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BY CERTIFIED MAIL/RRR: P-543-172-749

December 23, 1997

James McGuire, Counsel to the Governor  
Executive Chamber, The Capitol  
Albany, New York 12224

RE: The Public's Right to *Basic* Information about the Governor's  
Judicial Selection Process and to Withdrawal of the Governor's  
Unworthy Nomination of Andrew O'Rourke to the Court of  
Claims **Immediate Attention Required**

Dear Mr. McGuire:

On Friday, December 19th, your Albany office apprised me that I could reach you at your New York City office. I telephoned there before noon. Your secretary seemed quite familiar with my name and the matter about which I was calling, whose seriousness I emphasized. She led me to believe that I could expect a return call that day. So as not to miss it, I remained glued to my desk all afternoon long -- as well as all yesterday morning and afternoon (until 4:40 p.m. when I went to the Gannett newspapers).

As you know from our only previous conversation together on May 6, 1996, what I have to say is informed, substantive -- and *fully documented*. You were then First Assistant Counsel to the Governor and, following our conversation, I delivered to the Governor's office, for your attention, a copy of the file of our Article 78 proceeding against the New York State Commission on Judicial Conduct, as well as original petition signatures of over 1,500 New Yorkers, calling upon Governor Pataki to appoint "a State Commission to investigate and hold public hearings on judicial corruption and the political manipulation of judgeships in the State of New York". To this profoundly important transmittal, however, we received *no* response from you -- nor from anyone else in the Governor's office.

Before turning to the Governor's judicial selection procedures and his recent nomination of Andrew O'Rourke to the Court of Claims -- which we call upon him to withdraw -- please advise as to what became of our litigation file against the Commission on Judicial Conduct and of the petitions signed by 1,500 New Yorkers. Did you show them to Paul Shechtman, then Director of Criminal Justice? As you know, since Mr. Shechtman left Criminal Justice, the Governor has appointed him to the New York State Ethics Commission and, most recently, to the Chairmanship of the State Judicial Screening Committee.

I must tell you that in my first and only conversation with Mr. Shechtman on June 10, 1997, occasioned by his appointment to the Ethics Commission, he stated that he knew *nothing* about our Article 78 proceeding against the Commission on Judicial Conduct and had *not* seen the case file. This, notwithstanding, as Director of Criminal Justice, he was in charge of recommending the appointment of a special prosecutor -- which is what the Article 78 petition requested, entitlement to which the file documented. Indeed, Mr. Shechtman could be expected to have been particularly interested in the Commission's functioning since, in February 1996, he had co-authored with you a Report to the Commission supporting the Governor's misconduct complaint against Judge Lorin Duckman.

Inasmuch as Mr. Shechtman, in his capacity as Director of Criminal Justice, was a member of the Temporary Judicial Screening Committee (Executive Order #11, ¶3), his aforesaid statement to me, if true, further substantiates what CJA's correspondence has repeatedly claimed: that the Governor's office rigged the ratings of the Temporary Judicial Screening Committee by withholding from its members information adverse to the candidates they were rating. As detailed in that correspondence<sup>1</sup>, the Governor's office -- most particularly your predecessor, Mr. Finnegan, and Nan Weiner, the "Executive Director" of the Governor's "screening" operations -- blocked our direct access to the Temporary Committee and withheld from it the serious information we were trying to present. This information -- *verifiable* from the Article 78 file -- concerned Judge Juanita Bing Newton, whose qualifications the Temporary Committee was reported to be reviewing. Specifically, Judge Newton, as a member of the Commission on Judicial Conduct, used her position to protect high-ranking, politically-connected judges by: (1) participating in the summary dismissal of our facially-meritorious, documented judicial misconduct complaints against them and, thereafter, by (2) disregarding her ethical and professional duty to take corrective steps in the face of notice that the Commission had relied on litigation misconduct to defend itself from our Article 78 challenge and was the beneficiary of a fraudulent Supreme Court decision -- without which it *not* have survived. It was by depriving the Temporary Committee of that information that the Governor's office was able to procure from it a "highly qualified" rating for Judge Newton. Without that rating, the Governor could not have reappointed her to the Court of Claims, which is what he did in late May 1996.

A copy of this letter is being sent to Mr. Shechtman -- so as to provide him with an opportunity to deny, dispute, or clarify his June 10, 1997 statement to me that he was *unaware* of our Article 78 proceeding against the Commission on Judicial Conduct and had *not* seen the litigation file we provided to the Governor's office.

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<sup>1</sup> See, *inter alia*, our letters dated April 18, 1996 (to David Gruenberg, Counsel to State Judiciary Committee Chairman Lack); April 29, 1996 (to Michael Finnegan); June 11, 1996 (to N.Y.S. Senate); June 12, 1996 (to Michael Finnegan); March 7, 1997 (to City Bar President Michael Cardozo); June 2, 1997 (to Governor Pataki); and June 12, 1997 (to the indicated recipients of our June 2, 1997 letter).

Turning to judicial selection matters, I assume you are aware of my historic *first* conversation with Ms. Weiner. This was on December 3rd<sup>2</sup>, after I fortuitously discovered her *direct* line (212-681-4540), which does not even require an expensive long-distance call to Albany. Ms. Weiner's response to my informational inquiries on that date was that she would have to discuss them with you. Yet nearly a full three weeks have elapsed -- without any response from her or from you to straight-forward informational requests.

On December 3rd, I asked Ms. Weiner when we could expect a response from the Governor's office to our June 2, 1997 letter to the Governor (Exhibit "A"). That letter set forth facts showing that in a period when the First Department Screening Committee was constituted and should have been "operational", the Governor relied on the "highly qualified" rating of his Temporary Judicial Screening Committee to appoint Westchester Supreme Court Justice Nicholas Colabella to the Appellate Division, First Department -- a rating which our letter demonstrated was *not* the result of "thorough inquiry", which would have *readily* disclosed *verifiable* disqualifying facts. Such included his having been the subject of Article 78 proceedings based on his wilful and repeated violations of fundamental constitutional rights and black-letter law and his criminally corrupt conduct.

Our June 2, 1997 letter requested information to substantiate Justice Colabella's "highly qualified" rating, including the committee report on his qualifications. Indeed, we showed that the committee reports on Justice Colabella's qualifications, Judge Newton's qualifications, and the qualifications of the Governor's other approximately 100 appointees are *all* publicly available under the Governor's *own* Executive Orders, both #10 and #11, which read:

"Upon the announcement by the Governor of an appointment the report relating to the appointee *shall* be made available for public inspection." (Emphasis added, Executive Order #10: ¶2d and Executive Order #11: ¶2c)

In addition, we asserted the public's right to information as to committee procedures for screening candidates, particularly a copy of its questionnaires, if any. Further, we requested the dates on which the four Department Judicial Screening Committees became "operational", as well as information about the County Committees, including "the name of the person designated to *each* of the 62 County Committees by the chief executive officer of each county, as specified in ¶5 of Executive Order #10." We also invoked the Freedom of Information Law to obtain the cost to the taxpayers of the Judicial Screening Committees -- especially for "staff and resources" and "paid staff" required for their operations and investigative activity.

In our December 3rd conversation, Ms. Weiner stated that although she had seen some of our correspondence, she was unaware of our June 2, 1997 letter. This appeared to be the case because

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<sup>2</sup> I first called her a day or two earlier, leaving a message on her answering machine - which she had not returned.

she adamantly asserted that committee reports on appointed candidates are completely confidential. That the reports *are*, in fact, publicly accessible is highlighted in our June 2, 1997 letter, containing the above-quoted portion of the Executive Orders, and full copies of those Orders as exhibits. Ms. Weiner also seemed to indicate that the county committees had *not* been established -- from which she then backtracked to say that since there hadn't been too many vacancies to be filled by such committees, there hadn't been a need to appoint them.

**Additionally, I discussed with Ms. Weiner our requests for:**

- (1) the letter(s) pertaining to the establishment of the county committees;**
- (2) the date on which the Uniform Rules of the Governor's Judicial Screening Committees were adopted; and**
- (3) the three Appendices to the Uniform Rules indicated therein -- consisting of copies in blank of questionnaires required to be completed by judicial candidates.**

She asked that I put our requests in writing -- which I immediately did by fax (Exhibit "B"), adding:

"As discussed, please inform James McGuire that we wish to speak with him and would appreciate a call at a time convenient for him."

A week and a half later, hearing nothing from her and receiving none of the requested information, I telephoned Ms. Weiner. It was the early afternoon on December 12th. I **additionally requested the Governor's recent amendment to his Executive Order #10**, which I asked her to fax, ASAP. However, even as to this minimal request, Ms. Weiner said she'd have to "check" to see if she could provide it to us. I then asked her if Mr. O'Rourke had applied for a judgeship. Ms. Weiner refused to say whether he had, even after I told her, unequivocally, that if he was a potential candidate, we had "documentary proof" of his "unfitness for judicial office". In the letter I faxed her at 3:30 that afternoon (Exhibit "C"), I added:

"...It is our belief that...Mr. O'Rourke may have omitted and falsified answers in response to critical questions therein." (at p. 2)

We do not know the exact time on December 12th that the Governor's office released the announcement of Mr. O'Rourke's appointment to the Court of Claims. However, it appears that the announcement went out *after* my early afternoon telephone conversation with Ms. Weiner and, possibly, *after* my faxed letter. **Please confirm the time. Also, please set forth when Ms. Weiner told you of CJA's notification that Mr. O'Rourke's unfitness was a matter of documentary proof. If it was not shortly before the nomination was announced, when thereafter was it?**

That neither Ms. Weiner, you, nor anyone else from the Governor's office has followed up to obtain from us the "documentary proof" we proffered on December 12th -- even after its nature and seriousness were clearly identified by our December 15th letter to Mr. Shechtman (Exhibit "D") -- a copy of which we faxed to Ms. Weiner on that date (Exhibit "E") -- or inquired as to the basis of our belief that Mr. O'Rourke "omitted and falsified answers" on the State Judicial Screening Committee's questionnaire can only be interpreted as a further demonstration of this administration's lack of any genuine concern for the qualifications of its judicial appointees and for the integrity of the screening process that produces them.

Indeed, by failing to provide us with a blank copy of that questionnaire, as we have repeatedly requested, the Governor's office has impeded us in establishing the nature and extent of Mr. O'Rourke's fraudulent representations on his questionnaire to the State Judicial Screening Committee. Unless that is your intention, we ask that you *immediately* send us a copy of the Judicial Screening Committees' questionnaire(s) -- by mail, as well as by fax. Or is it your view that even the blank questionnaire forms are "confidential"? Our June 2, 1997 letter *expressly* invited the Governor to set forth his views as to the public's rights to information about and participation in his judicial appointments process.

Our December 15th fax to Ms. Weiner (Exhibit "E") specifically identified three further information requests -- all relating to Andrew O'Rourke's appointment to the Court of Claims:

- (1) the press release of his appointment;
- (2) the letter of appointment; and
- (3) "the State Committee's report on which the Gov. purports to have based his appointment of Mr. O'Rourke, which is accessible under the Gov.'s Executive Order #10, para. 2d".

I would note that the public's access rights under Executive Order #10, ¶2d remain *intact and unaffected* by the Governor's recent amendment to the Order<sup>3</sup>. The fact that such paragraph was *not* amended -- notwithstanding its significance was explicitly pointed out to the Governor in our June 2, 1997 letter (Exhibit "A") -- reflects his conscious intention to preserve that right -- or preserve the illusion of that right.

Under ¶2d of Executive Order 10, the committee report as to Mr. O'Rourke's qualifications should have been publicly available "upon the announcement by the Governor of [the] appointment". The

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<sup>3</sup> After waiting, to no avail, for Ms. Weiner to supply us with the amended Executive Order #10, requested on December 12th, we were able to obtain a copy from the Association of the Bar of the City of New York on December 18th.

Governor's announcement of Mr. O'Rourke's appointment is now eleven days old. We, therefore, demand that you -- as counsel -- respect the public's *expressly* provided-for right of public access and *immediately* provide the committee report on Mr. O'Rourke's qualifications.

So as not to further continue this already lengthy letter, we will close by stating that based on our experience to date with the Governor's office and its screening committees, temporary and permanent, we have no basis to believe that the State Judicial Screening has complied with Governor Pataki's "Uniform Rules" in processing Mr. O'Rourke's candidacy. CJA believes that the public is entitled to establish procedural compliance by the State Judicial Screening Committee with its own "Uniform Rules" -- rules which are supposed to ensure the integrity and thoroughness of the screening procedures.

As illustrative, from these "Uniform Rules", it appears that the Court of Claims vacancy filled by Mr. O'Rourke had to be the subject of

"broadly disseminated public notice of the existence of the vacancy, of the procedure to be followed by prospective candidates in order to be considered by the Committee, and of any date that has been set after which questionnaires may no longer be accepted." (Rule VII-1)

**Kindly apprise us as to the date of the "public notice" disseminated and the manner of its dissemination.** The *only* notice for Court of Claims vacancies published in the New York Law Journal of which we are aware appeared on November 26, 1997 (Exhibit "F"). The date set by that notice -- December 5, 1997 -- was for receipt of *resumes*. Presumably, the date on which questionnaires were due would have to have been considerably later, so that this published notice could *not* have been for the vacancy for which Mr. O'Rourke was nominated on December 12th. after having been interviewed and approved on December 9th<sup>4</sup>. **What was the date set for receipt of questionnaires for the vacancy for which Mr. O'Rourke was appointed?**

It may be that Mr. O'Rourke's interview, approval, and nomination were accelerated -- particularly after publication on December 3rd of a Letter to the Editor, "*O'Rourke Not Qualified to Serve as Judge*", in Gannett (Exhibit "G-1"). That published Letter describes our "well-documented 1992 study of O'Rourke's credentials for [the] federal judgeship" to which he had been nominated. Identifying that the study examined the only three cases Mr. O'Rourke had supplied to a U.S. Senate Judiciary Committee questionnaire request for ten, the Letter states that they demonstrated Mr. O'Rourke's "unethical conduct" and that he was "less than honest" in his questionnaire responses. The Letter *expressly* notes that CJA's study is "available to the public".

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<sup>4</sup> The December 9th date of Mr. O'Rourke's interview and approval is from the December 13th front-page, banner-headline article, "*O'Rourke Nominated for State Judgeship*", in Gannett (Reporter-Dispatch).

In view of yesterday's front-page, banner-headline Gannett story, "*O'Rourke Could Be Wearing Judge's Robes in January*" (Exhibit "G-2") -- which makes plain that the State Judicial Screening Committee was concerned that Mr. O'Rourke had not practiced law for nearly 15 years, but that Mr. O'Rourke "reminded the committee that he was rated qualified by the New York City Bar Association and American Bar Association when he was nominated for the federal judgeship"<sup>5</sup> -- we are *immediately* transmitting to you a copy of that study. It is the same one as is described in our unresponded-to December 15th letter to Mr. Shechtman as demonstrating that Mr. O'Rourke had been an "incompetent and unethical practitioner" in those three cases (Exhibit "D", at p. 2).

Consisting of nearly 50 single-spaced pages, our Critique is supported by a Compendium of over 60 exhibits, plus a Supplement. These documents not only establish Mr. O'Rourke's *absolute* unfitness for any judicial office, as *verifiable* from his false and dishonest responses to the U.S. Senate Judiciary Committee questionnaire, particularly as to those three cases, but the failure of the City Bar and the American Bar Association to investigate Mr. O'Rourke's responses to *their* own questionnaires -- most specifically, to their questions calling for him to describe his "ten most significant litigated matters" that he had "personally handled" (ABA) or his "last ten cases handled" (City Bar). That Mr. O'Rourke provided both the ABA and City Bar with the *same* three cases as he provided to the U.S. Senate Judiciary Committee may be seen from our November 2, 1992 letter to Gannett reporter Ed Tagliaferri (Exhibit "G-3").

Based upon this and other evidence that the State Judicial Screening Committee did *not* conduct a "thorough inquiry" of Mr. O'Rourke's qualifications, as mandated by Executive Order #10 and by the "Uniform Rules", which may have been violated in other respects as well, CJA calls upon the Governor to withdraw the nomination. We also call upon the State Judicial Screening Committee to withdraw its "highly qualified" rating of Mr. O'Rourke -- in support of which we will provide a copy of the Critique, Compendium and Supplement to *each* of its members.

Meantime, we await your prompt response to our informational inquiries -- which, for your convenience, we have highlighted in **bold type**.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator  
Center for Judicial Accountability, Inc.

Enclosures

cc: See next page

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<sup>5</sup> In fact, Mr. O'Rourke received a mixed rating from the ABA's Standing Committee on Federal Judiciary. Although a substantial majority rated him "qualified", a minority rated him "not qualified".

**cc: State Judicial Screening Committee**

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

**James Lack, Chairman, New York State Senate Judiciary Committee**

**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**

**Media**