

**Testimony before the Senate Standing Committee on the Judiciary on the
Nomination Process for Judges to the New York State Court of Appeals**

Submitted by the Hon. John F. O'Mara

Chair, New York State Commission on Judicial Nomination

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Senator Sampson, Senator Maziarz and other Honorable members of the Judiciary Committee, thank you for holding this hearing concerning the nomination process for Judges on the New York State Court of Appeals, and for inviting me to present testimony. While I am the Chair of the Commission and by law serve as its spokesperson, I appear today in my capacity as an individual Commissioner. I have served as a Judge on the New York State Court of Claims and as a State official in various capacities. I am with the law firm of Davidson & O'Mara P.C. in Elmira. I have been involved in the process of selecting judges for over 30 years as a delegate to judicial conventions and as a member of judicial screening committees, both state and federal. With this background, we have a keen appreciation for the Commission's independent role under the State Constitution, as well as this Committee's oversight role, and the Commission welcomes the opportunity to provide testimony on the process of the Commission on Judicial Nomination.

The Commission is committed to the goal that the Court of Appeals continue to reflect the best and brightest of New York's illustrious legal community. We know that this Committee shares this goal. The merit selection process for the Court of Appeals has worked well for 30 years. Yet, as with all public institutions, it can and should be periodically examined to ascertain whether it might be improved or strengthened.

Indeed, the Commission is engaged in its own process of self-examination. We appreciate the Committee's close attention to the process, and look forward to a continuing dialogue with the Committee and others vitally interested in the process.

I appear today under the constraints of Section 66 of the Judiciary Law, which provides: "All communications to the commission, and its proceedings, and all applications, correspondence, interviews, transcripts, reports and all other papers, files and records of the commission shall be confidential and privileged [subject to limited exceptions not applicable here]." Accordingly, the Judiciary Law circumscribes the areas that may be subject to my testimony.

BACKGROUND OF THE COMMISSION

Created in 1977 by an amendment to the New York State Constitution, the Commission on Judicial Nomination of the State of New York plays an important role in our State's government: its purpose is to see that the judges who sit on New York's highest court, the Court of Appeals, are chosen from among the State's most highly qualified and accomplished judges, practicing lawyers and legal scholars. Since its inception, the Commission has fulfilled this function by nominating to the Governor a small number of carefully considered candidates to fill vacancies on the Court of Appeals. The Commission's mandate is an important one: the Constitution requires that the Governor choose Judges of the Court of Appeals only from the nominees of the Commission.

The Commission on Judicial Nomination was a landmark, collaborative achievement of New York's judicial leaders, political leaders, the leaders of the bar, and public interest groups that were and are vitally committed to merit selection of judges,

including the Committee for Modern Courts, League of Women Voters, Citizens Union, and the American Judicature Society. The Commission has served New York's citizens well for 30 years.

BACKGROUND OF THE COURT OF APPEALS

The Commission's mandate reflects the importance of the Court of Appeals itself. In addition to being the highest court of the State of New York, the Court of Appeals is considered to be one of the most significant courts in the country. The Court is rightfully considered to be a beacon of the common law. The Court of Appeals decides profoundly important issues of law and, by the interpretation and advancement of the law, helps to improve life in a free society under the rule of law. As such, the Court shapes precedent that is looked to by courts not just in New York but across the nation.

The Court of Appeals consists of a Chief Judge and six Associate Judges, each of whom is appointed for a fourteen-year term and is subject to mandatory retirement at age 70. The Judges of the Court collectively decide all motions and appeals before them, thus demanding from the members of the Court not only legal excellence but also collegiality and a commitment to consensus-building. As a *certiorari* court, the Court of Appeals selects most of its caseload itself through applications for leave to appeal, and the Court is able to concentrate on the most important appeals with State-wide or national significance.

THE COMMISSION'S MANDATE

The State Constitution mandates that the Commission nominate candidates for the Court of Appeals on the basis of merit. Under the State Constitution, the Commission is required to recommend to the Governor "those persons who by their character,

temperament, professional aptitude, and experience are well qualified” to serve as a Judge of the Court of Appeals. *See* N.Y. Const. art. VI, § 2(c). This mandate is confirmed by statute. *See* N.Y. Judiciary Law § 63(1). The statutorily-prescribed composition of the Commission, as well as the rules and regulations governing its selection procedures, ensure that the Governor is provided with nominees who are well-qualified to serve on the Court of Appeals.

The Commission engages in extensive outreach to encourage well qualified candidates for the Court to apply. By statute, it encourages persons who may be well qualified for appointment to the Court of Appeals to agree to consideration by the Commission. *See* N.Y. Judiciary Law § 64(1). Under the Commission’s rules: “the chairperson and counsel shall arrange for broadly disseminated public notice of the existence of the vacancy, of the procedure to be followed by prospective candidates in order to be considered by the commission, and of any date that has been set after which questionnaires may no longer be accepted.” *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 7100.5(a). Moreover, “[e]ach member of the commission, and counsel, shall encourage persons who may be well qualified to become candidates for nomination to the Court of Appeals vacancy” *See id.* at § 7100.5(b). Consistent with the foregoing, the Commission endeavors to ensure that candidates from diverse geographic, professional and ethnic backgrounds, as well as from both genders, are among those well qualified candidates considered for nomination.

THE COMPOSITION OF THE COMMISSION

The twelve-member Commission is appointed on a multi-partisan basis. The Constitution achieves this multi-partisan structure by authorizing various public and

judicial officials to appoint the Commissioners. Appointments to the Commission are divided evenly among the three branches of government: the Governor and the Chief Judge of the Court of Appeals each appoint four members to the Commission; the Speaker of the Assembly, the Assembly Minority Leader, the Senate Majority Leader and the Senate Minority Leader each appoint one member.

No member of the Commission may hold an elected or judicial office, or serve as an officer in a political party. Only two former judges may serve on the Commission at any time. At least four members of the Commission must be non-lawyers.

The Commissioners have traditionally come from both public and private life, from business, professional and education as well as legal and political backgrounds, and from across New York State. The Commissioners are not compensated for their service, and each serves a four-year term. The current composition of the Commission reflects a broad cross-section of New York's legal, professional, and business communities, including four women and two members of ethnic minority groups.

ELIGIBILITY REQUIREMENTS FOR NOMINEES

In order to qualify for nomination, a candidate must be a resident of New York State and have been admitted to practice law in New York for at least 10 years. There are no other eligibility requirements. There is a long tradition of nominating distinguished legal practitioners, who were nominated and appointed to the Court of Appeals without prior judicial experience. A candidate need not have prior service as a judge and need not be a practicing lawyer to be eligible for the Court of Appeals.

THE PRE-NOMINATION PROCESS

Whenever a vacancy on the Court of Appeals arises, the Commission begins the nomination process which ultimately yields a short list of candidates for the Governor's selection. In anticipation of a vacancy, the process begins with extensive outreach by the Commissioners and counsel through, for example, publication of notices, direct notice to bar associations and law schools, and direct solicitation of potential applicants and recommendations for candidates.

The nomination process is initiated when candidates submit applications to the Commission or are recommended by others. The Commission requires each candidate to answer a comprehensive questionnaire which covers the candidate's personal, education and professional background, legal experience and community activities. The Commission also requires each candidate to submit a personal statement setting out the candidate's views on the law, the Judiciary, the Court of Appeals and his or her candidacy.

The Commission strives to obtain as complete a picture of each candidate's qualifications and achievements as possible. In addition to the questionnaires and personal statements, the Commission considers writing samples of the candidates and judicial decisions, if any. The Commission also considers each candidate's reputation in the community, and information provided on a confidential basis by colleagues, adversaries, and others who have come into contact with the candidate during his or her career. All interviewees have State Police background checks.

After gathering a wide range of information, the Commission meets as a body to interview each of the final round of candidates that it is considering. The candidates in

the final group considered by the Commission must also submit full information on their finances.

Only after this review process do the Commissioners cast votes to determine which candidates will be submitted to the Governor as the best qualified to serve on the Court of Appeals. The voting procedures used by the Commission ensure that no candidate will be recommended to the Governor without broad support from a large majority of the Commission, including the favorable votes of at least eight of the twelve Commissioners. *See* N.Y. Judiciary Law § 63(3).

By statute, all proceedings and records of the Commission are confidential. *See* N.Y. Judiciary Law § 66. This confidentiality encourages applications by candidates and protects their privacy. Moreover, it allows for candid debate by the Commission of each applicant's credentials. As noted by the American Judicature Society, "[a]pplicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination." *See* AJS Model Judicial Selection Provisions (Revised 2008) (Commentary on Model Rule __.05). Moreover, the "final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications." *Id.*

THE NOMINATION PROCESS

For the office of Chief Judge, the Commission must nominate seven candidates. For a vacancy in the office of Associate Judge, the Commission is required to nominate between three and seven candidates to the Governor. In the case of a vacancy in the office of Associate Judge, the Commission strives to nominate the maximum number specified under the Judiciary Law unless fewer candidates receive the affirmative vote of

at least eight members of the Commission. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 7100.7(b)(1). This overall range of numbers of applicants nominated by the Commission is generally consistent with the “best practices” embodied in the American Judicature Society’s Model Judicial Selection Provisions, which provide for the nomination of between two and five persons for each vacancy. As the American Judicature Society has explained, “the number [nominated] should be sufficiently low [so] that the commission nominates only the best qualified candidates.” *Id.* (Commentary on Section __.01).

The Commission does not rank the nominees submitted to the Governor. The Governor, with the advice and consent of the Senate, may only appoint judges to the Court of Appeals from the list of candidates nominated by the Commission. In this way, the Commission fulfills its duty to the citizens of this State by making sure that our State’s highest court -- our “court of last resort” -- is served by highly qualified and dedicated judges.

THE NOMINATION PROCESS IN 2008

On December 1, 2008, the Commission delivered its report to Governor Paterson, recommending seven well-qualified individuals as candidates to fill the vacancy created by the retirement of Chief Judge Judith S. Kaye, who reached the mandatory retirement age of 70.

The Commission’s report and its list on nominees were met with varying reviews. Professor Vincent Martin Bonventre of Albany Law School, a leading scholar concerning the Court of Appeals, observed: “This is perhaps the strongest list, whether for Chief Judge or Associate Judge, in the three decade history of the Commission and the appointment system.” On the other hand, according to published reports, Governor

David Paterson criticized the list of nominees as insufficiently diverse. And I know that members of this Committee -- including Chairman Sampson and Senators Diaz and Perkins -- have expressed similar concerns.

We appreciate your concerns and will attempt to address them today, or through further discussions with the Committee and its staff, subject to confidentiality constraints. We have also read the prepared testimony of former Senator John R. Dunne on behalf of the Committee for Modern Courts and NYC Corporation Counsel Michael Cardozo. I understand that the State Bar Association has appointed a special committee to study the judicial selection process. The views of such respected authorities will warrant serious consideration.

While I cannot discuss the internal proceedings or deliberations of the Commission, there are several points that I can make concerning the 2008 process, consistent with my duty of confidentiality.

The Commission Has Fulfilled Its Independent, Constitutional Duty

The Commission discharged its legal duties as defined by the State Constitution and the Judiciary Law. The Commission is duty-bound to evaluate the qualifications of candidates for appointment to the Court of Appeals and to recommend to the Governor those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office. In the case of a vacancy in the office of Chief Judge in 2008, the Commission completely fulfilled this constitutionally-prescribed obligation. The Governor's appointment of Justice Jonathan Lippman -- one of the seven nominees recommended by the Commission for the position of Chief Judge -- subject to the advice and consent of the Senate, has been widely applauded.

Commitment To Diversity

The subject of diversity -- a concern raised by the Governor and some members of this Committee -- has been addressed by the Commission. The Commission has expressed its commitment to diversity as follows:

The Commission . . . endeavors to ensure that candidates from diverse geographic, professional and ethnic backgrounds, as well as from both genders, are among those considered for nomination.

This statement appears on the Commission's website. *See* <http://www.nysegov.com/cjn/>.

There is no doubt in my mind that diversity in appointments to the Court of Appeals reinforces public confidence in the Judiciary and substantially enriches the jurisprudence of this diverse State. The people of the State of New York -- from the Niagara Frontier to Montauk -- are served by a jurisprudence that is animated by diverse experiences and backgrounds, and the unyielding commitment to equal justice that is borne of such diversity. This commitment is a moral imperative.

The New York State Commission on Judicial Nomination has fulfilled its commitment to diversity. The statistics (as collected to date) -- particularly those covering the past five vacancies on the Court of Appeals from 2006 through 2008 -- show that women and ethnic minorities have been well and proportionately represented on the Commission's lists of nominees to the Governor:

Women have been well represented on the Commission's lists. On the average, women represented 19% of the total applicants (21 of 112 applicants). On the average, women represented 15% of the nominees of the Commission (5 of 33 nominees). Accordingly, the number of women

nominated by the Commission roughly corresponds to the number of women in the applicant pool.

Ethnic minorities also have been well represented on the Commission's lists. On the average, ethnic minorities represented 23% of total applicants (26 of 112 applicants). On the average, ethnic minorities represented 18% of the nominees of the Commission (6 of 33 nominees). Accordingly, the number of ethnic minorities nominated by the Commission roughly corresponds to the number of ethnic minorities in the applicant pool.

Viewed from a larger perspective, we can look with pride to the Commission's nominations to the Court of Appeals in recent years. In the years that I have served on the Commission, those selected from our lists include two Appellate Division Presiding Justices, two Appellate Division Associate Justices, the Presiding Judge of the Court of Claims, a prominent trial judge, a distinguished trial lawyer, and by reappointment, two sitting Judges of the Court of Appeals. It is especially noteworthy that in 2008, women represented a majority of the Judges on the Court of Appeals -- reportedly the first time in history that an appellate court of last resort (state or federal) was comprised of a majority of female jurists. The diversity represented on the Court of Appeals is a model for the nation.

Our Shared Responsibility to Encourage Judicial Service

While we are rightfully proud of New York's tradition, more needs to be done particularly to encourage more applicants to apply to the Court. The statistics reveal a potential emerging trend that is of concern. While we are still collecting statistics, overall applications are down -- from 46 applications in 2003 to 17 applications in 2008. Notably, applications from women have also declined -- from 5 applications in 2007 to just 3 applications in 2008.

This decline is not due to a lack of outreach by the Commission; its work in this regard was excellent. As I pointed out in my letter to Governor Paterson on December 17, 2008:

With regard to the Commission's outreach efforts to solicit candidates for the upcoming vacancy in the office of Chief Judge, announcements of the vacancy and requests for applications were sent to all newspapers in the State of New York on three occasions, beginning in June of 2008. By the time of the September 8, 2008 application deadline, various newspaper articles had appeared highlighting Chief Judge Kaye's upcoming retirement, and the Commission's request for applications had appeared three times on the front page of the New York Law Journal, the most widely read legal periodical in New York. Additionally, in July 2008, the Commission sent letters requesting recommendations to the deans of every law school in New York, as well as to 19 Bar organizations across the State. Moreover, Commissioners and Commission staff personally spoke to and encouraged applications from dozens of potential candidates from a wide range of backgrounds, including college and law school deans, professors, state solicitor generals, former prosecutors, in-house counsel and prominent attorneys in private practice. I also understand that Commission staff spoke on several occasions to your Acting Counsel, encouraging your staff's input into these outreach efforts. As a result of these efforts, this Chief Judge vacancy was one of the most widely publicized and discussed in the history of the Commission.

I note, for the record, that direct notice of the vacancy was given to various local bar associations (including the Brooklyn Bar Association, a representative of which testified at your last hearing) and the Women's Bar Association.

Looking forward to the next anticipated vacancy on the Court in 2012, there is more outreach that can be done in order to try to reverse the overall decline in applications. The Legislature should appropriate funds for a more extensive outreach program to encourage and increase the number of applicants. We must also be mindful of the gross disparity between the salaries of judges and the salaries earned by highly skilled practitioners of the quality that I am sure this Committee and certainly our Commission and the public would like to see on the Court of Appeals. It should be further noted that federal judges not only receive higher salaries but can look forward to annual increases and lifetime tenure. Ultimately, it is our shared responsibility to do all we can to encourage applicants, recommend applicants, and respect the applicants and their privacy through an orderly and merits-driven process. We need to work together to ensure that all well qualified individuals -- from diverse backgrounds with diverse life experiences -- apply in large numbers so that we can continue to have the best and brightest individuals serve on the Court of Appeals.

Transparency

The Commission also strives for an open and transparent process, subject to its confidentiality constraints imposed by law. The Commission has launched a website which describes its work and the legal authorities under which it operates. *See* <http://www.nysegov.com/cjn/>. It has links to prior Commission lists, press releases and public correspondence. The website has received excellent reviews, and there have been

some suggestions for improvement, which we are seeking to implement. For example, we are adding biographical information concerning the Commissioners.

The Commission has also endeavored to provide more information to the public. After the Commission's December 1, 2008 report was delivered to the Governor, some criticized the report and its findings as insufficiently detailed. Notably, the level of detail in that report is the same as in all earlier reports -- none of which produced any such criticism. To address the comments concerning the December 1, 2008 report, I sent a supplementary letter to the Governor on December 17, 2008. That letter detailed the Commission's outreach for candidates in 2008, described the process undertaken by the Commission to evaluate candidates, and provided more detail concerning the qualifications, accomplishments, and leadership qualities that led the Commission to find that each candidate was well qualified to serve as Chief Judge of the Court of Appeals.

CONCLUSION

I appreciate this opportunity to provide testimony before the Committee. The Commission appreciates the Committee's interest in the judicial nomination process and its attention to the Commission's important mandate of ensuring that the New York Court of Appeals continues to display the high levels of judicial talent that our State deserves. We look forward to a continuing dialogue with the Committee and its staff -- and other interested parties -- to ensure that the most highly qualified individuals are nominated to serve on our State's Court of Appeals.