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Commission on Judicial Nomination
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The Honorable David A. Paterson
Executive Chamber
State Capitol
Albany, New York 12224

December 17, 2008

Dear Governor Paterson:

As Chair of the Commission on Judicial Nomination, I have taken note of your recent comments regarding the Commission's work. The Commission shares your goal of ensuring that nominees to the New York Court of Appeals continue to be talented individuals who reflect the best of New York's esteemed legal community.

One comment concerned the content of our report setting forth the qualifications of the nominees. Since its inception, the Commission's report of its nominees to the Governor has followed the format used in our most recent report of Chief Judge nominees. The Commission has used this format, which includes a biography setting forth the relevant accomplishments of each nominee, to convey an even-handed and neutral portrait of each nominee without appearing to recommend one candidate over another.

Pursuant to Section 66(2) of the Judiciary Law, the Commission is to provide you with access to papers and information relating to the nominees, which we did within days of sending you our December 1, 2008 report with regard to the upcoming vacancy in the office of Chief Judge. Further, when delivering the Commission report, the Commission's Counsel answered extensive questions posed by your Counsel concerning the candidates.

Although our report fully complies with the requirements of law, because of your observations, I am providing the information set forth herein for your consideration. Annexed to

this letter are expanded descriptions of each nominee, highlighting notable professional qualifications that the Commission considered important when determining, in their judgment and discretion, its most recent list of nominees for the vacancy created by the impending retirement of Chief Judge Kaye. This information further explains how each nominee, "by their character, temperament, professional aptitude and experience," is "well qualified" to serve as Chief Judge. Judiciary Law Section 63(1). As indicated, your Counsel already has this information but it is provided to you in this format to address your concerns.

Additionally, it has been observed that the Commission's report does not set forth its outreach efforts. While this is not required by applicable law, and has never previously been detailed in the Commission's report, set forth below is a description of our outreach efforts, to the extent we are able to describe them consistent with Section 66(1) of the Judiciary Law, which states that "[a]ll communications to the commission," including correspondence and interviews, "shall be confidential and privileged."

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.

The Commission was equally diligent in its evaluation of those who did apply to ensure that, as required by Section 63(1) of the Judiciary Law, each nominee "by their character, temperament, professional aptitude and experience" be "well qualified" to be Chief Judge. In this regard, I note that the Commission carefully considered the unique responsibilities of the Chief Judge, who is responsible under the State Constitution for managing, supervising, and leading New York's Unified Court System. The Commission and its staff carefully reviewed the voluminous applications provided by each applicant, which included extensive information concerning professional qualifications, writings, and background. Commission staff conducted numerous confidential interviews with leaders of the bench and Bar regarding each candidate whom the Commission interviewed. In the case of sitting judges, we spoke with attorneys who had recently appeared in their courts. In the case of practicing attorneys, we sought out and spoke with adversaries and co-counsel. Each candidate's writings were scrutinized, as were the events and circumstances of their employment. Each candidate interviewed was subject to a

State Police background check and was required to make a thorough financial disclosure. Through Commission staff, the resulting information from this investigation has been made available to your Counsel.

The Commission and its staff would be welcome to any communications from you regarding the merit selection process for Court of Appeals judges, and will promptly respond to the extent we are able to consistent with Judiciary Law Section 66.

With warm greetings, and highest regard, always,

Respectfully Yours,

John F. O'Mara
Chair

[In alphabetical order]

GEORGE F. CARPINELLO

George F. Carpinello, currently a partner in the law firm Boies, Schiller & Flexner LLP and based in Albany, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. Mr. Carpinello has been nominated by the Commission on three prior occasions, including in 2006 for the position of Chief Judge. He was interviewed by the Commission on November 11, 2008.

Mr. Carpinello has very strong professional experience and qualifications. He received his J.D. degree from Yale Law School, and was a member of the Yale Law Journal. Upon graduation, he served as a law clerk to Federal District Judge Newell Edenfield. He has practiced law at the highest levels of the profession, handling complex civil litigation matters in state and federal courts (including Bankruptcy Court), and has argued before the New York Court of Appeals. Mr. Carpinello served as counsel for the Adelphia Communications Corp. in its actions against the individuals eventually convicted in connection with Adelphia's collapse. He has been a law professor at Albany Law School of Union University (1986-1992), where he taught antitrust, business organizations, civil procedure, government ethics, and other subjects.

Mr. Carpinello has broad administrative experience in a variety of settings. Since 1985, he has served as the Chair of the New York State Advisory Committee on Civil Practice, which is the preeminent authority on civil practice and reform in the State. He was Director of the Government Law Center at Albany Law School of Union University (1990-1992), and served as President of the Legal Aid Society of Northeastern New York (1986-1988).

EVAN A. DAVIS

Evan A. Davis, currently a partner in the law firm of Cleary Gottlieb Steen & Hamilton in New York City, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. He was interviewed by the Commission on November 10, 2008.

Mr. Davis has extraordinary professional qualifications and has combined the practice of law with public service, at various levels of government, in the highest tradition of the profession. He received his J.D. degree from Columbia Law School and served as the Editor-in-Chief of the Columbia Law Review. Upon graduation, he was law clerk to Judge Harold Leventhal of the U.S. Court of Appeals for the D.C. Circuit, and thereafter, clerked for Justice Potter Stewart of the United States Supreme Court. In 1974, Mr. Davis joined the staff of the House Judiciary Committee where he led the Watergate and Cover-up Task Force. From 1975 to 1985 (and 1991-present), Mr. Davis has specialized in handling commercial litigation, criminal matters, and public interest litigation, and has litigated before the New York Court of Appeals. Mr. Davis served as Counsel to the Governor, Mario M. Cuomo (1985-1990), and led the negotiation of the Ethics Reform Act of 1986, the Toxic Tort Act, and other landmark reforms.

Mr. Davis has broad administrative experience in the public and private sectors. He was President of the New York City Bar Association (2000-2002), where his duties included overall supervision of finances, personnel and facility management. Mr. Davis has served for twelve

years as a Trustee and Board Vice Chair of Columbia University, where he chaired the Finance Committee. He had substantial supervisory responsibilities as Counsel to the Governor.

STEVEN W. FISHER

Justice Steven W. Fisher, Associate Justice of the Appellate Division, Second Department, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. Justice Fisher has been nominated by the Commission on three prior occasions: in 2000, 2002, and 2006. He was interviewed by the Commission on November 10, 2008.

Upon graduation, *cum laude*, from Brooklyn Law School, Justice Fisher was an Assistant District Attorney in Kings County. After engaging in the private practice of law, Justice Fisher became principal law clerk to the Hon. Milton Mollen, Presiding Justice of the Appellate Division, Second Department. Justice Fisher then served as a City of New York Criminal Court Judge and later as an Acting Justice of the Supreme Court in Kings and Queens County. Justice Fisher was elected Justice of the Supreme Court in Queens County, and in May 2004, he was appointed to the Second Department.

As a trial judge, Justice Fisher supervised the People v. Taylor death penalty litigation, known as the "Wendy's Massacre" case. As an Appellate Division Justice, he has written a number of well regarded opinions, including a dissent in Langan v. St. Vincent's Hospital of New York, 25 A.D.3d 90 (2d Dept. 2005) and the majority opinion in State Farm Mut. Auto. Ins. Co. v. Langan, 55 A.D.3d 281 (2d Dept. 2008), which addressed the rights of a decedent's same-sex civil union partner to sue for wrongful death and recover under the decedent's insurance policy, respectively.

Justice Fisher has considerable judicial administrative experience. For six years, he served as the Administrative Judge of the Eleventh Judicial District Supreme Court, during which time he oversaw the operations of courts in Queens County.

THEODORE T. JONES, JR.

Judge Theodore T. Jones, Jr., an Associate Judge of the New York Court of Appeals since 2007, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. He was interviewed by the Commission on November 10, 2008.

After serving in Vietnam, Judge Jones completed his legal education at St. John's University, School of Law. (His military service continued to 1975, when then Captain Jones was honorably discharged.) After working as an attorney at Legal Aid, Judge Jones was the confidential law secretary to Hon. Howard Jones, on the New York State Court of Claims. Over the next 15 years, Judge Jones engaged in the private practice of law in Brooklyn. In 1990, Judge Jones was elected Supreme Court Justice in Kings County, an office he held until his appointment to the Court of Appeals. In addition to his work as trial judge, Judge Jones was the Administrative Judge of Supreme Court, Civil Term, Kings County from 2006 – 2007.

As a trial judge, Judge Jones received praise for his handling of the highly publicized and time sensitive New York City Transit Strike cases. At the Court of Appeals, Judge Jones has

written a number of cogent decisions, including People v. Rawlins, 10 N.Y.3d 16 (2008), which examined the novel issue of whether New York courts would treat DNA and latent fingerprint reports as testimonial statements under the United States Supreme Court's Crawford analysis. Judge Jones also dissented in Haywood v. Drown, 9 N.Y.3d 481 (2007), a case examining whether a provision of New York's Correction Law violated the United States Constitution's Supremacy Clause; the United States Supreme Court granted certiorari and recently heard arguments in this case on the very issues set forth in Judge Jones's dissent.

JONATHAN LIPPMAN

Justice Jonathan Lippman, the Presiding Justice of the Appellate Division, First Judicial Department, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. He was interviewed by the Commission on November 11, 2008.

While at the Appellate Division, Justice Lippman has authored several scholarly opinions, including Fabiano v. Philip Morris Inc., 54 A.D.3d 146 (1st Dept. 2008), which held that punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose and are not available to redress a private harm. Further, several of his opinions have been affirmed by the New York Court of Appeals. See, e.g., People v. Packer, 49 A.D.3d 184 (1st Dept. 2008), aff'd, 10 N.Y. 3d 915 (2008) (search and seizure case); Roberts v. Boys & Girls Republic, Inc., 51 A.D.3d 246 (1st Dept. 2008), aff'd, 10 N.Y.3d 889 (2008) (negligence case arising from an injury incurred by a spectator at a baseball game).

Justice Lippman has broad administrative experience. As Presiding Justice of the Appellate Division, First Department, Justice Lippman manages one of the busiest appellate courts in the country. Prior to becoming a judge, he was Chief Clerk & Executive Officer of the Civil Branch of the New York County Supreme Court (1983-1989). In addition, he served as Deputy Chief Administrator (1989-1995), and then Chief Administrative Judge (1996-2007) for the New York Unified Court System. In those posts, Justice Lippman oversaw many advancements in the New York courts, including in the areas of jury reform, drug courts, the local justice court system, and expanding access to justice.

Justice Lippman has received many commendations. For example, he is the recipient of the 2008 William H. Rehnquist Award for Judicial Excellence by the National Center for State Courts (NCSC). The Rehnquist Award is presented annually to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics.

EUGENE F. PIGOTT, JR.

Judge Eugene F. Pigott, Jr., an Associate Judge of the New York Court of Appeals since 2006, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. He was interviewed by the Commission on November 11, 2008.

Before entering the SUNY at Buffalo School of Law, Judge Pigott was honorably discharged from the United States Army following his service in Vietnam. In 1982, after engaging in the private practice of law in Buffalo, he became Erie County Attorney. In 1986, Judge Pigott returned to private practice as chief trial counsel for the firm of Offermann,

Cassano, Pigott & Greco. In 1997, he was appointed to the New York Supreme Court and won election shortly thereafter. He was appointed to the Appellate Division, Fourth Department and elevated to Presiding Justice in 2000.

Shortly after his confirmation to the Court of Appeals, Judge Pigott authored the Court's most recent decision in the long running Campaign for Fiscal Equity matter, 8 N.Y.3d 14 (2006). Writing for the majority, Judge Pigott stated "[t]he role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational."

Judge Pigott has considerable administrative experience. As Presiding Justice of the Appellate Division, Fourth Department, Judge Pigott managed the courts serving citizens of the vast western and central upstate region of New York. Additionally, Judge Pigott previously served as Erie County Attorney and as the Erie County Legislature Clerk, where he supervised the Legislature's staff.

PETER L. ZIMROTH

Peter L. Zimroth, currently a partner at Arnold & Porter, LLP, was found by the Commission to be well qualified for the position of Chief Judge based on his character, temperament, professional aptitude, experience, qualifications, and fitness for office. He was interviewed by the Commission on November 11, 2008.

Mr. Zimroth has outstanding professional experience and credentials. He graduated in the top 10 of his class at Yale Law School, where he was Editor in Chief of the Yale Law Journal. Upon graduation, he served as a law clerk to Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia Circuit and to Justice Abe Fortas of the United States Supreme Court.

Mr. Zimroth has represented high profile clients in important litigation matters, including a former White House Counsel in the Whitewater matter, and Wyeth in numerous diet drug litigations. From 1987 to 1989, Mr. Zimroth was the Corporation Counsel of the City of New York, where he served as the City's chief legal officer and twice argued before the United States Supreme Court. From 1975 to 1980, Mr. Zimroth served as Assistant District Attorney of New York County and then Chief Assistant District Attorney. Mr. Zimroth also was an Assistant United States Attorney, and a Professor at New York University Law School.

Mr. Zimroth has considerable legal administrative experience. In addition to managing the complex diet drug litigations, as Corporation Counsel for the City of New York, he ran what is essentially a large law firm, consisting of hundreds of lawyers and a number of offices. As Chief Assistant District Attorney, he supervised the day-to-day operations of the District Attorney's office. Additionally, Mr. Zimroth is on the Board of Directors of the New York State Capital Defender Office, and was on the Board and Executive Committee of the Legal Aid Society.