

# GOVERNOR'S APPOINTED JUDGES STIR DEBATE

Loop-hole allows unelected path to Supreme Court

BY MICHAEL GORMLEY

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ALBANY — Gov. Andrew M. Cuomo, as governors before him, has plied a legal loophole that allows him to appoint judges to the little-known state Court of Claims, who are then immediately assigned to state Supreme Court sections statewide where they rule on criminal and civil cases.

Supporters of the maneuvering contend that it is necessary because of a worsening shortage of elected judges statewide — exacerbated by a 149-year-old limit on the number of judges established by the state constitution — that threatens the constitutional right to a speedy trial.

However, critics in and outside government argue that the loophole skirts another constitutional requirement — that Supreme Court judges be elected — and provides governors and legislative leaders with patronage jobs to dole out.

Many of the appointees are former counsels and other govern-

ment employees, politicians who were rejected by voters in judgeship races and former legislators who provided Cuomo with critical votes to his signature legislation. Other governors also have appointed some former staffers.

While lawmakers have options available to increase the number of judges, experts say the Court of Claims practice has persisted because it saves money over creating permanent, elected positions as well as offering patronage opportunities.

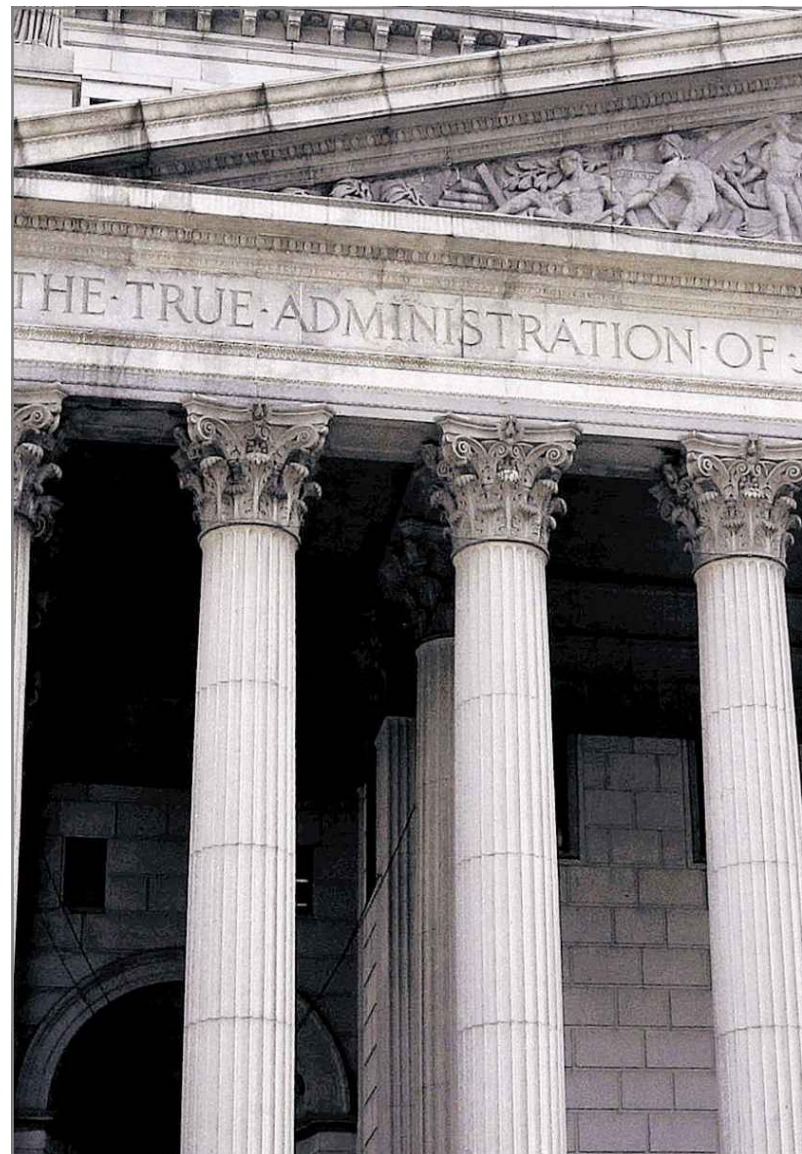
## A judge for every 50,000

The state constitution requires that Supreme Court judges be elected. A constitutional formula, however, limits judgeships to one for every 50,000 residents of a district, which experts agree is inadequate to contend with modern caseloads. That provision stems from an 1869 reform approved by voters after abuses by William “Boss” Tweed and his corrupt Tammany Hall political machine, which appointed cronies to judgeships.

Here’s the loophole: While the number of elected judges who can preside over state Supreme Court is capped, the constitution allows governors to appoint far more Court of Claims judges than are required to preside over that court, which handles claims against the state for anyone paying a \$50 filing fee. These judges can then be assigned to be acting Supreme Court judges for nine years (the term for Court of Claims judges) and can be reappointed. Elected Supreme Court judges serve 14-year terms.

The law, after a 2005 expansion, allows for 86 Court of Claims judges, although only about 30 judges are assigned at any one time to the 10 Court of Claims courtrooms statewide. Both Court of Claims and state Supreme Court judges make \$208,000 annually.

“It’s absurd,” said Albany Law School Professor Vincent Bonventre, an expert in the state’s judicial system. “Of course it’s a loophole, because the constitution allows a limited number and this is a way to get around it.”



“It’s absurd . . . this is a way to get around [the constitutional limit.]

— Vincent Bonventre, Albany Law School

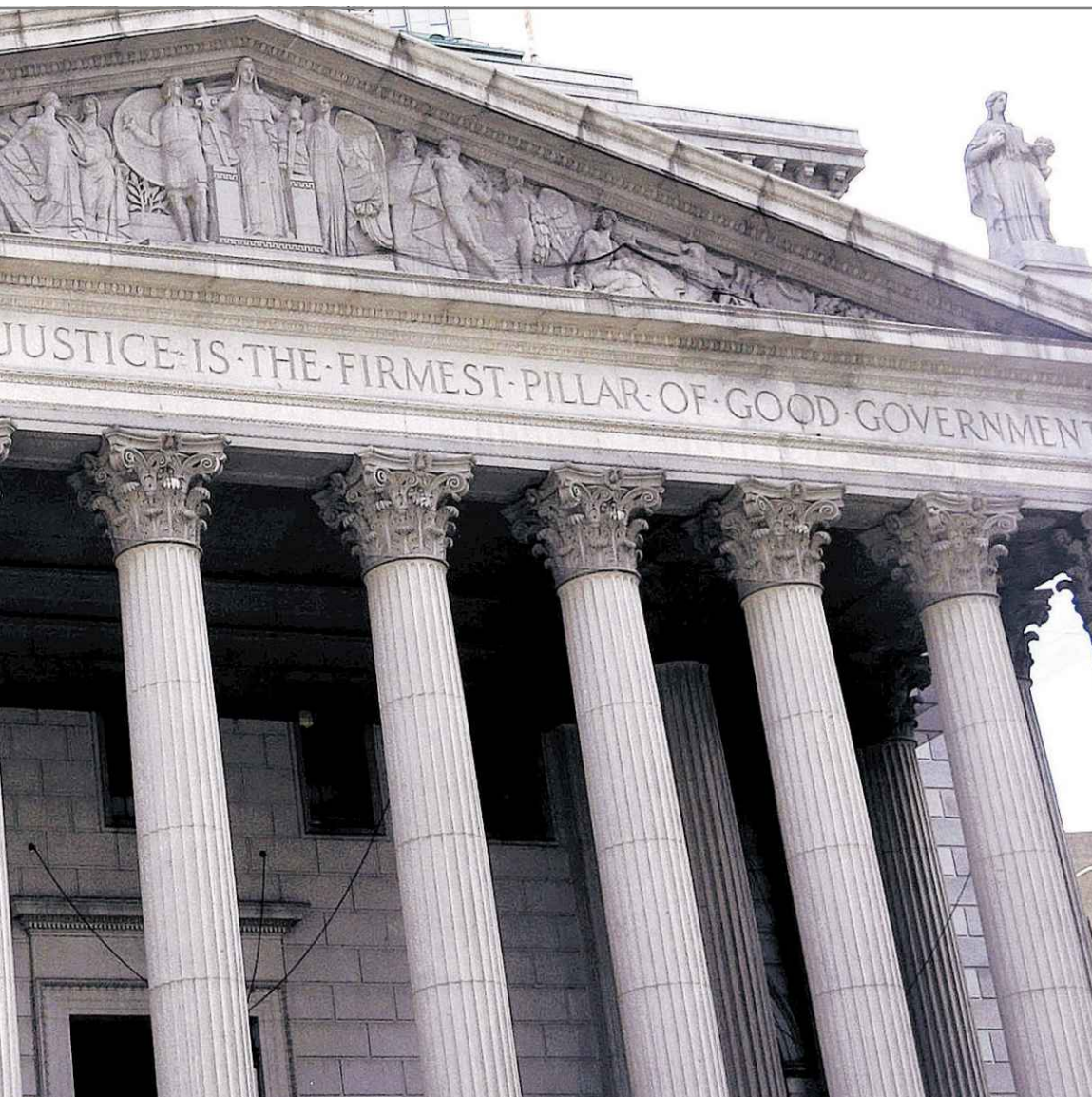
“It’s supposed to be a very temporary appointment, but oftentimes the acting ‘supremes’ do this for their careers,” Bonventre said. “It’s at that level that you don’t get the kind of scrutiny.”

But Rich Azzopardi, a Cuomo spokesman, said, “The number of Court of Claims judges has been unchanged for more than 13 years, predating this administration, and from our understanding, the Office of Court Administration deems

these positions vital to keeping up with ever-increasing caseloads.”

Jonathan Lippman, New York’s chief judge from 2009 to 2015 and now in private practice, said that the appointing of Court of Claims judges to be acting Supreme Court judges continues, even though the constitutional limit to create more elected Supreme Court judgeships hasn’t been exhausted.

“We want them to go up to the limit, but they choose ap-



AP / MARY ALTAFFER

“It is in the interest of this state to help ensure the wheels of justice continue to turn . . .”

— Cuomo’s spokesman Rich Azzopardi

can move people out of the Court of Claims that turn out pretty darn good,” Bonventre said. “I’m not saying these are all really good judges, but some of the best are assigned through the Court of Claims.”

Azzopardi said that even the candidates who worked for Cuomo at one time or were his political allies have additional experience as local judges, prosecutors or defense attorneys and in other areas of law. He said only three of the appointees who had worked in the attorney general’s office were hired by Cuomo.

“It is in the interest of this state to help ensure the wheels of justice continue to turn as quickly and efficiently as possible,” he said.

**‘Backdoor approach’**

But Assemb. Jeffrey Dinowitz (D-Bronx) called the process “a backdoor approach to deal with a problem that can be dealt with in a front-door approach.” He had pushed a bill for several years to consolidate all judgeships and create a merit-based selection process.

“That’s not what Court of Claims judges were meant to be for,” Dinowitz said, referring to the governor’s appointments. “Why do we need governors to make these decisions when there is a process to elect judges? The voters should decide.”

In addition, the process of appointing judges and sending them to state Supreme Courts to unfamiliar communities raises additional concerns, said state Sen. Velmanette Montgomery (D-Brooklyn), who sits on the Senate Judiciary Committee and has called for more judges of color.

“It does not result in representative judges being on the bench,” she said. The concern is compounded in racially diverse counties that could be served by an acting Supreme Court judge from another part of the state.

Every judicial district in the state except Manhattan still has

ample room under the constitutional cap for the legislature to add one or more Supreme Court judges, according to the state Office of Court Administration.

OCA said a primary reason more elected Supreme Court judgeships haven’t been created is because expansion is “a political act” that is up to the legislature, not the courts.

Every 10 years, the legislature has an opportunity to create new judgeships based on the census but it has not done so. The legislature also could enact legislation that could lead to a constitutional amendment, to be voted on by New Yorkers, to increase the number of elected judges, but that hasn’t happened, either.

Cost and politics have been cited as among the reasons, Hawkins said.

He said the legislature has estimated the cost of installing a new, permanent Supreme Court judge with staff at \$1 million. He said the recent increase in Family Court judges shows that the move is politically tricky because legislators all want new judgeships in their districts and many require that as the price of agreeing to add judgeships in other districts.

OCA said appointing a Court of Claims judge to serve full time as an acting Supreme Court judge isn’t cheaper than creating a new elected position, which they estimate at more than \$700,000.

Patronage is also a benefit under the current system that would be lost if enough elected judgeships were created, Bonventre said.

“All the good-government groups, the Fund for Modern Courts, they all come out with proposals to reorganize this Byzantine court system and straighten this mess out,” Bonventre said. “They don’t get anywhere, obviously for political reasons.”

“I’m sure it hasn’t escaped their attention,” Lippman said of the patronage benefit.

“There is a process to elect judges. The voters should decide.”

— Assemb. Jeffrey Dinowitz (D-Bronx)

**The state constitution limits the number of Supreme Court judges and requires they be elected.**

neys general who had worked for him and other previous hires and appointees by Cuomo; six other government lawyers; a former state senator who lost his seat after providing Cuomo with critical votes to pass his landmark gun control and same-sex marriage legislation; three candidates rejected by voters for the same level of judgeship; a judge whose previous job was deputy commissioner of the Department of Motor Vehicles; and another who was a lawyer for Cuomo’s former chief of staff.

Former Govs. George Pataki and David A. Paterson appointed the remaining number of judges, who include some former staffers. Some of them have been reappointed by Cuomo.

Court of Claims appointees have included the widely respected Susan Phillips Read, Pataki’s former counsel. “You

pointed judges instead. . . . When you have room within constitutional limits, I’d rather have it that way,” he said.

“But I’ll take more judges any way we can get them,” Lippman added, noting that the appointment practice began because of the need for judges during the crack epidemic of the 1980s.

Governors may appoint whomever they choose as long as they have 10 years’ experience as a lawyer. The nominees must be deemed “qualified” by

a committee made up of appointees from the governor, judiciary and other parties, and almost always are; and the appointees must be confirmed by the State Senate, which they routinely are. The state’s top judge also must agree to the appointments.

Cuomo has appointed more than two dozen new judges since 2011 to the Court of Claims who were also made acting Supreme Court judges. They include 11 former assistant attor-