JUDICIAL SELECTION

JUDICIAL SELECTION AND DISCIPLINE
Statement of Position
As announced by the State Board, December 1966

Judges should be chosen on the basis of merit. Ultimate control over a major governmental institution should rest with the people, however. Therefore the League supports:

1. The establishment of broadly based, nonpartisan nominating commissions, composed of lawyers and lay people, to propose a list of candidates for appointment to judicial vacancies or newly established judgeships.

2. Mandatory appointment by the appropriate chief executive from among the names so proposed.

3. Ratification or disapproval of the appointment by the voters after a suitable period of time. A Tenure Commission should make available to voters an evaluation of the judge's record in office prior to a retention vote.

Judicial Discipline

The League of Women Voters of New York State believes inadequate the present (1966) constitutional provisions for selecting judges and for administering reprimands to, forcing the retirement of, or removing judges of the state court. They are not sufficient to protect either the interest of the public or of the judges. Therefore the League supports:

1. The establishment of broadly based, nonpartisan Judicial Tenure (Conduct) Commissions, composed of lawyers and lay people, to (a) evaluate the record of a Judge scheduled to run for retention and prepare a report for public information; and to (b) receive and investigate in strict confidence complaints from any source about judicial conduct or disability.

2. The submission of recommendation of the Tenure Commissions to an established court so that no judge would be publicly reprimanded, forcibly retired or removed without appropriate legal proceedings.

Recent League Activity

League continues to support a constitutional amendment to establish a merit process for selection of all state judges.

Past League Activity

In 1974, the League, along with other citizen's groups, opposed a constitutional measure for appointment of judges to the Court of Appeals because it lacked the necessary safeguards to remove the process from politics. Instead, support was given to a model bill for appointment of all judges using nonpartisan nominating commissions.

A major breakthrough was made in 1977 with the passage of a constitutional amendment providing a merit selection plan for the Court of Appeals. This amendment and the implementing legislation, which followed its approval, established a process whereby the state's top judges are appointed by the governor with Senate confirmation from a limited list of candidates recommended by the Commission on Judicial Nomination. This 12-member commission is balanced politically between lawyers and laypersons, and the power of appointment to the commission is shared by the governor, the Chief Judge of the Court of Appeals and the majority and minority legislative leaders.

Originally, the commission was mandated to submit seven names for the position of Chief Judge and from three to five names for the position of Associate Judge. In the 1983 legislative session, however, a proposal to raise the minimum and maximum numbers of nominees for Associate Judge was considered. League effort to keep the minimum number of recommendations at three was successful, but the maximum number of permissible recommendations was increased from five to seven so that presently the commission may submit as few as three and as many as seven names to the governor when a vacancy for Associate Judge occurs.

Every session of the Legislature brought a number of bills to "reform" the nominating process by returning to an elected Court of Appeals or by turning the Commission on Judicial Nomination into a "screening" body by removing the limit on the number of names it may submit to the Governor for consideration of appointment. The League continued to oppose vigorously all efforts to dismantle or weaken the current nominating process.

Judicial Diversity through Merit Selection 1991-1995

In 1991, the Supreme Court of the United States (Chisom v. Roemer) ruled that judicial election districts must conform to the mandates of the Voting Rights Act to prevent dilution of minority voting strength. In February 1992, the Governor's Task Force on Judicial Diversity Report, in addition to highlighting the gross under-representation of women and minorities on the NYS court benches, also warned that the large multi-member judicial districts for the state Supreme Court violated the mandates of the Voting Rights Act and probably would not survive a court challenge. In a letter to the New York Times and in testimony at the Joint Senate, Assembly hearings on May 21, 1992, we suggested a better way to achieve diversity on the bench and to meet the requirements of the Voting Rights Act: Abolish judicial elections and establish a merit selection process as now used in selecting judges for the NYS Court of Appeals. A Call To Action was issued in June 1992, but the Legislature recessed without taking any action.

Three suits were filed in the federal Southern District Court challenging New York State's method of electing Supreme Court justices and New York City Civil Court judges (France v. Cuomo, Del Torro v. Cuomo, Healty v. Cuomo). In 1993 in response to this challenge posed by the Voting Rights Act to New York's system of electing trial court judges, the League joined with the Committee for Modern Courts, the New York State Bar Association, the Citizens Union of the City of New York, New York State Women's Bar Association, New York State Council of Churches and State Communities Aid Association in a campaign to secure a constitutional amendment for merit selection of judges. To help spread the word, the League prepared a new publication, Questions and Answers on Merit Selection of Judges, April 1994.

Throughout 1993 and 1994, the legal challenges to New York's system of electing judges seemed to present a real opportunity for reform. The choice appeared to be merit selection v. redistricting, creating more and smaller judicial districts. League opposed creation of smaller districts because we felt smaller districts increased the potential for politicization of judicial elections—concentrating the influence of political interests.

While the League continued to work with the court reform groups in supporting the Cuomo merger/merit constitutional amendment in the 1994 session and opposing legislation to create smaller judicial election districts, the Justice Department was concluding an investigation into the Legislature's creation of 15 additional Supreme Court judgeships in 1982, 1990 and 1994. As a result of this

investigation, the Justice Department tried to block the November 1994 judicial election of these judges or their successors, contending that the state Legislature violated the Voting Rights Act by creating these judgeships without gaining pre-clearance under Sec. 5 of the Voting Rights Act, thereby illegally expanding a discriminatory voting system. A Washington, D.C. federal court overruled the Justice Department and the elections were held and certified.

The Justice Department appealed that decision to the federal Supreme Court but withdrew the appeal without explanation in May of 1995.

Meanwhile, the League agreed to join Modern Courts in urging the Justice Department to view merit selection as a progressive step in securing minority voting strength. The reply from Justice indicated it scrutinizes each case individually on its merits but assured us that it has in the past favorably reviewed certain states' merit selection systems.

Voting Rights update 1997

The prognosis is poor for reform of judicial selection through application of the Voting Rights Act Amendment in New York State. Federal Supreme Court decisions of the past few years, particularly the 1995 Georgia case where the court ruled that race could not be the predominant consideration in redistricting decisions, it seems to cast doubt on the constitutionality of this application of the Voting Rights Act as amended in 1982. (Since 1993 the Supreme Court has struck down minority-majority voting districts in North Carolina, Georgia and Texas.)

Governor Pataki's Executive Order

The governor appoints Appellate Division justices and, with Senate confirmation, judges to the Court of Claims and fills vacancies on the Supreme Court and countywide courts. Governors Carey and Cuomo, by Executive Order, established a system of committees to screen candidates for gubernatorial appointments to judgeships.

The League and our court reform allies urged Governor Pataki to improve on previous governors' executive orders governing gubernatorial judicial appointments by: (1) instituting a merit selection process (i.e., placing a limit on the number of nominees forwarded by the screening panels); and (2) mandating diversity in the composition of the screening panels and among those nominated for judgeships.

We were not successful in either of these goals. The Executive Order signed in April 1995 provides no limit on the number of nominees forwarded to the governor. Although the order declares "highly qualified candidates should be drawn from a cross-section of the state, reflecting a diversity of experience and background," the order also states that committee members reviewing qualifications "shall not consider the race, religion, gender, national origin, sexual orientation or political party affiliation of a candidate."

The Executive Order establishes a statewide committee to review candidates for the Court of Claims, four departmental committees to screen nominees for the Supreme Court and the Appellate Divisions in the four judicial departments, and individual county committees for local courts.

While the structure of the committees is similar to that of his predecessors, the balance of appointees to the panel has shifted. In our view, it is heavily weighted to the executive branch. Governor Pataki has five appointments and the State Attorney General two appointments to each of the 13 member

departmental panels; the governor's counsel is a member of the statewide committee to select Court of Claims judges. (Under the Cuomo committees, the governor named four appointees to a 10 member departmental panel; the Attorney General had no appointments and the governor's counsel was not a member of any committee.)

The League expressed concern over the lack of provision for non-lawyer representation on the committees and unsuccessfully urged the Attorney General to consider making non-lawyer appointments.

Feerick Commission and 2003 Developments

Chief Judge Judith S. Kaye established the Feerick Commission, a blue-ribbon commission in 2003 to foster public confidence in the judiciary through an examination of the current judicial election process. The League Judicial Specialist, Lenore Banks, was a member of this commission. An Interim Report was issued in December 2003 and a Final Report in June 2004, calling for independent screening of judicial candidates, reform of the state Supreme Court judicial nominating convention process and tough new ethics and campaign finance rules for those running for judgeships.

Fordham University School of Law Professor John D. Feerick, chairman of the 29-member commission, said at a news conference that the proposal for a state-sponsored system for screening judges running for election would be the first in the nation.

The League has long held a position of support for appointment of all the state's judges through a merit selection process, (now called 'commission-based qualifications commissions'). In 2003 however, based on the realization that this is not going to happen in the foreseeable future, as an interim step, the League state board decided to focus on how to bring merit to the election process. The League supports reform of the current system of party control over the selection of Supreme Court judicial elections through reform of party nominating conventions; establishment of election qualifications commissions for all the state's elected judges and public financing of judicial elections. We continue to support a constitutional amendment to provide for merit selection of judges, i.e. a commission-based appointive system, as the best method of selecting all state court judges.

The League believes these judicial election qualification commissions should include: provisions for a broad and diverse panel or commission, composed of lawyers and lay persons necessary to reflect the diversity of the community; independence of the process so that no one faction controls the outcome and a limit or cap on the number of 'well qualified' or 'most qualified' nominees recommended to the party for nomination. The panel would screen candidates and propose a limited number of Well Qualified or Most Qualified candidates from which the party leader(s) must choose. There is a limit or cap on the number of nominees forwarded to the party officials who do the final selection of candidates, preferably three names for each vacancy. The cap or limit is used to narrow the field to well or most qualified choices in the selection of candidates.

The current method of screening for convention or for primary is the standard "Qualified" or "Not qualified". In other words, current screening commissions do not have to meet standards of excellence. The standard is to weed out the absolutely unqualified. Merit selection of candidates for election means that nominees must pass the qualification standards, such as the American Bar Association Standards.

Public confidence means a judiciary, whether elected or appointed, that is independent of public opinion and independent of party control and a judiciary that is well qualified, not merely qualified.

League supports the Feerick Commission proposals for reform of party judicial nominating conventions for Supreme Court justices to provide for smaller, more responsive, more accessible conventions. We believe the party judicial nominating conventions can be reformed to meet the constitutional deficiencies noted by the court and we support such efforts if combined with screening by independent judicial qualification commissions. Such convention reforms as electing delegates months before the convening of the convention, three year terms, lowering petition requirements, providing for a smaller body capable of deliberation, allowing candidates to address the convention, education for the delegates as to their authority, rights and responsibilities, and providing delegates with the opportunity to consider the reports of an independent judicial qualification commission - should all facilitate conditions for a more open, deliberative and independent body.

Finally, as long as judicial election is the way we nominate and select judges, public financing is necessary.

The League's position on election reform calls for public financing of statewide executive and legislative candidates. The same reasoning holds for judicial elections.

Legislation 2003-2005

As a result of Feerick Commission report, two bills, which the League supported, passed the Assembly. The first Assembly (A. 7) called for the creation of qualification commissions to screen candidates for nomination. The other bill (A. 8) called for voluntary public financing. The Judicial Qualifications bill was the subject of Senate public hearings in March 2005, and the League testified in support. No action was taken. We will continue to support these proposals in the 2008 legislative session.

2005-2007 Legislative Session- Supreme Court Judicial Nominating Conventions

During 2006 and 2007, various legislative proposals and a constitutional amendment were discussed to change the current method of party nominations for NYS Supreme Court Judges in order to meet the requirements of the Gleeson decision in the Lopez Torres case which declared use of the traditional nominating conventions unconstitutional, as violating the First Amendment rights of candidates and voters. These proposals ranged from:

- A constitutional amendment to institute a merit selection process for all state judges;
- Reforming the convention process (Feerick Proposal);
- Requiring all judges to run in an open primary (Brennan Center);
- A compromise proposal to have judicial candidates run in party designating conventions (similar to that used by political parties to nominate statewide candidates for executive and legislative races), screened by judicial qualifications commissions, with provisions that candidates can go directly to the primary with a limited number of petition signatures or with 25% of the convention votes. (Modern Courts, Brennan).

In 2008 the United States Supreme Court reversed the decision of the District Court for the Southern District of New York, affirmed by the Second Circuit Court of Appeals, in *Lopez Torres v. New York State Board of Elections,* declaring that New York's convention system for nominating Supreme Court

Judges violates the First Amendment rights of challengers running against candidates favored by party leaders and granting an injunction mandating a direct primary election to select Supreme Court nominees. With its holding that Plaintiff/Appellee's rights were not jeopardized by current New York State law for the nomination of Supreme Court Judges, the impetus for reform in this area was removed, and no further movement has occurred.