

1 BEFORE THE NEW YORK STATE SENATE STANDING
2 STANDING COMMITTEE ON THE JUDICIARY

3 New York State Senate
4 Public Hearing on
5 the Selection Process for the
Chief Judge of the Court of Appeals

6 Hearing Room A
7 Legislative Office Bldg.
8 Albany, NY

9 February 3, 2009
1:20 p.m.

10 PRESIDING:

11 Senator John Sampson
12 Chair
Senate Standing Committee on the Judiciary

13 PRESENT:

14 Senator George D. Maziarz (RM)
15 Senator Bill Perkins
16 Senator George H. Winner, Jr.
17 Senator Andrew J. Lanza
18 Senator George Onorato

19 SPEAKER

20 STATEMENT/QUESTIONS

21 Honorable John F. O'Mara
22 Chair
23 John J. Halloran, Jr.
Deputy Counsel
24 NYS Commission on
Judicial Nomination

1 CHAIRMAN SAMPSON: First of all, Your
2 Honor, we want to thank you for coming to
3 this hearing.

4 I just want to take the opportunity to
5 introduce myself. I'm Senator John Sampson,
6 the chair of the Judiciary Committee, along
7 with my colleagues Senator George Maziarz,
8 who is the ranker; Senator Winter [sic];
9 Senator Lanza; and also, to my right,
10 Senator Bill Perkins.

11 Last week we started conducting
12 hearings with respect to the judicial
13 nominating process for the Chief Judge. It
14 was a concern of ours which arose with the
15 selection a couple of months ago of the
16 nominee for the Court of Appeals, the Chief
17 Judge position.

18 Our concern is not with the selection
19 of Jonathan Lippman, it's about the process.
20 And one of the concerns that we had and was
21 voiced by the Governor and also the Majority
22 Leader, Malcolm Smith, was the lack of a
23 woman on the final list. And especially in
24 this day and era, when you look at the

1 election of the first African-American
2 president. We also had a woman run for
3 president of the United States, a woman run
4 for vice president of the United States of
5 America.

6 And with all the other years in which
7 the committee has met and the number of
8 women that have been considered and also
9 placed on the Court of Appeals, it was a
10 major concern, not only to myself but also
11 all my colleagues. And what we're trying to
12 do is to see if this was just an aberration
13 or if we need to fix the entire system, the
14 nomination process.

15 Without further ado, Senator George
16 Maziarz.

17 SENATOR MAZIARZ: Again, I just want
18 to join my colleague, Chairman Sampson, in
19 welcoming you here today and thanking you
20 for your willingness to appear here and
21 answer some of these questions again.

22 I think I want to emphasize, at least
23 for my conference, that we're not displeased
24 at all with the choices that were sent up to

1 the Governor. But clearly, some members do
2 have questions. So this is more about the
3 process than it is anything else.

4 We think that, at least speaking for
5 the members on our side, we think that Judge
6 Lippman was an excellent choice. We think
7 that all those that you sent were
8 qualified -- were eminently, in fact,
9 qualified to be the Chief Judge. And we
10 look forward to confirming Judge Lippman in
11 the very near future.

12 Thank you, Mr. Chairman.

13 CHAIRMAN SAMPSON: Senator Winter.

14 SENATOR WINNER: Thank you, Senator
15 Simpson.

16 CHAIRMAN SAMPSON: Sampson.

17 SENATOR WINNER: And it's Winner.

18 (Discussion off the record.)

19 SENATOR WINNER: I want to welcome
20 John O'Mara, who's a distinguished citizen
21 in the state and a distinguished public
22 servant, serving not only in this capacity
23 but in many other capacities, including a
24 very high-level capacity with former

1 Governor Pataki and certainly as the
2 chairman of the Public Service Commission
3 and other posts that you've held, including
4 distinguished jurist.

5 We're delighted to have you here and to
6 get your input into this important process.
7 Thank you for being here, John.

8 CHAIRMAN SAMPSON: Senator Perkins.

9 SENATOR PERKINS: Thank you so much,
10 Mr. Chairman Sampson. I want to first
11 commend you for the leadership that you're
12 providing as the chair of this committee,
13 particularly as it relates to this issue.
14 Because, as was said by you and others, this
15 is not about an individual, it's about a
16 process.

17 And what is significant that brings us
18 here is that when you have a process that
19 raises some concerns, to ignore it
20 conceivably can aggravate the problem, if
21 there is a problem. And if there's not a
22 problem, that's even better, because at
23 least you've vetted the process to see where
24 its strengths are, where its weaknesses are,

1 and, if possible, where improvements can be
2 made.

3 And that's ultimately all that this is
4 about, to see how we can better do that
5 which we've been doing so well at to begin
6 with. So it's not a critique of any
7 individual, past or present, but rather an
8 opportunity to review a process that in many
9 respects has been highly regarded, but
10 nevertheless even the best require a review
11 to make sure that what we're doing we're
12 doing right and as best as possible.

13 So I'm glad to be a part of this
14 committee and to be a part of this
15 opportunity to join you in helping us to do
16 a better job at what we're doing.

17 CHAIRMAN SAMPSON: Senator Lanza.

18 SENATOR LANZA: Thank you, Chairman
19 Sampson.

20 And, Your Honor, I want to thank you
21 for being here as well. The Court of
22 Appeals, as you know, is such an important
23 institution here in this state and, for that
24 matter, here in our great country. It

1 really is, I think, a beacon of justice, and
2 it affects the lives of the people of the
3 state in so many ways. Perhaps many of them
4 don't even know how important it is, but it
5 is there as really a bastion of our justice
6 system.

7 And so I just want to thank you for
8 your service to that institution and to the
9 people of the State of New York, and thank
10 you for being here to help us, as has been
11 said here, to better allow us to better
12 understand the process.

13 CHAIRMAN SAMPSON: Your Honor. You
14 may proceed, Your Honor.

15 COMMISSIONER O'MARA: Thank you,
16 Senator.

17 And, Senators, it's a pleasure and an
18 honor to be here. We thank you for the
19 invitation. Let me say that I have with me
20 John Halloran, who is one of the assistant
21 counsel to the commission.

22 I can also tell you that our counsel
23 Steve Younger, who is president-elect of the
24 state bar, and Stuart Summit, our counsel

1 emeritus -- who has been with the commission
2 since it was formed, and of course has a
3 great deal of institutional knowledge --
4 will be happy to cooperate with your
5 committee in any way that you would like.

6 Let me start by saying, first of all, I
7 appear in my individual capacity as a
8 commissioner. And secondly, as I'm sure you
9 are well aware, I am prohibited by law from
10 discussing any individual candidates or the
11 deliberations of the commission.

12 I have submitted a prepared statement,
13 which I hope you all have and which of
14 course I will not read.

15 The commission itself greatly
16 appreciates your interest in the process.
17 The commission itself is reviewing the
18 process. Any process should be reviewed
19 from time to time. And so we welcome your
20 input and the input of all the people who
21 are looking at the process.

22 I believe that the process works well,
23 and I would urge that you proceed cautiously
24 with any proposed changes to the process.

1 With respect to your concern about the
2 present list, I do not believe it was an
3 aberration. I believe it contained a group
4 of what one Court of Appeals observer
5 commented was the finest list ever presented
6 by the commission over its over 30-year
7 history.

8 If we look at the history of the Court
9 of Appeals, we will find that before the
10 commission was created, every member of that
11 Court of Appeals was a white male, with the
12 exception of one interim appointment in
13 1974. And unfortunately, that gentleman was
14 not elected.

15 Since the formation of this commission,
16 we have had a number of minority judges on
17 the Court of Appeals. And for the first
18 time ever, I am told, in the history of the
19 country, the highest court of the state was
20 comprised of a majority of women, and that
21 was our Court of Appeals.

22 So I think the system has worked very
23 well. I don't think you can look at any
24 particular list and say, well, you know,

1 somebody wasn't represented or should have
2 been represented. That list represents, in
3 the judgment of this diverse commission --
4 and believe me, it's diverse -- their
5 judgment as to who the best qualified
6 candidates were that they interviewed at
7 that time.

8 And I'll be happy to answer any
9 questions that you have.

10 CHAIRMAN SAMPSON: Your Honor, when
11 you talked about the diverse commission, who
12 is the commission composed of?

13 COMMISSIONER O'MARA: Well, as you
14 know, the commission is composed of four
15 appointees of the Governor, four of the
16 Chief Judge, and one of each of the
17 legislative leaders.

18 At the present time, there are four
19 women and two minorities on the commission.
20 I believe we could have more diversity. And
21 I believe that we should consider some way
22 to encourage the appointing authorities to
23 look at more diversity in making their
24 appointments.

1 but they should be. And we'll get you the
2 list. If they're not on the list, they will
3 be.

4 I remember specifically that the
5 Women's Bar Association was on the list.

6 CHAIRMAN SAMPSON: When you say
7 Women's Bar Association, there's different
8 women's bar associations I guess in every
9 city or every county. Were there
10 notifications with respect to -- were they
11 given notifications?

12 COMMISSIONER O'MARA: Well, I know
13 that I asked our counsel if women's bar
14 associations were notified when the issue of
15 a woman not being on the list came up, and I
16 got an affirmative answer. But we'll get
17 you the specific names.

18 CHAIRMAN SAMPSON: And when you talk
19 about the interviewing process, the
20 interviewing process was conducted by the
21 commissioners or the counsels?

22 COMMISSIONER O'MARA: By the
23 commission as a whole.

24 CHAIRMAN SAMPSON: By the commission

1 as a whole. What involvement, if any, did
2 the counsels have in the interview process?

3 COMMISSIONER O'MARA: Well, we have a
4 very detailed questionnaire which we'll
5 provide you with a copy of if you don't
6 have. And after that questionnaire is
7 received, all of the commissioners receive
8 it and review it. Our counsel review it.

9 We all, commissioners and counsel, make
10 contacts -- for example, with a judge, with
11 fellow judges or litigants who have appeared
12 before the judge, attorneys who have
13 appeared before the judge. Practicing
14 lawyers, we talk to their adversaries, we
15 talk to the judges they've appeared before.

16 We do a very, very thorough
17 investigation. And then, with respect to
18 the candidates that we interview, we have a
19 State Police background investigation done.

20 CHAIRMAN SAMPSON: Do the applicants
21 in and of themselves provide you with the
22 references for you to reach out to, or the
23 opposing attorneys to speak to? Or you
24 just -- what is the criteria with respect to

1 that if there is no reference given by those
2 applicants?

3 COMMISSIONER O'MARA: We look at
4 their references, but we also look
5 ourselves. We do not restrict ourselves to
6 the references that are contained in the
7 applications.

8 CHAIRMAN SAMPSON: And when you say
9 you look yourselves, where do you look? Do
10 you look in the geographical area where they
11 practice, or do you go to the associations,
12 or do you go to the court systems to find
13 this information out?

14 COMMISSIONER O'MARA: Well, we go to
15 the court systems. And, for example, if we
16 have a lawyer -- I remember the last time we
17 had a lawyer from Albany, we talked to
18 lawyers in the Albany area.

19 So I can assure you that there is a
20 very, very thorough investigation done
21 involving a tremendous amount of time. And,
22 incidentally, all our attorneys, as are the
23 commissioners, work pro bono.

24 CHAIRMAN SAMPSON: Senator Winner.

1 SENATOR WINNER: Thank you.

2 John, with regard to your service on
3 this commission over -- how many years has
4 it been now?

5 COMMISSIONER O'MARA: Twelve years.

6 SENATOR WINNER: Twelve years. Have
7 you found that there has been a diminishing
8 pool of applicants for a position on the
9 Court of Appeals?

10 COMMISSIONER O'MARA: Yes. And I am
11 concerned, the commission is concerned.

12 We had never in the past released
13 numbers of applicants. But because of the
14 concern -- and incidentally, the commission
15 started its review, two weeks ago we had a
16 meeting. And after talking to our counsel
17 and talking to the commissioners, we
18 determined there is no breach of
19 confidentiality in releasing numbers.

20 So we are starting back in history and
21 looking at numbers. And for this vacancy,
22 there were only 17 applications.

23 CHAIRMAN SAMPSON: The question I
24 have, there was a list -- I'm sorry, Senator

1 Winner, I don't believe you had finished.
2 Go ahead.

3 SENATOR WINNER: That's okay.

4 I just wanted to follow up on that by
5 just saying that you found that there are a
6 declining pool of applicants. Has the
7 commission made any kind of study or review
8 or interviewed individuals or bar
9 associations as to what you can attribute
10 that lack of interest in the highest court
11 of the State of New York?

12 COMMISSIONER O'MARA: We have
13 attempted to learn that. We have talked to
14 bar associations. We have talked to judges.
15 We've talked to law school deans. We've
16 tried to determine. And it's difficult.

17 But I think, very frankly, there is a
18 diminished interest in being on the bench.
19 And if we look at the disparity in salaries
20 between the judges and some of the highly
21 skilled practitioners who you would like and
22 hope to be on the Court of Appeals, I think
23 that that is a deterrent.

24 CHAIRMAN SAMPSON: So you're saying

1 salaries is a deterrent for being --

2 COMMISSIONER O'MARA: Yes. Yes.

3 CHAIRMAN SAMPSON: -- for those being
4 considered for the Court of Appeals?

5 COMMISSIONER O'MARA: If we look at
6 federal judges -- look, I understand the
7 difficulty financially that the state finds
8 itself in. And so it's not a good time to
9 be talking about salary increases.

10 But if we look at federal judges,
11 they're paid more. They can look for an
12 annual cost-of-living increase, and they
13 have lifetime tenure. So naturally I think
14 there's a lot more interest in the federal
15 bench than there is in the state bench.

16 With respect to an issue of
17 diversity --

18 CHAIRMAN SAMPSON: I would agree with
19 that statement, but we know -- I don't know
20 how many individuals have been appointed to
21 the federal bench as opposed to we're
22 talking about the state court system,
23 anywhere from Civil Court to Supreme Court,
24 Appellate Division and the Court of Appeals.

1 My question is then why, why is there
2 diminished -- you're saying it's salaries
3 alone, or is it because individuals think
4 they have no opportunity to get through the
5 commission to even be nominated for such a
6 position?

7 Because when I look at the chart that
8 you sent me, in 2006 we had 26 applicants.
9 Again in 2006, you had 30 applicants. In
10 2007, you had 24. In 2007, you had 15. And
11 this, you had only 17 applicants. But the
12 issue is, are the same applicants applying
13 for the same vacancies when they arise in
14 these years?

15 COMMISSIONER O'MARA: A lot of the
16 applicants are the same.

17 And when I got these numbers yesterday,
18 I didn't think it presented a true picture,
19 because my recollection is we were getting a
20 lot more. So I went back myself to 2003,
21 which was the vacancy before, and there were
22 46 applicants in 2003. So I've asked
23 counsel to go back and give us a more
24 thorough chart as to what's happening.

1 CHAIRMAN SAMPSON: Senator Winner.

2 SENATOR WINNER: Well, to follow up
3 again, John, the number of applicants are
4 basically made up predominantly of people
5 who personally apply? Or are they from
6 people who nominate individuals?

7 I mean, I believe the statute says that
8 you can be considered by the commission both
9 upon your own application and upon the
10 application or recommendation of others. Is
11 that accurate?

12 COMMISSIONER O'MARA: That's very
13 accurate.

14 We get a number of recommendations.
15 And when we do, our counsel reaches out to
16 that individual and asks them to fill out an
17 application. They have to fill out an
18 application before we can consider them.

19 SENATOR WINNER: So just because
20 somebody nominates somebody doesn't mean --
21 the applicant immediately then can veto any
22 furtherance of the process as it relates to
23 that individual.

24 COMMISSIONER O'MARA: By simply not

1 filing an application.

2 SENATOR WINNER: Okay. And are there
3 a number of recommendations that are made by
4 others? Or is it almost predominantly the
5 individuals themselves that are the
6 applicants?

7 COMMISSIONER O'MARA: There are a
8 number that are made by others. I wouldn't
9 venture to guess what that is. But the
10 predominant number are those who apply on
11 their own initiative.

12 That would be fair?

13 MR. HALLORAN: That's a fair comment.

14 CHAIRMAN SAMPSON: Senator Lanza.

15 SENATOR LANZA: Thank you, Chairman.

16 Chairman O'Mara, are race, gender,
17 ethnicity, are those factors that are
18 actively considered when the commission
19 makes recommendations to fill vacancies on
20 the Court of Appeals?

21 COMMISSIONER O'MARA: The
22 Constitution and the statute say that we
23 shall consider temperament, character,
24 professional aptitude, and experience.

1 But I can assure you and the statement
2 on our website sets it forth that we do
3 consider diversity. And the statement there
4 reads: "The commission endeavors to ensure
5 that candidates from diverse geographic,
6 professional and ethnic backgrounds, as well
7 as from both genders, are among those
8 considered for nomination."

9 SENATOR LANZA: So all else being
10 equal, race or gender, ethnicity might be a
11 factor that the commission would consider in
12 tipping the scale in favor of a candidate
13 for a vacancy?

14 COMMISSIONER O'MARA: Speaking for
15 myself, yes.

16 SENATOR LANZA: Okay, thank you.

17 CHAIRMAN SAMPSON: So, Your Honor,
18 when you talk about the criteria according
19 to statute, the temperament -- but when
20 you're looking at the diversity issue and
21 the gender issue, what is glaring to me with
22 respect to the chart that was sent to me is
23 in every single year in which there was a
24 vacancy, there was always -- always --

1 either one or two, a female who was
2 nominated.

3 And that's going back to -- with
4 respect to this chart, from 2006, with the
5 vacancy of George Bundy Smith. And now,
6 2008, with the vacancy of Chief Judge Kaye,
7 a woman wasn't nominated at all.

8 And in each of those years, the
9 applicants that were reviewed in 2006, two
10 were female, three were ethnic minorities.
11 In 2006 with the Albert Rosenblatt vacancy,
12 six were females, four were ethnic
13 minorities. The vacancy of Judge Kaye in
14 2007, three were females, three were ethnic
15 minorities. With the vacancy in 2007, the
16 issue of Carmen B. Ciparick, four females
17 and three ethnic minorities. In 2008, with
18 the Chief Judge vacancy, there were three
19 women, four ethnic minorities.

20 However, except for the vacancy of the
21 Chief Judge this year, every single year a
22 woman was nominated. Every single year.

23 COMMISSIONER O'MARA: Well, that has
24 not been true in every year. There have

1 been --

2 CHAIRMAN SAMPSON: I mean, according
3 to the chart that you sent to me that I
4 received today.

5 COMMISSIONER O'MARA: Okay, that's
6 just the last whatever it is, five --

7 CHAIRMAN SAMPSON: Yeah, the last
8 three or four years.

9 COMMISSIONER O'MARA: I would not
10 read anything into that. Simply because if
11 you look at the history of what's happened
12 with the list the commission has put forth,
13 a majority of the court have been women.

14 CHAIRMAN SAMPSON: Your Honor, and
15 that is correct. And I agree with you
16 wholeheartedly. What I'm looking at is the
17 history. And that's why, when I look at the
18 history, they were taken into consideration.

19 But all of a sudden, this year, you had
20 three women and not one woman made the
21 nomination list. I mean, you have a history
22 in which they were on this list. This year,
23 none at all.

24 And this is what I'm saying. You know,

1 all along over the 30-year period with
2 respect to the commission you took into
3 consideration, as you were saying, the
4 gender, the diversity issue. And it may not
5 be reality, but sometimes perception becomes
6 reality. When you're looking at a long
7 history in which there was not an issue,
8 then all of a sudden it is an issue this
9 year, there's a perception that something
10 else was going on.

11 It may not be reality, but we know that
12 sometimes perception becomes reality. And
13 especially when we're talking about the
14 judicial system in which we're asking the
15 people of the State of New York to have the
16 faith and confidence in our judicial system.
17 But when something like this occurs, a light
18 bulb or a question mark occurs to
19 individuals to start questioning the
20 process.

21 As I said before, was this just an
22 aberration, or was there something more
23 there because of the history that this
24 committee has?

1 Just for the record, just for the
2 record, I want to state that the Senate,
3 with all of my colleagues up here, have on
4 at least two and possibly three occasions,
5 when times were better, passed a salary
6 increase for judges throughout the State of
7 New York. It was the inability of former
8 Chief Judge Kaye to want to take on Sheldon
9 Silver and the New York State Assembly to
10 get that bill passed. That's why judges are
11 inadequately paid in New York State today.

12 I just want to make that point, because
13 that would not be in the paper tomorrow.

14 COMMISSIONER O'MARA: I'm not sure
15 that's the only or maybe even the main
16 reason. But certainly, at least in my
17 judgment, it's a factor, Senator.

18 CHAIRMAN SAMPSON: What is the pay
19 for a judge on the Court of Appeals?

20 COMMISSIONER O'MARA: Associate
21 judges are \$151,000.

22 CHAIRMAN SAMPSON: And do you know
23 what the pay is for Supreme Court judges?

24 COMMISSIONER O'MARA: Supreme Court

1 judges are up around \$200,000. I know that
2 a Circuit Court of Appeals judge, which is
3 below the Supreme Court, is 171 or 172.

4 SENATOR MAZIARZ: There's three
5 lawyers here, and they all said they'd take
6 the job.

7 CHAIRMAN SAMPSON: But with respect
8 to -- I'm asking for Supreme Court judges in
9 New York State.

10 COMMISSIONER O'MARA: In New York
11 State? I believe 137. I think it's 137.

12 CHAIRMAN SAMPSON: So it's 136.5. So
13 it's an increase to be an associate judge on
14 the Court of Appeals; correct?

15 COMMISSIONER O'MARA: Oh, absolutely.

16 CHAIRMAN SAMPSON: So, I mean,
17 there's not such a deterring effect with
18 respect to the salary issues when you're
19 going either from the Supreme Court, the
20 Appellate Division, to the Court of Appeals.

21 So the issues cannot be purely a salary
22 issue, because there is an increase when
23 you're going from Supreme Court or the
24 Appellate Division to the Court of Appeals.

1 personal, have it in for some of the
2 candidates that appear before some of these
3 panels.

4 One speaker talked about two incidents
5 in which two -- one was an already sitting
6 Supreme Court judge who was coming up for
7 reappointment and they were trying to
8 sabotage her reappointment.

9 But to get even further with respect to
10 the makeup of the commission, when you have
11 12 individuals, four appointed by the
12 Governor, four appointed by the Chief Judge,
13 and one each by the Minority Leader and
14 Majority Leader in both houses, the issue is
15 that you can have five individuals who can
16 hold one -- possibly hold the process
17 hostage because you need two-thirds votes.
18 You need eight out of the 12 for the
19 individual to come out of the committee.

20 My question to you is, why can't we go
21 to just a simple majority, then?

22 COMMISSIONER O'MARA: Well, certainly
23 the Legislature has that prerogative. But I
24 would urge extreme caution in doing that.

1 CHAIRMAN SAMPSON: Why?

2 COMMISSIONER O'MARA: Well, I think
3 that the framers of the constitutional
4 provisions and the statute were thinking
5 about preventing an unqualified or a barely
6 qualified applicant who might be able to get
7 a majority of the commission and without
8 real unanimous -- or, you know, substantial
9 support on the commission, be on the list.

10 And if we look at it, it isn't too much
11 more of a requirement. Because seven is a
12 majority on the commission, and the statute
13 requires eight. So there's not a great
14 difference.

15 CHAIRMAN SAMPSON: But the question
16 that I pose to you is five individuals can
17 get together --

18 COMMISSIONER O'MARA: Yes,
19 absolutely.

20 CHAIRMAN SAMPSON: -- to prevent a
21 nominee from even coming out.

22 COMMISSIONER O'MARA: Yes. A
23 successful nominee has to have eight
24 affirmative votes so that five -- if five

1 people vote against that candidate, he will
2 not or she will not make the list.

3 CHAIRMAN SAMPSON: And this is what
4 we talked about, a possible suggestion.
5 Instead of giving the Chief Judge four
6 appointees, why not decrease that to three,
7 four remain with the Governor, and each
8 Majority Leader and Minority Leader are
9 given two appointments to this commission?
10 What do you think about that?

11 COMMISSIONER O'MARA: I would be
12 reluctant to recommend changing the makeup
13 as it presently is.

14 But I would urge consideration of some
15 way to encourage more diversity.

16 CHAIRMAN SAMPSON: How would we
17 encourage more diversity?

18 COMMISSIONER O'MARA: Well, I don't
19 know. Perhaps requiring that one of the
20 Governor's appointees and one of the Chief
21 Judge's appointees be recommended by the
22 State Bar Association. Or -- I really don't
23 know what the answer to it is. But any way
24 that we can encourage more diversity on the

1 commission I think would be good.

2 And I have to say -- this is a thought
3 that occurred to me since our commission met
4 a week ago -- it might be a good thing to
5 have term limits for commissioners. So you
6 get some new thinking, some new blood. And
7 I know my term is up next month, and 12
8 years has been plenty.

9 CHAIRMAN SAMPSON: There presently
10 are no term limits?

11 COMMISSIONER O'MARA: There are no
12 term limits. You're appointed for a
13 four-year term, but there is no limit on how
14 many terms you can serve.

15 CHAIRMAN SAMPSON: So there's no
16 limit on the number of terms you can serve.

17 COMMISSIONER O'MARA: That's right.

18 SENATOR MAZIARZ: Has the Governor
19 talked to you about reappointing you at all?

20 COMMISSIONER O'MARA: No, I hope he
21 doesn't. I think 12 years is more than
22 adequate.

23 SENATOR PERKINS: What is the average
24 term? You did 12. Anybody there longer

1 stipends or --

2 COMMISSIONER O'MARA: None.

3 SENATOR PERKINS: No kind of --

4 COMMISSIONER O'MARA: Absolutely
5 none.

6 CHAIRMAN SAMPSON: Another possible
7 proposal that came up is increasing the
8 list; instead of from three to seven
9 nominees, to increase it maybe to nine
10 nominees.

11 COMMISSIONER O'MARA: Well, again, I
12 don't think that would be a good idea. This
13 is a nominating committee, not a screening
14 committee. If it were a screening
15 committee, I would say probably more would
16 be appropriate.

17 But if you look at all the, I guess,
18 good-government committees in the country --
19 the American Judicature Society, Modern
20 Courts -- all recommend low numbers, and in
21 fact many recommend lower numbers than we
22 have.

23 CHAIRMAN SAMPSON: Why is that?

24 COMMISSIONER O'MARA: They want to

1 get the cream of the crop.

2 CHAIRMAN SAMPSON: But, I mean, what
3 does the number -- getting the cream of the
4 crop from three as opposed to selecting nine
5 individuals? You can get the cream of the
6 crop with nine individuals.

7 Because I'm assuming once the
8 applicants submit their applications and
9 once you review them, at that point in time
10 I believe you have the cream of the crop.

11 COMMISSIONER O'MARA: Well, we're
12 looking for the most qualified candidates.
13 And seven is a large number.

14 CHAIRMAN SAMPSON: But when you
15 say -- what I'm trying to get at is when
16 you're saying the most qualified candidates,
17 you have applicants and then you vet the
18 applications. And then at that point in
19 time are you saying we do not have the cream
20 of the crop at that point in time, or do you
21 have to continue to vet those individuals?

22 COMMISSIONER O'MARA: I think we have
23 to continue.

24 CHAIRMAN SAMPSON: So the process is

1 you receive the applications, you vet out
2 those who don't make the cut, and then you
3 start interviewing the candidates.

4 COMMISSIONER O'MARA: After doing
5 extensive research on each of those
6 applicants.

7 CHAIRMAN SAMPSON: And once you make
8 that cut and once they pass the extensive
9 background checks and everything else, that
10 is when you come up with the possible pool
11 of individuals; correct?

12 COMMISSIONER O'MARA: Yes.

13 CHAIRMAN SAMPSON: And what criteria
14 at that point in time do you use to pick out
15 the cream of the crop?

16 COMMISSIONER O'MARA: Well, we use
17 the same criteria that the Constitution and
18 the statute sets forth. We consider our
19 statement on diversity, but we look -- we're
20 looking for the most qualified out of that
21 group.

22 CHAIRMAN SAMPSON: So it would be --
23 my analysis would be that those who do not
24 make this cut, get on this list, they have

1 not met the requirements that you're looking
2 for.

3 COMMISSIONER O'MARA: We have not
4 found those who are on the list to be the
5 most qualified.

6 CHAIRMAN SAMPSON: So those who don't
7 make this last cut, they are considered not
8 the most qualified; is that correct?

9 COMMISSIONER O'MARA: No, I wouldn't
10 say they're unqualified at all, or we
11 probably wouldn't have been interviewing
12 them in the first place.

13 CHAIRMAN SAMPSON: But that's the
14 point I'm making. So when you're talking
15 about the cream of the crop, they wouldn't
16 have made it this far if they weren't the
17 cream of the crop.

18 So what I'm saying is, what is the
19 difference between those individuals who
20 make the cut and those individuals who make
21 the list? You know, is it a certain
22 criteria? What are you looking at? Is it
23 you're looking at their references or -- I
24 mean, what are you looking at?

1 COMMISSIONER O'MARA: We're looking
2 at them, we're looking at their writings,
3 we're looking at what they've done
4 professionally. We're looking at the total
5 body of their work as a judge or a lawyer,
6 whatever it may be.

7 And out of that, when we arrive at a
8 final list, it is the judgment of the
9 12 commissioners that they are the most
10 qualified of the group that we have
11 interviewed.

12 CHAIRMAN SAMPSON: And I'm just
13 telling you the problem that I have, and
14 maybe some of my colleagues -- okay, that I
15 have -- is one of the candidates for the
16 position of Chief judge was Associate Judge
17 Carmen Ciparick. Am I correct?

18 COMMISSIONER O'MARA: I cannot
19 discuss individual candidates.

20 CHAIRMAN SAMPSON: Okay. The issue
21 is -- I know she put in an application.
22 That's all I know, since you can't discuss
23 individual candidates.

24 But when you are telling me that you're

1 looking for the cream of the crop, I'm
2 trying to pinpoint you down. What's the
3 criteria that you're looking for when you're
4 looking for the cream of the crop if these
5 individuals have been vetted, passed a
6 background check? What's the difference?
7 You know, how is that decision made if
8 you're taking in not only criteria and
9 temperament but if you're looking at gender,
10 you're looking at diversity?

11 COMMISSIONER O'MARA: We're looking
12 at everything. Character, temperament,
13 professional aptitude, experience. We're
14 looking at the interview that we conduct
15 with the candidates. We're looking at all
16 the writings that they've done, decisions
17 that they've made. We've talked to people
18 who have, if they're judges, appeared before
19 them. If they're litigants, people who have
20 litigated against them.

21 And when we get all that information
22 together, the final list is, in the judgment
23 of the committee as a whole, a list of the
24 most qualified people that we've seen.

1 CHAIRMAN SAMPSON: So for this Chief
2 Judge vacancy, there were only three women
3 that applied, according to the analysis, the
4 chart that you gave me. Correct?

5 COMMISSIONER O'MARA: Yes.

6 CHAIRMAN SAMPSON: Senator Perkins.

7 SENATOR PERKINS: I want to sort of
8 pursue a little bit this line of questioning
9 about the cream of the crop or the most
10 qualified. Because I'm familiar with a
11 different system, but maybe somewhat
12 comparable, in New York County, Manhattan,
13 where they create a panel of sort of lawyers
14 and interest groups when they're in the
15 process of selecting a Supreme Court judge
16 for the specific district, I think it's
17 Supreme District 1.

18 And the panel reports out, on the basis
19 of those qualifications or criteria that you
20 just outlined, the three best choices for
21 every vacancy to be filled. And those
22 choices are then submitted to the judicial
23 delegates that are elected, and they then
24 make a decision based on those who were

1 reported out.

2 And obviously at that point the
3 political process may become more a part of
4 the decision because of the fact that you
5 know that these three for this vacancy have
6 been vetted and judged by those qualified to
7 be cream of the crop. And then, again,
8 those who are elected to be judicial
9 delegates make a choice, knowing that the
10 choice will be someone who has at least been
11 already considered to be cream of the crop.

12 So I'm just wondering, when that cream
13 of the crop from those that are vetted,
14 right, or presented -- how do you know
15 politics is not at play at that point?
16 Because you know that group that has been
17 vetted is the cream of the crop. Therefore,
18 all are qualified at the highest standards,
19 with some variations depending upon their
20 records and their professional experiences.
21 But at that point, how do we discount the
22 possibility that politics is at play?

23 COMMISSIONER O'MARA: When we arrive
24 at a list to be interviewed, we're not

1 judging those people to be most qualified.
2 We're saying that from the information we
3 have about them, they look to us like they
4 should be further vetted to determine
5 whether or not they are among the most
6 qualified.

7 SENATOR PERKINS: And when you do
8 that further vetting --

9 COMMISSIONER O'MARA: That's when we
10 interview them and arrive at a final list.

11 SENATOR PERKINS: That final list.
12 Of how many?

13 COMMISSIONER O'MARA: Well, in the
14 case of a Chief Judge, it has to be seven.
15 In the case of an associate judge, it's at
16 least three and no more than seven.

17 SENATOR PERKINS: Now, how do we
18 know, after that vetting, that politics is
19 not at play? We assume it's not at play
20 because all of you are people that are
21 looking at it with some scientific
22 objectivity? Or, you know, how do we avoid
23 that? How do we assure that that's not
24 what's at play?

1 COMMISSIONER O'MARA: I think the
2 answer to that is --

3 SENATOR PERKINS: Or it's an act of
4 faith, a matter of faith in the process?

5 COMMISSIONER O'MARA: No, I don't
6 think so.

7 The appointing authority for the
8 various commissioners are so diverse -- the
9 Governor, the Chief Judge of the Court of
10 Appeals, and the four legislative leaders --
11 that while somebody in their voting may, you
12 know, take into consideration politics, we
13 can't stop that.

14 But I can assure you this, we never
15 permit an open discussion of political
16 considerations. I have never -- while I
17 can't discuss deliberations, I guess I can
18 say I've never heard that discussed.

19 SENATOR PERKINS: You've never heard
20 a discussion of the politics of the
21 decision-making, is that what you're saying?

22 COMMISSIONER O'MARA: Yes.

23 SENATOR PERKINS: Well, since you
24 mentioned the terms that people have served,

1 there are those who are there who have been
2 appointed by legislators that are no longer
3 around. Governors, right? You said some
4 may be there for 30 years.

5 COMMISSIONER O'MARA: Well, no, but
6 they're reappointed every four years. They
7 have to be reappointed.

8 SENATOR PERKINS: Okay. So they're
9 appointed by legislators, right,
10 politicians?

11 COMMISSIONER O'MARA: Those that have
12 been there the longest are legislative
13 appointees, yes.

14 SENATOR PERKINS: And the others
15 are --

16 COMMISSIONER O'MARA: Chief Judge of
17 the Court of Appeals, they change -- it
18 seems to me, in my 12 years, they change
19 more frequently. The same with
20 gubernatorial appointees.

21 SENATOR PERKINS: Okay. Well, I
22 guess my concern is that when you talk about
23 the cream of the crop and those who are most
24 qualified by virtue of a variety of criteria

1 which to some extent establish a
2 professionalism and your experience but
3 don't necessarily screen out other values
4 that are political values. And I was just
5 wondering if there was any discussion about
6 how do you account for that, how do you
7 allow for that.

8 COMMISSIONER O'MARA: It doesn't
9 happen.

10 SENATOR PERKINS: There's no politics
11 whatsoever in this process?

12 COMMISSIONER O'MARA: I can't tell
13 you what's in the individual mind of a
14 commissioner. I can only tell you that
15 plays no part in deliberations.

16 SENATOR PERKINS: In the
17 conversations and discussions that take
18 place.

19 COMMISSIONER O'MARA: Yes.

20 CHAIRMAN SAMPSON: And the
21 deliberations are done when all the
22 commissioners are involved in this
23 deliberation?

24 COMMISSIONER O'MARA: Yes.

1 CHAIRMAN SAMPSON: We've also been
2 joined by Senator Onorato.

3 SENATOR PERKINS: Let me understand
4 something about how would we know that the
5 deliberations are strictly about resumes,
6 strictly about resumes in terms of, you
7 know, professional experience, writings,
8 temperament. How do we know --

9 COMMISSIONER O'MARA: Since the
10 statute precludes us from discussing
11 deliberations, I guess there is no way to
12 know.

13 CHAIRMAN SAMPSON: Discussing the
14 deliberations amongst yourselves? What do
15 you mean, the statute prevents you from
16 discussing the deliberations amongst
17 yourselves?

18 MR. HALLORAN: No, no, it prevents
19 anyone on the commission from discussing
20 what went on in deliberations.

21 CHAIRMAN SAMPSON: Because I know the
22 information that comes to the commission is
23 confidential. But anything that comes out
24 of the commission is open to -- is free

1 game; am I correct?

2 COMMISSIONER O'MARA: Just the list
3 of nominees.

4 CHAIRMAN SAMPSON: Just the list of
5 nominees.

6 Because I notice that there was an
7 issue with a letter that you sent to
8 Governor Paterson in which you, I guess,
9 detailed the criteria of each nominee that
10 came out of the commission. Am I correct?

11 COMMISSIONER O'MARA: Yes, there was
12 a complaint that there was insufficient
13 detail.

14 First of all, let me say that that
15 report was in exactly the same form as every
16 report that's been handed up since the
17 beginning of the commission. However,
18 hearing the criticism, we prepared an
19 additional report and gave additional
20 information to the --

21 CHAIRMAN SAMPSON: What's the
22 additional information you gave?

23 COMMISSIONER O'MARA: More
24 information about the background of each

1 candidate, more information about the extent
2 of the outreach that the commission had done
3 in finding candidates.

4 SENATOR PERKINS: I apologize, I have
5 to run to another hearing. But I want to
6 again express my appreciation for your
7 presence and your contribution to this very,
8 very important subject.

9 Mr. Chair, I have a concern about
10 transparency. I have a lot of faith in
11 people's intentions, but I can't really
12 account for this process in as transparent a
13 way that I think would be helpful not just
14 for us, but for the public as well.
15 Especially when we have these instances
16 where there's a lot of concern.

17 And I'm just wondering, how do you
18 think about the concern of transparency?
19 Because in a sense, this is a secret kind of
20 decision-making process that takes into
21 consideration a lot of faith on those who
22 are making that decision, significantly that
23 they're not making it from a political point
24 of view.

1 And that may be in fact the case, but
2 it would be great if there was a way to be
3 more assuring that through some sort of
4 transparency or somehow or other that that's
5 the criteria that's being used. And even if
6 it's not the criteria that's being used,
7 even if there is some other criteria, just
8 to be sure what are the criteria that this
9 final decision-making process involves.

10 Do you have any thoughts about how
11 to -- other than faith, how to assure folks
12 that this is what it is?

13 COMMISSIONER O'MARA: I guess my
14 thought is it's a conundrum, because we all
15 want more transparency, but at the same time
16 we want to absolutely protect the
17 information about those people who are
18 applying for this position.

19 I think perhaps the answer to that is
20 that the appointing authorities should
21 insist that their appointees on the
22 commission see that that is the way that the
23 deliberations are conducted.

24 CHAIRMAN SAMPSON: I mean, we can

1 ask, you know, we can ask them to do that,
2 such as we can ask your committee to take it
3 into consideration. But we're basically
4 acting on faith that these individuals will
5 use their best judgment and use the criteria
6 that was put forth.

7 And this is why we talk about the issue
8 of transparency. Because what you may have
9 done or what you did do was totally correct
10 and aboveboard, but there's always -- you
11 know, we deal in sort of that political
12 realm and in the political realm, not
13 reality, a lot of time it's perception.

14 And as I go back to what I said before,
15 this commission for 30 years has always
16 considered, as you're saying, the question
17 of diversity and gender with respect to
18 their selections. But all of a sudden, this
19 one year, not one woman made the nominating
20 list. And I'm just -- it's troubling.

21 COMMISSIONER O'MARA: I think the
22 answer to that concern is that if the
23 appointing authority has sufficient
24 confidence in their appointee to name them

1 to the commission, they should have
2 confidence that they will conduct themselves
3 appropriately.

4 CHAIRMAN SAMPSON: And we do. And
5 I'm quite sure they do conduct themselves
6 appropriately. And I would say everybody
7 has been conducting themselves
8 appropriately.

9 But it's a glaring point, when you look
10 at the history -- I'm just saying when you
11 look at the history, if you look at the
12 history for the 30 years and you look at the
13 women who have applied, the women who have
14 been nominated, and then this year not one
15 woman made the cut. And this is troubling.

16 This is a concern, and this is why
17 we're just voicing our concern and just --
18 now we're calling for, we're looking at what
19 is the criteria for those who make this
20 final cut. What are we looking at? We want
21 to make sure that politics is not playing
22 any point, because our concern is making
23 sure that the people of the State of New
24 York have faith in that judicial system.

1 That's very important to all of us.

2 Senator Winner.

3 SENATOR WINNER: Just to follow up on
4 one question, that with only 17 people on
5 the list, or applicants this time, clearly,
6 if this pool continues to diminish and you
7 have a requirement by statute to nominate
8 seven people, we could be going in a
9 troubling direction here unless we have
10 encouragement of more people to apply.

11 I think that following up on this issue
12 of transparency, I mean, clearly, you know,
13 if you're going to be totally transparent,
14 you'd have to have your deliberations in
15 public. And I think that that would even
16 further erode the number of applicants that
17 would be willing to put themselves through
18 that process in order to assure the ultimate
19 goal that there's no one with any kind of
20 sinister political motivation behind their
21 deliberation.

22 So I guess it behooves those that are
23 critical of the process to say how you're
24 going to do this in a more public basis

1 without further making the pool of
2 candidates that you're trying to assure are
3 the most qualified for this very, very high
4 position -- I just think it's -- I don't
5 think that the burden by the critics has
6 been met to make any substantive changes
7 here.

8 CHAIRMAN SAMPSON: I would sort of
9 disagree with you, because even the judge
10 would say it's the mindset when we look at
11 the commission. The issue of term limits,
12 which the judge talked about, is a very
13 interesting issue.

14 When we're talking about the issue of
15 transparency, Senator Winner, we're not
16 talking about opening up this forum. We're
17 talking about a process that has worked all
18 these years, and every single vacancy a
19 woman was considered. Well, all of a sudden
20 a woman is not considered.

21 You know, maybe that's not troubling to
22 you, but it's troubling to me and it's
23 troubling to the neck of the woods where I
24 come from with respect to judges on the

1 benches and the issue of morale with respect
2 to judges and even prospective applicants
3 who want to apply. Because if they feel
4 that they're not even going to make the
5 criteria, why apply at all.

6 It can't be salary, because you're
7 getting a salary increase when you're moving
8 from Supreme Court, Appellate Division, to
9 the Court of Appeals, one of the most
10 prestigious positions that one can have.

11 So the issue here is not a critique
12 with respect to the commissioners, it's
13 about the process and making sure that in
14 their deliberations the criteria are met and
15 that the public feels confident in the
16 decisions that are made. Because if the
17 public does not have the faith in the
18 judiciary, then we're going down the wrong
19 road.

20 COMMISSIONER O'MARA: One thing I
21 might add, Senator, that the commission has
22 done on the issue of transparency is create
23 a website. So we now have a website and
24 have --

1 CHAIRMAN SAMPSON: This is the first
2 time you've created a website?

3 COMMISSIONER O'MARA: Yes. I think
4 we're a little late, but at least we've done
5 it. And it's up and running and we're
6 getting good compliments on it.

7 CHAIRMAN SAMPSON: And this is what
8 I'm saying. After the criticism, you
9 implemented certain procedures --

10 COMMISSIONER O'MARA: No, the website
11 was up before this last -- we've been
12 working on it for a year and a half, let me
13 put it that way.

14 MR. HALLORAN: It's been a
15 longstanding process.

16 CHAIRMAN SAMPSON: Your Honor, I want
17 to -- Senator, any questions?

18 SENATOR ONORATO: Just one.

19 Have you ever been influenced -- I
20 shouldn't say that. Have you ever been
21 approached by -- you know, we're in a game
22 of politics here. When some names have been
23 submitted to you, has anybody ever contacted
24 your commission in support of a particular

1 individual?

2 COMMISSIONER O'MARA: We receive
3 letters which, when they are received by
4 individual commissioners or just addressed
5 to the commission, the whole commission sees
6 them. But they might be from an ethnic bar
7 group, people who are interested in a
8 particular candidate.

9 Yes, we do receive those.

10 MR. HALLORAN: That's correct, yes.

11 SENATOR ONORATO: Do you get them
12 from legislators occasionally?

13 COMMISSIONER O'MARA: I have no
14 recollection, as I sit here today, of ever
15 having been contacted by a legislator.

16 SENATOR ONORATO: Thank you.

17 CHAIRMAN SAMPSON: I think what
18 Senator Onorato said, by "contact" you're
19 talking about personally contacted or a
20 letter in support or anything like that?
21 You never received --

22 COMMISSIONER O'MARA: No. No.

23 CHAIRMAN SAMPSON: That's with
24 respect to yourself, Your Honor.

1 COMMISSIONER O'MARA: Yes.

2 CHAIRMAN SAMPSON: What about any
3 other commissioners? Have they received any
4 letters or telephone calls with respect to a
5 particular candidate?

6 COMMISSIONER O'MARA: Not that I've
7 ever been told of or made aware of, no.

8 CHAIRMAN SAMPSON: Okay. Well, I
9 don't think we have any more questions for
10 you. And I wanted to personally thank you
11 for coming down to this hearing and
12 providing us some insight with respect to
13 the process.

14 When we're talking about the issue of
15 transparency, this is what we're talking
16 about. We can agree to disagree. And we'll
17 put forth certain questions to you, and you
18 have enlightened us on certain issues and
19 certain goings-on with respect to that
20 committee, and we can have a better
21 understanding of what the commission goes
22 through with respect to selecting these
23 candidates.

24 COMMISSIONER O'MARA: Thank you,

1 Senator. It's been my pleasure to be here.
2 And if there's anything else we can do to be
3 of assistance, we stand ready.

4 CHAIRMAN SAMPSON: Thank you very
5 much, Your Honor.

6 (Whereupon, at 2:20 p.m., the
7 hearing concluded.)

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