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TESTIMONY OF ELENA RUTH SASSOWER, DIRECTOR CENTER FOR JUDICIAL ACCOUNTABILITY, INC. (CJA)

In Opposition to Senate Confirmation of Appellate Division, Fourth Department Presiding Justice Eugene F. Pigott, Jr. as Associate Judge of the New York Court of Appeals. Presented at the Public Hearing of the New York State Senate Judiciary Committee, Thursday, September 14, 2006, Albany, New York.

My name is Elena Ruth Sassower and I am director and co-founder of the Center for Judicial Accountability, Inc. (CJA), a non-partisan, non-profit citizens' organization dedicated to safeguarding the public interest in judicial selection and discipline.

CJA opposes Senate confirmation of Governor Pataki's appointment of Eugene F. Pigott, Jr. to the New York Court of Appeals. We view it as the Governor's latest manipulation of the judicial appointments processes¹, which we have documented time, after time, after time,

¹ That we are not alone in our cynical view may be seen from "*Pataki Nominates Pigott for High Court*", New York Law Journal, August 21, 2006 (by John Caher), setting forth theories and scenarios of "pundits and political plotters", reflective of the political calculus they know to underlie Governor Pataki's judicial appointments:

"Under one theory, the governor would appoint Justice Prudenti, and then promote Second Department Justice Peter B. Skelos, the brother of an influential Republican state senator, to presiding justice. Under another, Justice Prudenti would go to the Court of Appeals and First Department Justice James Catterson, who was also on the nominating commission's list, would be shifted to the Second Department and instantly installed as presider.

One scenario had the nod going to Justice Thomas E. Mercure of the Third Department – but only if the governor or his people could arrange a cross endorsement to ensure that gubernatorial counsel Richard Platkin would get Justice Mercure's Supreme Court seat. An earlier attempt to finagle a Third Department cross endorsement for Mr. Platkin's benefit fizzled, as apparently did the more recent effort.

The three Democrats on the list – Judge Smith and Justices Richard T. Andrias of the First Department and Steven W. Fisher of the Second Department – never seemed to be in serious contention."

involving appointments at all levels of the judiciary. CJA's website, www.judgewatch.org, posts the substantiating documentary proof, accessible *via* the sidebar panel "Judicial Selection-State/NY".

This Committee did not require Justice Pigott to complete a publicly-available questionnaire, setting forth the specifics of his background, his political activity, his legal, judicial, and other positions he has held, his most significant decisions, his published writings and speeches, or any other information as to what he views as his qualifications. Nor, apparently, has the Committee asked Justice Pigott to furnish other documents bearing on his qualifications and fitness to be publicly-available.² Consequently, the public – and the press, acting on its behalf – are unable to investigate what Justice Pigott purports to be his relevant background and credentials.

From our googling Justice Pigott's name on the internet, we found the New York Court system's online posting of his bio (www.courts.state.ny.us/ad4/Court/Bios/Pigott.htm) – the last sentence of which caught our interest: "He served as a member of the Governor's Temporary Judicial Screening Committee between 1995 and 1996."

The Temporary Judicial Screening Committee, established on April 25, 1995 by Governor Pataki's Executive Order #11, was supposed to be just that, "temporary". It was to exist until the permanent judicial screening committees, established by Governor Pataki's simultaneously-promulgated Executive Order #10, were "fully operational". Yet, it took nearly two years before members of the permanent committees were even appointed – and then only because of the hue and cry of the bar associations which were roused to action by CJA's Letter to the Editor, "*On Choosing Judges Pataki Creates Problems*", published by The New York Times on November 16, 1996 [A-4]. Our Letter – the lead Letter on that day's editorial page – identified scandalous facts about the Temporary Judicial Screening Committee:

"Virtually no information about that committee is publicly available.

Indeed, the Governor's temporary committee has no telephone number, and all inquiries about it must be directed to Michael Finnegan, the Governor's counsel. Mr. Finnegan refuses to divulge any information about the temporary committee's membership, its procedures or even the qualifications of the judicial candidates Governor Pataki appoints, based on its recommendation to

² CJA requested such documents and other information by a September 5, 2006 letter, invoking "the Freedom of Information Law or such other law and rules as may be applicable" [A-1]. Chairman DeFrancisco responded by providing only "a copy of the Governor's nomination of Eugene F. Pigott, Jr. as an Associate Judge of the State Court of Appeals", stating that the Committee "has no other information pertinent to your request which is subject to the Freedom of Information Law applicable to the Legislature." [A-3].

him that they are 'highly qualified.'”

Expurgated by The Times was the paragraph in our original Letter that if the Temporary Judicial Screening Committee existed, it was “controlled by the Governor *via* Mr. Finnegan, who rigs its ratings by withholding from the committee information adverse to the politically-connected candidates it reviews”.

We do not know what month in 1996 Justice Pigott stepped down as a member of the Temporary Judicial Screening Committee³, but our interaction with Mr. Finnegan was in the spring of 1996. If Justice Pigott was a member of the Temporary Judicial Screening Committee at that time – and if Mr. Finnegan did not withhold from the Committee the information and documentary evidence we had provided – his mandatory professional and ethical responsibility was not only to have voted against the specific judicial candidate to whom we were objecting, but to take other, more forceful steps to protect the public. This, because the candidate was a judicial member of the New York State Commission on Judicial Conduct – and the evidence against her was the casefile of CJA’s first Article 78 lawsuit against the Commission, suing it for corruption.

Readily-verifiable from the casefile and our related correspondence were the following: (1) the Commission had unlawfully promulgated a rule which converted its mandatory statutory duty to investigate facially-meritorious complaints into a discretionary option, unbounded by any standard; (2) the Commission was unlawfully dismissing complaints which were not only facially-meritorious, but documented as to criminal conduct by high-ranking, politically-connected judges; (3) Attorney General Vacco was defending the Commission with fraudulent defense tactics because he had no legitimate defense; (4) the Commission had been rewarded by a fraudulent judicial decision, without which it would not have survived; and (5) the Commission, including the candidate, had failed and refused take corrective steps, as was their professional and ethical duty to do.

I have brought with me today a copy of the casefile⁴ identical to the one Justice Pigott should

³ Pursuant to Executive Order #11, paragraph 3, the Temporary Judicial Screening Committee had seven members. These were: “the designee of the Attorney General, the designee of the Chief Judge of the Court of Appeals, the Counsel to the Governor, the Secretary to the Governor, the Director of Criminal Justice, the President of the New York State Bar Association or his designee and the Honorable Lawrence H. Cooke, former Chief Judge of the Court of Appeals, who shall act as its chairperson.”

I believe it likely that Justice Pigott was “the designee of the Attorney General”, which would have been Dennis Vacco, who, like himself is from Buffalo.

⁴ The casefile, *Doris L. Sassower v. Commission on Judicial Conduct of the State of New York* (S.Ct/NYCo. #95-109141), is posted on CJA’s website, accessible *via* the sidebar panel “Judicial Discipline-State-NY”. A summary of the casefile is set forth in CJA’s \$3,077 public interest ad, “*Restraining ‘Liars in the Courtroom’ and on the Public Payroll*”, NYLJ, August 27, 1997 [A-6].

have had before him in the spring of 1996 as a member of the Temporary Judicial Screening Committee. And this is CJA's correspondence⁵ to Mr. Finnegan and the Governor's office during that period pertaining to the specific judicial candidate, to the casefile – and to the fact that we were unable to obtain from Governor Pataki's office and from Mr. Finnegan the most basic information about the Temporary Judicial Screening Committee, including how to contact it directly.

Additionally, this is our many years' worth of written requests to the Governor's office for such documentation as the Temporary Judicial Screening Committee's written reports of the qualifications of candidates appointed by the Governor to judicial office, which Executive Order #11 explicitly made publicly available⁶. The Governor's office provided us with not a single report – which, if they exist, should include a report on Justice Pigott's qualifications for an interim Supreme Court judgeship.

It may be surmised that the reason Justice Pigott stepped down from the Temporary Judicial Screening Committee sometime in 1996 was so that he might be approved by it for judicial office. On January 9, 1997, presumably based on a report of the Temporary Judicial Screening Committee approving Justice Pigott, the Governor nominated him to be an interim Justice of the Supreme Court for the Eight Judicial District [A-19]. The nomination was approved by this Committee at a "meeting" held on February 4, 1997 [A-20], for which, upon information and belief, there is no recording or transcript.

This interim Supreme Court judgeship enabled Justice Pigott to run as an incumbent later that year, winning election that November to a 14-year Supreme Court term. Less than 2-1/2 months into that term, in March 1998, Governor Pataki elevated Justice Pigott to the Appellate Division, Fourth Department, giving him precedence over countless more senior Supreme Court Justices. Presumably, this was with the approval of the Governor's now "fully operational" permanent Fourth Department Judicial Screening Committee. However, the Governor's office has not furnished us with any of that Committee's publicly-available reports approving the qualifications of candidates appointed by Governor Pataki for dates

⁵ The correspondence is posted on CJA's website, accessible *via* the sidebar panel "Judicial Selection-State-NY", which brings up a menu list including "Corruption of Judicial Appointments to New York's Lower State Courts". From there, go to "Chronological Paper Trail of Interaction with the Process-1996-2003". Illustrative correspondence is annexed, albeit without the substantiating exhibits: (1) CJA's April 18, 1996 letter to David Gruenberg, former Counsel to this Committee – to which Mr. Finnegan was an indicated recipient, sent a copy by certified mail/return receipt [A-9]; and (2) CJA's April 29, 1996 letter to Mr. Finnegan, sent to him, certified mail/return receipt [A-14].

⁶ The correspondence is posted on CJA's website, accessible *via* the sidebar panel "Judicial Selection-State-NY", which brings up a menu list including "Freedom of Information Law & Other Informational Requests Pertaining to Governor Pataki's Judicial Appointments & the Judicial Appointments Process".

earlier than June 1999.

It may be noted that Justice Pigott's March 1998 appointment to the Appellate Division, Fourth Department was as a so-called "temporary" Justice. This meant that he could remain on that Court not just for five years, which is the tenure of Appellate Division Justices, but, potentially, through the expiration of his 14-year Supreme Court term. Less than two years later, in February 2000, Governor Pataki elevated Justice Pigott yet again, making him the Appellate Division, Fourth Department's Presiding Justice, again giving him precedence over more senior Justices.⁷ Presumably, this, too, was approved by the Governor's permanent Fourth Department Judicial Screening Committee, although there was no such report from among those we received from the Governor's office.

Justice Pigott then set his sights on the New York Court of Appeals, to which in 2002⁸ and 2003 the Commission on Judicial Nomination recommended him to Governor Pataki for appointment. Among the members of the Commission on Judicial Nomination, from 1996 to the present, the Governor's former counsel, Michael Finnegan, who ran the Temporary Judicial Screening Committee from his counsel office, rigging its ratings.

CJA long ago and repeatedly documented that the Commission on Judicial Nomination – which operates behind-closed-doors – has corrupted its important role in the constitutionally-mandated "merit selection" of New York Court of Appeals judges. We did this in fact-specific criminal and ethics complaints detailing its wilful disregard of documentary proof of nominee unfitness and of the corruption of its chief information source about its mostly judge applicants: the Commission on Judicial Conduct. This Committee has received from us two fact-specific, documented reports dated October 16, 2000 and November 13, 2000 and a wealth of subsequent correspondence, statements, and testimony on the subject. These are all posted on CJA's website.⁹

⁷ These included Appellate Division Fourth Department Justice Samuel L. Green, a black jurist, "who at the time had 27 years of judicial experience compared with Justice Pigott's three years", *"Pataki Nominates Pigott for High Court"*, NYLJ, August 21, 2006 (Caher).

⁸ After being recommended to the Governor by the Commission on Judicial Nomination in 2002, Justice Pigott withdrew his name from consideration, allegedly because of "an administrative issue in his judicial department", *"Pataki Nominates Pigott for High Court"*, NYLJ, August 21, 2006 (Caher). As the issue necessitating withdrawal was "administrative", rather than personal, the public should be entitled to information as to what that work-related issue was – and how it was resolved.

⁹ See, in particular, the sidebar panel "Judicial Selection-State-NY", whose menu list includes "The Corruption of 'Merit Selection' to New York's Highest Court". As for our criminal and ethics complaints, see the sidebar panel "Searching for Champions-NYS", with its links to webpages for Attorney General Spitzer, the New York District Attorney, the U.S. Attorneys for the Southern and Eastern Districts of New York, and the New York State Ethics Commission.

As a result of the inaction of all concerned – including the press – the Commission on Judicial Nomination’s behind-closed-doors abandonment of “merit selection” principles has continued unabated, fatally tainting this nomination.

The only aspect of the Commission’s work not behind closed doors – and the only visible measure of whether it has adhered to any semblance of “merit selection” – is its July 20, 2006 report to the Governor recommending Justice Pigott for appointment to the New York Court of Appeal, along with six others [A-21]. Such report – a mere 1-1/2 pages – like the Commission’s predecessor reports, establishes the Commission’s violation of “merit selection” as it is NOT in conformity with the express requirement of Judiciary Law §63.3, which mandates that it:

“shall include the commission’s findings relating to the character, temperament, professional aptitude, experience, qualifications and fitness for office of each candidate who is recommended to the governor” (italics added).

The Commission’s July 20, 2006 report makes NO findings as to EACH of the seven recommended candidates. Rather, it contains a bald, conclusory statement that “in the collective judgment of the Commission” all seven candidates are “well qualified” according to the aforesaid criteria. This is then followed by an attached “summary of the careers of the recommended candidates” [A-23], which is nothing more than a distillation of resume-type biographic information, with NO qualitative assessment. Justice Pigott’s summary is 10 skimpy lines, none mentioning his membership on Governor Pataki’s Temporary Judicial Screening Committee. The summaries of the other six candidates are anywhere from 8 to 14 lines.

So that the record is clear, of the seven candidates which the Commission on Judicial Nomination presented to Governor Pataki by its July 20, 2006 report, CJA is able to attest, with substantiating documentation, that five would necessarily have been rejected by any Commission operating under “merit selection” principles. Such principles required the Commission to properly investigate their candidacies, which it demonstrably did not do as to these five – Justice Pigott, among them – or as to the other two.

This Committee’s duty, on behalf of the Senate, is to ensure the People’s constitutional right to “merit selection” of its New York Court of Appeals judges, for which, in 1977, they relinquished their right to elect Court of Appeals judges. On that basis, it must reject Justice Pigott’s appointment as there is NO publicly available evidence showing anything but that it is “merit selection” in name only. Investigation of the substantiating documentation would so prove.

Elena R. R.
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APPENDIX

- A-1 CJA's September 5, 2006 letter to NYS Senate Judiciary Committee Chairman John A. DeFrancisco
- A-3 Chairman DeFrancisco's September 8, 2006 letter to CJA
- A-5 "*On Choosing Judges, Pataki Creates Problems*", CJA's Letter to the Editor, The New York Times, November 16, 1996
- A-6 "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", CJA's \$3,077 public interest ad, New York Law Journal, August 27, 1997, pp. 3-4
- A-9 CJA's April 18, 1996 letter to David Gruenberg, former counsel to the NYS Senate Judiciary Committee – to which Governor Pataki's then counsel, Michael Finnegan, was an indicated recipient, sent a copy by certified mail/return receipt
- A-14 CJA's April 29, 1996 letter to Michael Finnegan, Governor Pataki's then counsel, sent certified mail/return receipt
- A-19 Governor Pataki's January 9, 1997 Nomination of Eugene F. Pigott, Jr. to be an interim Supreme Court Justice for the Eighth Judicial District
- A-20 NYS Senate Judiciary Committee's February 4, 1997 notice of meeting to consider the nomination of Eugene F. Pigott, Jr. as interim Supreme Court Justice
- A-21 NYS Commission on Judicial Nomination's July 20, 2006 letter-report to the Governor, with enclosed "summary of the careers of the recommended candidates"