

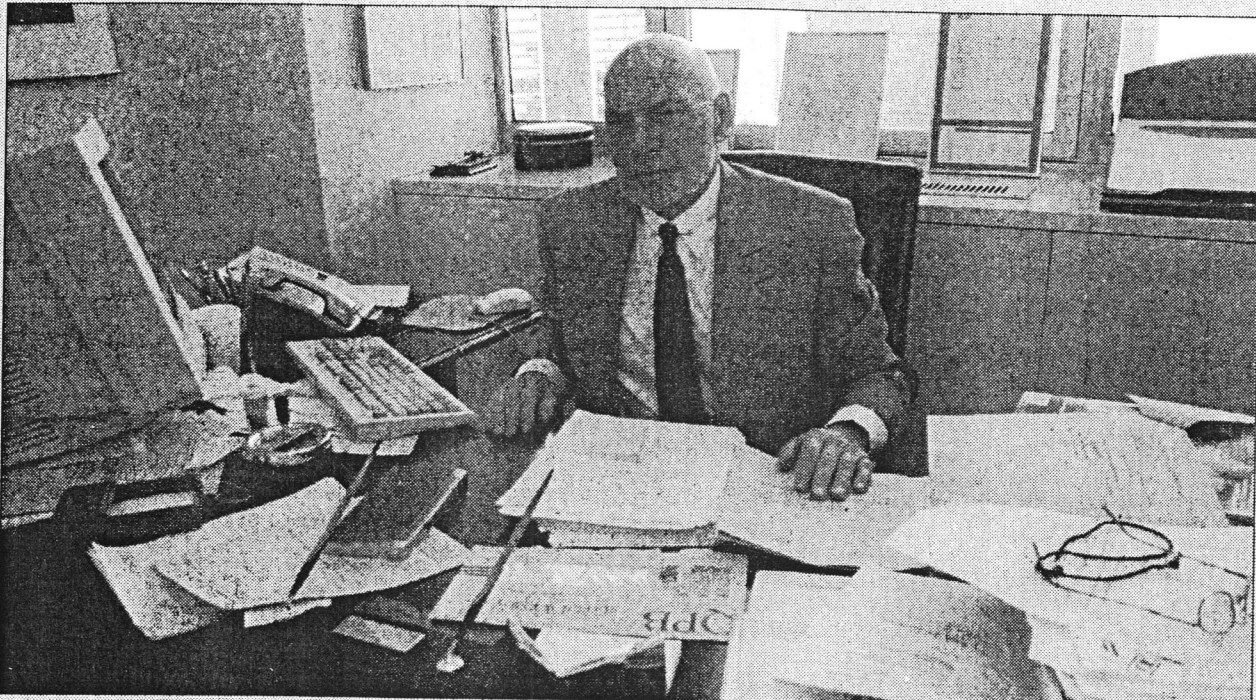
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■ BEHIND THE NEWS ■



PHOTOGRAPH BY ELIZABETH LIPPMAN

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

Semi-Secret Court of Appeals Nominations Draw Criticism

BY JOHN CAHER

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

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

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

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

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

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BY MICHAEL

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Critics See Flaws in Court of Appeals Nominations

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

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

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

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

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

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

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

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

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

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

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

Watchdogs' Response

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

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

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

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

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

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

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

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

Commission Confident

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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