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Elena Ruth Sassower, Coordinator

BY FAX: 212-556-3717 (6 pages)

TO: Tony Marcano, Jane Gross, Metro Editors  
David Rohde, "Investigative" Reporter

FROM: Elena Ruth Sassower, CJA Coordinator

RE: Following the New York Law Journal's Front-Page Scoop on NYS Commission on Judicial Nomination and its *Findingless* October 4, 2000 Report of Recommendees for the NY Court of Appeals

DATE: November 2, 2000

John Caher's "Behind the News" article, "*Semi-Secret Court of Appeals Nominations Draws Criticism*" is the featured story in today's New York Law Journal, spread across the top-center columns of its front-page. A copy is enclosed.

Important as it is, it is just the "tip of the iceberg" – as you should know from CJA's October 16, 2000 report, in the Times' possession for more than two weeks.

Will the Times be exploring the rest of the "iceberg" – that is, after it belatedly discloses to its readers the "tip"?

As previously requested, please immediately transmit CJA's October 16, 2000 report to the Times Editorial Board so that it doesn't rush out with an editorial endorsement of the Governor's appointee, as it did two years ago in "*Governor Pataki's Wise Choice*" (12/12/98) – when it knew nothing about the demonstrably corrupted process that had produced him.



cc: New York Times/Albany Bureau [By Fax: 518-436-7109]

P.S. Enclosed is a copy of the New York Times' December 30, 1982 article to which Mr. Caher's report refers – which CJA supplied him for his story. Apparently, in those early years of the "merit selection" process, the Times saw fit to tell readers something about the process.

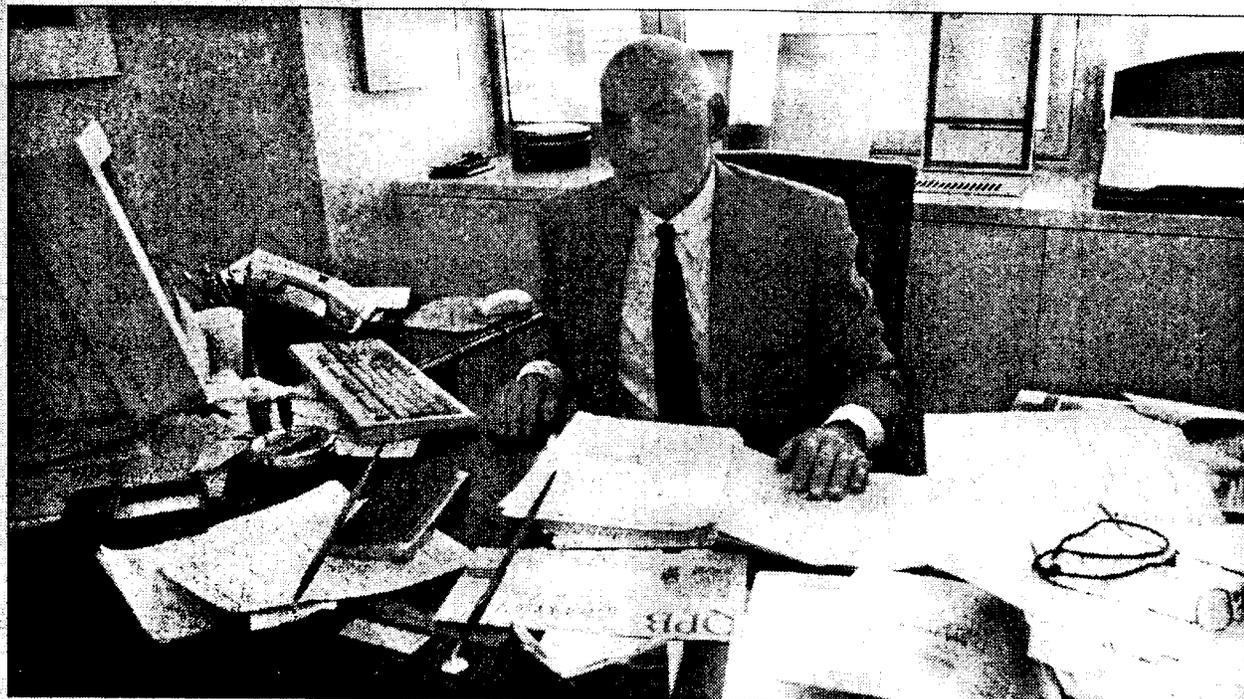
# New York Law Journal

Web address: <http://www>

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## ■ BEHIND THE NEWS ■



PHOTOGRAPH BY ELIZABETH LIPPMAN

Stuart A. Summit, counsel to the Commission on Judicial Nomination, insists the panel is operating according to law.

## *Semi-Secret Court of Appeals Nominations Draw Criticism*

BY JOHN CAHER

ALBANY — Nearly a quarter century ago, New Yorkers gave up their right to elect Court of Appeals judges, opting instead for the promise of a top judiciary selected on merit rather than political expediency.

But now, some critics say the process for nominating candidates for the state's highest court has devolved to the point where there is no way for the citizenry to tell if they are getting what they bargained for.

Two self-styled citizen action groups are questioning that process, and demanding a full accounting on just how the Commission on Judicial Nomination decided that the seven candidates now before Governor Pataki rep-

resent the best that New York State has to offer. The organizations, the We the People Foundation for Constitutional Education Inc. and the Center for Judicial Accountability Inc., contend that the Commission is ignoring the letter of the law, as well as the spirit, while depriving New Yorkers of any meaningful role in the selection of Court of Appeals judges.

Stuart A. Summit, counsel to the Commission, insists the panel is functioning according to the law. Yet Mr. Summit concedes "it is arguable that the drafters of the statute were hoping for high detail" in requiring public disclosure of the Commission's findings, a goal that he finds laudable yet impractical.

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BY MICHAEL

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# Critics See Flaws in Court of Appeals Nominations

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"Twelve people vote and who is nominated evolves from a highly complex voting process," Mr. Summit said. "You would have to have 12 psychoanalysts, and a good supply of sodium pentothal [truth serum] handy, to take each commissioner and diagnose their reasons and findings for who they chose."

The Commission operates in virtual secrecy under a statutory cloak that guarantees applicants a high degree of confidentiality. For instance, it does not reveal who has applied for a Court of Appeals vacancy, so there is no way for an outside observer to compare the credentials of someone who makes the list with someone who does not.

Also, it does not disclose its vote, so there is no way to determine if the Commission members unanimously agreed that a particular candidate is suitable or if there were dissents.

And finally, it does not in any way explain its rationale for concluding that seven applicants are better than the rest.

And if Mr. Summit has his way, the Commission will continue to operate in that fashion, despite what even he acknowledged is, to at least some extent, an understandable and legitimate concern.

The issue arises as Governor Pataki this morning is expected to make his third appointment to the Court, and the 17th as a chief executive since 1977, when voters amended the Judiciary Article of the State Constitution to provide for merit selection. That amendment put an end to 130 years of selecting Court of Appeals judges through popular election, and resulted in the establishment of the Commission on Judicial Nomination.

The Commission is a 12-member appointing body with four representatives each named by the Governor and the Chief Judge, and one each by the Senate majority leader, Senate minority leader, the Assembly Speaker and the Assembly minority leader.

Under the Judiciary Law, the Commission must evaluate candidates for the Court of Appeals and submit to the Governor a list of up to seven that it deems well qualified. In order to make the list, a candidate must secure eight of the 12 Commission votes, a two-thirds majority.

Judiciary Law §63 requires the Commission to evaluate the applicants and simultaneously release to the Governor and the public its "findings relating to the character, temperament, professional aptitude, experience, qualifications and fitness for office of each candidate who is recommended to the Governor."

On Oct. 4, the Commission released its report on the current crop of candidates, and the report mirrored previous efforts.

In a letter to Governor Pataki, Commission Chairman John F. O'Mara stated generally that the recommended candidates all met the legal criteria set forth under §63. He included one-paragraph biographical snippets on each of the candidates, without commenting in any way on the individual "character, temperament, professional aptitude, experience, qualifications and fitness for office" of any of them. The released findings indicated that all seven candidates met the criteria, but revealed nothing about the specific attributes of the chosen seven.

## Watchdogs' Response

We the People and the Center for Judicial Accountability contend that the Commission's public statement cannot be construed as "findings," as required under §63. Further, they claim that the bare-bones report and biographical sketches evince a disturbing trend in which New Yorkers are further and further distanced from the process of selecting Court of Appeals judges.

"We are more out of the loop now than we ever were," lamented We the People's chairman, Robert L. Schulz, a

frequent critic of the Albany power structure who has repeatedly challenged as unconstitutional — and with some success — various acts of the Governor and Legislature. Mr. Schulz is considering legal action to nullify Governor Pataki's pending appointment on the grounds that the Commission failed to fulfill its constitutional mandate, so the seven candidates under consideration are not properly before the Governor.

"There ought to be 'findings,' there ought to be much more information about people who approach the Commission, people who the Commission approaches, what the Commission discovered during its investigations," Mr. Schulz said. "But there is nothing."

The Center for Judicial Accountability is run by Elena Ruth Sassower in White Plains, a persistent critic of the New York judiciary and the manner in which judges are selected. Ms. Sassower said that since the statute requires "findings" on "each" candidate, a general statement simply cannot suffice.

"The report is the only visible manifestation of the Commission's supposed adherence to merit selection principles," Ms. Sassower said. "Everything else about the Commission's operation takes place behind closed doors."

The issues Ms. Sassower and Mr. Schulz are raising today are similar to those raised in the early 1980s by former Governor Mario M. Cuomo.

Just before taking office, Mr. Cuomo called for reforms that would require the Commission to "provide a more detailed account of its activities, along with a more complete assessment of the strengths and weaknesses of those whose names it submits" (*The New York Times*, Dec. 30, 1982). Mr. Cuomo said he wanted something more on the candidates than "what you get out of a yearbook." Eighteen years later, the Commission's "findings" on the individual candidates still reveal next to nothing.

## Commission Confident

Mr. Summit, of Phillips Nizer Benjamin Krim & Ballon LLP, said yesterday that while he and the members of the Commission might well prefer far more detailed disclosures, such a step is contrary to the complicated procedures the panel employs to ensure selection on merit. He also said he is confident that the legal definition of "findings" is sufficiently vague that the Commission would survive any challenge to its methods. Mr. Summit pointed out that what the statute requires is "findings," not conclusions — an important distinction.

In an interview yesterday, Mr. Summit provided an extensive primer on how the Commission functions and votes, and how its procedures came to be.

Mr. Summit said that when the Commission was first formed, members debated whether they should numerically rate the nominees. It was decided that to do so would be a mistake, since it would seemingly intrude on the province of the Governor to make his own objective determination as to which of the seven candidates was most suitable for a particular opening. Similarly, the release of detailed findings "would lead to at least conjecture, and probably worse, that the Commission really liked this one better than that one," which is precisely what the Commission sought to avoid, Mr. Summit said.

The Commission, Mr. Summit explained, uses a secret voting procedure intended to preclude endorsement of a non-consensus candidate.

According to Mr. Summit, this is how it works. At the outset, commissioners fill out a ballot listing all of the candidates who have been interviewed, placing a number next to each one indicating his or her preference. In other words, the commissioner's first choice is rated one and the 10th choice is rated 10.

Those ballots are then counted to determine aggregate scores. To make the cut and move on to the next round, an applicant must be among the top seven candidates of at least eight commissioners. In other words, it must be clear that the potential nominee has the

statutorily required support of two-thirds of the Commission members.

Slowly, the list of eligible candidates is winnowed and it becomes obvious that some candidates have far greater support than others. Eventually, the Commission generally agrees to limit voting to the top applicants, and their names — there might be a dozen or so — appear on the next ballot.

As the process continues, individual commissioners can see where the collective body is heading, and the voting begins to shift to reflect the general level of support. For instance, a commissioner who had been supporting one candidate may abandon that nominee in favor of another who has a better chance of making the next cut.

Although the voting remains secret, the commissioners openly discuss and debate the merits of the various applicants. During those discussions, issues such as geographic considerations and racial and gender diversity enter the equation, and factor in during subsequent rounds of voting. After hours of debate and several rounds of voting, the list is reduced to seven and transmitted to the Governor.

"It is a very amorphous process," Mr. Summit said. "How you would ever reduce to paper something that accurately reflected how these 12 people ended up voting for one [candidate] rather than another..."

Mr. Summit said that ideally he would prefer a more comprehensive report.

"I honestly concede it would be really neat to have some sort of description of what makes people different, and why they have risen to the top," Mr. Summit said. "It would be really nifty. If I was the czar of the process, or John O'Mara was, and we could actually write out what we thought made these the seven best that we had seen, that would be lovely. But it can't be done.... There is no one view of what makes a good judge of the highest court."

The seven candidates currently before the Governor are Presiding Judge Susan Phillips Read of the Court of Claims; Appellate Division Justices Victoria A. Graffeo of the Third Department and Richard T. Andrias of the First Department; Deputy Chief Administrative Judge Juanita Bing Newton; Administrative Justices Stephen G. Crane of Manhattan and Steven W. Fisher of Queens; and James C. Moore, the former State Bar Association president and a partner at Harter, Secrest & Emery in Rochester.

Whoever is chosen — pundits and some insiders say the battle is between Justice Graffeo and Judge Read but governors have been known to surprise the armchair experts and even their closest advisors — will be able to serve in an interim capacity subject to State Senate confirmation. Yet the Senate is out of session, and it is unclear whether the upper house will reconvene before the next legislative sessions begins in January.

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**York, New Jersey, Connecticut**

## **Cuomo Requests Greater Leeway To Select Judges**

### **Seeks Revised Procedure for Top Court in State**

By **DAVID MARGOLICK**

Governor-elect Mario M. Cuomo said yesterday that he would ask the Legislature to enact changes in the method of selecting judges for the state's highest court.

The proposed modifications are designed to diversify the pool of candidates for seats on the New York Court of Appeals, as well as to give the Governor a longer list of people to choose from.

Earlier this month, a special nominating commission forwarded to Mr. Cuomo the names of four candidates for the court seat now held by Judge Domenick L. Gabrielli, who is retiring tomorrow.

None of them were women or had extensive criminal-justice experience, two specifications that Mr. Cuomo had suggested, and he asked the panel for more names. The panel responded that it could not legally do so.

#### **A Jan. 15 Deadline**

It was uncertain whether Mr. Cuomo hopes to have the proposals enacted in time to broaden his choices for the Gabrielli seat, or would choose one of four candidates already nominated: Judges Vito J. Titone and Richard D. Simons of the Appellate Division, Joseph M. McLaughlin of Federal District Court in Brooklyn and Surrogate Bertram R. Gelfand of the Bronx. The vacancy must be filled by Jan. 15.

"It was clear that the people in the room wanted me to pick from the four names, and I told them I understand that," Mr. Cuomo said. "But if the theory is to improve the statute, the theory should be to improve it immediately."

Mr. Cuomo said he intended to discuss the proposed changes in the merit selection scheme soon with Mendes Hershman, the chairman of the nominating commission.

Asked when he hoped to meet with legislative leaders, he said: "I will be Governor Saturday. I would say, on Sunday."

#### **Changes Proposed**

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#### **Changes Proposed**

Politicians of both parties have expressed dissatisfaction with the commission's choices for the Gabrielli vacancy. But Charles Dumas, a spokesman for State Senator Warren M. Anderson, the majority leader, cautioned that the process of enacting changes in the procedure, first implemented in 1978, could be slow.

"Mechanically it would be possible by the 15th," Mr. Dumas said. "But whether there'd be sufficient time for deliberative consideration of the proposals would have to be decided by the legislators themselves."

The recommended changes would do the following:

¶ Increase the maximum number of candidates that the commission can provide the Governor for vacancies on the Court of Appeals from five to seven. The higher figure currently applies only the position of chief judge. The panel is required to submit at least three nomi-

**Continued on Page B4**

# Cuomo Asks Change in Naming Judges

Continued From Page B1

nees when as associate judgeship becomes vacant.

¶Decrease the number of votes required for a finding of "well-qualified" from eight to seven of the commission's 12 members. The lower number, it is felt, will make it harder for a small number of commissioners to block nominations through abstentions.

¶Require the commission to seek the broadest possible cross-section of candidates for court vacancies, with particular emphasis to be placed on finding qualified women, minorities and lawyers from private practice. All of those heretofore nominated by the commission have been sitting judges.

¶Require the commission to provide a more detailed account of its activities, along with a more complete assessment of the strengths and weaknesses of those whose names it submits.

"Obviously it needs to be something more than what you get out of a year-book, which is what we got here," Mr. Cuomo said. "They ought to help me make a judgment, not just say that somebody was born in Hamilton County and has been on the bench for 14 years."

In the meantime, the Court of Appeals is scheduled to be in session the first two weeks of January. Should Mr. Cuomo wait until the deadline for filling the seat, the seven-member court could hear some 60 cases short-handed.

The changes sought by Mr. Cuomo were agreed upon Tuesday night at a meeting between him and a group of

bar leaders and good-government officials active in replacing the direct election of judges with merit selection. Among those attending were Cyrus R. Vance, who headed an influential 1974 study on court reform; Louis A. Craco, president of the New York City Bar Association, and Robert MacCrate, the president of the Committee for Modern Courts.

The session, held at the City Bar Association's headquarters on 44th Street, appeared to leave all parties satisfied.

## Making the System Strong

"I think we have a Governor very receptive to making the judicial system strong," said Alan Rothstein of Citizens Union, one of those attending the dinner. "The major import of our meeting is that all of the proposed changes maintain the structure of merit selection intact."

"I'm very pleased with the intelligent, mature way the lawyers extended themselves to me last night," Mr. Cuomo said. "There was a union formed. It has been there incipiently; now it's there kinetically, and I hope it will continue. If all of government works this well, it should be a pleasant four years."

In some instances the proposals represent a compromise for Mr. Cuomo. He had asked, for instance, that only five votes be required for a finding of "well-qualified." Earlier this month, moreover, he claimed that under the state constitution, he was entitled to the names of all of those found "well-quali-

fied" by the commission, not merely to a predetermined number.

The need for a fixed number of choices was reiterated by participants at Tuesday's meeting.

"The cap is really essential to the proper functioning of a nominating commission," said Mr. MacCrate. "If you do not have that, it becomes a screening panel for the lowest common denominator."

Mr. MacCrate cautioned that any attempt by Mr. Cuomo to seek to apply the changes retroactively to the Gabrielli vacancy would be a "grave mistake."

"It would be a slap in the face to the commission and hostile to the whole idea of your merit selection process to say 'thanks for your time and effort' and throw the whole thing out," he said.

Mr. Hershman, the panel's chairman, said he generally supported the recommended changes, but warned that requiring reports more detailed than those already provided could threaten the panel's confidentiality requirements.

## LOTTERY NUMBERS

Dec. 29, 1982

New York Numbers — 422  
New York Win 4 — 1521  
New Jersey Pick-It — 257  
New Jersey Pick 4 — 8202  
Connecticut Daily — 488