



Public Policy Forum
Judicial Selection in
New York State
Presented by
Assemblyman
Herman D. Farrell, Jr.

March 13, 2006

Thomas L. Gais:

Good morning and welcome to another Public Policy Forum at the Nelson A. Rockefeller Institute of Government. My name is Tom Gais and I'm co-Director of the Institute. I'm delighted to introduce a very distinguished speaker, Assemblyman Herman D. Farrell, Jr., who will discuss his thoughts and proposals concerning selection of judges in New York State. I think it's fair to say that few political values are more desirable than competence, integrity, and independence in a state's judicial branch, though few are probably harder to guarantee in typical state and local political processes. That problem is not unknown in this state where partisan elections are used to fill 346 supreme court judgeships in 128 county courts, and where party nominations are, I think it's fair to say, not always turning on merit and integrity.

But a few of the state's leaders are tackling this long-standing problem. One such leader is New York State Chief Judge Judith Kaye, who formed the New York State

Commission for More Public Confidence in Judicial Elections, which produced its final report last month.

But another such leader is our speaker for today, who has publicly discussed his thoughts regarding reform in recent weeks. Certainly Denny Farrell is one of the most qualified people in the state to talk about nearly all aspects in New York State, political institutions and how they really operate. He has served in the State Assembly for over three decades from a district in New York City. Since 1994, he has served as Chair of the powerful Assembly Ways and Means Committee, and he also serves on the Assembly Rules Committee and the Black and Puerto Rican legislative caucus. He combines these state legislative positions with his long-standing leadership in local politics, including his service since 1981 as elected county leader of the New York County Democratic Committee.

His legislative achievements are too numerous to list, but one of the more impressive themes running through his career has been his interest in making government easier for citizens to understand, contact, and use in their day-to-day lives, including his work in passing a wide variety of consumer protection laws, notification requirements, and antidiscrimination laws, especially in the areas of banking and finance.

So, throughout his career, Denny Farrell has blended his performance goals and practical politics, a combination no doubt essential to solving New York's judicial selection process. So, please join me in welcoming Assemblyman Denny Farrell.

Assemblyman Herman D. Farrell, Jr.:

Thank you very much. It is a pleasure to be here on a nice, warm day— I use the word, “warm.” In Albany, in March, if you can't see snow when you look out the window, it's a beautiful day, even if the sun isn't shining. So, I'm glad to be here.

I agreed to come and speak about my position on judicial selection and screening of judicial candidates prior to a decision given by a Judge John Gleason that was decided

back in January, where he took a position pertaining to the manner in which we presently elect judges to the Supreme Court. And he said that it was unconstitutional in the manner in which we did it, and that he was going to recommend that we do primaries, instead of judicial conventions. And then he stayed that decision, because originally many people thought that we would have to set up a primary operation for this year. But when we went and I said we were going to appeal to the Second District Circuit, he gave us a stay and we're going to have an expedited chat to see what can be done.

But one of the things I promised the lawyers — Akin, Gump, and also Arthur Gregg, who is from my office and has been leading the court case, Akin and Gump doing it pro bono — was that I would not talk about the case in any manner. And they have promised me they will give me my children back after I finish making this speech. (Laughter)

So, I am going to speak about the selection method; I'm not going to talk about the case. But it is important to realize that whether you have the judicial convention to select, or you have a primary, we should have a way to know, "Do we have the most highly qualified people being elected?" Now, there is a discussion going on about the manner in which that is being done, but it is my belief that the intention of this discussion is really to lead to a thing called "merit selection."

Our state constitution says that our Supreme Court judges and justices will be elected. We have been having a battle since 1846 when this was done. We set up, in this state, election of judges in 1846 which was an off-shoot of the Jacksonian theory of government that we do such a thing.

And since 1846, every time we have had a judicial hearing, any time we have had a constitutional convention, there has been a discussion of "Should we get rid of the election of judges?" And each and every time they raise it, it is defeated, right up until as recently in 1977. We, in this state, are going to continue to elect judges; but there have been many changes made to our election process. Right now, over 100 Supreme Court

judges are appointed. Matter of fact, the mayor of New York City can appoint Supreme Court judges. How is that possible?

It happens that back in the 1970s, under the namesake of this building, Governor Rockefeller, everyone was saying we had a “state of emergency” resulting from a major increase in crime in New York State, basically in New York City. And they wanted to find a way to deal with it. We didn’t appear to have enough judges, we were getting an overload, even though actually, a large amount of the overload was also occurring in the civil parts in New York City. And they said we’ve got to come up with a way to deal with it.

Right now, the method in which you determine how many judges are in a locality is determined by a total count of people in the county, and you get one Supreme Court judge for every 50,000 people that you have. Now we’ve been going through that, and every couple of years we increase the amount of Supreme Court judges.

We should really look at why they made the decision to go to an appointed form of judgeship. They said we would give the governor the right to make Court of Claims judges acting Supreme Court judges, and we would bring them into New York City, and have them sitting on Criminal Court cases.

We also decided that we would give the mayor of New York City the ability to appoint criminal court judges, because when we gave the power to the governor to create the acting Supremes, not only could he do it with the court of claims judges, but he could do it with other judges. And those appointed criminal court judges, in turn, became eligible to become acting Supreme Court judges.

So, right now in New York City when the mayor appoints a criminal court judge and at the same time in my local district we elect a civil court judge, the mayor’s appointee within six months becomes an acting Supreme Court judge, and the judge that was elected is appointed to become a criminal court judge. You follow that? They’re moved in.



So when they are elected to the civil court in New York City, they become criminal court judges. And you end up having appointed Criminal Court judges sitting in the Supreme Court, so you have a mayor having the right to select Supreme Court judges. And it has been that way since the 1970s. And although there were

cases brought against it, they said because of a state of emergency they would be allowed to do it.

Right now in New York City, we have a state of emergency on the lower end criminal court cases. We need more criminal court judges than we need Supreme Court judges, but they are still making those criminal court judges Supreme Court judges and, at the same time, using the civil court to fill the requirements.

Now, that's a discussion we could go into for a very long time, as to why that is done only in New York City, even though we do get a few appointments upstate, and when they are appointed they are then sent down to New York City. But I am not going to go into that, and I'm not even going to get into the matter of race in New York City and how it has changed. But we do have to determine how we select judges.

Many years ago, back in the 1970s, a lot of my friends and I who were Democratic district leaders in New York County — that's where Tammany Hall came from — the reformers in that group got together and said, "We've got to come up with a better way of selecting the judges, rather than just having the county leader be the one to do it."

And we came up with a selection process which creates what we call a "double-blind system." And basically in Manhattan, if you wish to be a Supreme Court judge or justice, you can apply to our screening panel. How do you know to apply? Because we

put a notice in the *Law Journal* that says, "If you wish to be a Supreme Court judge, please send your resume to..." so and so. We give them a place to send it to and then they go through a screening process.

On that screening process — we call it, as I said, a "double-blind system" — how it works is, as the county leader, I have a committee called the Judiciary Committee, and that committee has one person from 12 Assembly districts that make up the county of Manhattan. They select one of the district leaders — some districts have four, some districts have six, some districts eight leaders — those leaders get together and they give me people from their Assembly district to sit on the judiciary committee. The judiciary committee is convened in February and at that time they go through a list of different groups that they choose to ask them to give us a delegate to our judicial screening panel.

What we normally do is pick bar associations, colleges, and community groups. We try to be as diverse in our selection as possible, and about three-quarters of our members on our screening panels tend to be lawyers. Now we don't ask that they be lawyers, but it turns out that when we go to the community groups, they tend to give us lawyers.

Now we don't pick the person; the group we ask picks the person. And we then pick — I will pick in consultation with the leaders and my lawyers — a convener of that panel. We tend to take people that come from large law firms. Why? Because we get to use their offices to hold our screening panel meetings. And usually they consider it an honor, and because they do, they usually take the responsibility to do all the photocopying and make food available for the long, late-night meetings.

So we tend to pick a large law firm. But the person who is the convener of the panel has no vote. He or she just runs and convenes the meeting. But the people who are selected by the individual groups, I don't even get to know who they are. Could I find out if I wanted to? Yes, I could. But I don't. Once the convener takes it, I'm out of it, excepting for the lawyers, who are there to make sure that they don't make any legal mistakes in what they are doing.

And then they start screening those applications that have been made — and we have a 20-page application you have to fill out — and we ask questions. One of the ones we like to ask is, “Give us two or three people who you have opposed and you won the case, and give us two or three people you opposed and you lost the case. Tell us certain cases you had where you lost and the judge that you were in front of, and cases you have won, and the judge you were in front of.” That allows the panel to go and ask questions about you that will tell us a little bit about your demeanor.

They will then go through the screening process, talking to people. They usually break down into groups in twos and threes to screen individual judges. And the vacancy rate tends to be this: we run two or three vacancies a year, even though this year (2006) we have none, excepting we had what I call “do-overs.” We have two judges coming up for re-election. They are also screened, but they are screened in a different manner.

And what we do is, having put the article in the *Law Journal* and they have responded, the panel will meet with them, talk with them, check them out. There are certain things you can do — and now we can even Google them. And when we are finished, they then vote. And their voting is to pick those most highly qualified. For every vacancy they pick three people; actually, our rules say, “No less than two, no more than three.” They tend to pick three. So, if there are three vacancies, there will be nine people selected. Now they are running against themselves, the most highly qualified among those people in the room.

When we do the screening of a do-over or an incumbent, the judge is screened against him or herself. We bring them in, again we ask cases that they did before — you know, cases they themselves have handled. You know, we try to get people who are unhappy about them and happy about them. We do the same thing: cases, give us the name of people you ruled against. Give us the name of people you’ve ruled in favor of. We go through those. Give us your ten best cases as you see them. We have a whole screening process. If they are found qualified, most highly qualified, we don’t do three-for-one for that vacancy. And they do not go in the pool against the other judges who are going for the new slots.

Now, there is no law that requires that to be a Supreme Court judge you have to be a seated civil, criminal, or family court judge, but we in Manhattan — and many of the counties I know of — tend to select seated lower-court judges to move up. So, some of the people we will be screening, who will put their name in, most of them — not some of them — are seated lower-court judges who want to move up to the Supreme Court.

They are then reported out, and once they are reported out they have three weeks, generally, to start talking to the people in the judicial convention. As I said earlier, the way they are nominated is through a judicial convention system.

Now one of the complaints is: “We don’t get to talk to those people.” They only have three weeks from when they get nominated to talk to the people who vote for them.”

Judicial delegates are elected in the primary where signatures start in June and they are elected in September. So we normally name the selection of the judges who we say are most highly qualified — we tend to report them on the Thursday before the Tuesday primary which will select the delegates, who will then name them. This system tends to give us, I think, very highly qualified people.

One of the things I’d like to say up front is that 99.99999 percent of the judges sitting on the bench are honest, hard-working people. And most judges, with the qualifications that they have, spend a lot of time talking to young lawyers who may be out of law school four or five years, haven’t even become a partner yet in the firm, and are making more than the judge is.

So for judges to take those jobs really says that they have a desire. When we see the degree, at least in Manhattan, of the people that we get as judges and Supreme Court judges, and having to go into the civil court first or the criminal court first, you almost would want to say, maybe we should have a head-check done with them, “Why are they doing this?” But they do it because they believe that this system requires that you have the best they can give.



And so I have a lot of problems with people saying how bad the judiciary is and everything else. Yes, every now and then we will come up with someone who's really a nut job. Put it this way, their mothers didn't bring them up right. Because most of the things they end up doing are things that if their mother had taught them young enough, you know,

"Thou shalt not steal. Thou shalt not shake-down people." If you had taught them those things early on, maybe they wouldn't have gotten into trouble. But even with the screening process, how do you really judge a judge? How do you judge their morality? I don't know. And whether you are appointing them or electing them, you can still have problems. So most of these judges are highly qualified.

Now, what is really going on, in my opinion, is this is a way of getting rid of the elected judges, and another way to go to the appointed system. They would like to see us have an appointed system. Matter of fact, Judge Kaye just put out regulations to create a screening panel, and I wouldn't oppose her screening panel, except that it has one problem: It's only screening the elected judges, not the appointed judges. And I want to know what makes the elected judges different than the appointed judges? I'll bring in two judges and ask you to look at them, and tell me which one is elected and which one is appointed. Unless you are very good, I don't think you are going to find a difference.

That bothers me, because that shows a bias toward merit selection. And I say that the system I've just described can allow you to have merit election.

So, for that reason this January I announced that I, as the State Chair of the Democratic Party, will take the system that we have in Manhattan and try and make it work throughout the state. On Thursday, March 9th, I had a meeting of people statewide, folks who were sent by county leaders upstate from different judicial districts. At the

meeting, we discussed, and we will be discussing for the next three months, how to take that plan, which works on a small island county like Manhattan, and make it work in some districts that have 12 counties, where you can't drive from one end to the other in less than four hours. How can you make that fit into a small county system?

But also, how to make a system like that work where there are some communities where the Democratic Party doesn't even intend to put together a slate of delegates to run in the judicial convention? Not very often, but now more and more, we have been able to get — now I'm talking as a Democratic state leader — Democratic county leaders to participate and put their delegates together, and run candidates, so that we have a full slate of candidates throughout the state. And it has been working; Binghamton last year did it for the first time, and elected a Democratic Supreme Court judge. And we've won some others elsewhere.

So, this is all about making sure that we have an elected process that will continue with merit election with folks who are most highly qualified becoming judges throughout the state. My plan calls for the panel to come up with recommendations, which will be given to the state party in July. It will be passed around to local officials and party members, who will debate and discuss it. They will then send recommendations to the panel for one last time, and put them into the party rules.

And then, in September of this year at our Fall State Party convention, I hope the State Committee will vote to make those rules the State Democratic Party's position.

And let me tell you it is not an easy thing to do, because a large amount of people are not in a hurry to do it this way. And it has nothing to do with honesty or integrity; it's just a question of, "Why can't I be trusted?" If you can give the governor or a mayor the power to appoint, why do you get mad when a county leader gets involved? We actually have what is called the "ratification process." But people say, "Well, you know what? They are not really being elected." Yes they are, because the voter at any given time can go in and vote against the candidates you put on the slate. And that's one of the things that people don't like. It is an elective process.

And one thing about democracy I've found is: You don't lose the right because you don't use the right. And a large amount of voters don't fully understand, or do understand that, and for that reason we don't get the amount of voting we should get in our system. Maybe if we turned around and said, "If you don't vote at least once every three years or something, every two years, we will then rescind your right to vote." Actually, we used to say, "If you don't vote once every four years, you come off the voting rolls." But we are not even doing that as much as we used to do, because it doesn't seem to work. Because a large amount of people deliberately stay off the voting rolls to avoid doing jury duty — notwithstanding the fact that we have changed the system and we take from the tax rolls as well as from the voting rolls the names of people we put on the juries.

So, that is basically what we are trying to do in the Democratic Party, and it's been a pleasure to be here. And I'll be very glad to answer whatever questions you may ask.

Jack Rice:

I'm General Counsel for the Business Council of New York State. Denny, the chief judge is making a proposal that would reverse what you just described for us. Is that true?

Assemblyman Herman D. Farrell, Jr.:

No, well, actually it doesn't. What she has said to me is that this would be her screening, and it would be like a basic screening. And I could continue to do the state party's rules, which would have a higher standard. But it creates a problem with her doing what she has done. Because what will happen is, people will be able to go through her panel and it may not be as stringent as our panel is, and what would happen then is they can say, "We've got an official sanction," or "acceptance from the State Judiciary Committee," as opposed to the political committee. And that will create some political problems.

There was one other thing I didn't talk about I see here in my notes: the election versus selection and that question, that famous question, "partisanship." There is a constant discussion of nonpartisan elections. There is no such thing. And if you think there is, think about what was on NPR today: a long discussion about South Dakota's case they are bringing on abortions. Why are they bringing the case and setting up a change in their laws this year? Because they just got two brand new, shiny Federal Supreme Court judges, who they know were selected for a specific position, and they are going to test that position to make sure that the contract was kept. That is as partisan as you can get.

And by the way, when we were fighting back in the 1950s to make sure that we could get the civil rights we wanted? We also made sure that we were very partisan in who we selected that went to the Supreme Court, trying to make sure we would get the decisions we wanted. So, it is partisan. It happens. And when people say it doesn't happen, they're either smoking something they shouldn't or they've got a weak link in their mental strain.

I thank you all very much and have a good day.