A STRATEGY FOR JUDICIAL PERFORMANCE EVALUATION IN NEW YORK

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A STRATEGY FOR JUDICIAL PERFORMANCE EVALUATION IN NEW YORK

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New York has experienced a loud and tumultuous decade with respect to the selection of its state and local judges. In 2006, the system of partisan nomination of candidates for election to the trial court bench was declared unconstitutional on First Amendment grounds,[1] causing the state legislature to argue over the future of the selection process until the United States Supreme Court reversed the decision in January 2008.[2] At about the same time, studies revealed that the voting public knows very little about the judicial candidates on the ballot, causing actual voter turnout in most judicial elections to hover near twenty percent.[3] And just recently, the nominating process for an opening on the state's Court of Appeals, spurred by the retirement of Chief Judge Judith Kaye, was criticized for producing a group of finalists that lacked sufficient diversity.[4]

These developments share two common threads. First, and most obviously, they call attention to the importance of establishing a credible, fair, and trusted judicial selection process for every court in New York State. But as importantly, these events underscore the need for decision-makers and the public to have complete,

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[1] López Torres v. New York State Bd. of Elections, 411 F. Supp.2d 212, 255 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006).

[2] New York State Bd. of Elections v. López Torres, 128 S. Ct. 791, 810 (2008).

[3] *E.g.*, Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 822-25 (2004).

[4] Sam Roberts, *Panel Gives Paterson Seven Names for Top Judge*, N.Y. TIMES, Dec. 2, 2008, at A29.

reliable, and relevant information about judges and judicial candidates. Informed voters are more likely to cast ballots in judicial elections, and to make better choices when they do. Informed nominating commissions are more likely to present slates of quality judicial nominees. And an informed public should have greater confidence in its judges.

Unfortunately, existing mechanisms in New York lack both the depth and breadth to provide information on judges and judicial candidates in a truly meaningful way. This need not be the case. Across the country, states have adopted judicial performance evaluation (JPE) programs that provide continuous, comprehensive assessments of the skills that each judge or judicial candidate brings to the bench.[5] In this essay, we describe how JPE programs work, consider what lessons those programs offer for judicial screening and judicial selection in New York, and explain how both the citizens and judges of New York would benefit from an official, comprehensive JPE program.

I. THE VALUE OF JUDICIAL PERFORMANCE EVALUATION—A NATIONAL PERSPECTIVE

JPE programs began in the mid-1970s as a mechanism for reviewing sitting judges' skills and abilities related to the process of adjudication.[6] Prior to that time, the only organized evaluations that existed in any jurisdiction were bar polls, which ran the risk of devolving into popularity contests or political gauntlets.[7] Rather than address specific case outcomes, which are properly the province of appellate courts or policymakers, JPE programs focus on qualities that would be expected of any judge, such as even-handed treatment of litigants.[8] To date, approximately twenty states and the District of Columbia have established a formal program to evaluate sitting judges,[9] and several more are on the way. Since 2007, state-authorized JPE programs have been introduced in Illinois, Kansas, and Missouri, pilot programs have been run in North Carolina and Washington, and JPE has been the subject of

[5] *See* Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 201 (2007).

[6] *See* Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U.L. REV. 7, 10 n.9 (2008).

[7] *See generally* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 736–37 (2002).

[8] *See* Kourlis & Singer, *supra* note 5, at 201.

[9] *See* Kourlis & Singer, *supra* note 6, at 10–11.

careful and intense study in Minnesota and Nevada.[10]

While the precise format of JPE programs varies by state, the most comprehensive programs all feature five elements: (1) the evaluation of sitting judges at regular intervals; (2) evaluations conducted by an independent, balanced commission; (3) evaluation criteria related strictly to the process of judging rather than individual case outcomes; (4) collection of a broad and deep set of data on each judge; and (5) public dissemination of evaluation results.[11] By "independent, balanced commission," we mean a commission composed of both attorneys and non-attorneys, appointed to staggered terms by different branches of government or segments of the community. Studies have shown that the input of lay citizens in the evaluation process is valuable both for the credibility of the evaluations—after all, judges are ultimately accountable to the public they serve—and for the citizens themselves, who gain a deeper appreciation of the challenges judges face.[12]

Five evaluation criteria are typically employed in JPE programs: knowledge of substantive law and relevant rules of procedure and evidence; integrity and freedom from bias; clarity of communication (both oral and written); judicial demeanor; and administrative capacity. Some jurisdictions add a sixth criterion—public service—which takes into account the judge's role in the community.[13] To flesh out each judge's satisfaction of these criteria, the independent commission collects data from a wide range of sources, including surveys of attorneys, jurors, court staff, litigants, and witnesses; caseflow management/docket data; direct courtroom observation; interviews with the evaluated judge; and public comments.[14]

Evaluations are typically conducted in advance of elections or reappointment decisions if the judge seeks another term on the bench.[15] Accordingly, once the commission has reviewed all the available information on a judge's performance, it drafts a written evaluation, including—where appropriate—a recommendation as to whether the judge should be retained or reappointed.[16] As a best practice, the judge is then allowed to review the evaluation and seek

[10] *Id.*

[11] *See* Kourlis & Singer, *supra* note 6, at 10–11.

[12] *See* Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 216 (1989).

[13] *See* Kourlis & Singer, *supra* note 6, at 10.

[14] *Id.*

[15] *See* Kourlis & Singer, *supra* note 5, at 202.

[16] *See* Kourlis & Singer, *supra* note 6, at 11.

another meeting with the commission if the judge is concerned about the accuracy or fairness of the evaluation.[17] If the judge does meet again with the commission, the commission may alter its evaluation or recommendation if it so chooses.[18] Ultimately, the evaluation and recommendation are distributed to relevant decision-makers ahead of the reappointment decisions or to the public though newspapers, voter guides, and the internet in advance of the election.[19]

JPE programs are not limited to retention or reappointment states, however. In Massachusetts, New Hampshire, and Rhode Island, where judges serve for life or until a mandatory retirement age, extensive JPE programs still exist.[20] At the other end of the spectrum, some states with contested judicial elections have created programs to evaluate and disseminate information on candidates who have never sat on the bench—a process we call *prospective* performance evaluation or PPE.[21] These developments underscore the value of performance evaluation programs regardless of a state's method of judicial selection.

II. THE NEED FOR ROBUST EVALUATION OF JUDICIAL CANDIDATES IN NEW YORK

The JPE model is immediately relevant in New York because of the longstanding need for quality information on judicial candidates. A 2003 public opinion survey found, among other things, that a clear majority of registered New York State voters (58%) "indicate[d] that the main reason they would not vote in a judicial election is that they do not know enough about the candidates."[22] The survey also found that 88% of respondents thought voter guides would be a useful way to learn more about judicial candidates and campaigns, with 46% of those respondents stating that voter guides would be "extremely useful" or "very useful."[23] Similarly, a detailed 2004 focus group study by the

[17] Kourlis & Singer, *supra* note 5, at 206.

[18] *See id.*

[19] *Id.* at 207.

[20] *See id.*

[21] *See* Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 725 (2007).

[22] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, PUBLIC OPINION AND JUDICIAL ELECTIONS: A SURVEY OF NEW YORK STATE REGISTERED VOTERS 22 (2003), *available at* http://law.fordham.edu/commission/judicialelections/images/jud-app_c.pdf.

[23] *Id.* at 25.

Government Law Center of Albany Law School determined that:

Lack of information about the judicial system and judicial candidates was the most commonly mentioned hindrance to voter participation;[24]

Eight of the nine focus groups in the study recommended the creation of multi-media awareness campaigns directed to citizens that include information about the New York State judicial system and judicial candidates;[25]

Seven of the nine focus groups recommended an independent screening process for judicial candidates,[26] and 82% of focus group participants thought screening commissions were a good idea;[27] and

Five of the nine focus groups recommended creating a system for monitoring or rating of judges, which would include developing judicial review boards with citizen participation, instituting a courtroom observation program, and making judicial reviews available to the public over the internet.[28]

Building on these studies, in 2004, the Commission to Promote Public Confidence in Judicial Elections ("Feerick Commission") issued a report recommending the independent pre-screening of judicial candidates "as a fair, credible, and realistic plan to promote confidence in judicial elections."[29] Specifically, the Feerick Commission called for the development of Independent Judicial Election Qualification Commissions (IJEQCs) in each judicial district.[30] The IJEQCs would, among other things, actively recruit judicial candidates, apply consistent and public criteria to all candidates, and publish a list of all candidates found to be well qualified.[31] The Feerick Commission explained:

> Through independent screening, the commissions assure the public that candidates for judicial office are qualified to serve on the bench. . . . The choice between candidates remains with the voter, but the commissions help voters make

[24] GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, REPORT TO THE COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS: FOCUS GROUP RESULTS AND RECOMMENDATIONS 12 (2004), *available at* http://law.fordham.edu/commission/judicialelections/images/jud-app_d.pdf.

[25] *Id.* at 17.

[26] *Id.* at 19.

[27] *Id.* at 27.

[28] *Id.* at 21.

[29] REPORT OF COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS 7 (2004), *available at* http://law.fordham.edu/commission/judicialelections/images/jud-report.pdf.

[30] *Id.*

[31] *Id.*

> informed choices about candidates, educating them about particular candidates and providing objective criteria on which to make decisions.[32]

The need for timely, relevant information on judges and judicial candidates was also a central point in Justice Anthony Kennedy's concurring opinion in *New York State Board of Elections v. López Torres*.[33] Acknowledging that states were free to adopt contested elections as a form of judicial selection despite the "difficult[y of] reconcil[ing]" elections with "judicial independence and judicial excellence,"[34] Justice Kennedy concluded that "the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications."[35] The Justice continued:

> A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.[36]

Justice Kennedy's exhortation in *López Torres* was rightfully lofty, but practical application of that advice has proven more difficult. The current efforts in New York to discern the qualities of judicial candidates are manifested primarily in a series of screening commissions for appellate and trial judges.[37] Unfortunately, these screening commissions are badly flawed or substantially incomplete in comparison to the robust JPE programs in place in other states. This is not to denigrate the efforts of those who participate in the screening commissions or use their very best efforts to evaluate judicial candidates. Nor do we suggest that the fundamental principles behind the screening commissions—emphasizing the qualities desired in judges and identifying judicial candidates that

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[32] *Id.* at 8.

[33] 128 S. Ct. 791, 801–03 (2008) (Kennedy, J., concurring).

[34] *Id.* at 803.

[35] *Id.*

[36] *Id.*

[37] Some local bar associations also poll their members on judges and judicial candidates. For the purposes of this essay, however, we concern ourselves only with state-authorized screening commissions.

best embody those qualities—are anything but sound. But commission members are simply not given the tools, training, or context to evaluate judicial candidates in a truly comprehensive way. Moving the screening commissions toward a more comprehensive JPE model, including bolstering commissioner training, broadening the pool of relevant data on each judge, and ensuring uniform and predictable standards of evaluation would add credibility and value to each screening commission's work. We consider next the strengths and weaknesses of the three major screening commissions: Part 150 Commissions for the Supreme Court, screening panels for the Appellate Division, and the Commission on Judicial Nomination for the Court of Appeals.

III. PART 150 COMMISSIONS

In the wake of the Feerick Commission's recommendation that IJEQCs be established in each judicial district, then-Chief Judge Judith Kaye and then-Chief Administrative Judge Jonathan Lippman established screening panels for candidates for the Supreme Court (New York's general jurisdiction trial court) and other elected judgeships in January 2007.[38] These new panels—known colloquially as Part 150 Commissions—are in place in all twelve of the state's judicial districts.[39] Each commission consists of fifteen members, appointed by the Chief Judge (five members, two of whom shall be non-lawyers), the Presiding Justice of the Appellate Division (five members, two of whom shall be non-lawyers), the President of the New York State Bar Association (one member), and four local bar associations (one member each).[40] Members serve three-year terms.[41] Candidates for elected judicial office are requested to complete an application, which is forwarded to the local commission.[42] In their applications, candidates must provide the names of attorneys and judicial officers who will vouch for their qualifications.[43] As part of its review, the Part 150 Commission contacts the named references, as well as other attorneys or judicial officers that it deems appropriate.[44] The

[38] An attempt to create similar screening panels through legislation in 2007 was not successful. *See* N.Y. LEGISLATIVE DIGEST 231st Reg. Sess., S. 5937 (2008) (bill summary).

[39] N.Y COMP. CODES R. & REGS. tit. 22, § 150.1 (2008).

[40] *Id.* § 150.2.

[41] *Id.* § 150.3.

[42] *Id.* § 150.10(5)(A).

[43] *See id.* § 150.10(5)(B)(2)(a)–(b).

[44] *See id.* § 150.10(5)(B)(2)(d)–(f).

commission also takes into account selected writings of each candidate, relevant conduct and disciplinary records, and information gleaned from an interview with the candidate.[45] If the candidate is a sitting judge, the commission may also collect the views of supervising judges and attorneys who have appeared before the candidate, as well as review relevant case management data and the disposition of appeals from the candidate's orders and judgments.[46] If the candidate is not a judge or has not been a judge for more than a year, the commission may gather the views of attorneys who have appeared opposite the candidate in a litigated matter, judges or judicial officers before whom the candidate has appeared, or other attorneys who are in a position to evaluate the candidate's performance and work product.[47]

All candidates are evaluated based on four criteria relevant to the process of adjudication: "professional ability;[48] character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience."[49] Applying the collected data to the relevant criteria, the commission issues a tentative rating of each candidate: "qualified" or "not qualified" for election to the judicial position he or she seeks.[50] If the candidate is initially rated "not qualified," he or she is entitled to a second interview with the commission.[51] Candidates are not legally bound to work with the commission; however, if they eschew the evaluation process, the commission will note that they "ha[ve] not complied with the commission's evaluation process."[52] The commission ultimately releases only the name of each candidate and the commission's recommendation; by rule, all papers filed with and generated by the commission as part of its evaluation process are deemed confidential.[53] In the 2008 election season, 129 judicial candidates were screened through Part 150 Commissions; 122 of them were deemed qualified, and seven not qualified.[54]

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[45] *Id.* § 150.10(5)(B)(2)(c), (g).

[46] *Id.* § 150.10(5)(B)(1)(a)–(b), (f)–(g).

[47] *Id.* § 150.10(5)(B)(2)(a)–(b).

[48] The term "professional ability" is undefined in the rules governing the Nominating Commission. The most analogous criterion in states with comprehensive JPE programs is the judge's (or candidate's) knowledge of the substantive law and relevant rules of procedure and evidence.

[49] N.Y COMP. CODES R. & REGS. tit. 22, § 150.5 (2008).

[50] *Id.* § 150.5

[51] *Id.* § 150.10(7)(A)–(B).

[52] *Id.* § 150.10(6)(A).

[53] *Id.* § 150.8.

[54] *See* NEW YORK STATE SUPREME COURT APPELLATE DIVISION, SECOND DEPARTMENT, 2008

Although they have been in place for less than three years, the Part 150 Commissions are by many measures the best system of performance evaluation in New York today. Each commission is tasked with considering a variety of information about each candidate, including written materials and relevant conduct records. However, four opportunities for improvement stand out. First, the commissions should consider increasing the amount and type of data they collect on each candidate, including the use of broad-based surveys to determine the perception of the candidates' skills and abilities in the wider legal and judicial communities. Surveys can be designed to measure the same qualities—integrity, preparedness, legal knowledge, and temperament—for both sitting judges and aspirants to the bench, with just slight changes in wording.[55] Second, there should be a more uniform evaluation process across the state's judicial districts. Some districts, for example, use the full commission to evaluate each candidate, while other districts rely on three-member panels to evaluate individual candidates. In fairness to all judicial candidates, every effort should be made to have a full commission evaluate each candidate. Third, while the judiciary is to be applauded for stepping in and creating the Part 150 Commissions in such short order, ultimately the commissions will require legislative support to enhance their long-term legitimacy and secure adequate funding. Evidence from other states suggests that the legislature, judicial candidates, and the public are all more likely to embrace the program if it has a

FINAL LIST OF RATED CANDIDATES (2008), *available at* http://www.courts.state.ny.us/courts/ad2/IJEQC/2008RatedCandidates.pdf; NEW YORK STATE SUPREME COURT APPELLATE DIVISION, THIRD DEPARTMENT, INDEPENDENT JUDICIAL ELECTION QUALIFICATION COMMISSIONS: 2008 COMMISSION RATINGS (2008), *available at* http://www.courts.state.ny.us/ad3/JEQC/2008-Qualified-Candidates.pdf; Press Release, New York State Supreme Court Appellate Division, First Department, First Judicial District, Judicial Candidates (Sept. 3, 2008), *available at* http://www.courts.state.ny.us/courts/ad1/press_release-2008-1stJD..pdf; Press Release, New York State Supreme Court Appellate Division, First Department, Twelfth Judicial District, Judicial Candidates (Sept. 3, 2008), *available at* http://www.courts.state.ny.us/courts/ad1/press_release-2008-12thJD..pdf; New York State Supreme Court Appellate Division, Fourth Department, Fifth Judicial District, 2008 Candidate Ratings, http://www.courts.state.ny.us/ad4/IJEQC/IJEQC-qualified_5JD-2008.htm (last visited May 6, 2009); New York State Supreme Court Appellate Division, Fourth Department, Seventh Judicial District, 2008 Candidate Ratings, http://www.courts.state.ny.us/ad4/IJEQC/IJEQC-qualified_7JD-2008.htm (last visited May 6, 2009); New York State Supreme Court Appellate Division, Fourth Department, Eighth Judicial District, 2008 Candidate Ratings, http://www.courts.state.ny.us/ad4/IJEQC/IJEQC-qualified_8JD-2008.htm (last visited May 6, 2009).

[55] *See* Singer, *supra* note 21, at 747–53 (suggesting a model for judicial candidates who have never served on the bench).

statutory basis. Finally, even though each Part 150 Commission considers a wide range of information in making its recommendation on each candidate, none of that information is actually transmitted to the public. Informed voting and public discourse rely not only on the evaluation of judicial candidates, but transmittal of the reasons behind any evaluation. The Part 150 Commissions should consider providing at least a short narrative on each candidate containing salient information on each candidate's experience and skills. This is the standard practice in several states, and provides important context to voters.[56]

IV. APPELLATE DIVISION SCREENING COMMISSIONS

Any Supreme Court Justice may apply to sit on the Appellate Division. To evaluate Appellate Division candidates, each judicial department has a thirteen-member screening commission.[57] Commissions are established by executive order and their exact composition changes from time to time. Under Governor David Paterson, each commission is to include five members appointed by the Governor, two members by the Chief Judge of the Court of Appeals, two members by the Attorney General, one member by the Presiding Justice of the Appellate Division for that department, two members by the leadership of the state legislature, and one member by the President of the New York State Bar Association.[58] The commission is charged in part with recruiting candidates for open positions, and is instructed to "strive to find candidates that reflect the diverse backgrounds and experiences of the citizens" of New York State.[59] Each aspiring Appellate Division justice completes an application for the commission, which consists primarily of providing a list of references.[60] The commission then contacts the named references and interviews each applicant.[61]

The commission is charged with building a slate of highly

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[56] *See, e.g.*, Colorado Commissions on Judicial Performance, 2008 Recommendations on Judicial Retention, http://cojudicialperformance.com/retentionlist.cfm/year/2008 (click on individual judge's name) (last visited May 20, 2009); Supreme Court of New Mexico Judicial Performance Evaluation Commission, Judicial Evaluations Quick View, http://www.nmjpec.org/quick/?year=2008 (click on "Detail" next to each judge's name) (last visited May 20, 2009).

[57] *See* Exec. Order No. 8 § C(1)–(2), 2008 N.Y. Sess. Laws 1629 (McKinney).

[58] *Id.* § C(2).

[59] *Id.* § A(2)(a).

[60] N.Y COMP. CODES R. & REGS. tit. 22, § 7100.5(b) (2008).

[61] *Id.* § 7100.6(b).

qualified applicants for the Governor,[62] who generally must choose from among the names provided. The commission members are asked to work collectively to build a consensus slate, and are not bound by a minimum or maximum number of applicants that they must recommend.[63] As part of its determination, each commission may consider whether each applicant would provide the appellate bench with ethnic or geographic diversity.[64]

While the commission provides at least some basic screening for aspiring appellate judges, the limitations on the process are striking. Even though all applicants are trial judges, there does not appear to be any particular focus on how the applicants performed on the trial bench, or whether their skills are suited to the appellate bench. Among other things, it would be logical for the commission to consider the judge's performance with respect to written and oral communication, command of the substantive law, and ability to manage his or her caseload. Indeed, because all applicants have trial court experience, Appellate Division screening is a natural forum for a comprehensive JPE program. The commission could use surveys of attorneys, jurors, litigants, and witnesses to evaluate each judge's performance, as well as a review of written opinions and orders and courtroom observation. The tools for the collection of such data are already in place. For example, the Fund for Modern Courts has conducted independent courtroom observation of New York judges since 1975.[65] That organization's work and expertise in this area might help facilitate the work of a more comprehensive Appellate Division commission. While not every aspect of a trial judge's skills translates to the appellate court, the information gleaned from a trial court JPE program would nonetheless provide valuable information to the commission. Appellate Division candidates would be evaluated on their actual track record on the bench, rather than the praise of their hand-picked references. This process would go further toward ensuring a high-quality appellate bench, as well as promoting public confidence in the Governor's appointments.

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[62] Exec. Order No. 8 § A(2)(c), 2008 N.Y. Sess. Laws 1629 (McKinney).

[63] *Id.* § C(3).

[64] *See, e.g.*, *id.* § A(2)(a).

[65] *See* The Fund for Modern Courts, Citizen Court Monitoring, http://www.moderncourts.org/Programs/monitoring.html (last visited May 6, 2009).

V. COMMISSION ON JUDICIAL NOMINATION

The Commission on Judicial Nomination, which is charged with screening nominees for the state's highest court, has the most formal structure of any screening commission in New York. Membership in the twelve-member commission is evenly split between attorneys and non-attorneys, and along partisan lines.[66] Members of the commission are appointed by all major stakeholders in state government, including the Governor, Chief Judge, and majority leaders in the state legislature.[67] The commission is charged with two main tasks. First, it is initially responsible for attracting potential nominees for a vacancy on the Court of Appeals with a large-scale public relations campaign.[68] Once applications have been received, the commission is charged with reviewing the candidates.[69]

Unlike the more open-ended process of the Appellate Division screening commissions, the nominating process for the Commission on Judicial Nomination is highly structured and formalized. Approximately twenty to thirty candidates are selected from the initial applications, all of whom are interviewed and subjected to a background check.[70] The commission ultimately recommends between three and seven candidates for each open seat, in a list developed over several rounds of discussion.[71] Candidates are ranked by each commissioner in each round, and candidates lacking adequate support in each successive round are dropped before the next round.[72] The candidates on the final list must have the support of at least eight of the twelve commission members, and must be among the top seven candidates in the rankings of at least eight commissioners.[73] The list of approved nominees and their resumes are forwarded to the governor, but he is not told about any of the commission's internal deliberations.[74]

The Commission on Judicial Nomination is well structured to prevent domination by one branch of government, which enhances both the perception and the reality of a fair evaluation process. The

[66] N.Y. JUD. LAW § 62(1) (McKinney 2002).
[67] *Id.* § 62(1)–(2).
[68] *Id.* § 64.
[69] *Id.*
[70] *Id.*
[71] *Id.* § 63(2)(a)–(b).
[72] *Id.*
[73] *Id.* § 63(3).
[74] *Id.* § 66.

information considered by the commission, however, is remarkably thin. Like Appellate Division screening commissions, the Commission on Judicial Nomination only considers references and the interview as part of its official nomination process. There are no surveys, no compulsory examination of written materials, and no public input before names are submitted to the governor. It is true that some of these limitations are driven by confidentiality concerns; if the names of new applicants became public before the list of final nominees was presented, some exceptional candidates might not apply for the position for fear of alienating clients or law partners. At some point, however, legitimate confidentiality concerns must be balanced against the equally legitimate need for public trust and confidence in judicial nominees. It may well be that the current confidentiality regime is the most desirable one, but that should not preclude a dialogue about better ways to develop information on judicial aspirants.[75]

VI. FROM CANDIDATE SCREENING TO COMPREHENSIVE JPE

The strengthening of existing screening commissions, using methods of data collection derived from judicial performance evaluation programs, would provide an immediate benefit to those charged with placing judges on the bench. It would also benefit the public at large, by providing another mechanism for ensuring that judges are selected from among the highest quality candidates. But the value of JPE programs extends far beyond the selection of judges. When thoughtfully developed and implemented on an ongoing basis, JPE programs provide regular feedback to sitting judges about their strengths and weaknesses on the bench, and regular information to the public about the performance of its judges. While a detailed proposal for a comprehensive JPE program in New York is outside the scope of this essay,[76] we briefly sketch out below the major elements of such a program and the benefits that would likely result.

JPE programs derive much of their value from the regular, ongoing review of sitting judges. A judge who is evaluated more

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[75] *See* John Caher, *Fine Results, But a Flawed Process*, 3 N.Y. ST. B.A. GOV'T, L. & POL'Y J. 25, 31 (2001) (exploring the argument for a more open process).

[76] We have set out such detailed proposals for JPE and PPE programs elsewhere. *See, e.g.*, Kourlis & Singer, *supra* note 6, at 29–43; Singer, *supra* note 21, at 747–57; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT 79–93 (2006), *available at* http://www.du.edu/legalinstitute/pubs/SharedExpectations.pdf.

than once during his or her term is afforded an opportunity to engage in professional self-improvement while on the bench. Indeed, judges who have participated in JPE programs have praised them for providing constructive feedback that is not otherwise available. In a recent survey of Colorado judges who had been evaluated as part of that state's JPE program, over eighty-five percent of trial judges indicated that JPE has been either "significantly beneficial" or "somewhat beneficial" to their professional development.[77] One judge in the survey commented, "Judges receive very little feedback. I thought the evaluation provided very valuable information, including the perception of others and areas I could work on."[78] Similarly, after a federal pilot study in 1991, participating judges commented that "[t]he responses from the bar are an excellent barometer of how we are perceived to be performing our duties," and that the survey results were "helpful because they are about as objective an evaluation as we can hope to get."[79] In addition to individual professional development, the judiciary as a whole benefits from more regular review, as a large number of evaluations can unearth trends that might offer opportunities for collective training or changes in allocation of judicial resources.

The need for regular evaluation during a judge's term is particularly striking in New York because of the lengthy, fourteen-year terms of both Court of Appeals Judges and state Supreme Court Justices. Accordingly, a comprehensive JPE program might involve two interim evaluations, one at the judge's fifth year on the bench and one at the judge's tenth year, with a final evaluation to take place at the end of the term if the judge seeks re-election or reappointment.

To facilitate this periodic review, we recommend that performance evaluation commissions, similar in size and structure

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[77] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES, at i (2008), *available at* http://www.du.edu/legalinstitute/pubs/2008JudicialPerformanceEvaluationFINALexecsum.pdf [hereinafter THE BENCH SPEAKS].

[78] *Id.* *See also* KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 48 tbl. IV-9(a) (1998) (noting that judges responding to a 1998 study in four states overwhelmingly agreed with the statement that evaluation "[r]eports provide information to me that will help me improve my performance.").

[79] DARLENE R. DAVIS, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 8 (1991), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/judieval.pdf/$file/judieval.pdf.

to candidate screening commissions, be established for every level of the New York courts. As each judge's interim evaluations approach, the commission would collect a wide range of data on the judge's performance, including survey data, review of written orders or opinions, an interview with the judge, and, for trial judges, caseflow management data and direct courtroom observation. The commission would then evaluate the performance of each judge against the same process-oriented criteria used in other JPE programs and share that evaluation with the judge.

Some states have also developed formal internal programs to assist their judges with professional self-improvement after evaluation is complete, and a New York model might follow this approach. In Arizona, for example, each evaluated judge is assigned to a private "conference team" consisting of another judge, a member of the state bar, and a member of the public.[80] The judge meets with the conference team to discuss his or her strengths and opportunities for improvement. Together, the judge and the conference team prepare a written self-improvement plan.[81]

Finally, any official JPE program in New York should address the public interest in knowing about the performance of sitting judges. This is in part a matter of transparency and accountability. In a time when the integrity and credibility of major institutions, both public and private, have come under intense scrutiny, those institutions that openly embrace transparency and accountability are more likely to find favor and legitimacy in the eyes of the people they serve. In one survey of citizens in four states with comprehensive JPE programs, at least 64% of respondents in every state agreed with the statement that "[t]he availability of official evaluation reports helps make judges in my state more accountable to me," and in most states the figure was around 75%.[82] Furthermore, judicial performance evaluation provides that accountability in a form that does not threaten judges' decisional independence. In the Colorado judges' survey discussed above, the vast majority of judges indicated that JPE did not decrease their independence, and 29% of trial judges indicated that it actually *increased* their independence.[83]

We therefore recommend that individual evaluation reports be

[80] *See* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 690–91 (1998).

[81] *Id.* at 692–93.

[82] ESTERLING & SAMPSON, *supra* note 78, at 41 tbl. IV-5.

[83] THE BENCH SPEAKS, *supra* note 77, at i.

widely disseminated to the public after completion and final review with the judge. One approach is simply to post new evaluations—whether interim or end-term—on a publicly accessible website at the end of each evaluation year. Recognizing, however, that maintaining the confidentiality of interim evaluations might be desirable in order to promote professional self-improvement, the better practice might be to keep interim evaluations from the public until the end of the judge's term, at which point both interim and final evaluations would be released together.

Public dissemination of evaluation results serves a second purpose as well. By providing the public with straightforward, impartial information about the relevant skills and experience of judges and judicial candidates, performance evaluations change the frame of reference as to what makes a desirable judge. As such, they are a powerful tool for civic education. Performance evaluation rewards judges and judicial candidates not for their fundraising ability, the suggestion that they would rule a certain way on controversial issues, or friendship with party bosses, but rather for their depth of experience, ability to manage a heavy caseload, and even-handed treatment of all participants in the court process. Put another way, judicial evaluations emphasize the qualities that one would expect of any judge, regardless of the case—qualities such as facility with the relevant substantive law and procedure, clear communication, patience, equanimity, and control over the courtroom. Accordingly, JPE programs invite decision-makers and the general public to see judges not as robed policymakers, but rather as guarantors of fair process. And the evaluations accomplish this goal: recent studies demonstrate that confidence in judicial candidates and the judiciary as a whole is bolstered when voters receive such information through JPE programs.[84]

CONCLUSION

The appropriate method of judicial selection in New York is rightly a matter of public debate. But there is a certain hollowness to any discussion of judicial selection that does not consider how

[84] *See* ESTERLING & SAMPSON, *supra* note 78, at 40–41; *see also* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM & LEAGUE OF WOMEN VOTERS OF COLORADO, 2007 COLORADO VOTER OPINIONS ON THE JUDICIARY 4 (2007), *available at* http://www.du.edu/legalinstitute/pubs/ExecutiveSummaryFinal.pdf (finding that voters who opposed term limits for judges were more than twice as likely to be familiar with Colorado's JPE program).

and under what circumstances the decision-makers obtain their information on judges and judicial candidates. JPE and PPE programs help fill that gap by providing relevant, neutral information to those charged with nominating, appointing or electing judges. Such programs also have rich value in fostering public education about the judiciary and judges' own professional self-improvement. As New York's citizens and policymakers continue to wrestle with the best way to choose their judges, we hope that appropriate emphasis will be placed on giving judges and the public the information they need to have confidence in those who eventually don the robe.