to local communities. Not only are the costs shared by more than one unit of government, but each unit acts independently of the other to a great degree. There is no genuine centralized budget such as is found in the other branches of the government.^[109]

The net result is that the administration of justice is not uniform throughout the state. Any attempt at uniformity on any matter such as personnel or salaries can be blocked by local authorities. For example, a community may refuse to appropriate money to have probation officers in sufficient numbers to handle the caseload or to provide sufficient numbers of clerical help.

The purse strings are the key to administrative control. Without budgetary and financial control of the system, centralized, unified administration flounders. The delegates to the constitutional convention must decide whether statewide administration will be bolstered by statewide fiscal control. They should also decide whether to eliminate chargebacks to communities, and whether the practice of granting "lulus" to some judges — lump sum payments in lieu of actual expenses^[110] — should be outlawed.

Rule Making

Another matter that should be dealt with in the constitution is the power to make rules of practice and procedure.

Originally courts improvised rules of practice and procedure as they went along, case by case, in much the same manner as they made rules of substantive law.^[111] Because of the conservatism of judges and the doctrine of *stare decisis*, judge-made rules of procedure had, by the mid-nineteenth century, been transformed into almost unbelievably complicated, obscure, rigid and sterile forms of action.^[112] New York's response was the Field Code, promulgated in 1848 — an exercise of procedural rule-making by the legislature.^[113] This marked a great step forward, and was copied not only throughout most of the United States but also in England. Ultimately, however, legislative rule-making "simply replaced the archaic complexities of the old system with the rigid, over-particularization of the new."^[114]

Judge Cardozo pointed out the difficulties of legislative rule-making:

The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mends often when it would mend.^[115]

Chief Justice Vanderbilt of New Jersey joined in the criticism, saying:

The regulation of procedure by the legislature has had deleterious effects, leading to an unwise division of responsibility for the administration of justice between the legislature and the courts. The harassing inflexibility of legislative-made practice and procedure has resulted not only in a flood of judicial decisions construing procedural statutes, but also in continual legislative tinkering with such statutes. ^[116]

New York's State Advisory Committee on Practice and Procedure operating in conjunction with the Temporary Commission on the Courts, described earlier, recommended in 1961 that the rule-making power should be given to the Judicial Conference, rather than to the courts or the legislature. After summarizing the advantages and disadvantages of giving the power to the Court of Appeals or the Appellate Divisions, the Committee concluded that the Judicial Conference had the advantage of detached and experienced views, prestige, and its own staff.

^[117] The recommendation of the Advisory Committee was rejected in part and accepted in part. Basic procedural rule-making power is now vested in the legislature, but the Judicial Conference is vested with power to make interstitial rules, supplementing but not conflicting with those made by the legislature. ^[118] This is out of line with the practice in the federal government and many states, where procedural rulemaking is vested in the highest court, with essentially only veto power being left to the legislature. ^[119] It is also out of line with recommendations of the American Bar Association ^[120] and the views of recognized leaders such as those quoted above. While there seems to be no harm in using the Judicial Conference rather than the Court of Appeals as the body which is basically responsible for promulgating the rules, there is harm in giving the legislature as prominent a role as it presently plays. If it is restricted to a veto power, it can still perform a useful function, curbing abuses and excesses and acting in general as watchdog.

In addition to considering the change just suggested, the convention delegates should also ponder the advisability of broadening the rule-making power to include evidence as well as practice and procedure. This is a subject that urgently requires attention, and it is most likely to receive it if New York follows the lead of other jurisdictions ^[121] in giving the Judicial Conference the power to remold the existing antiquated law through the exercise of its rulemaking power.

Conclusion

While the delegates to the constitutional convention will be faced with many other important problems such as reapportionment, unicameralism v. bicameralism, executive reorganization, and state-local relations,^[122] the drafting of a new judicial article is challenging enough to call for the highest talents that can be mustered, for the job bristles with difficulties. The principal (but not the only) issues in this connection have been discussed above, and may be summarized as follows:

- (1) How long should the article be? How much should be included?
- (2) Should the Family Court, the Court of Claims, and the Surrogate's Court be merged into the Supreme Court?
- (3) Should the office of Justice of the Peace be abolished?
- (4) Should the New York City Civil and Criminal Courts be merged into a single city-wide court?
- (5) Should New York switch from an elective to an appointive system of selecting judges, with or without nominating commissions?
- (6) Should all New York judges be given uniform tenure? What should it be?
- (7) Is the present system of removal of judges adequate, or should it be replaced by a California-type removal commission?
- (8) Should some administrative power be transferred from the presiding justices of the Appellate Division and the Judicial Conference to the Chief Judge of the Court of Appeals?
- (9) Should the court system have centralized financing and budgeting?
- (10) Should the rule-making power be vested in the legislature, the courts, or in some other body?

In the hope that a rough draft of a new judicial Article may serve as a catalyst for the thinking of the delegates to the constitutional convention, there follows a proposal recently prepared in a seminar on judicial administration. The seminar was held at the New York University Law School in the fall of 1966, with a membership of graduate and undergraduate law students^[123] and some of the staff of the Institute of Judicial Administration.

^[124] Each student studied one specific aspect of the general subject and prepared a draft of provisions embodying his own ideas. He presented it to the group and it was criticized and discussed not only by the regular members of the seminar, but also by an outside expert having special knowledge and experience in the area under discussion.^[125] Finally a consensus was reached among the members of the seminar, not precisely reflecting the views of the authors of this article or those of any other individuals who participated, but reflecting

the composite judgment of the group as to what New York's judicial article should contain. Here is the proposed article:

Proposed Judiciary Article For The New York Constitution

SECTION 1. *Judicial Power.* The judicial power of the State shall be vested in a unified judicial system consisting of the Court of Appeals, the Appellate Division of the Supreme Court, the Supreme Court, and the District Court. All courts except the Court of Appeals may be divided into geographical departments or districts as provided by law.

SECTION 2. *Court of Appeals.* The Court of Appeals shall be the highest court of the State and shall consist of a Chief Judge and six Associate Judges.

SECTION 3. *Jurisdiction of Courts.* The Supreme Court shall have jurisdiction in all cases except as provided by law. All other courts shall have jurisdiction as provided by law, jurisdiction shall be uniform throughout the state in all geographical departments or districts of the same court.

SECTION 4. *Selection of Judges.*

a. There shall be one Judicial Nominating Commission for all judges of the Court of Appeals and the Appellate Division of the Supreme Court, and one Judicial Nominating Commission within each district of the Supreme Court for all Supreme Court and District Court judges in that district.

b. A vacancy in the office of judge of the Court of Appeals, the Appellate Division of the Supreme Court, or the Supreme Court shall

be filled by the Governor from a list of three nominees presented to him by the appropriate Judicial Nominating Commission.

c. A vacancy in the office of judge of the District Court within the City of New York shall be filled by the Mayor of New York from a list of three nominees presented to him by the appropriate Judicial Nominating Commission.

d. A vacancy in the office of judge of the District Court outside the City of New York shall be filled by the Governor from a list of three nominees presented to him by the appropriate Judicial Nominating Commission.

e. The Judicial Nominating Commission for the Court of Appeals and the Appellate Division of the Supreme Court shall consist of seven members. It shall include one attorney residing within the geographical area of each department of the Appellate Division of the Supreme Court, who shall be selected by vote of attorneys residing in and registered with the department which he shall represent; two non-attorneys who shall be appointed by the Governor; and the Chief Judge of the Court of Appeals.

f. The composition of all other Judicial Nominating Commissions shall be as provided by law.

SECTION 5. *Eligibility of Judges.* No person shall be appointed to a judicial office unless he is domiciled within the State, is a citizen of the United States and is licensed to practice law in the Courts of the State.

SECTION 6. *Tenure of Judges.* All judges shall be appointed to a ten-year term.

SECTION 7. *Retirement of Judges.* Every judge shall retire at the age of seventy years under such terms as shall be provided by law.

SECTION 8. *Removal of Judges.*

a. A Commission on Judicial Removal shall be established, which shall consist of nine members appointed to four-year terms. The Court of Appeals shall appoint two judges of the Appellate Division of the Supreme Court, one judge of the Supreme Court and two judges of the District Court. The Governor shall appoint two attorneys and two non-attorneys.

b. The Commission shall recommend to the Court of Appeals that any judge be removed from office who has been found by the Commission to be guilty of willful misconduct in office, willful and persistent failure to perform his duties, or habitual intemperance. The Commission shall also recommend to the Court of Appeals that a judge be removed from office who is suffering from a disability which interferes with the performance of his duties and which is, or is likely to become, of a permanent nature. The Commission may also recommend lesser sanctions and measures in appropriate cases.

c. The Commission shall have the power to subpoena witnesses, make investigations, take evidence and make findings. It shall conduct its proceedings in a confidential manner up to the time that it recommends appropriate action. The Court of Appeals shall have the final power to reject or implement, with or without modifications, the recommendations of the Commission.

SECTION 9. *Conduct of Judges.* No judge shall practice law, or engage in any political or other activity which interferes with the proper performance of his duties. The Judicial Conference shall, from time to time, promulgate binding canons of judicial ethics.

SECTION 10. *Administration.*

a. The Judicial Conference shall be vested with the authority and responsibility for the administrative supervision of the unified judicial system. The Judicial Conference shall consist of the Chief Judge of the Court of Appeals, as chairman, and the Presiding judges of the departments of the Appellate Divisions of the Supreme Court.

b. The Chief Judge of the Court of Appeals shall have the power to assign and transfer judges and proceedings and to establish surrogate, family and other parts of courts.

c. Upon nomination by the chairman and approval by a majority of its members, the Judicial Conference shall appoint a State Administrator, who shall serve at its pleasure and shall perform such duties as are assigned to him. The Judicial Conference shall establish standards and administrative policies for state-wide application, and shall have the power to delegate responsibility and authority to local court administrators throughout the State.

d. The Court of Appeals shall make and enforce uniform rules governing the practice of law and the professional conduct of attorneys, including uniform rules for their admission and discipline.

SECTION 11. *Rule-Making.*

a. The Judicial Conference shall have the power with the assistance of such advisory committees as it shall appoint to promulgate rules of practice, procedure and pleading, including rules of evidence, for all the courts of the State. Such rules shall be effective immediately upon promulgation. The Legislature may amend or repeal

any of the rules of the Judicial Conference by a two-thirds vote of each house in the same legislative session.

SECTION 12. *Financing*. All expenses of the unified judicial system shall be borne directly by the State.

No such expenses shall be paid by any political subdivision of the State. The Judicial Conference shall establish a budget of itemized estimates of the annual financial needs of the unified judicial system, and shall certify it to the Governor who shall transmit it without change, but with his recommendations, to the Legislature. There shall be no lump sum payments in lieu of expenses to any personnel of the unified judicial system.

[End]

Judges

"Our duty is to save, unless in saving we pervert. When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment."

—Benjamin N. Cardozo, *People v. Knapp*, 230 N.Y. 48 at 63, 129 N.E. 202 (1920).

"There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men."

—Felix Frankfurter, *Watts v. Indiana*, 338 U.S. 49 (1949) at 52.

Footnotes

Footnote *: Delmar Karlen is Professor of Law at New York University, Director of the Institute of Judicial Administration, and a member of the New York Bar.

Footnote **: Joseph M. Miller is a member of the California Bar and a Research Associate at the Institute of Judicial Administration.

Footnote 1: Breuer, *Constitutional Developments in New York 1777-1958* 3 (1958).

Footnote 2: Breuer, *supra* note 1, generally; 1 Chester, *Legal and Judicial History of New York* 323-443 (1911) ; New York State Constitutional Convention Committee, *New York State Constitution Annotated* (1938), containing texts of New York State constitutions and amendments between 1777 and 1938.

Footnote 3: N.Y. Const. (1777) §§ 23, 24, 25, 27, 28, and 32.

Footnote 4: Breuer, *supra* note 1, at 26.

Footnote 5: N.Y. Const. (1821) art. 5.

Footnote 6: N.Y. Const. (1821) art. 5, § 5.

Footnote 7: N.Y. Const. (1821) art. 4.

Footnote 8: N.Y. Const. art. 4, § 7.

Footnote 9: Niles, *The Popular Election of Judges in Historical Perspective*, 21 *Record of N.Y.C.B.A.* 523, 526—529 (1966).

Footnote 10: N.Y. Const. (1846) art. 6, § 12.

Footnote 11: N.Y. Const. (1846) art. 6, §§ 5, 24. § 5: "The legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed." See also, New York State Constitutional Convention Committee, *Problems Relating to Judicial Administration and Organization* 733-4 (1938), indicating that the legislature actually had control of procedure in the early years of the state, but that this was without constitutional authorization.

Footnote 12: *Historical R, sum, of the Judiciary Article and Cognate Sections of the New York State Constitution, in State of New York*, Fourth Annual Report of the Judicial Council of the State of New York 151, 157-159 (1938).

Footnote 13: Breuer, *supra* note 1, at 39.

Footnote 14: N.Y. Judicial Council, *supra* note 12, at 161.

Footnote 15: Breuer, *supra* note 1, at 43.

Footnote 16: *Id.* at 50.

Footnote 17: *Ibid.*

Footnote 17a: N.Y. Judicial Council, *supra* note 12, at 162-65.

Footnote 18: Breuer, *supra* note 1, at 52.

Footnote 19: Tweed, *The Temporary Commission Reports on the Courts*, 26 N.Y.S.B.A. Bull. 77, 79-80 (1954).

Footnote 20: N.Y. State Temporary Commission on the Courts, 1956 Report to the Governor and the Legislature [1956 N.Y. Legis. Doc. No. 18] 67—83, reprinted 1956 McKinney's N.Y. Sess. Laws 1405, 1439—1449.

Footnote 21: 21 N.Y. Const. art. 6.

Footnote 22: 22 U.S. Const. art. 3.

Footnote 23: 21 N.Y. Const. art. 6, § 1(a).

Footnote 24: 24 N.Y. Const. art. 6, § 29.

Footnote 25: Elliott, *The Judiciary* 1-16 (1959).

Footnote 26: American Bar Association. Section of Judicial Administration. *Model Judicial Article*, 47 J. Am. Jud. Soc'y 8 (1963).

Footnote 27: Institute of Judicial Administration, Proposed Judiciary Article of the New York Constitution, 35 L.W.V. State News No. 6, Oct. 1958. (Published by the League of Women Voters of New York).

Footnote 28: National Municipal League, *Model State Constitution* 12 (1963).

Footnote 29: Peck, *Court Organization and Procedures to Meet the Needs of Modern Society.*, 20 Alabama Lawyer 181, 183-184 (1959); American Bar Association, The Section of Judicial Administration, *The Improvement of the Administration of Justice* 5 (4th ed. 1961) ; McWilliams, J. W., *Court Integration and Unification in the Model Judicial Article*, 47 J. Am. Jud. Soc'y 13 (1963).

Footnote 30: N.Y.C.B.A., *Bad Housekeeping: The Administration of the New York Courts* 23-29 (1954).

Footnote 31: *Id.* at 29-34.

Footnote 32: Tweed, *supra* note 19, at 78-79 (1954).

Footnote 33: N.Y. Const. art. 6, § 13.

Footnote 34: N.Y. Const. art. 6, § 16.

Footnote 35: N.Y. Const. art. 6, § 20.

Footnote 36: Institute of Judicial Administration, *A Guide to Court Systems* 29 (4th ed. 1966).

Footnote 37: N.Y. Const. art. 6, § 1.

Footnote 38: N.Y. Const. art. 6, § 28.

Footnote 39: Chester, *supra* note 2, at 345.

Footnote 40: Institute of Judicial Administration, *The Justice of the Peace Today* (1965).

Footnote 41: *Id.* at 14-15.

Footnote 42: Morrison, *A Guide for Justices of the Peace*, New York (1963).

Footnote 43: 378 U.S. 478 (1964).

Footnote 44: 86 S. Ct. 1602 (1966).

Footnote 45: N.Y. Const. art. 6, § 20 (c).

Footnote 46: The Surrogate's Courts, which handle admission of wills to probate and supervision of the administration of estates, have their roots deep in the history of New York. In colonial times, the governor handled these functions; but because travel was so difficult, he delegated the work in remote areas to "surrogates." In 1778, the legislature transferred the functions to a separate court of probate and in 1787, a surrogate for each county was authorized to be designated by appointment. In 1823, the probate court was abolished and its jurisdiction transferred to the chancellor. With the abolition of chancery in the 1846 constitution, the county judge was given the work of the surrogate, except where provision should be made by the legislature for a separate officer. Today, the surrogate still exists as a separate officer, though the constitution allows the same individual to act as surrogate and judge of the Family Court and County Court outside of New York City (N.Y. Const. art. 6, §§ 12, 14).

Footnote 47: The Family Court, which replaced the Domestic Relations and Children's Courts, has jurisdiction over neglect and support proceedings, paternity, juvenile delinquency, and family offenses proceedings, plus referrals from the Supreme Court, conciliation proceedings, and proceedings concerning physically handicapped and mentally defective or retarded children. (N.Y. Const. art. 6, § 13). Although the Family Court has jurisdiction over most aspects of family life, it lacks jurisdiction over one of the most important—divorce. This becomes even more anomalous when it is considered that recently the grounds of divorce were vastly broadened in New York beyond the former single ground of adultery.

Footnote 48: The Court of Claims hears private claims against the state. Originally, such claims were heard by the legislature, but an 1874 amendment to the constitution forbade the legislature to audit or allow any private

claim against the state. The power of the legislature to provide by law for the audit and allowance by some appropriate tribunal of claims against the state was continued. The Court of Claims operated until 1950 without constitutional status; the November, 1949 election made it a constitutional court. (Breuer, *The New York State Court of Claims* (1959)).

Footnote 49: N.Y. Times, May 28, 1966, p. 28, cols. 2-5.

Footnote 50: N.Y. Const. art. 6, § 14.

Footnote 51: N.Y. Const. art. 6, § 26 (a).

Footnote 52: Brennan, *Efficient Organization and Effective Administration for Today's Courts . . . The Citizen's Responsibility*, 48 J. Am. Jud. Soc'y 145, 146-147 (1964).

Footnote 52a: Gellhorn, *Children and Families in the Courts of New York City* 7-9 (1954).

Footnote 53: State of New York, Temporary Commission on the Courts, Subcommittee on Modernization and Simplification of the Court Structure. *A Proposed Simplified State-wide Court System* 5 (1955).

Footnote 54: N.Y. Const. art. 6, § 15.

Footnote 55: N.Y. Const. art. 6, §§ 3, 7, 8, 9, 11, 12, 13, 15, 17.

Footnote 56: American Bar Association, *supra* note 26, at 9-10 (§§ 2, 4).

Footnote 57: Hawaii Const. art. 5, § 1.

Footnote 58: U.S. Const. art. 3.

Footnote 59: N.Y. Const. (1777) § 23.

Footnote 60: N.Y. Const. (1821) § 7.

Footnote 61: Niles, *supra* note 9, at 526-529; N.Y.C.B.A., *supra* note 33, at 24.

Footnote 62: American Judicature Society, *Judicial Selection and Tenure* (A.J.S. Information Sheet No. 19, revised January 15, 1965).

Footnote 63: N.Y. Const. art. 6, §§ 4(c), 9, 13 (a), 15.

Footnote 64: N.Y. Const. art. 6, §§ 2 (c), 21; American Judicature Society, *supra* note 62, at 1.

Footnote 65: Winters & Sunwall, *Selected Readings on Administration of Justice and Its Improvement*, 7-19; Niles, *supra* note 9, at 530-531.

Footnote 66: Klots, *The Selection of Judges and the Short Ballot*, 38 J. Am. Jud. Soc'y 134, 136 (1955).

Footnote 67: Niles, *supra* note 9, at 530; Rosenman, *A Better Way to Select Judges*, 48 J. Am. Jud. Soc'y 86, 88

(1964).

Footnote 68: Costikyan, *Behind Closed Doors* 174-210 (1966); Berle, *Elected Judges—Or Appointed?* N.Y. Times, Dec. 11, 1955, § 6 (Magazine), p. 26.

Footnote 69: Leflar, *The Quality of Judges*, 35 Ind. L.J. 289, 292 (1960); Roberts, *Twenty-five Years Under the Missouri Plan*, 49 J. Am. Jud. Soc'y 92 (1965) ; Hearnes, *Twenty-five Years Under the Missouri Court Plan*, 49 J. Am. Jud. Soc'y 100 (1965) ; Schroeder & Hall, *Twenty-five Years' Experience with Merit Selection in Missouri*, 44 Texas L. Rev. 1088 (1966); Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, 52 A.B.A.J. 539 (1966).

Footnote 70: Costikyan, *supra*, note 68, at 195-200 (1966).

Footnote 71: *Ibid.*

Footnote 72: *Ibid.*

Footnote 73: Cf. Grossman, *Lawyers and Judges* (1965) ; Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 Vand. L. Rev. 785 (1964).

Footnote 74: Winters, *The Judicial Nominating Committee* (Reprinted from *Sui Juris*, news journal of the Student Bar Association, Boston College Law School) 1966 unpagued.

Footnote 75: Brown, *The Challenge of Judicial Selection*, 41 Los Angeles Bar Bull. 538, 539 (1966).

Footnote 76: N.Y. Const. art. 6, §§ 4 (c), 9, 13 (a), 15 (a).

Footnote 77: N.Y. Const. art. 6, §§ 2 (a), 6 (c), 9, 10 (b), 12 (c), 13 (a), 15 (a).

Footnote 78: N.Y. Const. (1777) art. 24; N.Y. Const. (1821) art. 5, § 3; N.Y. Const. (1846) art. 6, §§ 2, 4, 14; *Historical Resume, supra* note 12, at 158; Amendments to the Constitution of 1846, in N. Y. State Constitutional Convention Committee, N. Y. State Constitution Annotated (1938), at 80 (§ 13).

Footnote 79: N.Y. Judic. Law §§ 114, 115.

Footnote 80: N.Y. Const. art. 6, § 24.

Footnote 81: Cannon, *The New York Court on the Judiciary, 1948 to 1963*, 28 Albany L. Rev. 1, 2, n. 6.

Footnote 82: N.Y. Const. art. 6, §§ 22d.

Footnote 83: *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. Rev. 149, 185 (1966).

Footnote 84: Cannon, *supra* note 81, at 3.

Footnote 85: *Remedies for Judicial Misconduct, supra* note 83, at 185-186.

Footnote 86: *Ibid.*

Footnote 87: Cal. Const. art. 6, § 1 (b).

Footnote 88: Cal. Const. art. 6, § 10 (b).

Footnote 89: Burke, *Judicial Discipline and Removal; The California Story*, 48 J. Am. Jud. Soc'y 167, 170 (1965).

Footnote 90: Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166, 169 (1963).

Footnote 91: Burke, *supra* note 88, at 171-172.

Footnote 92: American Bar Association, *supra* note 26, at 11 (§ 7).

Footnote 93: N.Y. Const. art. 6, § 25 (a) ; Utah Const. art. 8, § 12; Mo. Const. art. 5, § 24; Ill. Const. art. 6, § 17; N.C. Const. art. 4, § 19.

Footnote 94: N.Y. Const. art. 6, § 20 (b).

Footnote 95: N.Y. Times, Oct. 30, 1966, p. 86, col. 7.

Footnote 95a: See e.g., 274 N.Y.S.2d XLIX.

Footnote 96: N.Y. Const. art. 6, § 7 (d).

Footnote 97: Fla. Const. art. 5, § 6.

Footnote 98: 82 Sup. Ct. 691.

Footnote 99: *Romiti v. Kerner* (pending (?) in federal district court in Illinois) ; *N.Y. State Assoc. of Trial Lawyers v. Rockefeller* (suit filed in federal district court in New York City in March, 1966, seeking an enlarged judiciary on the basis of the one-man, one-vote principle).

Footnote 100: Vanderbilt, *Improving the Administration of Justice — Two Decades of Development* 49 (1957).

Footnote 101: N.Y. Sess. Laws 1934, ch. 128.

Footnote 102: N.Y. Sess. Laws 1955, ch. 869.

Footnote 103: N.Y. Judic. Law § 224 (1966 supp.).

Footnote 104: N.Y. Const. art. 6, § 28.

Footnote 105: State of New York, Eleventh Annual Report of the Administrative Board of the Judicial Conference 9-10 (1966).

Footnote 106: American Bar Association, Section of Judicial Administration, *The Improvement of the*

Administration of Justice 11-14 (4th ed. 1961) ; Ill. Const. art. 6, § 2; N.C. Const. art. 4, § 9 (assignment of judges) ; N.J. Const. art. 6, § 7; Fla. Const. art. 5, § 2. See also Pfiffner & Presthus, Public Administration 197-214 (4th ed. 1960).

Footnote 107: N.Y. Const. art. 4, §§ 4, 6.

Footnote 108: The Unified Court System of the State of New York; Estimated Cost of Operation as Appropriated for 1966-1967. (A report of the Judicial Conference on file at the Institute of Judicial Administration.)

Footnote 109: N.Y.C.B.A., *supra* note 30, at 97-99.

Footnote 110: See, e.g., N.Y. Judic. Law § 143 (1966 supp.).

Footnote 111: Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. Rev. 27 (1950).

Footnote 112: *Ibid.*

Footnote 113: American Bar Association, *supra* note 106, at 51.

Footnote 114: *Ibid.*

Footnote 115: *Id.* at 52.

Footnote 116: Vanderbilt, Minimum Standards of Judicial Administration 91-92 (1949).

Footnote 117: New York (State) Advisory Committee on Practice and Procedure. Third Preliminary Report 455 (1959).

Footnote 118: N.Y. Judic. Law § 229 (3) (1966 supp.).

Footnote 119: 28 U.S.C.A. § 2072; Ariz. Rev. Stat. Ann. § 12-109; Utah Code Ann. § 78-2-4; W. Va. Code Ann. § 51-1-4.

Footnote 120: American Bar Association, *supra* note 106, at 56.

Footnote 121: Karlen, *Judicial Administration*, 1963 Annual Survey of American Law 658.

Footnote 122: Weinstein, *Issues for the 1967 Constitutional Convention*, 38 N.Y.S.B.J. 327, 329-334 (1966).

Footnote 123: Students in the seminar were: Miss Alexandra Kressel and Messrs Jeffrey Brodtkin, Earl Goldhammer, Anthony Russo, Michael Shagan, John Sherry, Barnett Sneiderman, and Frederic Solomon.

Footnote 124: Members of the Institute staff who, in addition to the authors of this article, participated in the seminar were: Professor Fannie J. Klein, and Messrs Allen Harris and Avram Weinberger.

Footnote 125: Outside guest experts were: Mrs. Patricia Ames, leader of the N.Y. League of Women Voters' fight for court reform; Federal District Judge Frederick van Pelt Bryan, formerly Counsel to the Temporary

Commission on the Courts; Jacob D. Fuchsberg, Esq., former President of the American Trial Lawyers Association; Dean Daniel Gutman of the New York Law School and formerly President Judge of the Municipal Court and counsel to Governor Harriman; Professor Howard Kalodner, Counsel to the Special Committee on the Constitutional Convention of the Bar Association of the City of New York; Thomas F. McCoy, Esq., State Administrator of the New York Courts; Russell D. Niles, Esq., formerly Dean of the Law School and Chancellor of New York University and currently President of the Bar Association of the City of New York; and Leland L. Tolman, Director of Administration of the Courts of the First Judicial Department.
