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N.Y. Governor 'Outraged' by All-Male Court Picks

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New York Gov. David A. Paterson said Wednesday he was "outraged" he has not been given the option of considering a woman to succeed Chief Judge Judith S. Kaye.

Appearing at a New York City news conference with Attorney General Andrew M. Cuomo, the governor said he had asked Cuomo if he has legal options other than selecting a chief judge from the all-male list of seven candidates sent to him Monday by the Commission on Judicial Nomination.

However, Paterson conceded that he is probably bound by the state constitution and statute to pick one of the seven.

"Theoretically, I suppose I could just decline to make a selection," he said. "But the constitution is pretty instructive. It says the governor 'shall appoint' [from the commission's list]. And so I don't want to follow up an injustice with further injustice caused by me."

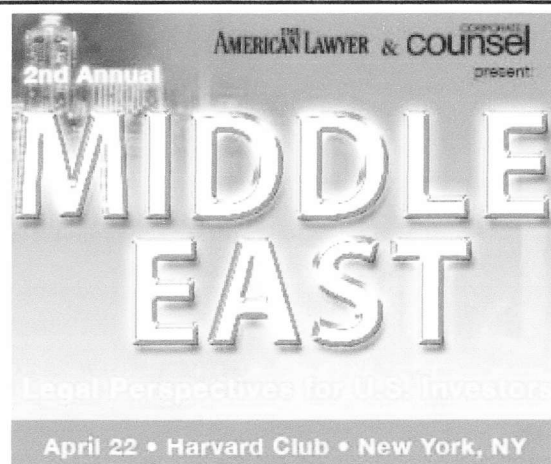
Paterson's counsel, Peter Kiernan, suggested that improvements in the selection process would have to wait for future vacancies. He said he expected the governor to adhere to the "mandatory" language in the constitution and select one of the seven men from the commission's list.

"That's the language of the constitution," Kiernan said. "He wanted to call attention to the flawed process and I think they did that emphatically."

The commission was created under a 1977 constitutional amendment. Supporters said it introduced a merit-based selection process for members of the Court of Appeals in place of an elective process that had become increasingly expensive in the 1970s.

Article 6, §2 of the state constitution states that "the governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission." Section 68 of Judiciary Law contains six references that the governor "shall make his appointment from among those persons recommended to him by the commission."

Paterson said the commission appears to be bound by statute to give him seven nominees for chief judgeship



openings and could not be made to expand the list, though he said he asked Cuomo to look into that question. Compelling the commission to redo a nomination process that began over the summer is not an option, Paterson said.

"It is not my real desire to ask the commission to go back and start this process over, because then the seven individuals who have rightly been brought forward would suffer and I don't want those individuals who worked hard to suffer in this process," Paterson said.

The governor said it is "most possible" that changing the commission's nominating procedures "would have to wait until the future" and not affect his selection of Chief Judge Kaye's successor.

The commission's list included Court of Appeals' Judges Eugene F. Pigott Jr. and Theodore T. Jones Jr., 1st Department Presiding Justice Jonathan Lippman, 2nd Department Justice Steven W. Fisher, and three private practitioners, George F. Carpinello, Evan A. Davis and Peter L. Zimroth. All are white except for Jones, the only black member of the Court of Appeals.

The list did not include Carmen Beauchamp Ciparick, the senior associate judge on the court and its only Hispanic. Ciparick acknowledged in September to the *New York Law Journal* that she applied for the chief judgeship. The other two women on the Court of Appeals, Judges Victoria A. Graffeo and Susan Phillips Read, said they did not apply.

At least one other female judge, Supreme Court Justice Fern A. Fisher, chief administrator for New York City civil courts, also said she had applied.

'GLASS CEILING'

Paterson stressed Wednesday that he considers all seven candidates on the commission's list "highly qualified" to be chief judge.

But he said he wondered how the commission "could feel comfortable sending forth a selection team of seven people and not one of them represents half of the human race."

"I am not happy about the message it sends to young women who are in college or who are thinking about applying to law school, young lawyers who are women who know the glass ceiling well, who wonder if they had the qualifications, would they have made the list?" Paterson said. "And the fact that that sentiment is out there is why I am standing here today."

For his part, Cuomo said that it is "clear that the governor should not be put in this position" of having no female candidate when choosing Kaye's successor.

Kaye, the first woman judge on the Court of Appeals and its first female chief judge, is stepping down on Dec. 31 due to the state's mandatory retirement rules.

"To circumscribe, to limit, the governor to only men, for the commission to say, 'We've searched this state. We couldn't find a single solitary qualified woman to serve on the bench' -- something is wrong with either the process or the legislation or the way we administer it," said Cuomo, whose father, former Gov. Mario Cuomo, appointed Kaye to the court and to its chief judgeship. "We will be exploring the available legal options."

Paterson acknowledged that he and Cuomo are uncertain whether they can do anything to change the nomination process before Jan. 15, when he must submit the name of Kaye's successor to the state Senate for confirmation proceedings.

The earliest he can nominate a candidate is Jan. 1.

The Commission on Judicial Nomination is made up of 12 members, four appointed by the governor, four by the chief judge and one each by the four majority and minority leaders of the Legislature. It is chaired by John F. O'Mara, a partner with Davidson & O'Mara in Elmira, who was appointed by former Gov. George E. Pataki.

In a statement Wednesday issued through the commission, O'Mara defended the commission's record of nominating women to the Court of Appeals, where women now outnumber men 4-3.

He said the commissioners and staff performed "extensive outreach" in identifying strong candidates "from as wide a pool of candidates as possible" to formulate the list now before Paterson.

"Of course, no process for selecting judges is perfect, and that includes the commission's process," O'Mara said. "We welcome the opportunity to work with the governor to analyze the process by which the commission selects

candidates."

O'Mara cautioned that it is "imperative that the commission maintain its independence."

To date, Paterson has made one selection as governor to the commission, Long Island lawyer Frederick K. Brewington.

The commission, citing confidentiality laws, does not divulge how many applications it gets for Court of Appeals openings, what it does to solicit applicants, how many candidates it interviews or why nominees do or do not make its lists.

There are four women on the commission, Ruth Friendly, Janet M. Kassar, Elena H. Kiam and Margaret S. Morton.

Members of the commission are not paid.

'ARTIFICIAL CURB'

Kiernan, Paterson's counsel, said Wednesday that the commission is supposed to report to the governor on the qualifications of each candidate it nominates and why they were recommended. But the commission typically releases only short biographical sketches of nominees with a general statement that all candidates have been found to be "well-qualified" for the court "by their character, temperament, professional aptitude, experience, qualifications and fitness for office."

Requiring more disclosure by the commission of its deliberations and more justification for why it picked its nominees could be among recommendations the governor will make, Kiernan said.

He also questioned whether the statutory limit on seven nominees for a chief judgeship opening is an "artificial curb" that could inhibit the commission's discharging of its constitutional duty to identify the "best-qualified" candidates.

'DIVERSE' APPOINTMENTS

New York City Corporation Counsel Michael A. Cardozo, an advocate for merit selection of judges, said in a statement that the "merit-based appointment system" had worked well and expressed satisfaction that the governor had not recommended "drastic changes" to the process.

"The present Court of Appeals selection system has produced an outstanding and diverse court," Cardozo said.

He acknowledged that "perhaps more steps can be taken to ensure that a larger, and more diverse, group of people apply to the nominating commission."

But Cardozo said the current system had produced "outstanding" judges, including four women, one Hispanic and three blacks.

"Even with Chief Judge Judith Kaye's retirement, there will continue to be three women, an Hispanic and an African American -- an ongoing reflection of the importance of a diverse court," he said.