CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 3002
Southampton, New York 11969

Tel. (631) 377-3583
Fax (631) 377-3582

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

Elena Ruth Sassower, Director & Co-Founder
Doris L. Sassower, Administrator & Co-Founder

COMMENT TO THE PROPOSED REVISED RULES OF THE NEW YORK STATE COMMISSION ON JUDICIAL NOMINATION

September 21, 2009

This responds to the Commission on Judicial Nomination's July 20, 2009 notice releasing its proposed revised rules for public comment.

At the outset, comment must be made as to the notice itself which, by a quote of the Commission's chair, former New York Court of Appeals Chief Judge Judith Kaye, conceals the origin of the proposed revised rules to make it appear as if they are some evolutionary consequence of "the experience of the Commission gathered over the last 30 years as well as the insights of many others".

This is a deceit. The proposed revised rules – whose motivating purpose is to mislead the Legislature into believing that their promulgation dispenses with the necessity of amending the Judiciary Law, if not the Constitution – are the result of Governor David Paterson's criticism last year of the Commission's failure to include any women in its December 1, 2008 report of seven nominees to fill the vacancy on the New York Court of Appeals created by Chief Judge Kaye's mandatory retirement. That criticism was then taken up by such public officers as Attorney General Andrew Cuomo, Senate Majority Leader Malcolm Smith, and Senate Judiciary Committee Chairman John Sampson, culminating in Chairman Sampson's holding hearings on the nominations process to the Court of Appeals – the first in the 30-year history of the Commission. Among those testifying at those hearings – indeed, testifying twice – was the Center for Judicial Accountability, Inc. (CJA).

The closest reference to this pertinent background to the proposed revised rules is the Commission's euphemistic statement:

> "Over the last year, the Commission has considered valuable input from the Governor, Legislators, and the Attorney General, as well as various individuals and organizations including the New York State Bar Association, the City Bar Association, the New York County Lawyers' Association, and The Fund for Modern Courts." (underlining added).

---

* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

The reason the Commission identifies these bar associations, which did not testify, and the Fund for Modern Courts, which did[1] – and does not identify the Commission's most continuous and outspoken critic, CJA – is because they, unlike CJA, all enable and promote its pretenses that it has "served New York's citizens well for over 30 years" and that its proposed revised rules will enable it to "continue to serve the public interest well" (underlining added).

In fact, the public interest is not served – and will not be – unless and until the Legislature confronts the divergence between the Constitution and Judiciary Law and amends the confidentiality provision of Judiciary Law §66 so that, for the first time in its history, the Commission's 30 years of records underlying its 24 nominee reports to the Governor may be examined and testimony taken of its members and counsel.[2] This requires more than the Commission's revision of its rules.[3]

---

[1] Like CJA, the Fund for Modern Courts testified twice. John Dunne, its vice-chair, testified at the January 27, 2009 hearing (pp. 9-34, plus written statement) and Victor Kovner, its chair, testified at the June 5, 2009 hearing (pp. 117-129, plus written statement).

[2] Questions about the quality and diversity of the Commission's reports of nominees have been a constant, beginning with its first report, criticized as "All white, all male, and all present or former sitting judges" by then New York Court of Appeals Associate Judge Sol Wachtler, who questioned "whether this was the merit selection which we had envisioned when we worked for passage of the amendment", (January 28, 1979 New York Times article, "*Merit System For Choosing Judges Isn't A Cure-all*" (Exhibit A-1)).

Illustrative of other press coverage: "*Cuomo Clashes With Committee Over Judgeships: Asks Panel to Disregard Law on Nominations*", New York Times, December 20, 1982 (Exhibit A-2); "*The Dispute Over Selections for Court of Appeals*", New York Times, December 27, 1982 (Exhibit A-3); "*The Campaign for Governor is Over: What's on Trial Is How Best to Pick Judges*", New York Times, December 29, 1982, editorial (Exhibit A-4(a)); "*Judges Are Better Elected Than Selected*", New York Times, January 11, 1983, letter to the editor by Assembly Speaker Stanley Fink (Exhibit A-4(b)); "*Cuomo Requests Greater Leeway To Select Judges: Seeks Revised Procedure for Top Court in State*", New York Times, December 30, 1982 (Exhibit A-5); "*Picking of Judges Assailed by Cuomo: Wants More Options in Filing Appeals Court Vacancies*", New York Times, August 15, 1983 (Exhibit A-6); "*Judge Selection for New York's High Court: The System Works*", New York Times, August 30, 1983, letter to the editor by Senate Minority Leader Manford Orenstein, "urg[ing] the commission to release the standards used for evaluation and the statistical data pertaining to the applicants." (Exhibit A-7); "*Cuomo Gets Names For Top Court Job: He Criticizes Lack of Diversity in List of 7 for Chief Judge*", New York Times, December 2, 1984, quoting then Commission Chairman Mendes Hershman "The commission's criteria are quality of intellect and expression, not gender, national origin, or religion" (Exhibit A-8); "*Challenge for Cuomo: Picking Judges*", New York Times, December 7, 1984 (Exhibit A-9); "*How Manhattan Stole the Judiciary*", New York Law Journal, December 9, 1993, column by Appellate Division Justice William C. Thompson (Exhibit A-10).

[3] The Commission's attempt to mislead the Legislature into believing that rule revisions will make amending the Judiciary Law, if not the Constitution, unnecessary appears to have been the brainchild of Michael Cardozo, former President of the City Bar and former chair of the Fund for Modern Courts. His January 27, 2009 testimony and written statements are a blueprint of the Commission's proposed revised rules, with the notable exception of his suggestion that "since there is no limit on the number of terms of the chair", the Commission might amend its rules "to limit the term of a chair to a limited number of years" (his January 27, 2009 statement, at p. 10). In fact, the Commission has long been in violation of the spirit and intent of Judiciary Law §62.4 fixing the term of the chairman as "a period of two years or until his term of office expires, whichever period is shorter." (underlining added).

The imperative to investigate the facts behind the Commission's reports – and, in particular, the facts behind the first and last reports of former Chairman John O'Mara's tenure (its November 12, 1998 and December 1, 2008 reports) – so as to ensure essential revision of the Judiciary Law, if not the Constitution – is established by the Senate Judiciary Committee's hearings on the Commission, held on January 27, 2009, February 3, 2009, May 21, 2009, and June 5, 2009.[4] At the four hearings, the only witnesses having testimonial capacity with respect to the Commission's operations – other than Chairman O'Mara, who expressly presented only for himself and not for the Commission, notwithstanding he is its "sole spokesperson" (Rule 7100.1)[5] – were myself[6] and William Galison[7].

---

[4] The transcripts of these four hearings are posted on CJA's website, www.judgewatch.org, most conveniently accessible *via* the top panel "Latest News". Additionally posted is videotape from the June 5, 2009 hearing (containing both my testimony and Mr. Galison's).

[5] At the February 3, 2009 hearing, Chairman O'Mara began by stating: "Let me start by saying, first of all, I appear in my individual capacity as a commissioner" (at p. 8, underlining added). His February 3, 2009 written statement similarly begins, "While I am the Chair of the Commission and by law serve as its spokesperson, I appear today in my capacity as an individual Commissioner." (at p. 1, underlining added). He offered no explanation as to why his appearance and statement were not on behalf of the Commission – and none was sought by the Senate Judiciary Committee.

Commission members and staff may have been reluctant to have Chairman O'Mara's representations attributed to them. As illustrative:

(a) his representations, in both his written statement (pp. 10-11) and orally (pp. 9, 21, 36), inducing the Senate Judiciary Committee to believe, and not adequately disencumbering it of the belief (Tr., p. 3: lns. 6-14; p. 21, lns. 21-p. 25, ln. 14; p. 51, lns. 9-15; p. 53, lns. 16-20), that diversity had not been an issue with respect to the Commission's previous nominee reports.

This is false and misleading, as may be seen from Chairman O'Mara's failure to provide ANY statistics for the first 18 years of the Commission's operations with respect to "gender and ethnic make-up" of the applicant pool, of the applicants interviewed, and of nominees – the subject of his March 25, 2009 letter to Chairman Sampson. Such would have revealed that the Commission's December 1, 2008 report of nominees was not "an aberration" by its absence of women. Seven of the Commission's prior reports also did not include women: its 1st (December 15, 1978 report); its 3rd (.....1981 report); its 4th (December 15, 1982 report); its 6th (December 1, 1984 report); its 7th (December 1, 1984 report); its 8th (March 27, 1985 report); and its16th (November 12, 1998 report) – totaling 8 of 24 Commission reports or 1/3.

Nor does that letter's focus on "gender and ethnic make-up" exhaust the gamut that is diversity, which includes geography, religion, professional experience, legal expertise, and party affiliation. As evident from news reportage (fn. 2, *infra*), there have been recurrent questions about diversity of the Commission's nominations;

(b) his dissembling before the Committee as to the reasons for the decline in applications, including in this exchange in which he conspicuously did not disclose what the Commission had learned from bar associations, judges and law school deans (at p. 16):

> Senator Winner: "...Has the commission made any kind of study or review or interviewed individuals or bar associations as to what you can attribute their lack of interest in the highest court of the State of New York?"
>
> Chairman O'Mara: "We have attempted to learn that. We have talked to bar associations. We have talked to judges. We've talked to law school deans. We've tried to determine. And it's difficult."

Assuredly what the Commission learned included – in large measure – the cynicism about the process, as reported in press articles. In addition to the December 3, 2002 New York Law Journal article, "*Court of Appeals Candidates Are Named*" (Exhibit B-1, p. 3) from which I quoted in my January 27, 2009 testimony (at pp. 86-87), is a September 18, 2003 New York Law Journal article, "*Few Appellate Judges Apply for Wesley's Seat*" (Exhibit B-2, p. 1), which began

> "Suspecting the deck is stacked in favor [of] the governor's former counsel or possibly an appellate judge in Buffalo, many of the state's top judges have decided against applying for a seat on the Court of Appeals...
>
> Judges and attorneys who had made the final cut in prior selection cycles but did not apply this time said... In either case, there is a powerful presumption that the Court of Appeals 'merit' selection process is open only to those who have close connections or who can rely on special circumstances, such as geography or political demographics.
>
> 'Everybody gets word that the [fix] is in and they don't want to apply,' said one Appellate Division justice.'"

A November 13, 2003 New York Law Journal article "*Model for Selecting Top Court Judges Reveals Its Flaws*" (Exhibit B-3, p. 2) also recited what judges and lawyers had to say:

> "'Word in the judiciary is that only one or two potential contenders have any shot at all,' complained one Appellate Division judge who declined to apply for the latest vacancy but has applied in the past.
>
> 'People think they have no opportunity, that it is fixed, and they don't want to participate in a sham,' said an upstate attorney...
>
> 'I think New York has a tainted merit selection plan,' said a partner in a Manhattan law firm who closely monitors judicial selection. 'What it really seems to be is a system where the governor picks his favorite, without the intervention of a judicial nominating commission of any substance and no Senate confirmation of any substance.'"

(c) his claim in his February 3, 2009 written statement (at p.14) that:

> "After the Commission's December 1, 2008 report was delivered to the Governor, some criticized the report and its findings as insufficiently detailed. Notably, the level of detail in that report is the same as in all earlier reports – none of which produced any criticism." (underlining added).

This is brazenly false. From 2000 onward (see fn. 6), CJA consistently – and very publicly – took the position, including in its written statements to the Senate Judiciary Committee, that the Commission's reports were non-conforming to Judiciary Law §63.3 in that they failed to make "findings" as to each nominee's "character, temperament, professional aptitude, experience, qualifications and fitness for office", as the statute expressly requires – and that, by reason thereof, the nominations were nullities, *as a matter of law*.

CJA's most detailed presentation on the subject was our October 16, 2000 report addressed to four bar associations, including the New York State Bar Association and City Bar, entitled "Evaluation of the New York State Commission on Judicial Nomination's October 4, 2000 report of recommendees to the New York Court of Appeals", copies of which I hand-delivered to the Commission, as well as to Chief Judge Kaye, at that time. I also provided a copy to The New York Law Journal, which thereafter published a front-page, above-the-fold story on November 2, 2000 entitled "*Behind the News*: *Semi-Secret Court of Appeals Nominations*

I gave two-fold testimony. In addition to testifying as to the divergence between the Constitution and Judiciary Law – as to which NO other witnesses, including Chairman O'Mara, testified – I summarized my direct, first-hand experience with the Commission, beginning in 1998 when CJA provided it with documentary evidence of the on-the-bench corruption of Appellate Division, Second Department Justice Albert Rosenblatt and his believed perjury on his publicly-inaccessible application, filed with the Commission, to be an associate judge of the Court of Appeals.[8] The

---

Draw Criticism" (Exhibit C). The article not only referred to CJA's objections to the Commission's report, but that of Robert Schulz, chair of We The People Foundation for Constitutional Education, who was noted as considering legal action. Indeed, Mr. Schulz did attempt to bring suit, based on the Commission's non-conforming October 4, 2000 report of nominees.

The article also referred to prior objection to the lack of findings in the Commission's reports, as follows:

> "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) [Exhibit A-5]. 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."

Significantly, Governor Cuomo's objections to the Commission's report in 1982, and thereafter, were in the context of his complaints concerning the lack of diversity of its nominees.

[6] I testified as CJA's director at the January 27, 2009 hearing (pp. 73-91) and at the June 5, 2009 hearing (pp. 64-84 and pp. 107-117). The voluminous documents which I brought to the June 5, 2009 hearing for Chairman Sampson, in support of my testimony, were copies of CJA's submissions in opposition to Senate confirmation of Court of Appeals nominees: Howard Levine (1993); Carmen Ciparick (1993); Albert Rosenblatt (1998); Victoria Graffeo (2000), Susan Read (2003), Robert Smith (2004), Eugene Pigott, Jr. (2006), Theodore Jones, Jr. (2007), Judith Kaye (2007), Jonathan Lippman (2009). All these are posted on CJA's website, accessible *via* the sidebar panel: "Judicial Selection-NYS", which brings up a menu with a link to a webpage on "The Corruption of 'Merit Selection' to the NY Court of Appeals".

[7] Mr. Galison testified at the Senate Judiciary Committee's July 5, 2009 hearing (pp. 94-107, plus correspondence).

[8] The particulars are set forth, with substantiating documentation, *inter alia*, by CJA's March 26, 1999 ethics complaint against the Commission, filed with the New York State Ethics Commission (at pp. 22-24)– which is still pending, uninvestigated, ten years later, as well as by CJA's monumental public interest lawsuit against the New York State Commission on Judicial Conduct, arising from its complicity in the Commission on Judicial Nomination's corruption of "merit selection" by its November 12, 1998 report nominating Justice Rosenblatt as among the "best qualified" of its "well qualified" applicants. The lawsuit, spanning 3-1/2 years from 1999-2002, was "thrown" by fraudulent judicial decisions at each court level – in Supreme Court/NY County (2000), at the Appellate Division, First Department (2001-2002), and at the Court of Appeals (2002) over which Chief Judge Kaye presided. CJA's website posts these documents, accessible *via* the sidebar panel "Searching for Champions-NYS" linking to the New York State Ethics Commission, and *via* the sidebar panel "Test Cases-State (*Commission*)".

Commission's November 12, 1998 report nonetheless nominated Justice Rosenblatt as not just "well qualified", but among "the best qualified of those who filed applications for consideration in accordance with the Commission's rules."

Mr. Galison testified as to his direct, first-hand experience with the Commission in 2008, providing it with information as to the administrative misconduct of Appellate Division, First Department Presiding Justice Jonathan Lippman, then a candidate for chief judge of the Court of Appeals. Nonetheless, the Commission's December 1, 2008 report nominated Justice Lippman as not just "well qualified", but among "the best qualified of those who filed applications for consideration in accordance with the Commission's rules."

Both I and Mr. Galison, additionally, gave relevant testimony at the Senate Judiciary Committee's February 11, 2009 hearing in opposition to Justice Lippman's confirmation as chief judge.[9]

The accuracy and probative force of my testimony before the Senate Judiciary Committee, as likewise of Mr. Galison's, is undenied and undisputed by the Commission, the bar associations, and the Fund for Modern Courts. Such document-supported testimony rebuts Chairman O'Mara's testimonial claim that the Commission does a "very, very thorough investigation" of applicants.[10] Indeed, it establishes that during a ten-year period, spanning nine nominations, the Commission wantonly endangered and injured the public by willfully disregarding its duty to adequately investigate candidate qualifications and that it not only deliberately failed to avail itself of credible sources of negative information concerning the candidates it was purporting to screen, but did so with knowledge that its key sources of negative information – the Commission on Judicial Conduct and the attorney disciplinary system – are dysfunctional, politicized, and corrupt.[11]

Nothing in the proposed revised rules will ensure the thoroughness of the Commission's investigation of candidate qualifications – the *sine qua non* of "merit selection", without which its determination of nominee fitness is fatally flawed. This includes the Commission's proposed revised Rule 7100.2(a) providing, for the first time in 30 years, for compensation of the Commission's counsel and the reimbursement of expenses. Indeed, proposed revised Rule 7100.7(b), entitled "Investigation of candidates", assigning counsel to:

---

[9] The videotape of that testimony is posted on CJA's website, accessible *via* the sidebar panel "Judicial Selection-NYS", which brings up a menu with a link to "The Corruption of 'Merit Selection' to the NY Court of Appeals – Jonathan Lippman: 2008-9".

[10] February 3, 2009 transcript, p. 13, lns. 16-17; p. 14, lns. 19-20.

[11] The substantiating documentation, all accessible from CJA's website, includes: (1) CJA's October 16, 2000 report detailing the Commission's corruption of "merit selection" by its October 4, 2000 report of nominations; (2) the record of CJA's public interest lawsuit against the NYS Commission on Judicial Conduct, spanning from 1999-2002; and (3) CJA's written requests, testimony, and written statements to the New York State Senate Judiciary Committee pertaining to the Committee's hearings to confirm Court of Appeals nominees, spanning from 1998-2009. [See fns. 6 & 8].

> "investigate the background and qualifications of a candidate as is necessary to determine that all statutory or constitutional criteria for appointment to the Court of Appeals are met, and to ensure that the commission has the fullest possible information available for its deliberations with respect to the candidate"

is essentially unchanged from the Commission's current Rule 7100.6(b) for "Investigation of candidates", which, as proven by the direct, first-hand experience of CJA and Mr. Galison, the Commission willfully disregards, without the slightest accountability. Tellingly, too, proposed revised Rule 7100.8(a), entitled "Commissioner impartiality", is not matched by a counterpart provision governing counsel impartiality.

Nor do the Commission's proposed revised rules resolve the serious constitutional questions, arising from the substantive discrepancies between the constitutional amendment that created the Commission by vote of the People of New York in 1977 and the implementing statute, Article 3A of the Judiciary Law, passed by the Legislature in 1978, without a hearing,[12] and amended in 1983, without a hearing.

Rather, the Commission conceals the discrepancies between the Constitution and Judiciary Law by a proposed Rule 7100.0, entitled "Preamble", wherein it implies that "the Constitution and laws of the State of New York" are consistent in creating an "overarching constitutional and statutory mandate" that has given rise to the rules. Only in the last sentence of the "Preamble", which speaks of "the confidentiality provisions of the Judiciary Law", without reference to the Constitution, is any divergence between the two even obliquely implied.[13]

Among the key discrepancies to which I testified before the Senate Judiciary Committee is that Article VI, §2(c) of the Constitution – unlike Judiciary Law §63.2– contains no restriction as to the number of "well qualified" persons the Commission may furnish the Governor for each Court of Appeals vacancy[14], thereby promoting diversity – be it gender, racial, ethnic, religious, geographic,

---

[12] The 1978 bill jacket for Judiciary Law, Article 3A contains a stunning May 10, 1978 letter from then Assemblyman Charles D. Henderson to then Governor Hugh Carey, strenuously urging his veto of the bill (Exhibit D-1). In pertinent part, it stated:

> "...This bill, which exceeds and distorts the intent of the amendments to the Constitution, enacts the most fundamental changes in our system of government since the Civil War. No public hearings were held on this bill and its final form was only available to legislators a few days before the debate and vote. (at p. 1, underlining added).
>
> "...The legislation before you was conceived in private, behind closed doors, no public hearings were held before the measure was presented to the Legislature with very little notice." (at p. 6, underlining added).

[13] Chairman O'Mara's written statement (at pp. 2, 7-8) and testimony (at p. 34, 42), likewise, concealed this divergence – as did the statements and testimony of the Fund for Modern Courts and Mr. Cardozo.

[14] Assemblyman Henderson also deemed the statute unconstitutional in his May 10, 1978 letter to Governor Carey (Exhibit D-1):

professional – by enabling the Commission to provide the Governor with the broadest cross-section of persons whose "character, temperament, professional aptitude and experience" it determines as meeting the constitutional standard of "well qualified". Judiciary Law §63.2 is unconstitutional by reason of this substantive divergence[15], as is the Commission's proposed revised Rule 7100.8(c)(1)[16],

---

> "...I contend that the bill violates the Constitution by limiting the number of names which the Chief Executive of this state may consider for appointment...
>
> Considering the constitutionality of the proposal, the amendment calls for well qualified. How then can you establish or limit the well qualified to a fixed number? What happens if one hundred applicants are interviewed and the nominators find that fifty are well qualified? Where in the amendment or bill does it say how the further elimination will take place in order to reduce the fifty well qualified to nine, or seven or three well qualified? When we fix the number we are saying nine or seven or three 'best qualified'. The Constitutional Amendment clearly says well qualified and makes no mention of best qualified.
>
> We therefore find ourselves in the incongruous position of picking out of fifty well qualified candidates a specific number of the most well qualified because that is what the proposed statute states. Can you or anyone define a set of standards or criteria for the most well qualified?...
>
> May I further submit that it is an invasion of the appointive pwers (sic) of the Governor, your power, to limit the number of well qualified from which to make an appointment. How can the Governor be held accountable to the people if his powers are circumscribed and limited as this bill does?..." (p. 2, underlining in the original).

Governor Cuomo also questioned the constitutionality of Judiciary Law §63.2 when – as Governor-elect – the Commission presented him with its December 15, 1982 report of four nominees, none women. A December 20, 1982 New York Times article "*Cuomo Clashes With Committee Over Judgeships*" (Exhibit A-2) describes what happened:

> "Governor-elect Mario M. Cuomo said yesterday that a state law governing the nomination of judges to the State Court of Appeals was inconsistent with the State Constitution. He asked a nominating panel to disregard the law and recommend additional candidates for a court vacancy...
>
> But the chairman of the commission, Mendes Hershman, said that it was 'unlikely' that it would comply with Mr. Cuomo's request. He suggested that Mr. Cuomo seek to have the law changed or 'seek a determination by the courts as to what the Constitution means.'" (underlining added).

No court determination was ever sought by Governor Cuomo. Apparently, he confined his efforts to amending Judiciary Law §63.2(b) to expand, from five to seven, the maximum number of nominees the Commission could forward him for a vacancy in the office of associate judge. See August 15, 1983 New York Times "*Picking of Judges Assailed by Cuomo*" (Exhibit A-6).

[15] A similar point was made by Assemblyman McNulty in the March 25, 1983 Assembly debate on the amendment to Judiciary Law §63.2(b) expanding the number of nominees:

> "...an elimination of the upper limit would allow for the possibility of the selection of more women and minorities on our highest court, and I believe that there should have been no

which rests on Judiciary Law §63.2. Likewise unconstitutional is the Commission's related proposed revised Rule 7100.8(c)(2) insofar as it speaks of "relative merits" of candidates and its "Appendix I" of balloting procedures insofar as it is designed to reduce the number of nominees to conform to Judiciary Law §63.2.

It is to overcome the statutorily-created interference with the diversity inherent in the constitutional scheme of an unlimited number of "well qualified" nominees that the Commission proposes revised Rules 7100.8(d) and 7100.8(e) – which are completely new. They are as follows:

> "**(d) Consideration of the qualifications of a candidate.**
>
> In considering and evaluating each candidate's qualifications for the Court of Appeals, the commission will consider criteria and standards including character, temperament, professional aptitude and experience. Commissioners and commission staff will not discriminate against any candidate on the basis of any legally impermissible factor.
>
> **(e) Commitment to diversity.**
>
> The commission is committed to considering nominees for the Court of Appeals with outstanding personal and professional qualifications who reflect the diversity of New York's communities including, but not limited to, diversity in race, ethnicity, gender, religion, sexual orientation and geography. A diverse Judiciary ensures that a broad array of perspectives and experiences are brought to the bench; reinforces public trust and confidence in the fairness of the justice system and the administration of justice; and ultimately enhances the delivery of justice and the Judiciary's credibility and moral authority." (underlining added)

Proposed revised Rule 7100.8(d) is unconstitutional. The Constitution delineates "character, temperament, professional aptitude and experience" as the sole basis for the Commission's determination that a candidate is "well qualified". These are NOT "includ[ed]"among other "criteria and standards". Even the Legislature, in enacting Judiciary Law §63.2, limiting the number of nominees the Commission provides the Governor, did not engraft upon the statute other "criteria and standards". Indeed, the Legislature did not even engraft a requirement that the limited number of nominees selected by the Commission be the "best qualified" of the candidates, notwithstanding this was the rationale for Judiciary Law §63.2.[17]

---

upper limit" (Assembly transcript, at pp. 63-64).

[16] Renumbered from current Rule 7100.7(b)(1).

[17] The Judiciary Law furnishes no criteria by which the Commission is to reduce its pool of "well qualified" applicants to the specified number, thereby enabling the Commission to be arbitrary and self-interested. Such is a further ground upon which the limitation of Judiciary Law §63.2 is unconstitutional.

As for diversity, the Constitution implicitly provides for it by the unlimited number of persons the Commission can forward to the Governor upon determining that each meets the sole "criteria and standards" of "well qualified" by "character, temperament, professional aptitude and experience".

In any event, diversity is a value that is in tension, if not conflict, with merit. It is a political consideration, not properly entertained by a body constitutionally-charged – as the Commission is – with evaluating, on an individual basis, candidate merit and only candidate merit. Considerations of diversity are properly reposed in a popularly-elected governor, accountable to the People, as the Constitution provides.[18] The inclusion in the proposed revised rules of diversity as a factor in the

---

[18] Former Supreme Court Justice James J. Leff – who sought election as chief judge to the Court of Appeals in 1973 – similarly stated in a letter to the editor in the December 23, 1982 New York Law Journal entitled "*Wider Selection Urged for Governor*" (Exhibit E-1):

> "...The Constitutional provision directs only that the commission 'report and recommend to the Governor those persons" etc. Should the commission be presented with an embarrassment of riches, it might well recommend a score of names and leave the political, geographic, ethnic and sexual decisions to the Executive, where the Constitution has vested them, and where they legitimately belong. What the Legislature has done, by the device of limiting the recommendation...is to turn a screening commission into a nominating commission.
>
> Moreover, in an area where 'sunshine' should be the rule, the Legislature has made confidentiality a central aspect of commission procedure. We are not told why the anointed were preferred over others. What we have is twelve commission members accountable only to each other, capable of maneuvering their own predilections before an Executive. The Governor, under the Constitution, is entitled to greater scope than the Legislature has granted him."

Former Acting Supreme Court Justice Walter M. Schackman echoed this in a letter to the editor in the December 30, 1982 New York Law Journal, entitled "*Changes Needed In Judicial Selection*" (Exhibit E-2):

> "Any such panel should have as its *sole* mandate, the determination of whether a candidate is qualified or not without numerical limitation and it should be left to the executive or such other entity required to make the nomination, to select from that group. That would place the responsibility where it belongs, with an individual or individuals who must justify their selections to the electorate. If considerations in addition to ability enter into the nomination, including gender, race or geography, then the political entity should make that selection and be answerable for it to the people." (italics in the original).

See, also, the August 15, 1983 New York Times article, "*Picking of Judges Assailed by Cuomo*" (Exhibit A-6):

> "Arthur L. Liman, a Manhattan lawyer, who was the chairman of Gov. Hugh L. Carey's advisory commission on criminal justice, said that in addition to considering a candidate's merits, the panel was forced to take 'political and policy' considerations into account. These include, he said, the court's ethnic, geographical and sexual make-up – factors he said were more appropriately left to the Governor." (underlining added).

Commission's selection of nominees injects the very politics into its evaluative process descried by the Senators at the hearings[19].

Likewise injecting politics into the evaluative process – and unconstitutional by reason thereof – is the proposed revised Rule 7100.6(b) "The chairperson will request a meeting between the commission and the governor or governor-elect to discuss the vacancy and efforts to recruit candidates"[20]. This is contrary to the theory of "merit selection", whereby the Commission constrains the Governor – rather than serving as a means for his securing from it the nominee of his choice.[21]

The new revised rules also do not resolve the discrepancy between the Constitution and Judiciary Law with respect to confidentiality. As I testified,[22] nothing in the 1977 constitutional amendment informed voters that in giving up their right to elect New York Court of Appeals judges in favor of a "merit-selection" appointment, the Legislature would thereupon promulgate Judiciary Law §66, shutting them out and preventing them – and the Legislature – from verifying the Commission's adherence to "merit-selection" principles, *to wit*, that the Commission's determination of "well

---

19 See February 3, 2009 transcript, pp. 41-45, 48, 51, 52.

20 The Commission's salutary proposed revised Rules 7100.6 "Solicitation of candidates" and 7100.11 "Website" will doubtless increase the applicant pool. However, there is no testimony by anyone – let alone by anyone claiming to possess the "well qualified" criteria for nomination – that the reason he/she did not apply was because of unawareness of a Court of Appeals vacancy or that the Commission was soliciting applications. Articles about impending vacancies appear on the front-page of the New York Law Journal, with notice of the Commission's solicitations of candidates also appearing on its front-page from at least 1983. Anyone possessing "well qualified" credentials is likely a New York Law Journal reader.

Chairman O'Mara has denied that the Commission's outreach was insufficient and has stated that the "decline [in applications] is not due to a lack of outreach by the Commission; its work in this regard is excellent" (statement, p. 12). The proposed revised rules, if not implicitly adopting the evidentiarily-unsupported pretense that insufficient outreach accounts for diminished applications, deflects from the Commission's failure to confront the evidence-supported explanation for the drop in applications to which I testified based on newspaper accounts, *to wit*, the perception that the Commission's process is "fixed", delivering to the Governor his favored choice. See fn. 5(b), *supra*. Also see August 15, 1983 New York Times "*Picking of Judges Assailed by Cuomo*" (Exhibit A-6), quoting lawyer Arthur Liman, "There's been a sense of frustration by people who've applied for seats and don't understand what criteria are being used. In the long run, what this process is going to do is discourage quality people from applying."

21 This was so-recognized by the New York State Bar Association's submitted comments on the Commission's proposed revised rules, wherein it states:

> "The intent of the Constitution is that the Commission function independently from the Governor as the appointing authority or the Senate as the confirming authority, in order to provide balance and to restrict the Executive's appointment power to a list of highly qualified nominees..." (underlining added).

22 In so doing, I reiterated CJA's position stretching back to 1993 when we testified in opposition to Senate confirmation of Carmen Ciparick to the New York Court of Appeals

qualified" nominees was based on thorough investigation of their qualifications. Indeed, Judiciary Law §66 is deleterious to "merit selection" as it prevents members of the public from knowing who applied to the Commission so that they may come forward and provide it with information bearing on applicant fitness.

The Commission's proposed revised Rule 7100.0 refers to the Commission as operating "with diligence and transparency in a manner consistent with the confidentiality provisions of the Judiciary Law" – without revealing that the Commission's interpretation of Judiciary Law §66, if not the statute itself,[23] makes meaningful transparency virtually impossible.[24]

Thus, the revised rules do not – and cannot – provide the public, or even the Governor and Senate, with any information establishing that the Commission's short-lists of nominees are "the best qualified candidates", "cream of the crop" "the most qualified of the group that we have interviewed" – which is what Chairman O'Mara claimed in testifying before the Senate Judiciary Committee[25] and what the Commission claims in its reports to the Governor, *to wit*, that its nominees are "the best qualified of those who filed applications for consideration in accordance with the Commission's rules."

Plainly, and as recognized by the Senators at the hearing, verifying that any given slate of nominees

---

[23] Judiciary Law §66 reads:

> "1. All communications to the commission, and its proceedings, and all applications, correspondence, interviews, transcripts, reports and all other papers, files and records of the commission shall be confidential and privileged and, except for the purposes of article two hundred ten of the penal law [perjury], shall not be made available to any person except as otherwise provided in this article.
>
> 2. The governor shall have access to all papers and information relating to persons recommended to him by the commission. The senate shall have access to all papers and information relating to the person appointed by the governor to fill a vacancy. All information that is not publicly disclosed in accordance with subdivisions three and four of section sixty-three of this article, or disclosed in connection with the senate's confirmation of the appointment, shall remain confidential and privileged, except for the purposes of article two hundred ten of the penal law.
>
> 3. The commission staff shall not publicly divulge the names of, or any information concerning, any candidate except as otherwise provided in this article."

[24] Inasmuch as counsel and staff will now be compensated and provided reimbursement for expenses, pursuant to proposed revised Rule 7100.2, the State Comptroller may find himself encountering difficulties similar to those he encountered with the Commission on Judicial Conduct insofar as a compliance audit. See Comptroller Ed Regan's 1989 report on the Commission on Judicial Conduct entitled "*Not Accountable to the Public*". It is accessible from CJA's website, *via* the sidebar panel "Library".

[25] See February 3, 2009 transcript, p. 10, lns. 5-6; p. 35, ln. 1; p. 38, lns. 9-11.

are the "best qualified" requires – at a minimum – the names of the other candidates in the applicant pool[26] (if not their completed application forms) – which, if Judiciary Law §66 does not preclude in fact[27], the Commission purports it does.[28]

As for the only peep-hole into the Commission's determination of its short-list of nominees, provided by the Commission's proposed revised Rule 7100.9, "Report to the Governor", it is at once too vague and too restrictive as to the report's content. According to the proposed revised rule, the report:

> "will contain the commission's nominations, in conformance with Section 63(3) of the Judiciary Law. The report will set forth (a) the relevant accomplishments of each nominee, and include major legal matters in which the nominee participated, as well as other notable professional qualities that the commission considered important in determining that each was well qualified and fit to serve as the chief or an Associate Judge of the Court of Appeals, as the case may be; and (b) the efforts made by the commission and counsel to publicize each vacancy and to solicit applications from the broadest group of well qualified candidates. However, the report will not compromise the confidentiality of commission proceedings, as mandated by Section 66 of the Judiciary Law."

---

[26] See January 27, 2009 transcript, pp. 26-27; February 3, 2009 transcript, p. 38, lns. 12-23.

[27] The Commission could conceivably include such information in its report to the Governor, pursuant to Judiciary Law §63.3 – just as it has now belatedly concluded (without explanation as to the basis therefore) that Judiciary Law §66 does not preclude it from providing statistical information about applicants and details of its outreach (February 3, 2009 transcript, p. 15).

[28] Chairman O'Mara's justification for the confidentiality of the Commission's proceedings and records pursuant to Judiciary Law §66 included purporting, in his written statement (at p. 7), that it "encourages applications by candidates". He offered no evidence to support such proposition and it is rebutted by his own testimony as to the drop in applications to the Commission (notwithstanding Judiciary Law §66).

His assertion in his written statement (at p. 7) that a candidate "should be protected" from "public embarrassment that could result from failure to receive a nomination" – as if candidates who submit themselves as "well qualified" for appointment to our state's highest court should be spared from what most unsuccessful candidates for public office face – is also unsupported by evidence, including statements from any of the long list of applicants over the Commission's 30-year history whose names were publicly disclosed by the press (and who, notwithstanding past failures to secure nominations, reapplied). This includes the three women applicants who were not included in the Commission's December 1, 2008 report: New York Court of Appeals Associate Judge Carmen Ciparick, New York Civil Court Administrative Judge Fern A. Fisher, and Brooklyn Supreme Court Justice L. Priscilla Hall – as to whom Chairman O'Mara provided not the slightest explanation as to why they were not among the seven nominees the Commission reported out, citing confidentiality (transcript, p. 25, lns. 10-11; p. 38, lns. 18-19; p. 46, lns. 9-12).

Moreover, although there are different degrees of confidentiality, Chairman O'Mara acknowledges none in implying that amending Judiciary Law §66 would infringe on applicants' "privacy" and subject them to scrutiny of "their private lives" Indeed, his opposition appears to be based on the most extreme elimination of confidentiality – one which would make public the Commission's debates and deliberations on candidate qualifications.

The language "in conformance with Section 63(3) of the Judiciary Law" replicates the Commission's current Rule 7100.8. But what does it mean? Seemingly, Judiciary Law §63.3 could not be clearer in stating:

> "The report...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."

By this standard, the Commission's December 1, 2008 report to Governor Paterson that ignited his criticism of the Commission was not "in conformance with Section 63.3 of the Judiciary Law" because it contained no "findings" as to "each candidate". Rather, it – like the Commission's prior reports to New York's Governors over its 30-year history – presented a bald conclusory statement that "in the collective judgment of the Commission" all the nominees were "well qualified by their character, temperament, professional aptitude, experience, qualifications, and fitness for office", followed by a summary of the careers of the nominees, devoid of such specificity as citation of cases exemplifying the candidates' intellect, perspicacity, and courage, or any track record of affirmances and reversals, or reference to an unblemished record, free of professional or judicial misconduct complaints. Nevertheless, the Commission's position, enunciated by Chairman O'Mara's December 17, 2008 letter to Governor Paterson, was that its December 1, 2008 report "fully complies with the requirements of law".

If the Commission's December 1, 2008 report is an example of "in conformance with Section 63(3) of the Judiciary Law" – a position the Commission has not repudiated – the first sentence of proposed revised Rule 7100.9 is worthless. As for the second sentence, it would appear that the proposed "(a)" is exemplified by the Commission's "expanded descriptions of each nominee" accompanying its December 17, 2008 letter. Although these "expanded descriptions" set forth some of the key information that CJA repeatedly asserted, since 2000, was requisite to proper reports, as for instance, citation to cases, the descriptions are not sufficiently qualitative and provide only a fraction of the meaningful information obtained by the Commission from the candidates' completed questionnaires – which, by emendation of the Judiciary Law, should be removed from confidentiality.[29] Nor do these descriptions include information obtained from the Commission's investigations.[30]

To the extent the information specified by "(a)" and "(b)" now constitutes the Commission's new interpretation of "in conformance with Section 63(3) of the Judiciary Law", such imposes a limitation on Judiciary Law §63.3 that the statute does not contain. Judiciary Law §63.3 – by its use of the word "include" – does not restrict the Commission from furnishing information beyond

---

[29] Personal information such as social security numbers, addresses, telephone numbers, could be redacted, as likewise other information deemed confidential.

[30] That "findings" were expected to include information as to judicial disciplinary complaints is reflected by the Commission on Judicial Conduct's March 25, 1983 memo to the Legislature in response to a proposed amendment to the Judiciary Law pertaining to confidentiality. See footnote 12 of CJA's October 16, 2000 report.

"(a)" and "(b)" in its reports to the governor.

As for the last sentence of proposed revised Rule 7100.9 – "However, the report will not compromise the confidentiality of commission proceedings, as mandated by Section 66 of the Judiciary Law" – it is superfluous, at best, as Judiciary Law §66.2 expressly exempts from confidentiality information disclosed pursuant to §63.3 – which is the Commission's report.

Finally, the Commission's revised amended rule 7100.10 "Amendment or waiver of rules", essentially replicating the current 7100.9, should be stricken and, if retained, modified. There is no point in publicly-promulgated rules if the Commission is able to dispose of them "in a specific instance" by a majority vote of eight Commissioners at a duly constituted meeting – and without notice to anyone outside the Commission. At very least, any amendment or waiver of the rules by the Commission "in a specific instance" should be accompanied by notice to the Governor, Senate, and the public – and a provision to that effect must be inserted if the rule is to be retained.

CONCLUSION

Beneficial as many of the Commission's proposed revised rules are, they are largely window-dressing. They neither ensure the integrity of the Commission's determination of supposedly "well qualified"/"best qualified" candidates, nor provide any transparency with respect thereto. Such requires revision of the Judiciary Law, if not the Constitution – action incumbent upon the Legislature based upon the uncontradicted, document-supported, direct, first-hand testimony of myself and Mr. Galison before the Senate Judiciary Committee.

Should the Commission now choose to deny or dispute any aspect of our testimony – or my above comments – it must do so, with specificity, so that the Senate Judiciary Committee may be properly guided in protecting the public's rights and interest. In any event, it is incumbent upon the Commission to respond, substantively to the foregoing, including by addressing the unconstitutionality of proposed revised Rules 7100.8(c) and 7100.8(d), consistent with the "continuing dialogue" to which Chairman O'Mara twice referred in his written statement:

> "We appreciate the Committee's close attention to the process, and look forward to a continuing dialogue with the Committee and others vitally interested in the process." (at p. 2 , underlining added)
>
> "We look forward to a continuing dialogue with the Committee and its staff – and other interested parties…" (at p. 14, underlining added).[31]

Consistent with my own testimony before the Senate Judiciary Committee that it:

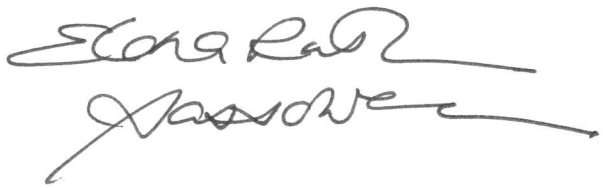
> "call upon the bar associations and the so-called good government organizations to

[31] Chairman O'Mara ended his testimony on a similar note: "…if there's anything else we can do to be of assistance, we stand ready." (p. 58)

assist in reviewing the kind of primary source documentation as to what's been going on all these years because none of them, all of these bar associations and organizations, such as the Fund for Modern Courts, purport that everything is pretty much okay.

They have resisted for over a decade confronting the kind of documentation that I brought forward to you." (June 5, 2009 transcript, p. 77, ln. 21- p. 78, ln. 8),

copies of these comments will be furnished to the New York State Bar Association, the New York City Bar Association, the New York County Lawyers' Association, the Fund for Modern Courts, and to such other hearing witnesses as Michael Cardozo so that they may provide their "valuable input" with respect thereto to the Commission, to the Senate Judiciary Committee – and to Assemblyman Rory Lancman, member of the Assembly Judiciary Committee, who, on January 28, 2009, took the lead in restoring the integrity of the 1977 constitutional amendment by sponsoring a bill to repeal Judiciary Law §63.2 so as to require the Commission to furnish the Governor with all "well qualified" candidates for the New York Court of Appeals.[32]



[32] Mr. Cardozo, as well as the Fund for Modern Court's current chair, Victor Kovner, and its vice-chair John Dunne, are supremely qualified to address Assemblyman Henderson's May 10, 1978 letter to Governor Carey (Exhibit D-1), as they were key players in securing the 1977 constitutional amendment and the 1978 Judiciary Law bill that the letter so damningly describes as concealing from the People "the true facts".

Among "the true facts" – prompted by the election flyer "On Tuesday, November 8, 1977 For Better Courts Vote YES on Court Reform Amendments 1-2-3" (Exhibit D-2) (which I obtained years ago from the Fund for Modern Court's files) – is whether it is demonstrative of how Amendment 1, "Selection of Judges of the Court of Appeals", was promoted, *to wit*, not revealing to voters that by their YES vote they would be relinquishing their right to elect Court of Appeals judges.

TABLE OF EXHIBITS

Exhibit B-3: "*Model for Selecting Top Court Judges Reveals Its Flaws*", New York Law Journal, November 13, 2003, article by John Caher

Exhibit C: "*Semi-Secret Court of Appeals Nominations Draws Criticism*", New York Law Journal, November 2, 2000, article by John Caher

Exhibit D-1: May 10, 1978 letter from Assemblyman Charles Henderson to Governor Hugh Carey, from legislative bill jacket, Chapter 156, Laws of 1978

Exhibit D-2: Election Flyer: "On Tuesday, November 8, 1977 For Better Courts Vote YES on Court Reform Amendments"

Exhibit E-1: "*Wider Selection Urged for Governor*", New York Law Journal, December 23, 1982, letter to the editor by Supreme Court Justice James J. Leff

Exhibit E-2: "*Changes Needed In Judicial Selection*", New York Law Journal, December 30, 1982, letter to the editor by Acting Supreme Court Justice Walter M. Schackman