

Report of the Task Force on Mandatory Retirement of Judges

June 1999

I. INTRODUCTION

The Task Force on Mandatory Retirement of Judges (Task Force) hereby issues its final report and recommendations to the Chief Judge and Chief Administrative Judge. After many months of careful study, the Task Force has concluded that it is in the best interests of the judiciary and the people of the State of New York to amend the laws governing mandatory retirement of judges.

The Task Force proposes two formulations, each of which would improve the current utilization of veteran judges. The first of these would extend eligibility for certification to serve beyond the mandatory retirement age from Supreme Court Justices to all State-paid judges.¹ The second proposal, a more innovative and far-reaching approach, would institute a “senior judge” system for eligible judges, simultaneously fostering more opportunities for judicial service by minorities, women and younger lawyers.

In each case, effectuation of the Task Force’s recommendations would require amendments to Article VI, section 25(b) of the New York State Constitution and sections 23

¹ Under this proposal, judges of the following courts would be newly eligible for certification: County Court, Family Court, Surrogate’s Court, Court of Claims, New York City Civil Court, New York City Criminal Court, City Courts and District Courts.

and 115 of the Judiciary Law. The senior judge proposal would also require amendments to various sections of the Retirement and Social Security Law and the Civil Service Law.

II. MANDATE

The Task Force was appointed by Chief Administrative Judge Jonathan Lippman on June 23, 1997 in response to growing interest in the subject of mandatory retirement for judges.² The Task Force was charged with evaluating the adequacy of the current mandatory retirement scheme and suggesting possible alternatives. As stated in the press release announcing the Task Force's appointment, "Each year the court system loses many competent Judges who are required to leave the bench because of their age, stirring fresh discussion on how the court system can make optimum use of judicial resources while ensuring opportunities for qualified younger attorneys with judicial aspirations." The Task Force was asked to "balance these important considerations carefully in arriving at its recommendations."

III. METHODOLOGY

The Task Force convened regularly to review the extensive literature on mandatory retirement, to discuss how the existing judicial retirement system might be improved and to

² The Hon. Alfred H. Kleiman, as Chair of the Judicial Section of the New York County Lawyers Association, formally requested the appointment of a committee to study judicial retirement laws in New York State.

fashion consensus among a diverse group of individuals and viewpoints. The Task Force solicited the opinions of members of the judiciary and of all State and local bar associations in New York. We received more than 100 letters in response, which collectively constituted a rich source of information on the many difficult issues associated with changing the mandatory retirement scheme as well as judicial and bar attitudes toward judicial retirement.

Representatives of the Task Force also held in-person or telephone discussions with Administrative Judges or their Executive Assistants around the State. Throughout this period, the Office of Court Administration provided invaluable assistance and information concerning the many fiscal, pension and facilities issues associated with each new judicial retirement proposal under consideration. The National Center for State Courts was an excellent source of information on judicial retirement schemes around the nation. The Task Force also benefitted greatly from consulting with Hon. Bernard Meyer, former Associate Judge of the New York State Court of Appeals, who is chairing the American Bar Association Senior Lawyers Division's project to establish a uniform law on mandatory retirement.

IV. BACKGROUND

A. The Historical Underpinnings of Mandatory Retirement

A fundamental tenet of our society and constitutional system of government is that each person should be treated as a unique and valuable individual rather than a statistic or stereotypic member of a given group. Mandatory retirement treats all judges who reach the age of 70, except Supreme Court Justices, as if they were unfit to perform their judicial duties beyond that point. This is both inequitable and unwise. Under the current age restriction, the State is denied the experience and ability of many jurists working at the peak of their productivity and intellectual powers. The retirement demarcation of 70 has long since ceased to bear even a minimal relationship to the State's goal of maintaining a qualified, effective judiciary. To the contrary, the current retirement age is counterproductive to judicial efficiency and productivity. In too many cases, it dispenses with highly experienced jurists capable of discharging their duties with great effectiveness well beyond age 70.

The concern expressed more than a century ago by the drafters of the State Constitution's mandatory retirement provision that "the natural decay of the powers of [humanity] might at times leave upon the bench an inefficient judge" is today belied by the revolutionary improvements in health and medicine that have so greatly increased average life expectancy and enriched our society. When New York's mandatory retirement age was adopted in 1869, the average life expectancy was in the 40s.³ Today, the average American

³ The average life expectancy of a person born in 1900 was 47. See Compton's Electronic Encyclopedia.

can expect to live 76.1 years.⁴ Moreover, life expectancy increases as people live longer. Thus, a 65-year old judge can now expect to live into the 80s, well beyond the mandatory retirement age.⁵

The many purported justifications for mandatory retirement fail to consider that age alone does not determine a judge's functional ability. Each person ages differently. Nor does mandatory retirement consider the value of a judge's accumulated wisdom and experience on the bench. According to a prominent jurist and scholar who has studied the issue in depth, judging is a "late peak" occupation in that judicial performance improves with age, is at its best late in life and remains stable for many productive years after age 70 or until the onset of senility.⁶ Medical research supports this view and refutes the constitutional presumption that disabilities begin appearing at age 70. Studies have shown that there is no decline in average intelligence until age 80, and that healthy older adults perform better than younger people in select areas such as knowledge about their profession and life.⁷

⁴ *U.S. Life Expectancy Hits New High*, New York Times, September 12, 1997, at A 14.

⁵ Persons reaching age 65 in 1992 could expect to live to 82.5 years of age. *Sixty-Five Plus in the United States*, U.S. Census Bureau (1995).

⁶ See Richard A. Posner, *Aging and Old Age*, University of Chicago Press, at 180-181 (1995).

⁷ See Staudinger, Cornelius & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 *The Annals* 43, 45 (1989). Despite age-related declines in learning ability and memory performance, healthy older adults demonstrate superior performance in selected domains such as knowledge of their profession and life matters, and in pragmatic aspects of intellectual

Courts have held that the interest in maintaining a judiciary of the highest caliber permits states to enact mandatory retirement laws to remove from the bench the group of judges in which age-related disabilities are most likely to occur. The United States Supreme Court has acquiesced in, but certainly not endorsed, the general principle that judicial performance can deteriorate sufficiently by age 70 to justify mandatory retirement.⁸ In fact, the Supreme Court acknowledged that this premise was “probably not true,” but under the minimal constitutional inquiry applicable to age discrimination claims, the Court deferred nonetheless to the state prerogative over its judiciary.⁹

In upholding mandatory retirement laws, courts routinely cite the difficulty of removing older judges with impaired mental faculties. To be sure, the embarrassing, expensive and protracted process of deciding which judges are senile and which are not is obviated by an objective age demarcation. We believe, however, that the difficulties associated with administering an evaluation system designed to regularly monitor the mental and physical fitness of older judges have been overstated and can be overcome.

functioning such as creativity and wisdom. Wisdom was defined as the advanced cognitive development and mastery over one’s emotions that comes with age, experience, introspection, reflection, intuition and empathy, and creativity as the ability to apply unique, feasible solutions to new situations.

⁸ See *Gregory v Ashcroft*, 501 US 452 (1991).

⁹ *Id.* at 473.

B. The Constitutional and Statutory Framework

The New York State Constitution requires the retirement of judges at age 70.

Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. (Article VI, section 25(b)).

Judiciary Law § 23 tracks and implements the State Constitution, stating that “No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age . . .”

While the foregoing provisions compel judicial retirement at the age of 70,¹⁰ Article VI, section 25(b) of the Constitution provides that judges retired from the Court of Appeals or the Supreme Court are eligible for certification to serve as justices of the Supreme Court for up to three additional two-year terms.¹¹

¹⁰ Housing Court Judges and Town and Village Judges are not subject to a mandatory retirement age. There is also no age limit on service by Judicial Hearing Officers.

¹¹ Attainment of the retirement age results in the expiration of the term of the retiring justice, with the underlying judicial position becoming open to election or appointment for a new term (*see* Art. 6, § 25[b] [“A retired judge or justice shall not be counted in determining the number of justices in a judicial district * * *.”]). Certification in no way affects this situation.

Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certified in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office . . .

Section 115(1) of the Judiciary Law, which governs the certification of retired Justices of the Supreme Court, provides that eligible judges may be certified by the Administrative Board of the Courts “upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court.”

New York State judges have been continuously subject to mandatory retirement at age 70 since the Constitution of 1869. According to the New York State Court of Appeals in People v Mann, 97 NY 530, 532 (1885), “The policy of fixing by constitutional provision a limitation of age to judicial service, first established in this State in respect to the chancellor and judges of the Supreme Court by the Constitution of 1822, and abandoned in the Constitution of 1846, was re-established by the judiciary article of 1869 . . .”

The reason for the age limitation was discussed by the Court of Appeals in People v Gardner, 45 NY 812, 819-820 (1871), which surveyed the written proceedings of the convention which led to the 1869 Constitution.

The convention found a judicial system with a fixed, comparatively short term of office for the judges thereof, . . . and quite consistently therewith, no limit of age set up. This term it was proposed to lengthen to one nearly double, and the proposition was adopted. Then, as might have been expected, came the apprehension that, during this long term, the natural decay of the powers of man might at times leave upon the bench an inefficient judge. So as a safeguard against this, while as a general rule, fourteen years was made the term of office . . . it was enacted that no person, holding any of these offices, should hold it longer than the end of the year in which he reached the age of seventy years. It is palpable that the intention of the convention was to place this limit of age upon the comparatively very extended term which they had adopted, and to guard against the possible evil which the lengthened term had alone suggested as possible.

The constitutional provision authorizing the certification of Supreme Court Justices and Court of Appeals Judges is of more recent vintage, having been part of the Court Reorganization Amendment to the New York State Constitution, adopted by the voters on November 7, 1961. The provision was intended to “implement the provisions of the new Constitutional Amendment abolishing official referees and providing instead that certain retired judges and justices may be certified to perform the duties of a justice of the Supreme Court. A fuller employment of the capacities of a retired justice than is permitted by the more restricted powers of a referee is thus made possible.”¹² The amendment permitted certificated judges to serve in trial or special term only.¹³

¹² See Governor’s Memoranda, New York State Legislative Annual (1962), at 366.

¹³ A 1966 amendment authorized retired Appellate Division Justices to serve in the Appellate Division. That same year, the voters rejected an amendment to allow retired judges of the Court of Appeals to continue serving on that court. They also rejected an amendment to

C. Other Jurisdictions

Unlike New York, many states as well as the federal judiciary accept the premise that judges perform effectively well beyond their 70th year. The majority of jurisdictions (27) either compel retirement at age 72 and above or have no mandatory retirement age at all. Of the 38 states that do have mandatory retirement laws, 24, including New York, compel retirement at age 70.¹⁴ Four jurisdictions require retirement at age 72, one at 73, one at 74 and eight at 75.¹⁵ Thirteen jurisdictions (26%) have no mandatory retirement provisions, permitting judges to serve for as long as they are able.¹⁶

Under the federal system, judges may remain as active full-time members of the judiciary for as long as they wish. Federal judges over 65 with sufficient years of judicial

allow other judges to serve beyond the mandatory retirement age. *See* Peter Galie, *Ordered Liberty: A Constitutional History of New York* (1996), at 278. In 1983, the voters again rejected an amendment that would have permitted certification for service beyond age 70 for judges of the Court of Claims, County Court, Family Court, Surrogate's Court and the New York City Civil and Criminal Courts.

¹⁴ Twenty-four states require retirement at age 70: Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Vermont, Virginia, Wisconsin and Wyoming. Sixteen of these states make some form of exception to compulsory retirement. For example, New York permits Justices of the Supreme Court to serve for six additional years assuming they are mentally and physically fit.

¹⁵ The mandatory retirement age is 72 in four jurisdictions: Colorado, Iowa, North Carolina and South Carolina. It is 73 in North Dakota, and 74 in the District of Columbia. It is 75 in eight states: Georgia, Illinois, Indiana, Louisiana, Oregon, Texas, Utah and Washington.

¹⁶ California, Delaware, Idaho, Kentucky, Maine, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, Tennessee and West Virginia.

service may voluntarily assume “senior” status and reduced caseload responsibilities.

In an age when judiciaries around the nation are struggling with the increasing complexity and volume of their caseloads, the New York State Constitution’s compulsory retirement age casts off a group of productive and valuable jurists who can perform creditably, and often with great distinction, well into their 70s and 80s.¹⁷ In fact, the current New York State practice is contrary to the standards being applied in the vast majority of jurisdictions in the United States.

V. BALANCING MANDATORY RETIREMENT AND OPPORTUNITIES FOR JUDICIAL SERVICE

The value of a diverse judiciary needs no argument--inclusiveness promotes public trust in justice. Today the overall number of women and minority judges is higher than ever before. As of January 1999, 23.4% of New York State judges were women, while 11.9% were minority (Black, Hispanic, Asian or Native American) (see table below). Despite measured progress over the last decade, these figures still lag well behind the composition of law school classes in recent years. In recent years, minorities have accounted for 20 to

¹⁷ The prominent examples of Holmes, Brandeis, Hand and Brennan certainly seem to confirm this proposition.

25 percent of law school admissions nationally, while women have made up about 45 percent of law school admissions.¹⁸ The delayed entry of minorities and women into the legal profession of course goes far to explain these disparities, but the under representation of minorities and women on the bench remains a serious concern for our justice system, which is greatly affected by public perceptions of fairness and equal justice.

The Task Force strongly supports the continuation of judicial service beyond age 70, but not at the expense of reduced judicial opportunities or delayed entry into the judiciary for women and minority lawyers. Regular turnover invigorates the judiciary by bringing fresh ideas and greater diversity to the bench. Consequently, the Task Force favors retaining the services of experienced, productive judges beyond age 70--*but only if this goal is balanced with the creation of new opportunities for minority and women lawyers* who aspire to the bench. The fact that this balancing act is critical is demonstrated by the table below, which shows the overall participation of minorities and women in the Supreme Court in New York City as of January 1999, the relatively high diversity among the group of Supreme Court Justices elected over the last five years, and the relatively low diversity among the group of Justices most recently certificated for service beyond age 70.

¹⁸ Mark A. Brown, *High Court May Be Guilty of Hiring Bias*, The National Law Journal, November 30, 1998, at A21, col. 1. Enrollment of women in New York State law schools was 46% in 1995 and 45% in 1994. Minority enrollment in New York law schools was 24% in 1995 and 23% in 1994. See Daniel Wise, *Minority Enrollment at CUNY Law Soars*, New York Law Journal, August 15, 1996, at 1, col. 3.

	All Judges: Statewide Jan. '99	NYC Elected JSCs Excluding Certificated Jan. '99	NYC Elected JSCs 1994- 1998	Certificated Statewide JSCs Jan. '99	Certificated NYC JSCs Jan. '99
Black	91	29	19	4	4
Hispanic	42	12	8	0	0
Asian	8	1	0	0	0
Native American	1	0	0	0	0
White	1,048	84	40	49	27
Total	1,190	126	67	53	31
% Minority	11.9%	33.3%	40.3%	7.5%	12.9%
Men/Women	910/280	96/30	50/17	50/3	28/3
% Women	23.6%	23.8%	25.4%	5.7%	9.7%

The Task Force has concluded that the goal of balancing mandatory retirement with opportunities for judicial service by minorities and women is best served by a senior judge system. Under the senior judge model we propose, a judicial vacancy is immediately created each time a sitting judge attains senior status (possibly at age 62 in many cases), with a new election or appointment taking place. The judiciary thus would draw upon an increasingly diverse talent pool for new judges while retaining the assistance of experienced judges working up to full-time. As a result, the State would achieve a balance between the promotion of judicial diversity and the retention of judicial experience--all while enjoying

a much-needed substantial increase in judicial availability.

While judicial diversity is well served by a senior judge system, we note that expanding eligibility for certification to all State-paid judges is not inconsistent with this important goal. Because many more judges will be eligible for, and doubtlessly obtain certification, there will be an increased number of judicial vacancies available at a time when minorities and women are ascending to the bench with greater frequency. Of course, under the expanded certification model, these vacancies would be created when sitting judges attain age 70, whereas under the senior judge model vacancies are created as early as when a sitting judge reaches 62.

VI. MANDATORY RETIREMENT PROPOSALS

We recommend two separate proposals. They are not, however, mutually exclusive. Indeed, the senior judge model we propose includes a certification component. While we believe that in the long run the senior judge proposal is the more comprehensive approach to the many issues surrounding retention and utilization of veteran judges, we note that the expanded certification model is less complex and can probably be implemented more expeditiously.

A. Expanded Certification

The current certification process applies only to Justices of the Supreme Court, who

may serve until age 76. All other judges must retire at age 70. We recommend an amendment to Judiciary Law § 115 to provide that all State-paid judges reaching the mandatory retirement age would be eligible for certification to stay in judicial service for up to four additional two-year periods, that is, until age 78. Under our proposal, as under the existing law, the certificated judge's seat would be vacated and another individual would be appointed or elected to that seat for a new term. This approach provides the court system with additional judicial resources by retaining the many highly experienced, productive judges currently being lost.

Certification would be valid for two years based upon a need for judicial services and a finding of mental and physical capacity. Upon expiration of the initial term, the retired justice may be certified for additional terms of two years each by the Administrative Board upon a finding of continued need for judicial services and mental and physical capacity. Under our proposal, no retired justice may serve beyond the last day in the year in which he or she reaches 78. Although many Task Force members are of the view that judges should be permitted to serve for as long as they are able, as is the case in many states, there was a general recognition that judicial performance can deteriorate sufficiently by age 78 as to render imposition of an age limitation reasonable. In addition, nowhere in New York State do we have a life term for judges. Having no mandatory retirement age would be tantamount to a life term.

A certificated judge is for all purposes, including powers, duties, salary, status and rights, a judge of the court from which he or she retired, in the district or county in which he or she resides at the time of certification. Certificated judges shall be subject to assignment by the Chief Administrative Judge, in consultation with the appropriate Deputy Chief Administrative Judge and the Presiding Justice of the Appellate Division of the judicial department of his or her residence.

We also recommend that the Chief Administrative Judge promulgate precise rules delineating the procedures and criteria governing the certification of judges, including creation of a five-member evaluatory panel in each judicial district consisting of the appropriate Administrative Judge, Deputy Chief Administrative Judge and three bar association representatives who practice within the district. The evaluatory panel would be responsible for assessing the need for a certificated judge in that district, the mental and physical capacities of the applicant and the applicant's judicial performance. The panel would issue recommendations to the Chief Administrative Judge, who would make the final decision in consultation with the appropriate Presiding Justice.

If the need for an additional judge in that jurisdiction is not established, the judge may apply to an adjoining judicial district or resubmit his/her application again in the following year. Should the need for a certificated judge arise subsequently, applicants should be designated for service in the order in which they applied.

Furthermore, in the case of appointed judgeships, the Task Force is concerned about the potential for a judge turning 70 to receive certification with no action taken to fill the resulting vacancy in a timely manner. The Task Force recommends that the Legislature take appropriate steps to avoid this situation in drafting implementing legislation.

1. Criteria for Designation

We recommend that in evaluating an applicant for service beyond age 70, the evaluatory panel consider the following criteria with respect to each judge:

a. The need for additional judges in relevant jurisdictions. Specific criteria for each court type should be developed to determine if the need exists. For example, that need might be measured by reference to the number and/or percentage of cases over “Standards and Goals.”

b. Whether after an examination the judge has been found to be physically and mentally competent to perform the duties of the office;

c. Scholarship, including knowledge and understanding of substantive, procedural and evidentiary law; attentiveness to factual and legal issues before the court; application of judicial precedents and other appropriate sources of authority; and quality and clarity of written opinions;

d. Productivity, including effective docket management and prompt case disposition;

e. Temperament, including the ability to deal patiently with and be courteous to all parties and participants;

f. Work ethic, including punctuality, preparation and attentiveness, and meeting commitments on time and according to the rules of the court; and

g. Whether any justified complaints have been filed with the Commission on Judicial Conduct or court administrators.

2. Certifying Need and Mental and Physical Ability

Any system that prolongs judicial service beyond the current retirement age must provide for the periodic evaluation of judges. One of the advantages of a mandatory retirement age is that it draws a bright line and thereby avoids the tedious, expensive and potentially unpleasant process of determining which judges are physically and mentally fit to serve and which must be removed for reasons of failing competence. The evaluation process is also costly and time consuming from the point of view of court administration. The court system bears the expense of physical examinations and must employ staff to keep track of the voluminous paperwork associated with each application.

While the court system recently amended the rules governing the designation and redesignation of JHOs, there are no similar rules governing the mental and physical certification of JSCs. Under Judiciary Law § 115, any JSC who reaches age 70 may, upon application, be certified by the administrative board for service as a retired JSC upon findings that he or she has the mental and physical capacity necessary to perform the duties of such office, and that his or her services are necessary to expedite the business of the supreme court. There are no other published criteria governing the certification of justices, and the Court of Appeals has held that the Administrative Board has nearly unfettered discretion in certifying JSCs.¹⁹ The Task Force recommends the promulgation of more detailed criteria, as set forth in section VI, A, 1.

B. Senior Judge Model

This proposal combines two concepts. It permits eligible judges to apply for “senior status” beginning at age 62, **and** extends eligibility to serve beyond the mandatory retirement age to all State-paid judges via the certification process previously discussed. A judge is eligible to apply for “senior status” beginning at age 62, assuming the judge has ten years of judicial service, while judges who are age 63 must have nine years of service, and so on up to the mandatory retirement age of 70, at which time all judges are automatically eligible for

¹⁹ See *Marro v Bartlett*, 46 NY2d 674, 677.

senior status. Once a senior judge reaches the mandatory retirement age,²⁰ he or she also becomes subject to the statutory provisions governing certification (see section VI, A). Thus, continued service as a senior judge is subject to a biennial determination of the judge's mental and physical competence and of the need for his or her services. No judicial service would be permitted after age 78.

A judicial vacancy is created when a judge assumes senior status, and his or her seat will be filled by a duly elected or appointed judge as if the senior judge had retired. Once a judge is accorded senior status, he/she retains that status, except upon removal by the Commission on Judicial Conduct. However, upon attaining the mandatory retirement age, senior judges become subject to certification in the same manner as other judges. A senior judge shall be treated as a retired judge for pension purposes and therefore **must** begin collecting pension benefits and social security, if applicable, upon assuming senior status. All senior judges eligible to receive pension benefits must accept their pension as part of their compensation. To provide further inducement to taking senior status, we recommend an amendment to existing law to permit senior judges to earn additional pension credits commensurate with the amount of time worked during the course of the year. The accrual of additional retirement service credit, however, would cease after the senior judge reaches age 70.

²⁰ We will assume for the purposes of this section that the mandatory retirement age remains at 70.

1. Pension and Compensation Issues

In order to effectuate a senior judge system, it will be necessary to amend various statutes governing public sector pensions, specifically Retirement and Social Security Law (RSSL) sections 40 (c)(9), 211 and 213, and Civil Service Law section 150.

We propose that senior judges be permitted to work less than full time, but not less than half time over the course of the calendar year. Senior judges who work less than full time will have their compensation reduced commensurately. No senior judge may earn more than a similarly situated non-senior judge.

Example: A 62-year old judge with 25 years of retirement service credit wishes to assume senior status and work half time. Assume that the judge's final salary was \$100,000 and that she is eligible to receive 55% (\$55,000) of her last year's salary in annual pension benefits. Assume further that the judge is entitled to receive \$5,000 in annual social security benefits. The judge's total salary would consist of \$60,000 in pension and social security benefits plus \$50,000 (half of the full-time pay of \$100,000). However, since the sum of pension, social security and half pay would be \$110,000--more than the salary of a similarly situated judge--the court system's contribution would be only \$40,000, for a total salary of \$100,000.

The benefits to the State of such a scheme are obvious. Not only does the State obtain additional judges, but they are gained at relatively little extra cost because the bulk of judicial compensation would consist of pension benefits. Any issues involving "double dipping" restrictions can be addressed through amendments to the governing statutes, specifically Retirement and Social Security Law sections 40(c)(9), 211(2)(b) and 213, and Civil Service

Law section 150.

2. Reduced Workloads

A senior judge may work less than full-time. Less than full-time includes the following arrangements, provided that the judge must work half of the days in the year expected of full-time judges:

- a. Less than five days of the week
- b. Half a day (mornings or afternoons)
- c. Only certain months of the year.

3. Obtaining senior status

We recommend that the Chief Administrative Judge promulgate rules delineating the procedures and criteria governing the designation of senior judges. We propose the creation of an evaluatory panel in each judicial district consisting of the appropriate administrative judge, deputy chief administrative judge and bar association representatives, which would be responsible for evaluating the need for a senior judge in that jurisdiction and the capabilities of the applicant. The evaluatory panel would make a recommendation to the Chief Administrative Judge, who would make the final decision in consultation with the appropriate Presiding Justice.

The evaluatory panel must certify that there is a need for a senior judge in that

jurisdiction. The determination of need would be the same as for certificated judges (section VI, A). If the panel does not so certify, the judge may apply to an adjoining judicial district. If no need exists in the judge's home district or an adjoining district, the judge may resubmit his/her application again in the following year. Should the need for a senior status judge subsequently arise, the senior judge applicants must be designated for senior status in the order in which they applied.

4. Support staff

Senior judges who work less than full time would be required to share staff.

VII. BUDGETARY ISSUES

In the event that a senior judge or expanded certification system is adopted, many additional judges will be sitting throughout the State within a few years. It is necessary to consider the added cost to the State of additional judges and their staff as well as the other costs associated with operating a court part. With the assistance of OCA staff, the Task Force conducted a fiscal analysis. We found that it would cost approximately \$650,000, on average, to operate a court part in New York, an estimate that includes all relevant personal and nonpersonal service costs.

Historically, the number of judges reaching age 70 has averaged 35 per year. In 1997, 30 judges attained their 70th year: 14 JSCs; 4 Acting JSCs; 4 Appellate Division; 4 County

Court; 2 Family Court; 1 Court of Claims and 1 District Court. In 1998, 29 judges reached age 70: 15 JSCs; 5 City Court; 2 Acting JSCs; 2 Surrogates; 2 Court of Claims; and 1 each in the Appellate Division, County Court and District Court.

For purposes of anticipating the cost of an expanded certification system, assume that it costs \$650,000 on average to operate a court part; that an average of 35 judges reach age 70 annually; that 25 (70%) of these eligible judges will receive certification;²¹ and that approximately half of this number are Justices of the Supreme Court (historically about 15 JSCs per year reach age 70). The net additional cost to the State would be approximately \$8.45 million per year (13 x \$650,000). To put this figure in context, it amounts to 0.6% of the Judiciary's 1999-2000 budget, truly a small price to pay for scarce judicial resources (and for retaining the most experienced judges in the system) in an era of rapidly increasing caseloads. The retention of these judges actually would effect other cost savings in areas such as New York City, where the current shortage of judges results in high overtime pay for court personnel. In addition, phasing out the Judicial Hearing Officers program would result in additional cost savings.

Under a senior judge system, a large number of judges would initially be eligible for

²¹ Unlike the first two figures, which have an empirical basis, the latter is an estimated number used here for the purpose of calculating an approximate cost. The actual percentage of eligible judges receiving certification may well be higher or lower.

senior status. Research conducted in September 1998 with the assistance of OCA's Judicial Benefits Office indicated that there were then 370 judges age 62 or older. Of this group, 314 judges or 85% would be eligible to apply for senior status under the criteria recommended in section VI. Of course, senior judges would earn less compensation than certificated judges and their part-time status would result in reduced personal service costs to the judiciary, but the overall cost of a one-time absorption of scores of judges would still be very significant. For example, assuming that approximately half (150) of eligible judges receive senior status and that half of these work half-time, the estimated cost to the State would be approximately \$68.6 million ($75 \times \$610,000 + 75 \times \$305,000$).²² To place this figure in context, it would amount to 5% of the Judiciary's most recent budget, a small price to pay for a major infusion of judicial resources (the equivalent of 113 additional full-time judges). By contrast, the creation of a similar number of new judgeships by the legislature would cost the State more because there would be no savings on judicial compensation. Nor would the State reap the significant savings associated with retaining highly experienced judges who do not have to be trained and are already working at the peak of their productivity.

VIII. FACILITIES

²² In the case of full-time senior judges, who would draw much of their pay as pension benefits, it is estimated that the cost of operating a court part would be reduced by approximately \$40,000.

In some jurisdictions, there was significant concern regarding how these additional judges would be provided with facilities. While the question of facilities should not stand as an impediment to creating a senior judge system or expanding certification, it may be a factor to be considered in determining whether to grant certification or senior judge designation in a particular instance.

IX. CONCLUSION

The Task Force on Mandatory Retirement of Judges has concluded that it is in the best interests of New York State to amend the laws governing judicial retirement. The Task Force submits two formulations, both of which would improve upon the existing outdated constitutional and statutory schemes. The first proposal would extend eligibility for service beyond age 70 as a certificated justice or judge to all State-paid judges. The second proposal would institute a senior judge system that would permit eligible jurists to assume senior status as early as age 62, thereby promoting increased opportunities for judicial service by minority, women and young lawyers. We urge action on these proposals.

Respectfully Submitted,

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