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[Back to Article](#)

## **Free: Supporters of Court of Appeals Nominating System Urge Caution**

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ALBANY - State legislators were urged yesterday to proceed cautiously as they consider changes in how candidates are selected for the Court of Appeals, despite the dissatisfaction of some with the all-male list of nominees for the next chief judge.

New York City Corporation Counsel Michael A. Cardozo and former state Senator John Dunne, speaking at a hearing on behalf of the Committee for Modern Courts, defended the track record of the Commission on Judicial Nomination and argued against making sweeping statutory changes in a system that has been in place for more than three decades.

"In my opinion, the system has served the state well and represents a huge improvement over the previous elective system," Mr. Cardozo told the Senate Judiciary Committee.

No minority or woman was elected to the Court of Appeals between the Court's inception in 1846 and 1977, when voters adopted a constitutional amendment halting judicial campaigns to the high court in favor of a system under which governors have picked members from commission lists.

Since then, Mr. Cardozo noted, four women, three blacks and one Hispanic have been elevated by governors to the Court.

When Mr. Cardozo told Judiciary Committee Chairman John L. Sampson, "We have a huge way to go" Mr. Sampson finished the sentence with, "We have come a long way."

"We have come a long way," agreed Mr. Cardozo, "and the fact that until Judith [Kaye]

retired, in the last six years there were four women out of seven sitting judges on the Court, a distant cousin of mine name Benjamin Cardozo would have been shocked. So we have to be careful not to throw the baby out with the bath water."

Still Mr. Sampson, D-Brooklyn, argued, "Once you've finally arrived, all of a sudden the curve ball is thrown." He said the latest list sent to Governor David A. Paterson by the commission (NYLJ, Dec. 2) represented just such a troubling sign that progress toward diversity on state court benches is not guaranteed.

Mr. Cardozo pointed out that barring an unexpected resignation, it will be nearly four years until the next opening will occur with the mandatory retirement of Judge Carmen Beauchamp Ciparick at the end of 2012. He suggested forming a "study committee" to look at what other states have done with appointive judicial systems in recent years to formulate improvements instead of acting precipitously in response to the recent search for a chief judge.

Mr. Paterson and Attorney General Andrew M. Cuomo both complained that the commission's list of candidates contained six white males, including chief judge-nominee Jonathan Lippman, presiding justice of the Appellate Division, First Department (NYLJ, Jan. 14). It also included the name of Court of Appeals Judge Theodore T. Jones Jr., who is black.

There were no women or Hispanics on the list even though Judge Ciparick, an Hispanic who is senior associate judge on the Court, applied to and was interviewed by the commission. Two other women were among the 12 candidates interviewed by the commission, New York City Civil Court Administrative Judge Fern A. Fisher (See Profile) and Brooklyn Supreme Court Justice L. Priscilla Hall (See Profile), but they also did not make the final cut.

Mr. Sampson said yesterday he would likely schedule Justice Lippman's confirmation hearing before his committee within the next few weeks, but wanted to improve the nomination process going forward.

"The purpose is not to challenge the nomination of Judge Lippman, but to deal with the process so we won't run into problems like this again," Mr. Sampson said as he closed yesterday's hearing. "The system, as indicated, has worked before. We were improving. But now we have hit a bump in the road. Hopefully we can make some modification, whether it be with a rule change or statutorily."

Mr. Dunne and Mr. Cardozo both suggested that more diverse candidates would be advanced by the commission if more diverse commission members were selected by state leaders.

Four members of the commission are appointed by the governor, four by the state's chief judge and one each by the four majority or minority leaders of the Legislature.

Currently, four of the commission members are white women and two others are black men. There are no Hispanics.

"The answer is not to change the system, but for our elected officials, the governor and legislative leaders, who are empowered to appoint members of the Commission on Judicial Nomination, along with the chief judge, to appoint those who reflect the diversity of our state and also make their expectations clear to their commission appointees that diversity considerations must be a factor in the process," said Mr. Dunne, of Whiteman Osterman & Hanna in Albany.

About 73 percent of the state is white, 17 percent black and 16 percent Hispanic. About 51 percent of the population are women.

Mr. Cardozo said he is somewhat biased about the commission because, as a counsel to a task force on court reform appointed by then-Governor Hugh L. Carey in the mid-1970s, he helped write the statute under which the commission was created.

He suggested that the commission's proceedings be made more transparent, perhaps by releasing the numbers of applications the commission receives and how many candidates it interviews for openings.

### **'Lack of Applicants'**

Commission Chairman John F. O'Mara said in an interview yesterday that the commission has decided to do just that as part of an effort to open up its process. He declined to give the exact numbers yesterday, but said applications have been declining for years for Court of Appeals openings.

"The real problem is the lack of applicants," Mr. O'Mara said.

Sources familiar with the 2008 screening process for Chief Judge Kaye's seat said the commission received only about 20 applications.

Mr. O'Mara was appointed to the commission by then-Governor George E. Pataki. His term expires at the end of March.

As he has since the commission announced its list on Dec. 1, Mr. O'Mara yesterday continued to defend the panel's work.

"I think you'll see a lot of defenders, if you see what the process has produced," said Mr. O'Mara, a partner with Davidson & O'Mara in Elmira. "In spite of the complaints this time about the lack of a woman on our list, under our recent lists, the majority of the Court of Appeals judges have been women. I do believe the process works."

Mr. O'Mara said he did not receive an invitation to appear before Mr. Sampson's committee until late on Jan. 22 and could not work it into his schedule. But he said he would be happy to appear before the committee at one of the other public hearings Mr. Sampson said he would schedule in New York City and upstate.

"It works," Mr. O'Mara said of the commission. "Without question, I think that any rational person that looks at the process and looks at what's happened under the process would come to the same conclusion."

Mr. Sampson acknowledged that Mr. O'Mara has indicated his willingness to appear before his committee. Still, Mr. Sampson said yesterday he was "disappointed" that neither Mr. O'Mara nor members of the commission appeared at the Albany hearing.

"They should have been here so my colleagues could question them," Mr. Sampson said. "But hopefully, within the not-too-distant future, we will have that opportunity."

Attorney Ravi Batra, a former member of the Brooklyn Democratic Judicial Screening Committee, told Mr. Sampson's committee that nominating commissions such as Mr. O'Mara's panel can be rife with petty personal or political divisions that can prevent excellent candidates from being recommended for appointment.

The fact that neither Judge Ciparick, now acting chief judge of the Court of Appeals, nor Justice Fisher were on the final list shows how "tainted" the nomination process was, Mr. Batra contended.

"Two women, two superstars," agreed Judicial Committee member Ruben Diaz Sr., D-Bronx. "They were called not qualified? The system is broken."

Brooklyn Bar Association President John Lonuzzi said that "some eyebrows were raised" within the legal and judicial communities when the commission's list omitted the names of Judge Ciparick and Justice Fisher.

"Was this an aberration . . . or was this something that is broken, has failed and now needs to be fixed?" Mr. Sampson asked him.

"It's certainly something that's broken," Mr. Lonuzzi replied. "It's certainly something that's failed and it's certainly something that needs to be fixed."

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