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TO: The Members of Governor Pataki's State Judicial Screening Committee

FROM: Elena Ruth Sassower, Coordinator

RE: Reconsideration and Retraction of Andrew O'Rourke's "Highly Qualified" Rating

DATE: December 29, 1997

This letter calls upon you, as members of Governor Pataki's State Judicial Screening Committee, to take *immediate* steps to have the Committee reconsider and retract its "highly qualified" rating of Andrew O'Rourke for the Court of Claims. This extraordinary action is fully warranted as we believe Mr. O'Rourke obtained that rating by fraud, to wit, by failing to disclose and/or by misrepresenting material facts pertinent to his qualifications for that position. It is certainly warranted by the Committee's failure to conduct the "thorough inquiry" that Executive Order #10, ¶2c expressly requires *before* the Committee determines a candidate to be "highly qualified"¹. Such mandated "thorough inquiry" would have readily enabled the Committee to independently discover those disqualifying facts -- and Mr. O'Rourke's fraud.

In truth, the public has no substantiation that the Committee, by the requisite "majority vote of all members", actually conferred such "highly qualified" rating upon Mr. O'Rourke -- or the basis therefor. This is because the Governor's office has refused to respect the public's "inspection" rights, *expressly* provided for under Executive Order #10, ¶2d. Pursuant thereto, the committee reports on candidates rated "highly qualified" are to be available for "public inspection" "upon the announcement by the Governor of [the] appointment". Although the Governor announced Mr. O'Rourke's appointment to the Court of Claims on December 12th, the Center for Judicial Accountability, Inc. (CJA) has been unable to obtain the committee report on Mr. O'Rourke's qualifications, which should have been available from that date. The Governor's office simply ignores our written requests.

¹ Executive Order #10, ¶2c: "Each Judicial Screening Committee shall -- recommend for appointment or designation only those candidates who, as determined by a majority vote of all members of the committee, are highly qualified for the judicial office for which they are being considered. *No committee shall pass on the qualifications of any candidate until after a thorough inquiry has been made by the committee and the staff.*" (emphasis added).

It now appears that there is *no* committee report on Mr. O'Rourke's qualifications. In a December 27th Gannett article, "*Judicial Reform Group Challenges O'Rourke Judgeship*", the Governor's office was referred to and quoted:

"Michael McKeon, a Pataki spokesman, said no written report was produced. '*I don't think there is a report,*' McKeon said. 'They interviewed him and they voted, and then they communicated that to the governor.'" (emphasis added)

If Mr. McKeon is correct and *no* committee report on Mr. O'Rourke's qualifications exists, the State Screening Committee has additionally violated Executive Order #10, ¶2d, *expressly* requiring that the "Judicial Screening Committee *shall...prepare written reports* on the qualifications of each candidate it determines to be highly qualified and recommends to the Governor." (emphasis added). This requirement is reflected, as well, in Section XII of the "Uniform Rules" of Governor Pataki's Judicial Screening Committees. That Section, entitled "Report to the Governor", states:

"Upon the conclusion of all proceedings with respect to a vacancy, the respective Chairman or Executive Director *shall* promptly send a *written report* to the Governor containing a summary of the qualifications of each candidate found 'highly qualified' by the Committee and explaining the factors considered by the Committee..." (emphasis added).

As detailed in our enclosed December 23, 1997 letter to James McGuire, the Governor's counsel, there is no basis for believing that the State Judicial Screening Committee has complied with Executive Order #10 or the "Uniform Rules" with respect to Mr. O'Rourke's nomination. Quite the contrary, as evident from the facts detailed in that letter. Based thereon, our letter calls upon the Governor to withdraw Mr. O'Rourke's nomination. It also calls upon the State Judicial Screening Committee -- an indicated recipient of the letter -- to withdraw its "highly qualified" rating of Mr. O'Rourke. In support thereof, our letter states that we are submitting to the Governor's office and to each and every member of the State Judicial Screening Committee a copy of our own written report of Mr. O'Rourke's judicial qualifications -- a report submitted by our predecessor local group, the Ninth Judicial Committee, to the U.S. Senate Judiciary Committee in May 1992, when Mr. O'Rourke was seeking confirmation for a federal district court judgeship. A copy of that report, consisting of a 50-page Critique, a 224-page Compendium of over 60 exhibits, and a Supplement, is transmitted herewith.

The report contains two findings -- each *independently* verifiable from the supporting documentary exhibits. Those findings, set forth on page 2 of the Critique, are:

- (1) that no reasonable, objective evaluation of Mr. O'Rourke's competence, character and temperament could come to any conclusion but that he is thoroughly unfit for judicial office; and
- (2) that a serious and dangerous situation exists at every level of the judicial nomination and confirmation process -- from the inception of the senatorial recommendation up to and including nomination by the President and confirmation by the Senate -- resulting from the dereliction of all involved, including the professional organizations of the bar."

Additionally enclosed is CJA's December 26, 1997 letter to Mr. O'Rourke, calling upon him to substantiate the "highly qualified" rating conferred upon him by the State Judicial Screening Committee, including by waiving confidentiality, in whole or in part, as to his written responses to the questionnaire he was required to complete for you -- if, in fact, he was required to complete one as your "Uniform Rules" require. In that regard, our letter highlights our methodology in our 1992 report: we obtained Mr. O'Rourke's publicly-available written responses to the "public portion" of the U.S. Senate Judiciary Committee questionnaire -- which we investigated. By such investigation, we documentarily established that Mr. O'Rourke falsified, obscured, and omitted the true facts as to his qualifications and that the three insignificant cases he described for the Senate Judiciary Committee -- in response to its question asking for ten of his "most significant litigated matters" -- were cases which revealed him to have been an "incompetent and unethical practitioner" when he practiced law -- which was not since 1983. Additionally, by obtaining the blank questionnaire forms of the American Bar Association and the Association of the Bar of the City of New York, we were able to pierce "the veil of secrecy" shrouding their judicial screening processes and demonstrate that their approval of Mr. O'Rourke for a federal judgeship was not based upon any meaningful investigation. In the case of the City Bar, we also demonstrated that its "approval" rating was the result of its actually "screening out" information adverse to Mr. O'Rourke.

The significance of this latter finding as to the failure of the ABA and City Bar to investigate Mr. O'Rourke's qualifications² is obvious from a December 22nd Gannett news story, "*O'Rourke Could Be Wearing Judge's Robes in January*". A copy of that article is annexed to both our December

² Ironically, the City Bar's May 7, 1992 letter to the U.S. Senate Judiciary Committee, advising that its Judiciary Committee had "approved" Mr. O'Rourke for appointment to the U.S. District Court for the Southern District contained, as well an "approved" rating for Mr. Shechtman's appointment to that same court. [See May 7, 1992 *ltr* annexed to June 2, 1992 *Supplement*.]

23rd letter to Mr. McGuire (as Exhibit "G-2") and to our December 26th letter to Mr. O'Rourke. It describes that Mr. O'Rourke allayed the State Judicial Screening Committee's concerns that he had not practiced law for 15 years by "remind[ing]" the Committee that he had been approved by the ABA and City Bar for the federal judgeship. Consequently, our December 26th letter to Mr. O'Rourke not only invites him to comment upon our 1992 report -- but upon his obligation to have advised you that it showed those bar ratings to be insupportable and fraudulent.

In contrast to the U.S. Senate Judiciary Committee, which requires federal judicial nominees to complete a questionnaire -- including a "public portion" available to the public, the State Senate Judiciary Committee does not require nominees to the state bench to complete any questionnaire. Nor does it make any other information available about nominees the Governor appoints to the state bench -- including their resumes, which are also not available from the Governor's office³.

Consequently, we ask that you immediately provide us with a copy, in blank, of your questionnaire -- the only one which Mr. O'Rourke would have been required to fill out -- if he filled one out -- as part of his appointment to the Court of Claims.

Such blank questionnaire would better enable us to establish for you the extent to which Mr. O'Rourke defrauded the State Judicial Screening Committee by dishonest representations. As illustrative, on the blank copy of the questionnaire used by the Second Department's Judicial Screening Committee under Governor Cuomo⁴ there is a question (#31):

³ See CJA's unresponded-to June 12, 1996 letter to Michael Finnegan, former counsel to the Governor, member of the Temporary Judicial Screening Committee, and former Chairman of the State Judicial Screening Committee.

⁴ If the Judicial Screening Committee's questionnaire is anything like the questionnaire used by the Second Department Judicial Screening Committee under Governor Cuomo then it hardly is as thorough as the City Bar's "Uniform Judicial Questionnaire". For example, its question regarding cases handled by a "practicing attorney" (#17A) asks a candidate to "list" the ten most recent cases in which he has appeared..., without calling for any description. This, of course, would have been a great advantage to Mr. O'Rourke, whose descriptions for the U.S. Senate Judiciary Committee of three cases he had "personally handled" was replete with falsifications, distortions, and omissions -- as our Critique fully documented. Of course, the aforesaid question #17A is explicitly addressed to "PRACTICING ATTORNEYS AND... JUDGES WHO HAVE BEEN SITTING FOR LESS THAN ONE YEAR." (emphasis added). As such, it might not have been deemed applicable to Mr. O'Rourke who has not been a practicing attorney for the last 15 years. Under such circumstances, he could have had no "recent" cases with which to answer this question.

"Have you ever been interviewed and/or rated as a candidate for any judicial office ... by any committee, bar association or other group, including this committee? If 'Yes', state the office(s) for which you were rated, the name and address of the group before which you appeared or which issued the rating, and the rating which you were given or the result of the interview, if known."

This question may reasonably be interpreted to include the rating of "thoroughly unfit for judicial office" which we gave to Mr. O'Rourke by our fully-documented and independently-verifiable 1992 critique of his qualifications.

As hereinabove stated, quite apart from Mr. O'Rourke's obligation to have disclosed such document to you, any "thorough inquiry" by the State Judicial Screening Committee would have READILY unearthed its existence -- as well as CJA's long-expressed concern with the possibility that Mr. O'Rourke might be considered for appointment to the state bench. Indeed, CJA's examination of Governor Pataki's judicial screening process began precisely because we were mindful of that possibility. This is reflected by our January 10, 1996 letter to the Governor's office (Exhibit "A") -- the first of our voluminous correspondence with him, whose first paragraph read:

"As discussed a short time earlier by phone, please confirm for us whether Andrew O'Rourke is being considered for appointment to a judgeship. If 'confidentiality' prevents you from doing so, we would appreciate a letter to that effect."

That letter, to which we received no response, was the subject of repeated phone calls by us to the Governor's office, following which we re-faxed it three additional times for the express attention of Michael Finnegan, then the Governor's counsel -- and a member of his Temporary Judicial Screening Committee. Indeed, in addition to the four times in total that the letter was faxed (1/10/96, 1/16/96; 1/29/96; and 2/12/96), we also mailed copies to Mr. Finnegan three separate times, by certified mail/return receipt (3/29/96 ltr: P-624-546-598; 4/18/96 ltr: P-801-449-994; 4/29/96 ltr: P-608-518-937). In each of these three mailings, the January 10, 1996 letter was an exhibit and we pointed out that we had had no response to it⁵. To date, the Governor's office has not responded to that letter -- much as it has not responded to any of our subsequent letters detailing the dysfunction of the Governor's judicial screening process by his continued use of a deliberately insulated and secretive Temporary Judicial Screening Committee, whose "highly qualified" ratings were not the result of

⁵ Our April 29, 1996 letter, addressed to Mr. Finnegan, described how the Governor's office refused to identify and clarify the title and duties of Nan Weiner, who failed to return our repeated phone calls -- the purpose of which was not to obtain information about the Governor's Temporary Judicial Screening Committee, but to provide it with information bearing adversely on the qualifications of a judge being considered for reappointment: Court of Claims Judge Juanita Bing Newton -- a purpose explicitly identified in our phone messages.

"thorough inquiry" and which, in fact, were being rigged by the Governor's office. This includes our June 2, 1997 letter to the Governor⁶ -- copies of which were sent to virtually each member of the Governor's Judicial Screening Committees -- both Temporary and Permanent⁷.

Our June 2, 1997 letter alerted you to a serious situation affecting the public welfare and its rights -- for which your assistance was expressly sought by our June 12, 1997 coverletter (Exhibit "B"). It also gave you notice and ample reason to believe that CJA was a credible source of verifiable information about judicial candidates, particularly those in Westchester, where CJA is based, and brought to your attention our website: www.judgewatch.org. Had anyone connected with the State Judicial Screening Committee "visited" that website, they would have found -- by name -- a description of our 1992 report on Mr. O'Rourke's judicial qualifications and the failure of the federal judicial screening process. Yet no one contacted us about our Critique, notwithstanding you are charged with conducting a "thorough inquiry". Moreover, when I called up Nan Weiner, Executive Director of the Governor's Judicial Screening Committee, early in the afternoon of December 12th, and told her in no uncertain terms that we expected to be contacted if Mr. O'Rourke was being considered for a judgeship, she refused to identify whether he was.

As recounted in our December 23rd letter, it was a couple of hours *after* that phone call that the Governor's office announced Mr. O'Rourke's appointment to the Court of Claims -- which was late in the day on that *Friday* afternoon. It may well be inferred that announcement of Mr. O'Rourke's nomination was accelerated by my phone call. In any event, my phone call did not stop the nomination -- as it should have if the Governor's judicial selection process were true to its purported goal of ensuring that only "highly qualified" candidates be appointed to the bench. In a properly working process, Ms. Weiner would have *immediately* alerted the Governor's office to put a "hold" on the intended nomination until it received and verified the nature of the disqualifying information I told her we had. Yet, neither Ms. Weiner nor anyone else from the Governor's office has since contacted us about that information. Nor have we been contacted by your own Committee Chairman,

⁶ Our June 2, 1997 letter to the Governor is annexed as Exhibit "A" to our enclosed December 23, 1997 letter to Mr. McGuire.

⁷ The members to whom we did not send our June 2, 1997 letter were those for whom we were unable to obtain addresses -- including from Mr. Shechtman, to whom we turned for assistance inasmuch as he had been a member of the temporary judicial screening committee. Mr. Shechtman failed to respond to our repeated request -- even to our suggestion that we would supply him copies of the letters, with postage paid on the envelopes, so that he could mail them for us, without giving us the addresses (*See Exhibits "G-2" and "G-3"* to our December 15, 1997 letter to Mr. Shechtman -- a copy of which was sent to Nan Weiner).

Paul Shechtman, to whom we addressed a December 15th letter⁸, elaborating upon the nature of our documentary proof of Mr. O'Rourke's unfitness for judicial office.

The burden of ethical action and professional responsibility, therefore, falls upon you, the members of the State Judicial Screening Committee. As quoted in our June 12, 1997 coverletter (Exhibit "B"), EC 8-6 of both the ABA's Model Code of Professional Responsibility and the New York Code of Professional Responsibility, defines your duty:

"It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those unsuited for the bench..."

Your examination of our enclosed 1992 Critique and of the record of our correspondence with the Governor's office will leave no doubt but that Mr. O'Rourke's appointment to the state bench is not one based on merit, but on political considerations -- and that the integrity of the judicial screening process has been sabotaged by Mr. O'Rourke's political patrons, as well as by the candidate himself.

Lest you believe you can shirk your responsibility to take corrective action because Mr. O'Rourke has yet to be "confirmed" by the State Senate and that we can there block confirmation of this demonstrably unworthy nominee, who gained his nomination -- both state and federal by fraud -- you should be aware that there is *no* "confirmation process" for such appointive judgeships. Indeed, not only does the State Senate's Judiciary Committee *not* hold any "confirmation hearing" at which members of the public are permitted to testify, but the Senate Judiciary Committee is completely uninterested in any negative information or opposition, no matter how serious and evidentiarily-supported, whether it relates to the nominee, the dysfunction of the process that produced the nominee, or both. Apart from our past direct, first-hand experience with the Senate Judiciary Committee, as recounted in our June 11, 1996 to the Senate and in our June 12, 1996 letter to Mr. Finnegan, you should be aware that notwithstanding we notified the Senate Judiciary Committee of our opposition to Andrew O'Rourke's nomination on December 15th -- the first business day after the December 12th appointment -- and then telephoned again several days later, again leaving a lengthy message as to our opposition -- no one from the Committee contacted us. Yet, according to the December 22nd Gannett news story "*O'Rourke Could Be Wearing Judge's Robes in January*":

"State Sen. James Lack, chairman of the Senate Judiciary Committee, said his staff was already at work checking O'Rourke's references and contacting people who worked with him."

⁸ Our December 15th letter to Mr. Shechtman is Exhibit "D" to our enclosed December 23rd letter to Mr. McGuire.

Instead of "confirmation hearings", the Senate Judiciary Committee holds its own "meeting" on the nomination. It is a coffee-klatch session, without the coffee and without any stenographer or mechanical recording of the proceedings. For show, the Senators, both Republican and Democrat, ask the nominee a couple of "soft-ball" questions -- completely ignoring the serious information that have been brought to their attention showing the nominee's unfitness. Simultaneously, they exchange pleasantries and herald the Governor for his fine appointment. When the charade of this Committee "meeting" is through, confirmation is rushed through the full Senate -- again, with congratulatory speeches from both sides of the aisle.

Where -- as the record here shows -- the Governor and the State Senate ignore evidentiary proof of the unfitness of judicial candidates and use the judicial screening process as a "front" for behind-the-scenes political manipulations, the People of this State must turn to the State Judicial Screening Committee for leadership. By Executive Order #10, your own selection as a member of the Committee has been premised on your being "outstanding citizens". Now is the time to demonstrate that citizenship for the benefit of your fellow citizens. Indeed, it is now time to show that you are the "independent panel", which the Governor's December 12, 1997 press release announcing Mr. O'Rourke's appointment to the Court of Claims purported you to be.

You may be assured of our complete cooperation.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator

cc: Governor George Pataki

Att: James McGuire, Counsel

Paul Shechtman, Chairman, State Judicial Screening Committee

Nan Weiner, Executive Director, Governor Pataki's Judicial Screening Committees

Judith Kaye, Chief Judge, New York State Court of Appeals

Michael Cardozo, President, Association of the Bar of the City of New York

Jerome Shestack, President, American Bar Association

Joshua Pruzansky, President New York State Bar Association

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