

1 BEFORE THE NEW YORK STATE SENATE STANDING  
2 STANDING COMMITTEE ON THE JUDICIARY

3 -----  
4 New York State Senate  
5 Public Hearing on  
6 the Selection Process for the  
7 Chief Judge of the Court of Appeals  
8 -----

8 Hearing Room A  
9 Legislative Office Bldg.  
10 Albany, NY

10 January 27, 2009  
11 10:03 a.m.

12 PRESIDING:

13 Senator John Sampson  
14 Chair  
15 Senate Standing Committee on the Judiciary

15 PRESENT:

16 Senator George D. Maziarz (RM)  
17 Senator Bill Perkins  
18 Senator George H. Winner, Jr.  
19 Senator Ruben Diaz, Sr.  
20 Senator Michael H. Ranzenhofer  
21  
22  
23  
24

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6	Former Chair, Senate	
7	Judiciary Committee	
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1                   CHAIRMAN SAMPSON:       First of all, I  
2                   wanted to say good morning and thanks to  
3                   those who have come out to participate in  
4                   this hearing with respect to looking at the  
5                   judicial nomination with respect to the  
6                   process with respect to the Chief Judge and  
7                   also the Court of Appeals.

8                   I want to introduce my colleagues. To  
9                   my left, Senator George Maziarz, the ranker  
10                  on the Judiciary Committee. And also  
11                  Senator Winner, also a member of the  
12                  Judiciary Committee.

13                  And, you know, my purpose with respect  
14                  this hearing today is just really to  
15                  investigate the process of selecting judges  
16                  for the Court of Appeals.

17                  Everyone knows, when the Governor  
18                  expressed his concern with respect to the  
19                  list that he was presented with respect to  
20                  making this selection, that his concern was  
21                  there were really no women on that list.

22                  And also Senator Malcolm Smith  
23                  expressed a very deep concern, because the  
24                  issue of when you look at the population of

1 the State of New York and you look at the  
2 inroads that women have made throughout this  
3 country, it was really a sad day that a  
4 woman was not included on that list.

5 And just looking at some of the  
6 statistics, when you're looking at  
7 18 percent of the population are  
8 African-Americans and only 9 percent are  
9 comprised within the judiciary, 16 percent  
10 of the population are Hispanics, and only  
11 4 percent are comprised in the judiciary,  
12 and Asians, which are 22 percent of all law  
13 students, yet not even comprise 1 percent of  
14 those on the bench.

15 And this issue is not about Judge  
16 Lippman, the appointment with respect to the  
17 Governor made. This issue is about getting  
18 into the process and making sure it is  
19 reflective of what the population of  
20 New York State looks like, and making sure  
21 that we continue to keep this process as  
22 independent as possible and we don't allow  
23 politics into this selection process.

24 This has always been the issue between

1           whether we should allow jurists to be  
2           elected or appointed. And these are the  
3           issues when we allow politics to enter into  
4           the appointment and selection process, are  
5           we really getting an independent judiciary.

6           So these are some of the concerns that  
7           I have. And hopefully through this  
8           committee we are able to ensure a process  
9           that is fair, thorough, and open to a  
10          variety of individuals, a variety of  
11          backgrounds, who can disagree on some things  
12          but should not be punished because of their  
13          beliefs on certain issues.

14          At this point in time I'd like to  
15          introduce my colleague and my friend George  
16          Maziarz.

17                 SENATOR MAZIARZ:       Thank you very  
18                 much, Mr. Chairman. We certainly appreciate  
19                 the opportunity to have a hearing on this  
20                 particular issue.

21                 We've also been joined by my colleague  
22                 Senator Mike Ranzenhofer, from Western  
23                 New York. Senator Ranzenhofer is not just a  
24                 new member of this committee but a new

1 member of the Senate.

2 So welcome, Senator Ranzenhofer.

3 (Applause.)

4 SENATOR MAZIARZ: Wow. You don't  
5 have much applause in this business,  
6 particularly in one of these hearing rooms,  
7 so --

8 SENATOR WINNER: Enjoy it while it  
9 lasts.

10 SENATOR MAZIARZ: Enjoy it while you  
11 can, right.

12 And also I know the chairman of course  
13 will take care of the introductions, but I  
14 know that former Senator John Dunne, a  
15 former chair of this committee, a long-time  
16 member of the New York State Senate and one  
17 of the sponsors of the original Modern Court  
18 Act in the State of New York, is going to be  
19 testifying today. So it's an honor to have  
20 Senator Dunne here.

21 Thank you.

22 CHAIRMAN SAMPSON: Thank you very  
23 much, Senator Maziarz.

24 At this point in time, Senator Winner.

1                   SENATOR WINNER:       Well, I just  
2                   obviously look forward to hearing Senator  
3                   Dunne and others give their perspective on  
4                   how the statute works with regard to the  
5                   selection process and hope that, you know,  
6                   there are ways that we can go forward to  
7                   make some changes in this process that will  
8                   still preserve the overriding goal, which is  
9                   to make sure that those that are chosen for  
10                  the highest positions of Court of Appeals  
11                  justice, associate justice, and Chief Judge  
12                  of the Court of Appeals are the highest  
13                  qualified individuals that we can put on  
14                  that high court, which is the most  
15                  prestigious state court in the United  
16                  States.

17                  CHAIRMAN SAMPSON:       Thank you very  
18                  much, Senator Winner.

19                  Senator Ranzenhofer?

20                  SENATOR RANZENHOFER:       Yes, just a  
21                  brief comment. First of all, it's good to  
22                  be here --

23                  CHAIRMAN SAMPSON:       I want to make  
24                  sure, did I pronounce your name correctly?

1                   SENATOR RANZENHOFER:       My wife is  
2                   still working on that after 30 years, so  
3                   don't worry about it.

4                   (Laughter.)

5                   SENATOR RANZENHOFER:       But I'm very  
6                   interested in this topic because not only am  
7                   I a new Senator but also a practicing  
8                   attorney who has personally gone through the  
9                   process of judicial nomination and the whole  
10                  process -- not at the Court of Appeals  
11                  level, obviously, but have gone through the  
12                  process personally, so I'm very interested  
13                  in hearing some perspectives on this  
14                  particular issue.

15                  CHAIRMAN SAMPSON:       Thank you very  
16                  much.

17                  And at this point in time, my colleague  
18                  who has just joined me, Senator Diaz.

19                  Senator Diaz, do you have anything to  
20                  say?

21                  SENATOR DIAZ:       Thank you.    Just  
22                  congratulating you for your chairmanship and  
23                  to work together with my colleagues and just  
24                  welcome them.



1                   CHAIRMAN SAMPSON:       Thank you very  
2                   much.

3                   And at this point in time I just really  
4                   want to get right into it. We have a  
5                   witness list, but at this point in time I  
6                   would like to defer to our colleague,  
7                   Senator Dunne, if you like to come up and  
8                   speak, Senator Dunne.

9                   And we welcome you, Senator Dunne.

10                  SENATOR JOHN DUNNE:       Thank you,  
11                  Mr. Chairman. It's good to be home.

12                  CHAIRMAN SAMPSON:       Thank you very  
13                  much, Senator Dunne.

14                  SENATOR JOHN DUNNE:       Senator Sampson,  
15                  members of the Judiciary Committee, thank  
16                  you on behalf of Modern Courts for holding  
17                  this important forum on the judicial  
18                  nomination system for the Court of Appeals  
19                  and for providing me with the opportunity to  
20                  present testimony not only on behalf of the  
21                  Committee for Modern Courts but also in my  
22                  private capacity as a practicing attorney.

23                  As a former State Senator and chair of  
24                  this distinguished committee, and as an

1           Assistant Attorney General of the United  
2           States at the Department of Justice Civil  
3           Rights Division and a long-time advocate for  
4           a commission-based appointive system, I have  
5           given both the subject of judicial selection  
6           and diversity a great deal of thought.

7           In fact, the last time I appeared  
8           before this committee was on the subject of  
9           diversity in the judiciary, a matter of top  
10          priority for the entire community.

11          Modern Courts has long believed that  
12          the best opportunity for a diverse judiciary  
13          is through a commission-based appointive  
14          system, especially where the appointing  
15          authority is the Governor, who represents  
16          all the people of our state. This remains  
17          one of the guiding principles of our  
18          organization for more than 50 years, and the  
19          diversity of the present-day Court of  
20          Appeals demonstrates the success of that  
21          system.

22          Let me take you back, if I may, while I  
23          was in the Senate. And after many years of  
24          struggle, in 1977 a constitutional

1 amendment, with strong leadership from  
2 then-Governor Carey, established a  
3 commission-based appointive system for the  
4 selection of judges of the Court of Appeals.  
5 The bipartisan support for the amendment and  
6 subsequent legislation derived from the  
7 belief that this system would eliminate the  
8 role of money, reduce the influence of  
9 politics, provide for the most highly  
10 qualified judges, and, finally, promote  
11 diversity.

12 And as you know, the vacancies on the  
13 Court of Appeals are filled using this  
14 commission-based appointment system.

15 Let me first just say it is not  
16 screening committee, a device which the last  
17 three Governors have utilized for the  
18 Governor's other judicial appointments and  
19 panels on which I have served as a screener.

20 It's not a screening but an appointive  
21 system. Candidates submit their  
22 applications to the Commission on Judicial  
23 Nomination, a bipartisan body of 12 members  
24 who evaluate the candidates, determine who

1           are well-qualified, and forward a list of no  
2           more than seven to the Governor, who make  
3           choose only from that list. The Governor's  
4           nominee is then sent to you for  
5           confirmation.

6           This year the Commission on Judicial  
7           Nomination presented a list of seven  
8           nominees -- all outstanding, but all men --  
9           for consideration for appointment as Chief  
10          Judge of the Court of Appeals. By law, the  
11          Governor selected a nominee from that list  
12          to fill the vacancy created by the  
13          retirement of Chief Judge Kaye.

14          I personally believe that the selection  
15          of Jonathan Lippman as our next Chief Judge,  
16          subject to your committee's confirmation,  
17          was an excellent choice.

18          The failure of the Judicial Nomination  
19          Commission to present even one woman,  
20          however, was not a failure of the appointive  
21          system. The system has encouraged and  
22          allowed New York to have a diverse Court of  
23          Appeals for over 30 years, something not  
24          shared by many states, especially those who

1           suffer the political and economic influence  
2           that plagues states where elections to the  
3           state's highest court remain the state law.

4           One need only look to those states  
5           which elect their highest judges to know  
6           that an appointive system is critical to  
7           both fair and equal justice. Let me cite an  
8           example.

9           In West Virginia, Justice Brent  
10          Benjamin of its Supreme Court of Appeals  
11          refused to recuse himself from the appeal of  
12          a \$50 million jury verdict even though the  
13          CEO of the lead defendant spent \$3 million  
14          supporting the judge's campaign.

15          In Wisconsin, Justice Butler was  
16          appointed to the Supreme Court by the  
17          Governor in August 2004, becoming the first  
18          African-American supreme court justice in  
19          Wisconsin history. He subsequently lost his  
20          seat in a highly controversial and bitter  
21          \$5 million campaign in which a small-town  
22          trial judge with thin credentials ran a  
23          television advertisement campaign falsely  
24          suggesting that the only black justice on

1           the state supreme court had helped to free a  
2           black rapist.

3           And here in New York you may recall the  
4           history that part of the impetus for  
5           establishing a commission-based appointive  
6           system for the Court of Appeals was the  
7           electoral defeat in the early 1970s of the  
8           late and beloved -- and I use that term well  
9           because I worked so closely with Judge  
10          Harold Stevens -- of the beloved Judge  
11          Harold Stevens, the first African-American  
12          to serve on the New York Court of Appeals,  
13          by the extremely well-financed campaign by  
14          an attorney with no prior judicial  
15          experience.

16          We get then to the question, which  
17          becomes how to ensure the integrity and  
18          continuity of a system that does work, that  
19          protects our courts from the influence of  
20          money, media and those who seek to interfere  
21          with the cornerstone democratic ideal of an  
22          independent judiciary, even when we find  
23          that the Commission on Judicial Nomination  
24          in this most recent round of nominations has

1 neglected the important factor of gender  
2 diversity.

3 The answer is not to change the system,  
4 but for our elected officials -- the  
5 Governor and the legislative leaders who are  
6 empowered to appoint members of the  
7 Commission on Judicial Nomination, along  
8 with the Chief Judge -- to appoint those who  
9 reflect the diversity of our state and also  
10 make their expectations clear to their  
11 nominees that diversity considerations must  
12 be a factor in the process.

13 New York's appointive system has  
14 achieved a diverse and distinguished Court  
15 of Appeals. Modern Courts continues to  
16 support that appointive system as the best  
17 means of ensuring diversity. And I hope  
18 that you will give us an opportunity during  
19 your deliberations so that we may have  
20 exchange of thoughts and pursue once more a  
21 step closer to true justice.

22 Thank you. You've been very generous.

23 CHAIRMAN SAMPSON: Senator Dunne,  
24 thank you very much.

1                   We have a few questions from the panel,  
2                   and I think Senator Diaz first.

3                   SENATOR DIAZ:        Thank you,  
4                   Mr. Chairman.

5                   Good morning.

6                   SENATOR JOHN DUNNE:    Good morning,  
7                   Senator.

8                   SENATOR DIAZ:        You said, in reading  
9                   in your statement, that there are some words  
10                  that comes to light. For example, you said  
11                  that the purpose of the committee to  
12                  evaluate the candidates that will be  
13                  submitted to the Governor, one of the  
14                  purposes is to promote diversity.

15                  So you agree that this committee  
16                  failed?

17                  SENATOR JOHN DUNNE:    It did not meet  
18                  the expectations of those who have seen a  
19                  commendable record of promoting a diversity  
20                  among the panel of nominees. So yes, it --  
21                  I think it's fair to say there was that  
22                  failure, no question about that.

23                  SENATOR DIAZ:        Also you said that, as  
24                  we know, the committee failed to appoint a



1 woman to -- they nominated all males.

2 So the committee also failed there, you  
3 agree?

4 SENATOR JOHN DUNNE: Yes.

5 If I may, but -- if you visit a session  
6 of the Court of Appeals before the first of  
7 this year, you'll notice that four out of  
8 the seven justices were women, which was a  
9 great tribute to the system.

10 SENATOR DIAZ: We're talking about  
11 the composition of the committee now.

12 SENATOR JOHN DUNNE: Right.

13 SENATOR DIAZ: Also one of the  
14 purposes of the committee is to -- you say  
15 it has neglected the important factor of  
16 gender diversity.

17 So the committee also failed there?

18 SENATOR JOHN DUNNE: Yes.

19 SENATOR DIAZ: So then my question  
20 is, if you said we agree that the committee  
21 failed in promoting diversity, failed in --  
22 when they nominated no women, failed in the  
23 gender diversity, why would you say the  
24 question then becomes how to ensure the

1 integrity and continuity of a system that  
2 does work?

3 How do you explain that the system does  
4 work when we have seen the failure of the  
5 system?

6 SENATOR JOHN DUNNE: I think that you  
7 have to take the record of the commission  
8 over the last 30 years as whole. It has  
9 achieved the purpose for which it was  
10 formed.

11 That if this was, indeed, I think  
12 everybody agrees was a diversion from that,  
13 or an exception from the record, it leads me  
14 to believe that the system works, that it is  
15 operated by human beings like ourselves,  
16 just men and women trying to do the right  
17 job -- I'm concerned, Senator, about opening  
18 up a change in a system that has worked  
19 despite a failure this last time.

20 SENATOR DIAZ: Well, I would say that  
21 we are in a new era, new times, new things.  
22 For the first time ever, we have a minority  
23 governor, a black governor. And I don't  
24 know if it's a mere casualty, but it's

1 strange that the system has worked,  
2 according to you, always.

3 SENATOR JOHN DUNNE: No, not always.  
4 I take the record as a whole.

5 SENATOR DIAZ: Yeah, but then when we  
6 have a black Governor that could appoint a  
7 qualified, well-prepared woman or minority  
8 person like Judge Ciparick, and that the  
9 committee ties up the hands of the Governor  
10 and that the Governor is forced to appoint  
11 one of the seven.

12 So I think that the problem here is how  
13 do we take away the power from that  
14 committee to just -- or how could we give  
15 the power to the Governor to say, Go back  
16 and do something that includes -- that  
17 promotes diversity, that includes not only  
18 men, and does provide gender diversity.

19 So the question here is, let's untie  
20 the Governor's hands and let's give the  
21 Governor the power or the authority to order  
22 the committee: No, no, no, no, no, what you  
23 did is wrong. What you did is uncalled for.

24 I mean, anybody can see -- you just

1           said it was a -- oh, the committee wasn't  
2           wrong -- because we all know, sir, that we  
3           have well-qualified women in the State of  
4           New York, well-qualified minority  
5           candidates.

6                     But to go and give the Governor seven  
7           men and then force the Governor, you've got  
8           to choose one of them -- it is not "if" or  
9           "but", one of them, that's what you have to  
10          do -- I think that's unfair for the  
11          Governor, I think that's unfair for the  
12          state, I think that's unfair for women, I  
13          think that's unfair for minorities, and I  
14          think that the Governor should be able to  
15          say: No, no, go back and give me diversity,  
16          give me gender diversity, give me -- give me  
17          other things.

18                    Don't you agree?

19                    SENATOR JOHN DUNNE:        Let me respond.

20                    CHAIRMAN SAMPSON:        Before you  
21          respond, I just want to introduce Senator  
22          Perkins, who's just also joined us.

23                    Again, Senator Dunne, I'll let you  
24          respond to the question, and then after that

1           then go to Senator Winner.

2           SENATOR JOHN DUNNE:       I'll be as brief  
3           as I can.

4           Let us put this in historic  
5           perspective, if I may. Prior to 1977, when  
6           I was a member of this committee, the  
7           Governor had no say whatsoever in the  
8           selection of the members of the Court of  
9           Appeals. They were elected by the people.

10          SENATOR DIAZ:       They never did, sir --

11          SENATOR JOHN DUNNE:       I'm sorry?

12          SENATOR DIAZ:       Let me interrupt. We  
13          are in a new era, we are in a new stage, we  
14          have a minority --

15          SENATOR JOHN DUNNE:       Well, all right,  
16          but let me -- let me --

17          CHAIRMAN SAMPSON:       He's giving us the  
18          history.

19          SENATOR DIAZ:       Because we never had a  
20          black governor. We never had a minority  
21          governor.

22          CHAIRMAN SAMPSON:       We're not saying  
23          that. He's just giving us some history.  
24          Senator Dunne's giving us the history.

1                   Yes, Senator Dunne.

2                   SENATOR JOHN DUNNE:       Just a footnote,  
3                   that's all.   The only African-American  
4                   member of the Court of Appeals we had prior  
5                   to that time was appointed by Malcolm  
6                   Wilson, a white male who had been Lieutenant  
7                   Governor.   So let me just give the historic  
8                   perspective.

9                   So the thought was if we're going to  
10                  make a change in what was a very political  
11                  system, let's have the Governor have a voice  
12                  in it, let's have the Chief Judge have a  
13                  voice in it, let's have the legislative  
14                  leaders.   Bringing all three branches of  
15                  government together to have a voice in this  
16                  new appointive system which we hoped would  
17                  bring a larger measure of justice.

18                  You're going to love being in the  
19                  majority, having the responsibility to try  
20                  to work out some of these problems.

21                  But clearly it was those three branches  
22                  sitting together and trying to figure out  
23                  how they could balance the various interests  
24                  at the outset.

1           So, frankly, legislators didn't want to  
2           give carte blanche to the Governor, they  
3           wanted to control some influence on it, and  
4           they didn't want the Governor to say, well,  
5           I don't like your list, come back with more.

6           This is not a screening committee, it  
7           is a nominating committee. And I think that  
8           they've taken their responsibilities very  
9           seriously.

10           What I'm concerned about, Senator Diaz,  
11           is opening up a whole new discussion based  
12           upon a single failure which over the long  
13           run of 30 years of history have produced not  
14           only a very fine court but one which  
15           reflects very significance diversity.

16           CHAIRMAN SAMPSON:       Thank you, Senator  
17           Dunne.

18           Senator Winner.

19           SENATOR WINNER:        Senator, thank you  
20           for being here.

21           Senator, you say that the system failed  
22           this time. And did it fail solely because  
23           it failed to include a woman or a minority  
24           on that list?





1           have a responsibility to meet expectations?  
2           Or does it have a responsibility to nominate  
3           people who are found to be highly qualified  
4           as associate judge or Court of Appeals  
5           judge?

6                    SENATOR JOHN DUNNE:        I think the  
7           committee has a responsibility to respect  
8           the law, to act in accordance with its  
9           provisions, to recognize the seeds of and  
10          origins of this legislation.  And I believe  
11          that your responsibility now is to pass upon  
12          the qualifications of the single individual  
13          who's been proposed.

14                   We're looking prospectively.  And I  
15          believe that the prospects are not so dim as  
16          to suggest that there would be a failure to  
17          have a more diverse panel.  But the fact  
18          that there is not a diverse panel does not  
19          nullify or in any way challenge the  
20          legitimacy of the process that was used and  
21          the nominee that the Governor nominated.

22                   SENATOR WINNER:        So the committee did  
23          its job?  Under the law, it met its  
24          responsibilities?

1                   SENATOR JOHN DUNNE:       No question  
2                   about that.

3                   SENATOR WINNER:       And additionally, we  
4                   don't know, do we, who they interviewed?

5                   SENATOR JOHN DUNNE:       Correct, we do  
6                   not. That's not a matter of public record,  
7                   that's correct.

8                   SENATOR WINNER:       So they could have  
9                   interviewed scores of women candidates for  
10                  this position, couldn't they?

11                  SENATOR JOHN DUNNE:       Well, the  
12                  process is that the aspirant must file an  
13                  application for consideration. I don't know  
14                  how many, other than the one sitting  
15                  associate judge of the Court of Appeals,  
16                  applied.

17                  SENATOR WINNER:       Again, they could  
18                  have interviewed scores of applicants --  
19                  there could have been scores of women  
20                  candidates that applied and were considered  
21                  by this committee, couldn't there have been?

22                  SENATOR JOHN DUNNE:       No question  
23                  about that.

24                  SENATOR WINNER:       And there also could

1           have been scores of people who were  
2           nominated by others to be candidates for  
3           this position as well, under the statute?

4           SENATOR JOHN DUNNE:       That's correct.  
5           Part of the responsibility of the panel  
6           is --

7           SENATOR WINNER:        So Senator Sampson  
8           and Senator Perkins and Senator Diaz could  
9           have nominated a number of women for  
10          consideration for this position and they  
11          would have been considered by the committee;  
12          isn't that also correct?

13          SENATOR JOHN DUNNE:       I never want to  
14          opine what public officials want or not want  
15          to do.

16          SENATOR WINNER:        And so we don't know  
17          whether the committee in fact did opine on  
18          the qualifications of a number of women or  
19          other applicants for this position, do we?

20          SENATOR JOHN DUNNE:       I know of no  
21          information that would shed light on that.

22          SENATOR WINNER:        Thank you, Senator.

23          CHAIRMAN SAMPSON:        Just to note for  
24          the record, there was only 12 candidates

1           that the Judicial Nominating Committee  
2           interviewed for this position. And out of  
3           those candidates, there were only three  
4           candidates that were women.

5           And to note even further, the  
6           commission indicated that they interviewed  
7           19 bar associations, but which bar  
8           associations were sort of a cross-section of  
9           the entire state.

10          So the issue is whether or not that the  
11          committee -- no one is saying that the  
12          committee did not do what they are legally  
13          responsible to do. But at the same time,  
14          this is the same committee who years ago  
15          included women when Judge Kaye took the  
16          bench I think some 26 years ago or 24 years  
17          ago. At that point in time there were 40  
18          applicants who applied for a position to the  
19          Court of Appeals, and now we only have 12  
20          applicants. This is a matter of concern.

21          Senator Diaz, I'll let you respond  
22          briefly, and then we're going to Senator  
23          Perkins.

24                    SENATOR DIAZ:       For the benefit of my

1 colleagues here, a sitting judge in the  
2 Court of Appeals by the name of Ciparick, a  
3 woman, a Hispanic woman, has been a sitting  
4 judge there for so many years, for so many  
5 years. I doubt that she would not be  
6 qualified, and she was interviewed.

7 Thank you.

8 CHAIRMAN SAMPSON: Senator Perkins.

9 SENATOR PERKINS: Thank you very  
10 much.

11 My concern is that something went  
12 wrong. And if not in fact, in perception.  
13 And very often perception is more important  
14 than facts, especially in the public arena  
15 and public discussions.

16 And no one stood up to say that, Oh,  
17 no, everything went as you would have  
18 expected in terms of opening up the process  
19 so that diversity could be considered.  
20 There was no responsible response that way.

21 So something went wrong. And we have  
22 to be very careful about not recognizing  
23 that. And I want to thank you for your  
24 recognizing some shortcoming that possibly

1           took place, as opposed to sort of like  
2           saying, you know, we don't know this, we  
3           don't know that, we don't know the other.  
4           Because otherwise we're not going to be able  
5           to fix it in such a way that what you might  
6           want can have some credibility.

7           So in other words, you want the process  
8           that allows for a committee to, you know, be  
9           able to do that they did without having  
10          questions about the integrity of their  
11          process, and that would allow for some  
12          diversity.

13          And the question for me becomes how do  
14          we fix it so that the problem that we  
15          discovered doesn't happen again. So that,  
16          at least in terms of perception, the public  
17          is convinced that it was done the right way.

18          And right now, your response is, well,  
19          let's keep doing what we're doing, because  
20          this is an aberration. Well, I don't think  
21          that we can accept that.

22                 SENATOR JOHN DUNNE:         Let me respond  
23          once again from my own personal experience.

24                 I have been nominated by governors and

1 the president of the United States to serve  
2 on various commissions. And before the  
3 appointment is made, you sit down with your  
4 sponsor and you try to find out where that  
5 individual is coming from. Our whole system  
6 is geared so that there will be a diversity  
7 of views in any type of body that's going  
8 consider an issue.

9 And you get it clear what the -- "I  
10 want you to be on that commission not only  
11 to achieve its goals, but keep in mind this  
12 is what the administration wants."

13 Now, that message can come from the  
14 Governor, as I've suggested in my testimony,  
15 from the other appointive officials, the  
16 legislative leaders, the Chief Judge: "In  
17 your deliberations, when you go into that  
18 room, I want you to consider the following  
19 points." And as I mentioned here, I think  
20 that message, no matter who the appointer  
21 is, should be "I want to make sure there's  
22 diversity on our state's highest court."

23 I think that's where it comes from, I  
24 can tell you from experience. And you don't

1           violate your own personal principles. You  
2           say, "I'd like very much to," or "Thanks, I  
3           can't go along with that agenda." I don't  
4           mean to oversimplify it, but that's the  
5           message.

6           The whole idea behind this system of  
7           nominating members of the commission was to  
8           provide a wide, diverse basis for selection,  
9           hoping that those individuals, because they  
10          come out of a -- two-thirds of them from a  
11          political system -- let's say the four  
12          appointed by the Chief Judge aren't  
13          political -- bring together a conflict of  
14          political views. And diversity is a matter  
15          of great importance; more priority perhaps  
16          with some, but an important factor.

17          CHAIRMAN SAMPSON:        Senator Dunne, is  
18          the question -- do you think that the  
19          process, because there are -- you have the  
20          commission, who is statutorily implemented,  
21          in the way of making the process maybe a  
22          little more open? So, you know, as Senator  
23          Perkins talked about, the issue of public  
24          perception and making sure politics doesn't



1           come into play in the selection process.

2           Because there's a perception at this  
3 point in time, whether it's reality or  
4 not -- and sometimes perception becomes  
5 reality -- that politics did come into play  
6 with this selection of those candidates.

7           SENATOR JOHN DUNNE:       I'm not ashamed  
8 to say to you, Senator, I believe that  
9 politics is a noble profession. I truly --  
10 I've spent my life involved in it. But  
11 during those negotiations back in '77, some  
12 advocates said let's put it into the  
13 constitution so that there won't be any  
14 tinkering with it by politicians, who are  
15 elected officials.

16           Well, there were those of us who  
17 thought otherwise. And we figured leave it  
18 to the wisdom of those who bring a  
19 collection of political views into the  
20 mainstream to make decisions.

21           So you'll notice I kind of edited my  
22 remarks. We're not eliminating politics.  
23 We're trying to reduce the controlling  
24 influence that it had, particularly for the

1 elimination of some very fine judges from  
2 the bench.

3 CHAIRMAN SAMPSON: Thank you very  
4 much, Senator.

5 Any more questions for the Senator?

6 Senator, thank you very much for that  
7 input, and it was very helpful to us. Thank  
8 you.

9 SENATOR JOHN DUNNE: It was a  
10 privilege. Thank you.

11 CHAIRMAN SAMPSON: I think the next  
12 panelist is Ravi Batra. Is Mr. Batra here?

13 MR. BATRA: Yes.

14 CHAIRMAN SAMPSON: I just want to  
15 note for the hearing, after this witness,  
16 we're going to break so we can go and report  
17 into session, and then we'll resume  
18 hopefully in another 20 minutes after the  
19 break.

20 Is that okay, members?

21 MR. BATRA: Good morning,  
22 Mr. Chairman. I've got two originals for  
23 yourself and the ranking Senator, and I've  
24 brought copies for the members of the

1 testimony.

2 CHAIRMAN SAMPSON: Mr. Batra, Senator  
3 Diaz said make sure you don't read the whole  
4 thing. You know, we don't want to be too  
5 late to session.

6 (Laughter.)

7 MR. BATRA: I understand.

8 CHAIRMAN SAMPSON: You can go ahead,  
9 Mr. Batra. Yes, we're ready.

10 MR. BATRA: Thank you. First of all,  
11 let me just say what a privilege it is not  
12 only for me personally but professionally,  
13 as a lawyer, to be before the Judiciary  
14 Committee, the distinguished Judiciary  
15 Committee of the New York State Senate,  
16 particularly when it is looking at an issue  
17 which proves beyond any doubt, with the  
18 highest regard to Senator Dunne, that the  
19 system is broken.

20 So I will go to my prepared testimony,  
21 Senator, Mr. Chairman, and I will get into  
22 some questions and answers.

23 Good morning, Chairman John Sampson and  
24 members of the distinguished Judiciary

1           Committee. As every lawyer, I am duty bound  
2           to aid in the true administration of justice  
3           and to enhance public confidence in the rule  
4           of law. And this distinguished committee  
5           has my respect consistent with the rules of  
6           professional conduct.

7           I am, however, constrained by the  
8           confidentiality with respect to the  
9           identities regarding information I've  
10          learned in confidential settings. Service  
11          on judicial screening panels implicates  
12          confidentiality, as the attorney or judge  
13          candidate is asked to waive her statutory  
14          confidentiality in disciplinary matters and  
15          permit inquiry to such grievance committee  
16          or the Commission on Judicial Conduct. I  
17          am, of course, left with some First  
18          Amendment rights apart from the ethical duty  
19          to act and the duty to keep confidences.

20          Initially, I must congratulate the  
21          New York State Senate -- I see Senator  
22          George Winner on your left, Mr. Chairman,  
23          who well appreciates sunshine in  
24          government -- in selecting you for chairing

1           this most important committee.

2           For it is, after all, the guardian of  
3           the rule of law and to continue to ensure  
4           that the implied covenant of the third  
5           branch of government, which is merit-based  
6           dispute resolution, without fear or favor,  
7           is honored and that politics and  
8           consensus-building, while appropriate in the  
9           executive and legislative branches of  
10          government, be banned -- not reduced, be  
11          banned in anything to do with the court's  
12          functioning; to wit, be it decisional or  
13          administrative, judicial screening panels or  
14          the Commission on Judicial Nomination, the  
15          disciplinary committees for the bar and the  
16          CJC for the judiciary, and independent  
17          bodies, committees or commissions whose job  
18          it is to investigate and ensure integrity in  
19          government.

20                 Obviously, even more damning than  
21          politics in the wrong venue is  
22          discrimination or malice.

23                 I must disclose some biases that I  
24          have. Initially, to aid fairness, I am

1 happy to disclose that I supported presiding  
2 Justice Lippman's attempts to be elected a  
3 justice of the Supreme Court and referred to  
4 him as "the zenith of merit" upon his  
5 cross-endorsement for election to New York  
6 State Supreme Court.

7 A copy of my statement is attached to  
8 what has been submitted to the committee.  
9 And, Mr. Chairman, I would ask that the  
10 bound prepared statement be included in the  
11 record.

12 Second, each person on the seven-person  
13 list issued by the Commission on Judicial  
14 Nomination is well-qualified to serve as  
15 Chief Judge. And that I hold Acting Chief  
16 Judge Ciparick and Administrative Judge Fern  
17 Fisher in very high personal regard.

18 Third, I was appointed by then-Chief  
19 Administrative Judge Jonathan Lippman in May  
20 of '97 to serve on OCA's task force on  
21 mandatory retirement of state judges.

22 Four, I have served in the New York  
23 State Bar Association's house of delegates,  
24 authored a report on judicial discipline

1 while then-Senator Lack's bill, S4264, was  
2 pending, and such a report was adopted by  
3 the board of New York County Lawyers --  
4 copies attached -- and was a coauthor of a  
5 report also adopted by NYCLA and negotiated  
6 with then-Chief Judge Jon O. Newman of the  
7 United States Circuit Court of Appeals to  
8 change its policy which kept approximately  
9 60 percent of its orders secret from the  
10 public and made them -- these orders were  
11 known as summary orders -- and made them  
12 electronically published.

13 Five, I wrote a letter on July 16,  
14 2008, as finance chair of Justice Milton A.  
15 Tingling's campaign for Manhattan Surrogate,  
16 to the legendary Manhattan D.A., the  
17 Honorable Robert Moses Morgenthau, asking  
18 for an investigation into then-candidate  
19 Nora Anderson and her employer, Seth  
20 Rubenstein, to see if there was any  
21 pay-to-play violation or if the then  
22 \$225,000 loan was legal or criminal. We all  
23 know that there were arrests made in  
24 December.

1           Number six. Supporting Senator Dunne's  
2           comment, I consider politics to be good and  
3           necessary for a democratic republic to  
4           function and be involved in an appropriate  
5           forum for "judge birth," be it elective or  
6           appointive. However, once a person dons the  
7           robes and takes the bench, I oppose politics  
8           to even touch a judge's life. And to the  
9           extent unavoidable, as during reelection or  
10          reappointment, then that it be kept at a  
11          minimum.

12           However, I am opposed to politics,  
13          discrimination or malice intruding into the  
14          professional selection function carried out  
15          by any judicial screening panel, but  
16          critically, with regard to the  
17          constitutional duties imposed upon the  
18          Commission on Judicial Nomination, I have  
19          zero tolerance, as the discretion of the  
20          Executive, as Senator Diaz was referring to  
21          earlier, that the Governor's hands were  
22          affected, and in fact the Senate are  
23          necessarily constrained by the commission's  
24          seven-person list.



1           To say it another way, a corrupted or  
2           illegal means and method, let alone a  
3           calculated and corrupt end result, designed  
4           to block the Governor's options in my  
5           judgment renders the list tendered by the  
6           nomination voidable --

7           CHAIRMAN SAMPSON:        Mr. Batra, what do  
8           you mean by that?

9           MR. BATRA:        Well, because the lay of  
10          the land is that the Governor is to select  
11          only from those nominated by the nominations  
12          commission.

13          When that body acts improperly, then  
14          that's a constitutional violation of  
15          magnificent proportions, because the  
16          Governor's hands are tied in who the  
17          Governor can nominate, and the Senate's  
18          advice and consent power, which is  
19          constitutionally the reason for your  
20          existence --

21          SENATOR WINNER:        How did it act  
22          illegally?

23          MR. BATRA:        I'm sorry?

24          SENATOR WINNER:        How did it act

1 illegally?

2 MR. BATRA: How did they act  
3 illegally? I think, Senator Winner, it is  
4 without a question that no matter how good  
5 they may have acted for 30 years,  
6 approximately -- just like a doctor who's  
7 done a wonderful job for 30 years but cut  
8 the wrong leg off this time, he's still  
9 negligent and still got to pay for the leg  
10 off.

11 Here, Exhibit A and B of their  
12 misconduct is the current Acting Chief Judge  
13 of the State of New York is Carmen Beauchamp  
14 Ciparick, and she was found not qualified.  
15 Second, the other --

16 SENATOR WINNER: You're substituting  
17 your decision with regard to that for the  
18 commission's decision. The commission  
19 apparently made a decision not to nominate  
20 her. So you're substituting your judgment  
21 and saying that she should have been  
22 nominated, yet you did not sit through any  
23 of the hearings or do any of the interview.

24 MR. BATRA: There is no doubt in my

1 mind that I am, and I would submit to you,  
2 Senator, that this is an issue of res ipsa  
3 loquitur. Anyone with a reasonable mind  
4 could come to no other conclusion. In fact,  
5 I want to --

6 SENATOR WINNER: Well, clearly that  
7 commission did come to a different --

8 MR. BATRA: That's okay.

9 SENATOR WINNER: And you say that  
10 that decision is per se illegal?

11 MR. BATRA: It is tainted, in my  
12 view, Senator Winner, with Batson-like  
13 violations. And in fact -- but that issue  
14 would have gone to what before the Governor  
15 had nominated.

16 So because this committee is looking  
17 forward, not backwards, it is important --  
18 and I must pause, Senator Winner, because  
19 what I intended to say further on is I  
20 absolutely support the nomination of Chief  
21 Judge Jonathan Lippman.

22 SENATOR WINNER: So they obviously  
23 didn't act illegally.

24 MR. BATRA: That's not the point.

1           That's not the point, Senator. The seven  
2           people nominated by the commission are all  
3           worthy people.

4                   New York State is what Philadelphia  
5           used to be a hundred years ago. A  
6           Philadelphia lawyer was the best lawyer in  
7           the United States. Today, New York lawyers  
8           are the best lawyers in the United States.

9                   So to suggest that New York State, with  
10          18 million citizens and over 100,000  
11          lawyers, to suggest that these seven weren't  
12          wonderful, that's not the question. They  
13          are. Every one of them is qualified. But  
14          that begs the question.

15                   With Acting Chief Judge Carmen  
16          Beauchamp Ciparick, who is the senior-most  
17          judge on the Court of Appeals, if she can't  
18          make the cut, we don't have to go much  
19          further to decide, without doubt, that the  
20          system is broken.

21                   And now I think the inquiry should move  
22          to how do we fix a system that is clearly  
23          broken. Because this appointment, this  
24          selection process, this nomination dealt

1 with the third branch of government's  
2 head -- not just any Court of Claims Judge A  
3 or Court of Claims Judge B or associate  
4 judges of the Court of Appeals. This  
5 nomination was about the head of the third  
6 branch of government, your coequal branch.

7 And so this particular moment in time,  
8 when the commission should have acted in the  
9 highest degree of integrity, it broke down.  
10 And the reason it broke down is the process,  
11 its protocol lends itself to very bad and  
12 corrupt manipulation.

13 CHAIRMAN SAMPSON: And that's the  
14 issue I want to talk to you about. What do  
15 you mean about manipulative? You know, we  
16 have 12 members on this panel, and you need  
17 a two-thirds vote to come out of that  
18 process. So when you talk about  
19 manipulative, what do you mean by that?

20 MR. BATRA: Well, first of all, the  
21 nominations commission has mercifully  
22 statutorily required, as opposed to  
23 constitutionally required -- because if it  
24 was constitutionally required, then the

1           Senate would have its hands tied to some  
2           extent.  Because it's statutory, this body  
3           is capable of changing that process.

4           The current protocol is absolutely  
5           fertile soil for political manipulation and  
6           corruption.

7           CHAIRMAN SAMPSON:       Give me an  
8           example.  Explain that.

9           MR. BATRA:       The current setup is  
10          thus.  You have 12 members on the panel, on  
11          the Commission on Judicial Nomination.  Four  
12          of them come from the governor, four from  
13          the Chief Judge, and one each from the  
14          legislative leaders, the speaker and the  
15          minority leader in the Assembly, the  
16          majority leader and the minority leader of  
17          the Senate.  So that gives you the pool of  
18          12, if you will, 12 jurors.

19          Now, of those 12, the voting  
20          requirement is undemocratic.  It doesn't say  
21          you want a majority vote, 51 percent.  It  
22          says we want two-thirds vote.  That's even  
23          more stringent than the filibuster rules of  
24          the United States Senate.  And that is not

1 the way to run a republic. That's not the  
2 way to find professionally capable people.

3 So now go one step further. It may  
4 take eight votes to affirmatively come out.  
5 But as this Senate so well knows, several  
6 years ago, four or five years ago when the  
7 State Senate Democratic and Republican lines  
8 were seven votes apart, well, to the lay  
9 public, they said, "Well, they're seven  
10 votes apart, that's a lot of leeway." Not  
11 really. If four Senators switched from one  
12 registration to the other, automatically it  
13 goes to the other side.

14 So you only need five votes, five out  
15 of 12, to control the list that comes out.  
16 Because if five votes on that panel opine  
17 against any individual candidate, as clearly  
18 Acting Chief Judge Ciparick and  
19 Administrative Judge Fern Fisher didn't make  
20 the list, and they did apply -- and that's  
21 reported in the *New York Law Journal* --  
22 clearly five people on that panel blocked  
23 them.

24 And for five people to control what

1 comes out is sacrilegious. Particularly,  
2 we're not talking about normal public  
3 policy --

4 CHAIRMAN SAMPSON: So basically what  
5 you're saying is they can hijack the  
6 process, then.

7 MR. BATRA: Absolutely.

8 I believe, without doubt, that Jonathan  
9 Lippman would have made the list no matter  
10 who was making the list. But a fair process  
11 that wasn't trying to play politics in the  
12 belly of this constitutionally empowered  
13 Judicial Nomination Commission would have  
14 also, without question, put Acting Chief  
15 Judge Carmen Beauchamp Ciparick on the list  
16 as well as Administrative Judge Fern Fisher.

17 CHAIRMAN SAMPSON: Senator Diaz.

18 SENATOR DIAZ: So you mentioned  
19 Carmen Ciparick. You know how many years  
20 was she -- she has been in the Court of  
21 Appeals?

22 MR. BATRA: Well over 20 years,  
23 Senator. And a most distinguished member.

24 SENATOR DIAZ: And Justice Fern



1 Fisher?

2 MR. BATRA: She has been  
3 administrative judge --

4 SENATOR DIAZ: For how many years?

5 MR. BATRA: -- since '97, for the  
6 entire civil courts of the City of New York  
7 and is a Harvard Law grad.

8 SENATOR DIAZ: So the two of them  
9 were found not qualified?

10 MR. BATRA: Shockingly, to the dismay  
11 of everyone --

12 SENATOR DIAZ: Two women?

13 MR. BATRA: Yes.

14 SENATOR DIAZ: Two women?

15 MR. BATRA: They were found not  
16 qualified.

17 SENATOR DIAZ: Two women?

18 MR. BATRA: Two women. Two  
19 superstars.

20 SENATOR DIAZ: Two superstars, two  
21 super -- they were found not qualified?

22 MR. BATRA: Right.

23 SENATOR DIAZ: If the system is not  
24 broken --

1 MR. BATRA: The system is badly  
2 broken.

3 SENATOR DIAZ: If that committee is  
4 not in need of reform, then I don't know  
5 what we -- what else we could do.

6 MR. BATRA: If this committee and if  
7 this Senate does not act when something as  
8 critical and as horrific to the necessary  
9 public confidence in the courts as this is,  
10 if this committee does not act to reform  
11 this process --

12 SENATOR DIAZ: I'm always --

13 MR. BATRA: -- it will be a shameful  
14 thing.

15 SENATOR DIAZ: I'm always putting  
16 myself in problems.

17 CHAIRMAN SAMPSON: That's an  
18 understatement.

19 SENATOR DIAZ: But I will say that  
20 I'm afraid that what the committee did is  
21 verging, verging in discrimination. I will  
22 say that. I will leave it at that.

23 MR. BATRA: You know, Senator, I  
24 think that at a bare minimum that there

1           should be a call for the resignation of the  
2           members of the Commission on Judicial  
3           Nomination for what they've done.

4           And I have certain concrete  
5           suggestions, if I might, Mr. Chairman.

6           CHAIRMAN SAMPSON:       What are your  
7           suggestions?

8           MR. BATRA:       In addition to the report  
9           that I've prepared and given, I would  
10          suggest that because, as Senator Dunne was  
11          noting, that this Judicial Nominations  
12          Commission is not a screening panel or a  
13          regular bar panel but a constitutional body  
14          and is part of our government of the State  
15          of New York, therefore the Sunshine Laws  
16          that are alive and well in New York should  
17          be applicable to it.

18          Second, there should be no part of  
19          government that's secret, absent national  
20          security, public safety, et cetera. And  
21          certainly this nominations commission  
22          doesn't qualify under that category.

23          Two, I would eliminate their current  
24          rule that they have to give a list of three

1 to seven nominees and expand it to 12.

2 CHAIRMAN SAMPSON: Why would you do  
3 that?

4 MR. BATRA: Because if -- when they  
5 legally give the Governor a list of only  
6 three, the lesser the number they put out,  
7 the tighter the Governor's hands are  
8 handcuffed.

9 And so that three to seven should be  
10 gone. And the lesser the number there is,  
11 it only means more politics, more potential  
12 for corruption in that process. So the  
13 three to seven should be eliminated, and it  
14 should be replaced by 12.

15 The third change I would recommend,  
16 Mr. Chairman, is to go from the current --  
17 the membership source is currently four from  
18 the governor, four from the Chief Judge, and  
19 one each from the legislative leaders of the  
20 majority and minority parties. I would go  
21 from the 4, 4 and four 1s to 4, 3, and four  
22 2s.

23 The first four would be from the  
24 Governor, because it is the Governor's

1 appointment, after all.

2 The amount of members the Chief Judge  
3 ought to be able to appoint should not ever  
4 equal the Governor's, because I do not  
5 believe in the judiciary self-perpetuating.  
6 The separation of powers of our founding  
7 fathers bars the judiciary from making their  
8 own judges. They cannot make their own  
9 judges. It is inappropriate. It violates  
10 our elementary rules of separation of  
11 powers. And so to give the Chief Judge the  
12 same number of members on the panel is  
13 inappropriate, in my judgment, and it should  
14 be three.

15 And the next, the four 2s, would be for  
16 each of the legislative leaders. Each of  
17 them should get two members on that panel,  
18 on the reconstituted panel.

19 And the reason for that is right now it  
20 only takes two blocs to control the list.  
21 So if you have one major bloc, let's say the  
22 governor's bloc, and you get one member from  
23 any of the other appointed blocs, two blocs  
24 control the outcome, which is that five

1 members will control the list.

2 So if you go to 4, 3, and four 2s, it  
3 will be more democratic and it will require,  
4 at a minimum, three blocs to control the  
5 list.

6 So the essential lesson of separation  
7 of powers that our founding fathers had was  
8 power, wherever found, should be diluted.  
9 Because politics is good, but diluted power  
10 is best. And so that would do that.

11 The fourth concrete change, and a very  
12 critical change, is to change its current  
13 undemocratic and highly offensive two-thirds  
14 voting requirement to a simple majority.

15 And on that note, I will tell you that  
16 in my prepared testimony, which is now part  
17 of the record, I have cited situations where  
18 in prior screening panels where I've served  
19 in, that two-thirds vote was used to attempt  
20 to knock out two wonderful jurists who came  
21 up for renomination.

22 And it is that kind of misbehavior --  
23 either for personal malice, or a contract  
24 kill, or worse -- that should never be

1           allowed, as a matter of systemic integrity.

2           CHAIRMAN SAMPSON:       When you talk  
3           about the issue of a "contract kill,"  
4           there's examples of instances of such?

5           MR. BATRA:       Yes, Mr. Chairman. I  
6           have in my prepared testimony -- having  
7           served on the blue ribbon judiciary  
8           committee of the City Bar in the early '90s,  
9           as a designee of the New York County Lawyers  
10          Association, I have personally witnessed  
11          attempts to knock out two wonderful jurists.  
12          And having never appeared before any of  
13          those judge candidates who were up for  
14          renomination.

15          But I was struck by some of the  
16          pettiness that some of the screeners were  
17          engaging in in terms of what experience  
18          they'd had in court, if they weren't treated  
19          with kid gloves, or things of that nature.  
20          Which I found to be totally inappropriate  
21          for a screener to engage in, because that's  
22          not why they're there.

23          They're not there to settle the score  
24          on a personal level, they're there to

1           enhance public confidence in the system by  
2           picking the very best jurist, especially one  
3           who disagrees with you. This is not  
4           intended to make -- that only judges are  
5           qualified who agree with you. Because the  
6           core reason for the judiciary to exist is in  
7           the appropriate case to say no to power.

8           So in that particular experience of a  
9           number of years, I was successful in  
10          blocking the demise of two wonderful Court  
11          of Claims judges who were up for  
12          redesignation. And in fact one of the  
13          members of that judiciary committee at the  
14          time is now a distinguished member of the  
15          federal bench in the Southern District of  
16          New York.

17          Another experience -- and there have  
18          been several -- that I've had in the  
19          Brooklyn Democratic Independent Judicial  
20          Screening Panel, and I have witnessed very  
21          petty misconduct by lawyers who may not have  
22          been given the right solicitation when they  
23          happened to be in a restaurant and a judge  
24          walked in. I don't think a judge needs to



1           be under a duty to say hello to a lawyer in  
2           a social setting or any setting because they  
3           may end up before that lawyer-screener in a  
4           panel. This is not what we want of our  
5           society.

6                     And it's to that level of pettiness. I  
7           have seen it, I have experienced it, fought  
8           against it. And I want to cite to you two  
9           concrete examples. Again, I can't give  
10          you -- because I am constrained by  
11          confidentiality, I can't give you real  
12          specifics absent a subpoena, because I'm  
13          only here by invitation.

14                    But very early on in joining the Kings  
15          County Democratic Screening Committee --  
16          also known as the Karp Committee for over  
17          30 years -- and I joined it in 1995, a very  
18          high-ranking judge was up for renomination.  
19          And I was thunderstruck to hear bar leaders  
20          who have served on the panel share with the  
21          panel their anger at that candidate. And  
22          the anger was predicated upon court rulings,  
23          solicitations in social settings, and things  
24          of that nature.

1           And that is not -- while it's human for  
2           people to have feelings, and screeners are  
3           human too, they are not allowed, in my  
4           judgment, when they're serving as  
5           fiduciaries for Jane and John Q. Litigant to  
6           get the best judge to decide the case on the  
7           merits and merits alone, that they, the  
8           screeners, can rely on anything other than  
9           the merits of the judge candidate. And yet  
10          they do. I've seen it.

11           And I can tell you, in that very first  
12          instance on the Karp Committee, being new to  
13          Brooklyn at that time, in '95, although I  
14          was aware of some of the screeners as bar  
15          leaders, I did take it upon myself, after  
16          the particular candidate had been voted  
17          down, to push for rehearing and talk to each  
18          panel member. And I can tell you that that  
19          particular high-ranking judge was voted up  
20          and renominated, reelected, and went on to  
21          serve with distinction for many, many years  
22          until his retirement.

23           A second -- and there are other  
24          examples, but one last example I'll give you

1 is after District Attorney Charles J. Hynes  
2 had started his necessary investigation into  
3 the election of the Supreme Court judges  
4 after there were two instances of judicial  
5 corruption -- to wit, Victor Barron and  
6 Gerry Garson. I felt, given my professional  
7 relationship with the then county leader of  
8 Brooklyn, that it was best for me to resign.  
9 And I did so in 2003.

10 A year after I had left, I received a  
11 frantic phone call from a judge who I had  
12 not appeared before for years -- I had  
13 appeared once before him many, many years  
14 ago in a matrimonial matter, and he had  
15 distinguished himself in the highest regard,  
16 and in fact his rulings were affirmed by the  
17 Appellate Division Second Department with  
18 G.J. Mangano presiding.

19 So years after, there was no  
20 interaction as lawyer-judge, I got this call  
21 from a judge I hold in high esteem. As I  
22 hold all judges in high esteem unless proven  
23 otherwise. But I always hold the bench in  
24 high esteem. And I heard a tale of horror

1 by the newly formed, newly reconstituted,  
2 reformed judicial screening panel, then  
3 chaired by Martin R. Edelman, who is the  
4 former president of the New York State Trial  
5 Lawyers.

6 And what I heard was that there rules  
7 that had been put in place that again, like  
8 the Commission on Judicial Nomination, are  
9 ripe for misconduct or, worse, corruption.

10 This particular judge, I can share the  
11 name because this was not done in a  
12 confidential setting. I wrote a letter to  
13 Chairman Edelman, and I gave a copy to the  
14 judge candidate. And he shared it with  
15 members of the executive committee, so it's  
16 a public record. I'm referring to the most  
17 distinguished judge, Justice Louis Marrero.  
18 And he sat in criminal term.

19 After he had been voted down by that  
20 Edelman panel -- for no good reason -- he  
21 went and got letters from four present and  
22 former administrative judges, including the  
23 current chief administrative judge, Ann  
24 Pfau; Michael Pesce; former administrative

1 judge and recently passed away, Ronnie  
2 Aiello; and, if memory serves correctly,  
3 Neil Firetog. And those four letters went  
4 into the Edelman committee, and they still  
5 voted him down.

6 When I got this call, I called up Marty  
7 Edelman, a friend of mine, and I said,  
8 "There's a huge injustice here." He  
9 explained to me the background of some of  
10 the stuff.

11 But I then wrote a letter saying  
12 essentially that the -- they had constituted  
13 a very strange, misaligned, tortured  
14 protocol. To be voted up in the first  
15 instance, Mr. Chairman, you only needed a  
16 51 percent vote. But if you were voted down  
17 and you came back for a rehearing because  
18 you felt that the panel had done injustice,  
19 did not understand the facts of the law or  
20 the qualifications, they now made you jump  
21 over a hoop of two-thirds vote, higher than  
22 the filibuster rules of the United States  
23 Senate.

24 Now, the disparity between original

1 approval and approval upon rehearing, that's  
2 an illegal standard. Because any practicing  
3 lawyer will tell you, when you to go court,  
4 you don't need a higher standard for winning  
5 on reargument, you basically -- it's the  
6 same standard, and you're using it to  
7 identify the court's attention to the  
8 specific points that the court  
9 misunderstood.

10 CHAIRMAN SAMPSON: Correct.

11 MR. BATRA: Okay? And Mr. Edelman  
12 was quoted in the *New York Law Journal* as  
13 saying that Judge Marrero was one vote shy  
14 on the rehearing under the two-thirds rule.  
15 Which means he would have more than one  
16 approval if the standard had been legal.  
17 Okay?

18 I am happy to tell you, and quite proud  
19 of the Kings County Democratic Party for  
20 what they did in that instance. In spite of  
21 the fact that Justice Marrero was a  
22 Republican, and Supreme Court spots are  
23 highly prized by everybody in the political  
24 party system, they did not grab that open

1 spot that had been created by the panel by  
2 its misconduct. Instead, I understand they  
3 did get my letter, it was circulated, and to  
4 their wonderful grace they renominated  
5 Justice Marrero. And he went on to serve,  
6 again with distinction, until his untimely  
7 demise.

8 So what is before you, Mr. Chairman, is  
9 a historic opportunity to remake the  
10 system -- to wit, the Commission on Judicial  
11 Nomination -- because it is badly broken.  
12 It is beyond dispute and no one can argue.  
13 Because if they argue such, then they have  
14 to admit that any reasonable professional  
15 lawyer who is impartial and independent  
16 would never find Acting Chief Judge Carmen  
17 Beauchamp Ciparick, despite her longest  
18 service on the Court of Appeals, and  
19 Administrative Judge Fern Fisher, who to my  
20 understanding is also the longest serving  
21 administrative judge of the civil courts of  
22 the City of New York, which handles the most  
23 number of cases of any court by an  
24 administrative judge -- that if any system

1           could find these two wonderful jurists not  
2           qualified, you don't have to ask the next  
3           question, is the system broken. The answer  
4           is absolutely, exclamation point.

5           CHAIRMAN SAMPSON:       Mr. Batra, thank  
6           you very much for your comments. And we'll  
7           definitely take them under advisement.  
8           Thank you very much.

9           MR. BATRA:           Thank you, Mr. Chairman.  
10          I appreciate the privilege of appearing.

11          CHAIRMAN SAMPSON:       Since all my  
12          colleagues left for session, I'll continue  
13          the hearing, because I can go check in at  
14          any point in time.

15          I think the next person on the witness  
16          list is Michael Cardoza. Is Michael Cardoza  
17          here? At 11:30? Okay.

18          So we'll go to the next one, John  
19          Lonuzzi, president-elect of the Brooklyn Bar  
20          Association. Are you here, John? Come on  
21          down.

22          John, thank you very much for coming  
23          before the panel. Most of my members had to  
24          check into session, but I'll stay here. And



1 Mr. Lonuzzi is the president-elect of the  
2 Brooklyn Bar Association. Once again, thank  
3 you for coming, traipsing all the way up to  
4 Albany.

5 MR. LONUZZI: Of course, thank you.  
6 It's my pleasure to be here.

7 Good morning. My name is John Lonuzzi.  
8 I am president-elect of the Brooklyn Bar  
9 Association. I also serve as chair of the  
10 Brooklyn Law Association's tort law  
11 committee and as a member of the  
12 association's judiciary committee.

13 I would like to thank the Senate  
14 Standing Committee on the Judiciary and, in  
15 particular, Senator John Sampson, chair of  
16 the committee, for inviting me to testify  
17 this morning and participate in this  
18 important hearing.

19 It's truly a privilege and an honor to  
20 appear before this committee to share my  
21 thoughts on how we might be able to improve  
22 on the process by which nominees to the  
23 Court of Appeals are selected by the  
24 Commission on Judicial Nomination.

1                   First and foremost, I commend the  
2                   Commission on Judicial Nomination for the  
3                   exemplary work it has done in the past. By  
4                   way of example, the Commission on Judicial  
5                   Nomination was responsible for the  
6                   nomination of Chief Judge Judith S. Kaye,  
7                   who served this state with distinction and  
8                   dignity for the past 15 years.

9                   When Chief Judge Kaye faced mandatory  
10                  retirement, all seven nominees named by the  
11                  commission to replace the Chief Judge were  
12                  found "highly qualified" or "qualified" by  
13                  both the New York State Bar Association and  
14                  the Women's Bar Association of the State of  
15                  New York.

16                 Clearly, the commission has worked very  
17                 hard to ensure and maintain the highest  
18                 level of integrity and competence on the  
19                 Court of Appeals, one of the most prominent  
20                 and highly regarded appellate courts in our  
21                 country.

22                 However, notwithstanding the exemplary  
23                 work of the commission, there is need and  
24                 room for improvement in the judicial

1 nomination process.

2 First, I respectfully submit that this  
3 committee consider measures to expand the  
4 number of commissioners on the commission to  
5 include bar association representatives and  
6 attorney practitioners.

7 I would also suggest, as my colleague  
8 Mr. Batra suggested, that the committee  
9 consider expanding the number of names of  
10 nominees that are provided to the Governor,  
11 the number of candidates who come out of the  
12 commission.

13 Bar association representatives bring  
14 the collective knowledge, experience and  
15 perspectives of their thousands of members  
16 to the process and can help ensure that the  
17 nominees selected by the commission have the  
18 right tools for the job, are highly regarded  
19 and respected by the practicing bar, and,  
20 importantly, represent the interests and the  
21 diversity of the bar.

22 Having attorney practitioners,  
23 particularly trial level and appellate  
24 attorneys, on the commission can also be

1           beneficial to the process. Attorney  
2           practitioners, who regularly practice in our  
3           trial level and appellate courts, know what  
4           qualities and traits to look for in  
5           candidates for the Court of Appeals and know  
6           which prospective candidates have what it  
7           takes to make an exceptional Court of  
8           Appeals judge.

9           I respectfully suggest that every  
10          effort be made to diversify the commission  
11          so as to reflect the diversity and  
12          composition of the population of this state.  
13          If the commission itself is not diverse, it  
14          is unlikely that the slate of nominees  
15          proposed by the commission will be diverse.

16          It's hopeful that a more diverse  
17          commission might produce a more diverse  
18          array of nominees in the categories of race,  
19          gender, areas of practice, and geographical  
20          representation. We surely all can agree  
21          that in a state as ethnically and culturally  
22          diverse as New York, we want our jurists to  
23          reflect that diversity. This is essential  
24          if we want the public to respect and put

1           their faith in our legal system.

2           The Brooklyn Bar Association would be  
3           more than willing to offer any assistance to  
4           this committee and to work with this  
5           committee to make the judicial nomination  
6           process better and more transparent.

7           I would imagine that many other bar  
8           associations throughout the state would be  
9           similarly willing, any of them, to work with  
10          this committee to address these concerns and  
11          come up with some solutions to the obvious  
12          problems that are plaguing the commission.

13          CHAIRMAN SAMPSON:        Mr. Lonuzzi, I  
14          want to ask a couple of questions.

15          So what you're saying is that this  
16          selection, it didn't reflect the diversity  
17          of the State of New York; would that be  
18          correct?

19          MR. LONUZZI:            Correct.

20          CHAIRMAN SAMPSON:        And when you say  
21          expanding this list to include associations  
22          and practicing attorneys, does the  
23          commission now reach out to associations or  
24          practicing attorneys regarding the selection

1 of some of these nominees, do you know?

2 MR. LONUZZI: Well, I can tell you,  
3 as president-elect of the Brooklyn Bar  
4 Association -- and I obviously worked very  
5 closely this past year with the president of  
6 the Brooklyn Bar Association and our  
7 executive director. I'm in constant contact  
8 with our executive board, our board of  
9 directors. I'm also affiliated at very high  
10 levels with a number of other bar  
11 associations at the county level, at the  
12 state level. I'm a delegate at the New York  
13 State Bar Association -- I've not had any  
14 contact with the commission. I'm not aware  
15 of any of my colleagues who were approached  
16 or contacted by the commission.

17 We strive, we make every effort at our  
18 bar association -- and I know we're not  
19 alone in this -- to be inclusive. We know  
20 what sort of diversity exists in our county  
21 and in the Borough of Brooklyn. We try  
22 very, very hard to have our bar association,  
23 our membership, our leadership, reflect that  
24 diversity. I know our bench in Kings County

1 reflects that diversity, and that's a good  
2 thing.

3 When folks walk into a courthouse, they  
4 want to know that they're going to be  
5 treated fairly, and perception means a lot.  
6 And that was a theme that I heard earlier  
7 this morning, and it really does. When you  
8 have a state as diverse, as I said before,  
9 culturally, racially, as the State of  
10 New York, and the bar as diverse as it is,  
11 and the trial-level bench as diverse as it,  
12 when you have that set of circumstances and  
13 you have seven nominees coming out of the  
14 commission, six of whom are white males, I  
15 don't think that that's reflecting the  
16 diversity in the profession and in this  
17 community.

18 CHAIRMAN SAMPSON: And that, you  
19 feel, does have an effect on the citizenry's  
20 perception of reliability in the judicial  
21 system?

22 MR. LONUZZI: Well, I mean, sure. I  
23 mean, I can tell you how it's perceived by  
24 my colleagues when the list came out --

1                   CHAIRMAN SAMPSON:       How was it  
2                   perceived?

3                   MR. LONUZZI:       Well, you know, the  
4                   Honorable Theodore T. Jones, Jr., associate  
5                   judge on the Court of Appeals, the only  
6                   minority on the list -- and he certainly  
7                   wasn't on that list because he was a  
8                   minority. Judge Jones is probably one of  
9                   the most qualified jurists in the state and  
10                  would have made an exceptional Chief Judge,  
11                  as Judge Lippman will make an exceptional  
12                  Chief Judge.

13                  Certainly some eyebrows were raised  
14                  that folks were missing from that list.  
15                  Those names have been already stated today,  
16                  Judge Beauchamp Ciparick and Judge Fern  
17                  Fisher. A lot of eyebrows were raised that  
18                  those names were not included on the list.  
19                  Very, very highly qualified people.

20                  Judge Beauchamp Ciparick, someone who's  
21                  served on the Court of Appeals for a very  
22                  long time, and certainly someone who has all  
23                  of the qualifications and all of the traits.  
24                  You need not have been a member of the



1           commission and you need not have been privy  
2           to the meetings that the commission had to  
3           know that Judge Beauchamp Ciparick is a  
4           highly qualified candidate and should have  
5           been included on that list.

6           CHAIRMAN SAMPSON:        So would it be  
7           safe to say this selection or this process  
8           maybe wasn't -- looking at it historically  
9           with respect to this nominating commission,  
10          was this an aberration in the whole cog and  
11          the wheel? Or this is something that needs  
12          to be -- it's broken, it has failed, and now  
13          it needs to be fixed?

14          MR. LONUZZI:        Oh, it's certainly  
15          something that's broken. It certainly has  
16          failed. And it certainly does need to be  
17          fixed.

18          CHAIRMAN SAMPSON:        Thank you very  
19          much.

20          MR. LONUZZI:        Thank you, Senator. I  
21          appreciate your time.

22          CHAIRMAN SAMPSON:        Thank you.

23                            The next individual on the witness list  
24                            is Elena Sassower, and she's the director of

1 the Center for Judicial Accountability.

2 Ms. Sassower, good morning.

3 MS. SASSOWER: Good morning. One  
4 moment, please.

5 The starting place for any testimony is  
6 necessarily the New York State Constitution,  
7 Article VI, Section 2, which contains the  
8 pertinent provisions regarding the New York  
9 State Commission on Judicial Nomination.  
10 The amendment in 1977 replaced what had  
11 previously been the election of judges to  
12 the New York Court of Appeals. What was  
13 substituted was a merit-based appointive  
14 system.

15 What was not revealed when the citizens  
16 of this state voted in favor of this  
17 amendment, which was supposed to ensure the  
18 quality of our state's highest court, what  
19 they were not told was that after they gave  
20 up their electoral right to make the choice  
21 as to who would be their highest state  
22 judges, that process would be encapsulated  
23 in confidentiality. The Legislature did  
24 that in 1978, the following year, without

1 any legitimate purpose.

2 And upon information and belief, no  
3 hearings were ever held by the Legislature  
4 in the implementing legislation, which is  
5 Judiciary Law Article 3-A, which would be  
6 the second focal examination to any  
7 understanding of where we are today.

8 You, Senator, have done something  
9 historic. I do not believe that in the  
10 30 years since the Commission on Judicial  
11 Nomination was established by constitutional  
12 amendment and thereafter to a very  
13 significant degree transmogrified by a  
14 legislative statute and then further made  
15 the subject of rules and regulations of the  
16 Commission on Judicial Nomination  
17 promulgated by the commission, which needs  
18 to be the third examination to where we are  
19 today -- I do not believe that in all this  
20 time, 30 years, until today, Senator, under  
21 your leadership, there has ever been a  
22 hearing on how, quote, merit selection to  
23 the New York Court of Appeals works.

24 CHAIRMAN SAMPSON: There's a first

1 time for everything.

2 MS. SASSOWER: Thank you, Senator,  
3 for doing what has, I believe, not ever been  
4 done for 30 years and was long needed to be  
5 done, because the evidence was in countless  
6 years ago of the corruption -- not just the  
7 politicization, but the outright corruption  
8 of this process.

9 Now, let me just say that in holding  
10 this hearing, Mr. Chairman, our new chairman  
11 of hopefully a functioning Senate Judiciary  
12 Committee such as we have not had, you  
13 stated in a press release, because your  
14 press release announced that this would be  
15 your first order of business, that -- it  
16 says: "At the hearings, Senator Sampson  
17 plans to ask members of the commission and  
18 its chair, John O'Mara, to testify  
19 concerning how the commission decided on its  
20 final list of candidates and the methods it  
21 employed throughout the candidate selection  
22 process."

23 Lo and behold, at this hearing,  
24 completely absent without any explanation --

1 and there can be no justification -- is the  
2 chairman of the Commission on Judicial  
3 Nomination, John O'Mara, the absence of any  
4 members of the commission --

5 CHAIRMAN SAMPSON: Just a note on  
6 that Ms. Sassower. Mr. O'Mara did submit a  
7 written document. In addition, he has made  
8 himself -- am I correct -- available at some  
9 point in time for inquisition with respect  
10 to this.

11 MS. SASSOWER: That doesn't satisfy  
12 the public. The public was entitled, as you  
13 rightfully said -- as I think Senator  
14 Perkins talked about how perceptions somehow  
15 become reality, there are perceptions, there  
16 are suspicions, there are questions. And  
17 the public, which is here represented not  
18 only by the few present but by the media,  
19 who perhaps have disappeared as well --

20 CHAIRMAN SAMPSON: They'll be back.

21 MS. SASSOWER: -- were entitled to  
22 hear you interrogate. And you made certain  
23 observations which I'd like to address --

24 CHAIRMAN SAMPSON: Go right ahead.

1 MS. SASSOWER: -- with respect to  
2 what you may have been told by Chairman  
3 O'Mara.

4 Let me just say that Chairman O'Mara --  
5 not only is Chairman O'Mara not here to  
6 testify, not only are the 11 other members  
7 of the commission not here to testify, but  
8 you also don't have the testimony offered of  
9 prior members of the Commission on Judicial  
10 Nomination who could have offered themselves  
11 up in the spirit of public service. Let us  
12 remember that their labors, such as they  
13 are, on the Commission on Judicial  
14 Nomination are not compensated, which  
15 parenthetically raises yet another issue  
16 that should be examined by this committee,  
17 which is the funding, the expenditures, if  
18 any, of the Commission on Judicial  
19 Nomination for its purported investigation  
20 and scrutiny of nominees.

21 Upon inquiry on that subject years ago,  
22 I was told that there is no budget for the  
23 Commission on Judicial Nomination, that  
24 essentially everything is done I guess

1 voluntarily by the law firms whose counsel  
2 really is the gut --

3 CHAIRMAN SAMPSON: I think that is  
4 correct.

5 MS. SASSOWER: Yes. Well, that also  
6 raises questions and, indeed, why the  
7 Commission on Judicial Nomination features  
8 on its letterhead four counsel who could  
9 have been here, should have been here.  
10 Bottom line is they are not here.

11 Now let me go to the substance. Your  
12 press release for this important -- excuse  
13 me, not your press release, I read from your  
14 press release where you told the public  
15 properly that they would hear from Chairman  
16 O'Mara and the members of the commission,  
17 none of whom are here to answer your  
18 questions and to answer the questions of  
19 others and to be challenged by citizens such  
20 as myself who are knowledgeable and in a  
21 position to critically address their  
22 representations lest you be snowed by  
23 misrepresentations.

24 CHAIRMAN SAMPSON: Okay. Correct.

1 MS. SASSOWER: Your notice of this  
2 public hearing also refers, importantly,  
3 that this hearing will allow the committee  
4 to explore the judicial investigation  
5 process, including a perceived lack of  
6 transparency in the commission's process.  
7 Now, you have put your finger right on it --  
8 except that there's no perception here, it's  
9 a fact.

10 Because what the judiciary law did in  
11 changing the constitutional amendment that  
12 created the Commission on Judicial  
13 Nomination is to veil the entire process in  
14 confidentiality. It is impossible, as  
15 currently constituted, to put -- what is the  
16 first problem here? You can never verify  
17 that any candidate, any slate of candidates  
18 are in fact well-qualified. Why? Because  
19 everything is essentially confidential, with  
20 limited exceptions. Let me tell you what  
21 they are.

22 Under the Judiciary Law 66 --

23 CHAIRMAN SAMPSON: I think we know  
24 what the exceptions are. What I'm trying to



1 get from you --

2 MS. SASSOWER: Well --

3 CHAIRMAN SAMPSON: What I'm trying to  
4 get from you, Ms. Sassower -- just listen to  
5 me -- what I'm trying to extract from you is  
6 what would be your recommendations to  
7 effectuate the change. You know, this is --  
8 we know that there's an issue, there's a  
9 problem. We have identified it. Now we're  
10 looking -- instead of pointing the finger,  
11 what I want to -- and I want you to help me,  
12 is what would you be looking for for a  
13 solution or recommendations.

14 MS. SASSOWER: Thank you. Number  
15 one, you want to scrap Judiciary Law 66 and  
16 open the process. Remember, we are  
17 selecting judges to our state's highest  
18 court. There is no justification for the  
19 public not knowing who are the pool of  
20 candidates who apply. Anyone who wants the  
21 job must subject themselves to public  
22 scrutiny and examination, just as you do,  
23 Senator, when you chose to run for public  
24 office.

1           This is one of the highest public  
2           offices in the state, with power more  
3           sweeping than anything that you or your  
4           colleagues have. With a tenure that I'm  
5           sure you envy, 14 years. Okay? There is  
6           no -- if you want that public office, your  
7           application must be public.

8           Now, let me just say there is  
9           nothing -- obviously, there may be areas of  
10          personal information on an application form  
11          that can be simply withheld --

12          CHAIRMAN SAMPSON:        Redacted.

13          MS. SASSOWER:        Redacted. But the gut  
14          of this application, if you read through it,  
15          there is nothing that anyone who thinks  
16          themselves well-qualified, which is the  
17          constitutional standard --

18          CHAIRMAN SAMPSON:        What would be your  
19          second improvement?

20          MS. SASSOWER:        Okay. So the public  
21          has to have access.

22          CHAIRMAN SAMPSON:        Open access.

23          MS. SASSOWER:        Open access, knowledge  
24          to who is applying. Now, the advantage of

1           that is that when they know who's applied,  
2           they can participate in providing the  
3           commission with relevant information.

4                    What is the sine qua non of merit  
5           selection? It is that you do investigation.  
6           And obviously if you only seek information  
7           about a candidate from the favorable  
8           sources, you know what you're going to get.

9                    I have to tell you, Senator, that the  
10          evidence is in. The Commission on Judicial  
11          Nomination, in its recommendations, is not  
12          availing itself of available negative  
13          sources of information. When those persons  
14          who come up and say, oh, those seven members  
15          on this current short list are completely  
16          well-qualified, they're not in a position to  
17          judge, because they don't know what's out  
18          there.

19                   CHAIRMAN SAMPSON:        So basically what  
20          you're saying is take everything into  
21          consideration.

22                   MS. SASSOWER:         Right.

23                   CHAIRMAN SAMPSON:        So moving on to  
24          now your -- let's go to your next

1 recommendation.

2 MS. SASSOWER: Okay.

3 Now, as you are undoubtedly aware, most  
4 of the candidates applying to be a judge on  
5 our state's highest court are already  
6 judges. And they certainly are all lawyers.  
7 If they're not judges, they are practicing  
8 lawyers, mostly; some are academics,  
9 perhaps.

10 The Commission on Judicial Nomination  
11 as part of its merit selection, supposed  
12 investigation, relies on the integrity and  
13 the efficacy of the Commission on Judicial  
14 Conduct and on attorney disciplinary bodies.  
15 The fact of the matter is the evidence is --  
16 and all of this I can provide substantiation  
17 for everything that I am telling you now is  
18 based upon 15 years of in-the-trenches,  
19 direct, firsthand experience, evidence.

20 The Commission on Judicial Conduct is a  
21 corrupt facade which dumps legitimate  
22 complaints against sitting judges,  
23 permitting them to then be elevated through  
24 the court system, including to the New York

1 Court of Appeals.

2 CHAIRMAN SAMPSON: So let me see if I  
3 understand your point with respect to that.  
4 Looking into the Commission on Judicial  
5 Conduct --

6 MS. SASSOWER: It's an integral part  
7 of the merit selection process.

8 CHAIRMAN SAMPSON: Okay. Get to your  
9 third point.

10 MS. SASSOWER: The third point. And  
11 this goes to the important diversity issue.

12 CHAIRMAN SAMPSON: Okay, good.

13 MS. SASSOWER: Okay. The rationale  
14 for the confidentiality, okay, I believe was  
15 that this would somehow enhance the process.  
16 It has had the opposite result. The reason  
17 is that you have a shrunken pool of  
18 applicants because, according to reports,  
19 most lawyers and judges think it's a fixed  
20 process. It's the closeness, the fact that  
21 it is so veiled that it prevents applicants  
22 from applying. May I just read some  
23 pertinent --

24 CHAIRMAN SAMPSON: Make it quick.

1 We've got limited time here.

2 MS. SASSOWER: This is from the *New*  
3 *York Law Journal*, an example, an  
4 illustrative example, but it gets to  
5 something that, Senator, you yourself  
6 identified. You said, oh, but in this round  
7 you know they only had -- what did you say,  
8 12, they interviewed 12. But when Judith  
9 Kaye was first considered, it was 40.

10 Okay, there's a difference between  
11 number interviewed and total pool of  
12 applicants. To be interviewed, you have to  
13 get beyond -- okay. All right.

14 The fact of the matter is those figures  
15 presumably come out of your private  
16 conversations which actually are a breach of  
17 Judiciary Law 66. If you got it from  
18 Chairman O'Mara, if you got it from counsel  
19 there or anyone else, they are breaching the  
20 restrictions that need to be removed.

21 But let me read you the relevant -- an  
22 example of what is happening. This is from  
23 December 3, 2002, an article in the *New York*  
24 *Law Journal*. "Meanwhile, there is growing

1           concern among the bench and bar over an  
2           apparent decline in interest in serving on  
3           the court, according to several attorneys  
4           close to the selection process. Prior to  
5           releasing its list" -- this is now 2002,  
6           December 2002 -- "the Commission on Judicial  
7           Nomination interviewed about 18 applicants,  
8           but only after extending the application  
9           process because of a shortage of interested  
10          and suitable candidates. Three appellate  
11          jurists said there seems to be a sense that  
12          only one or two candidates close to the  
13          Governor have any real chance changes to  
14          secure an appointment."

15                 This is repeated over and again in the  
16          reportage, which says, in sum and substance,  
17          the reason -- we have 130,000 lawyers in  
18          New York State registered, 130,000 plus.  
19          You must be in the Bar of New York to be  
20          considered for the Court of Appeals. To  
21          suggest that there is a lack of interest to  
22          be on our state's highest court, that they  
23          have to extend deadlines in order to get not  
24          even a score of lawyers, there's something

1 wrong.

2 CHAIRMAN SAMPSON: And I agree,  
3 Ms. Sassower. And right now, if you can, I  
4 want you to try to -- just hold on. I want  
5 you try to sum it up so we can come to some  
6 sort of conclusion right now.

7 MS. SASSOWER: Okay. I think that,  
8 as I said, you have your work cut out for  
9 you. You are doing something that has not  
10 been done, needed to be done.

11 Senator Dunne warned you you shouldn't  
12 tinker with statute. Senator, you need to  
13 overhaul the statute. Dramatically. And  
14 you're starting -- and if you open up the  
15 process, not only will you be faithful to  
16 the constitutional amendment, which didn't  
17 say we're going to keep the public out, but  
18 you will find an enhanced process, a process  
19 that will invite a wide range of applicants.

20 But finally, once again, even still,  
21 you need to be sure that the regulatory  
22 bodies, the Commission on Judicial Conduct,  
23 the attorney disciplinary committees are  
24 functioning, because they are one of the



1 first stops for the Commission on Judicial  
2 Nomination in securing information about  
3 candidates. And they are useless. They are  
4 worthless and they are corrupt. And there  
5 needs to be hearings and investigations of  
6 those bodies.

7 CHAIRMAN SAMPSON: Ms. Sassower, I  
8 wanted to thank you very much for your  
9 comments and definitely we'll truly take  
10 them under advisement. Thanks again.

11 MS. SASSOWER: Thank you for your  
12 leadership. And I look forward to working  
13 together closely with your committee and  
14 providing any assistance and documentation  
15 of the serious charges that I here present  
16 with respect to the corruption of the  
17 Commission on Judicial Nomination and of,  
18 quote, merit selection to the New York Court  
19 of Appeals.

20 CHAIRMAN SAMPSON: Thank you very  
21 much, Ms. Sassower. Thank you.

22 MS. SASSOWER: Thank you.

23 Oh, may I just make one fast comment.  
24 The Commission on Judicial Nomination did

1 something unprecedented this time around,  
2 and they did it in response to the criticism  
3 of the Governor as well as others with  
4 respect to the report of qualifications.  
5 That report, under the Judiciary Law, the  
6 report that the Commission on Judicial  
7 Nomination makes public when it selects its  
8 short list and then presents to the  
9 Governor, is supposed to contain findings,  
10 findings.

11 The report of the Commission on  
12 Judicial Nomination has never contained  
13 findings. It's nonconforming. And the  
14 Governor complained about it. And you see  
15 what the Commission on Judicial Nomination  
16 did in response. They did a do-over. And  
17 they tried to substitute a second report for  
18 the December 1st report; they substituted a  
19 December 17th report. But even that does  
20 not represent compliance with any  
21 understanding of what findings represent.

22 And indeed, you should call upon the  
23 bar associations, you should call upon the  
24 scholars of this state to comment on whether

1 the written report of qualifications which  
2 the Commission on Judicial Nomination has  
3 been using over all these years, and  
4 currently, is compliant.

5 CHAIRMAN SAMPSON: Thank you very  
6 much, Ms. Sassower.

7 At this point in time we have Michael  
8 Cardozo, New York City corporation counsel.  
9 Mr. Cardozo.

10 Once again, I want to welcome you to  
11 this hearing, Mr. Cardozo. Most of my  
12 colleagues were here a little bit earlier,  
13 but we had session. And I will make sure  
14 they get a copy of your statements.

15 You can proceed.

16 MR. CARDOZO: Thank you, Senator  
17 Sampson. And thank you for giving me an  
18 opportunity to testify on this important  
19 issue today.

20 With me is Eduardo Crosa, an attorney  
21 in my office.

22 I think as you know, I am the  
23 corporation counsel of the City of New York.  
24 And in that capacity, for the last seven

1           years I have dealt with the judicial  
2           selection issue on behalf of the Mayor on  
3           numerous fronts, including drafting the  
4           Mayor's executive order dealing with his  
5           appointments to the bench and advising him  
6           on his judicial appointments, including the  
7           35 individuals that the Mayor happened to  
8           swear in just yesterday to the criminal,  
9           family and civil court of New York.

10                 Let me make my position clear at the  
11           outset. I certainly agree that after 30  
12           years operating under our present judicial  
13           nominating system, it's time to take a look  
14           at the way the system has worked. And I  
15           commend your committee for calling this  
16           hearing for that purpose. But in my  
17           opinion, the system has served the state  
18           well and represents a huge improvement over  
19           the previous elective system.

20                 But experience and the passage of time  
21           demonstrate that procedural improvements can  
22           be and should be made -- I suggest by rule,  
23           not legislation -- particularly in the areas  
24           of diversity, outreach and transparency.

1           But the more fundamental and additional  
2 changes suggested by some, including  
3 expanding the number of nominees, should in  
4 my opinion be rejected.

5           Moreover, the next vacancy on the Court  
6 of Appeals is not --

7           CHAIRMAN SAMPSON:       Let me interrupt  
8 for one moment.  When you talk about  
9 expanding the number of nominees --

10          MR. CARDOZO:       Right.  I was going to  
11 go into that in some detail in just a  
12 moment.

13          CHAIRMAN SAMPSON:       Okay, go ahead.

14          MR. CARDOZO:       But I think of  
15 significance, Senator, is that the next  
16 vacancy on the Court of Appeals is not  
17 expected until 2012.  Assuming, of course,  
18 that as I hope and believe should be the  
19 case, Justice Lippman is promptly confirmed  
20 by the Senate.

21               And that five-year period, barring an  
22 unexpected vacancy, gives us an opportunity  
23 to carefully consider changes to improve the  
24 system without rushing them through.

1           I want to note at the outset that I  
2           could be accused by some of being biased in  
3           favor of the present system. And I say that  
4           because approximately 35 years ago I had the  
5           privilege of serving as counsel to Governor  
6           Hugh Carey's Task Force on Court Reform,  
7           chaired by the late Cyrus Vance, which in  
8           fact recommended and ultimately led to the  
9           constitutional and statutory provisions that  
10          we're discussing today.

11          The results of the task force  
12          recommendations replaced an elective system  
13          that was highlighted by expensive election  
14          campaigns and television advertisements  
15          featuring jailhouse doors swinging shut  
16          behind a prisoner whom the nominee was  
17          implicitly responsible for jailing. In its  
18          stead, this state voted to adopt the merit  
19          selection process we are discussing today.

20          And that process has resulted in three  
21          African-Americans, one Hispanic, and four  
22          women, all highly qualified, being appointed  
23          to the court. And with the exception of one  
24          interim appointee, these constituencies had

1 never been previously represented on the  
2 court.

3 CHAIRMAN SAMPSON: Just to  
4 interject -- and I agree with you,  
5 Mr. Cardozo. But our concern here was, with  
6 respect to this, you have applicants such as  
7 Fern Fisher Brandveen, Carmen Ciparick, also  
8 I think there was Priscilla Hall -- these  
9 were candidates, but they didn't make the  
10 list, who were highly qualified. And  
11 furthermore, Carmen Ciparick is the acting  
12 Chief Judge at this point in time.

13 So as Senator Perkins said a little bit  
14 earlier before you were here, is this an  
15 aberration or is there a fundamental problem  
16 where the public's perception and their  
17 belief in the judicial system comes into  
18 question?

19 MR. CARDOZO: I'll be happy to  
20 address that. I happen to know Judge Hall,  
21 Judge Ciparick, and Judge Fern Fisher  
22 Brandveen, all of them outstanding jurists.

23 By definition, if you're going to have  
24 a limited number of names and charge a group

1 of people, the Judicial Nomination  
2 Commission, to select the seven people they  
3 deem most qualified, we all know by  
4 definition there is someone who didn't make  
5 the cut.

6 And by limiting the number of names,  
7 which I think is the fundamental point --  
8 and I'll be happy to address now what you  
9 asked me a few moments ago -- the system has  
10 said we want to limit the number of names.  
11 Now, in this instance, and I agree with the  
12 concerns you've expressed that it resulted  
13 in no women on the list and just one  
14 minority. And that, I think, can be  
15 addressed by some procedural suggestions  
16 that I want to make.

17 The fundamental question, though, I  
18 think is why limit the number of names. And  
19 that issue lies at the very, very essence of  
20 the whole system. Because the system is  
21 supposed to be that these 12 commissioners,  
22 after doing their work -- I want to come  
23 back to that issue -- but after doing the  
24 work, they are the ones, not the Governor,



1 not the legislative leaders or the Chief  
2 Judge, they are the ones to say who they  
3 deem to be the seven most qualified.

4 CHAIRMAN SAMPSON: Correct.

5 MR. CARDOZO: And so while the  
6 Governor obviously must appoint from the  
7 list given to him, his discretion is  
8 intentionally limited.

9 And the moment you open those numbers  
10 up, you are in danger of changing the system  
11 from a nomination system to a screening  
12 commission. In other words, you would  
13 screen out those unqualified. But as I've  
14 heard some suggest, why not have 10 or 15  
15 names rather than seven? And you are then  
16 giving the Governor greater and greater  
17 latitude, allowing more and more likely the  
18 politics to feed into this.

19 And let me draw, by way of example -- I  
20 was privileged, as I noted earlier to be  
21 asked by the Mayor to draft his executive  
22 orders. Because as you know, he makes  
23 roughly -- has roughly a hundred judges to  
24 appoint over a 10-year period. And his

1 executive order doesn't provide for four to  
2 seven names, his executive order says that  
3 his nominating commission -- and he only  
4 appoints a minority of the members of  
5 that -- they shall only give him three  
6 names. Not four to seven, but three names.

7 And again, the purpose, the underlying  
8 fundamental point here is the commissioners  
9 are supposed to make the judgment who are  
10 the four or five or seven most highly  
11 qualified people.

12 CHAIRMAN SAMPSON: On this point,  
13 there was a Mr. Batra here earlier. And in  
14 this instance, you have 12 individuals on  
15 the nominating commission; correct?

16 MR. CARDOZO: Yes.

17 CHAIRMAN SAMPSON: And you need  
18 two-thirds votes for somebody to come out of  
19 that committee. But what you can do, you  
20 have four from the Governor, four from the  
21 Chief Judge, and one from each branch -- the  
22 Senate minority, Senate majority, Assembly  
23 majority and minority. The issue here is  
24 you can have a block of five, five votes who

1           can hijack the proceeding and prevent an  
2           individual from coming out.

3           MR. CARDOZO:       Yes.

4           CHAIRMAN SAMPSON:     And in those  
5           instances, you know, what can be done?  And  
6           you're talking about limiting the number.  
7           Which I would have no problem, as you're  
8           saying, limiting the number.  But the  
9           question is, the process in which those  
10          members are engaging, what are they taking  
11          into consideration to making sure that we  
12          get the best qualified individuals  
13          irrespective of allowing any sort of  
14          politics to play -- there's nothing wrong  
15          with politics, but play into a process where  
16          we're trying to make sure that we have the  
17          confidence of the people in our judicial  
18          system?

19          MR. CARDOZO:       I think that's an  
20          excellent question.

21          Since the members of the commission, as  
22          you say, are nominated by the three branches  
23          of government, but because they have  
24          staggered terms, there's no particular party

1 at any particular time that should dominate.  
2 And by definition, one-quarter of the  
3 commission turns over every year because of  
4 the staggered terms.

5 So obviously it is both mathematically  
6 and I guess politically possible for a,  
7 quote, bloc of five to block someone. But  
8 you are in that instance required to find a  
9 fairly large consensus among those five,  
10 because you are having to get people from  
11 different branches, the nominees from  
12 different branches of government who have  
13 been presumably nominated by different  
14 people.

15 In other words, there are Pataki  
16 appointees here, there are Silver appointees  
17 here, there are Bruno appointees all on that  
18 commission, and now Governor Paterson has  
19 now appointed someone. So it's a mixture of  
20 people.

21 So obviously, again, in any system, be  
22 it appointive, elective, or however you  
23 draft the rules, there's always that kind of  
24 possibility.

1           But the fundamental point of limiting  
2           the number of names I think is so  
3           fundamentally important to what we're  
4           talking about, I think it would be a serious  
5           and grave mistake -- and if you look across  
6           the country, not just in New York City --  
7           going back to Mayor Koch, the mayor has had  
8           a limited number of names. But Arizona,  
9           various other states have this kind of  
10          system.

11           CHAIRMAN SAMPSON:       And I would agree  
12          with the point you're making if you knew  
13          that the process wasn't --

14           MR. CARDOZO:       So let me address that,  
15          if I could. Because what I suggest -- and  
16          you asked me that before, why rule change  
17          rather than legislation, so let me suggest.  
18          The concerns that many have, and I've read  
19          some of your comments on this, I think fall  
20          into three basic categories: diversity,  
21          outreach, and transparency. Let me address  
22          each of them and why I think, at least  
23          initially, they can be addressed by rule  
24          change at the commission level rather than

1           legislation.

2           First, diversity. I think you are  
3           right that there's a concern. I don't mean  
4           that the commission necessarily made a  
5           mistake. Perhaps the seven most qualified  
6           people were the ones, and they were all  
7           outstanding people on the list. But there  
8           certainly was a perception of a problem  
9           because of the absence of women and only Ted  
10          Jones on the list as a minority. And again,  
11          I point to the past 30 years we've done  
12          better on women and diversity --

13                 CHAIRMAN SAMPSON:       And you're correct  
14           about that. But I think what we're saying,  
15           especially this perception in this day and  
16           age where we had a Senator from New York run  
17           for the presidency of United States, we had  
18           a woman vice presidency for the United  
19           States and inroads that have been made, you  
20           know, it's just the perception --

21                 MR. CARDOZO:       And so let me make this  
22           suggestion. The commission rules should be  
23           amended to emphasize the importance of  
24           diversity and that in selecting a

1 candidate -- selecting the nominees, excuse  
2 me, that consideration should be taken into  
3 account explicitly -- that is, the rules  
4 should say explicitly -- the importance of  
5 having a court composed of individuals of  
6 different ethnicities, different genders,  
7 geographic and legal backgrounds.

8 The rules should say specifically that  
9 in selecting candidates, take that factor  
10 into account, because the courts are better,  
11 are stronger, and there's a greater public  
12 acceptance of their decisions.

13 And I would add, on that -- again,  
14 talking about my recent experience, although  
15 I've spent a good deal of my professional  
16 life on this issue -- that Mayor Bloomberg,  
17 in the seven years he's been mayor, has  
18 appointed as far as new judges are  
19 concerned, because obviously there's some  
20 reappointments, he has appointed 44 judges  
21 as of yesterday, under his system.

22 Twenty-two of those 44 were women, and 12 of  
23 those 44 were minority.

24 And the Mayor's committee clearly --

1 and the Mayor, when he is making the  
2 appointment -- clearly recognized the  
3 importance of diversity. And the  
4 commission's rules, therefore, should say  
5 it.

6 But I think there's a second point on  
7 diversity that I would suggest, and that is  
8 that the members of the commission  
9 themselves should reflect the great  
10 diversity of this state. Not just ethnic,  
11 it's geographic, it's gender, it's  
12 everything else.

13 Now, you can't mandate that by statute.  
14 But certainly the people who are making the  
15 appointments -- and I know how strongly the  
16 Governor feels on this, and I know the  
17 importance that the legislative leaders --  
18 and certainly I know both Jonathan Lippman  
19 feels this way, Judith certainly felt this  
20 way. They should be urged emphatically, and  
21 in a report that this committee could  
22 constructively issue, that in appointing the  
23 members of the nominating commission  
24 themselves, they should take into account



1 the then-present composition of the  
2 committee.

3 And I would suggest to you, Senator,  
4 that if the commission amended its rules --  
5 and they have the power to amend their  
6 rules -- and the appointing authorities  
7 could be urged to do that, that you would go  
8 a long way to dealing with the diversity  
9 issue.

10 A second recommendation is outreach. I  
11 know there's been a great concern about the  
12 apparent limited number of people who  
13 actually applied to the nominating  
14 commission. And so the rules should be  
15 explicitly amended to mandate all kinds of  
16 outreach.

17 And again, that does not take a genius  
18 to figure out what to do. But there should  
19 be regular required meetings with bar  
20 associations -- and I don't just mean the  
21 establishment bar, I mean the women's bars,  
22 I mean the minority bars, I mean the  
23 Schenectady bar and the Utica bar -- across  
24 the state on a regular basis.

1           There could be requirements that they  
2           speak; you know, how do you become a judge  
3           kind of thing. In New York City, that's  
4           what we do. We have a periodic program  
5           that's put on, quote, "How Do You Become a  
6           Judge."

7           Last year the Mayor invited the  
8           minority bar, representatives of the various  
9           minority bars to meet with him personally to  
10          talk about this, to get the word out that  
11          this is the available.

12          So one further suggestion on outreach,  
13          and this is more mechanical but I think it  
14          might help. Right now, when you apply, you  
15          have to fill out a very, very detailed  
16          questionnaire, financials and all the rest.  
17          And certainly that information is necessary  
18          before any final decision made. But there  
19          could be a preliminary short form  
20          questionnaire, if I could use that phrase,  
21          for the initial effort.

22          You know, someone says "I don't want to  
23          go through having to call my accountant or  
24          go through boxes in my basement" and fill

1 out all the clearly appropriate information  
2 before someone becomes a judge of the  
3 highest court in the state.

4 But before you get to home plate,  
5 you've got to get to first base. And I  
6 think you could create a short form that  
7 everyone should be required to fill out  
8 initially. And then, once the person is  
9 under serious consideration, then they're  
10 asked to fill out a longer form.

11 I think you could bring more people out  
12 if the process was somewhat simpler. And  
13 again, that could be done by rule change.

14 The third point is transparency, and  
15 you've made that point. And I think because  
16 of your efforts, only recently the  
17 commission has established a website.

18 I will admit, as someone who had a hand  
19 in the drafting of the statute 30 years ago,  
20 we didn't know what a website was 30 years  
21 ago, I plead guilty to that. But clearly in  
22 this day and age there should be a website.  
23 They've made some constructive beginnings.  
24 There's a lot more information that could be

1 put on that website. Technology is so far  
2 advanced today, so you could put even more  
3 information on the website.

4 And at the same time, the commission  
5 should be urged, when it is issuing its  
6 final report to the Governor, to put as much  
7 information about what's happened as  
8 possible in --

9 CHAIRMAN SAMPSON: I think it lacked  
10 it in this instance. I think there wasn't a  
11 report, and subsequently a report followed.

12 MR. CARDOZO: Yes. Right.

13 And again, I think the rules should be  
14 therefore amended. And again, this could be  
15 done by rules, subject to the  
16 confidentiality restrictions that are in the  
17 statute. But there's a lot more  
18 information, including the outreach efforts,  
19 you know, what have you done. And if that's  
20 required by the rules, if we all know that  
21 it's required by the rules and you're going  
22 to have to tell the Governor what you did,  
23 that it's going to happen.

24 And I would suggest to you that if you

1           were to amend the rules as I suggested on  
2           diversity, if you amend the rules with  
3           respect to outreach and transparency and you  
4           urge the appointing authorities to take  
5           diversity into account in appointing the  
6           commission members, you will go a long way  
7           to dealing with the issues that you have  
8           raised.

9           And as to further changes, we have five  
10          years. What I would suggest is you might  
11          form a study committee; you could take a  
12          look at what's happened across this country.  
13          Arizona, for example, had a merit selection  
14          system that they modified relatively  
15          recently. How has it worked in other  
16          states? And rather than just dealing with  
17          the issue of the moment, if you will, take a  
18          hard look to see if further changes are  
19          made.

20          CHAIRMAN SAMPSON:        I don't think --  
21          you know, the issue at the moment brings  
22          along the changes that need to occur.  
23          Because if we weren't dealing with these  
24          issues, you know, our mindset with not

1 thinking about this commission and what's  
2 going on -- and your talking about issues of  
3 diversity, outreach, and transparency, this  
4 is what -- and I'm quite sure the Mayor has  
5 been advocating -- we have been advocating  
6 this for years with respect to the judiciary  
7 and the people who sit on the bench.

8 And what I'm saying is for the  
9 commission not to take it into consideration  
10 when looking for the next candidate, it sort  
11 of like begs the question. I can promulgate  
12 it with respect to rules, but how do I know  
13 that they're going to implement that or try  
14 to circumvent it?

15 So these are just concerns --

16 MR. CARDOZO: I agree with you,  
17 Senator. But of course we're not -- I'm  
18 sure not about to say we have to have X  
19 percent of the candidates women,  
20 African-American, Asian. We're not saying  
21 that --

22 CHAIRMAN SAMPSON: We're not even --  
23 I'm not even --

24 MR. CARDOZO: I know you're not,

1 Senator.

2 CHAIRMAN SAMPSON: -- talking about  
3 any issue of quota. But what I'm talking  
4 about is the issue of fairness, perceptions.

5 But most of all, what I'm concerned  
6 about is the people's confidence in our  
7 judiciary. And that's very, very important  
8 to me, and I'm quite sure -- I know your  
9 history, and it has been very important to  
10 you.

11 MR. CARDOZO: Yes.

12 CHAIRMAN SAMPSON: And this is  
13 something we want to make sure our people in  
14 the State of New York have full faith and  
15 confidence in our judiciary.

16 MR. CARDOZO: And that's why I would  
17 say -- and I agree with you as to what  
18 happened this time. There's questions that  
19 certainly should be asked.

20 The history of the last 30 years ago --  
21 and I remember the controversy, showing my  
22 age, over Judge Kaye's initial appointment  
23 as the first woman. And, you know, we  
24 didn't have an African-American on the Court

1 of Appeals except for an interim  
2 appointment, I think, until Fritz Alexander,  
3 as I recall.

4 CHAIRMAN SAMPSON: Correct.

5 MR. CARDOZO: And I think that we  
6 have a -- while we have a huge way to go --

7 CHAIRMAN SAMPSON: We have come a  
8 long way.

9 MR. CARDOZO: -- we have come a long  
10 way. And the fact that until Judith  
11 retired, in the last six years there were  
12 four women out of seven sitting on the  
13 court -- a distant cousin of mine named  
14 Benjamin Cardozo would have been shocked.

15 So we have to be careful not to throw  
16 the baby out with the bathwater here.

17 CHAIRMAN SAMPSON: And I do agree, we  
18 have come a long way. And when you finally  
19 think you're arrived, all of a sudden the  
20 curve ball is thrown and then you have to  
21 rethink: Have you made the necessary  
22 changes, have you come a long way, or are we  
23 going to revert back.

24 And the issue has always been if you



1 don't prepare for the future, you'll always  
2 revert back to the ways of the past. And  
3 this is something we want to try to prevent.

4 MR. CARDOZO: And therefore -- and  
5 therefore, one of the other issues is not  
6 just the ethnicity of the people who are the  
7 nominating commissioners -- and I'm not  
8 taking a swipe at any of them. They're all  
9 well-intentioned people. But we've got to  
10 be sure that everyone who is making an  
11 appointment to the judicial nomination  
12 commission understands the importance of  
13 what the Court of Appeals is, a diverse  
14 Court of Appeals, the process, et cetera.

15 And we've got to point a bit of a  
16 spotlight on who is being appointed to the  
17 Commission on Judicial Nomination. You  
18 know, everyone can make the appointments, we  
19 all know the politics that may get involved  
20 in that.

21 CHAIRMAN SAMPSON: We do.

22 MR. CARDOZO: But I would suggest  
23 that you've already helped raise the  
24 consciousness here. If we make these

1 changes -- and there's a lot of groups that  
2 are very, very committed. I'm sure Senator  
3 Dunne, when he was here, made -- I didn't  
4 have the opportunity to hear him, but  
5 knowing him, I suspect he made these points  
6 too.

7 And so I would urge it be done this  
8 way. Now, there's just one -- but I would  
9 not increase the number of names, as I said.  
10 And I certainly would not, as some  
11 additional points I've heard of suggesting  
12 that staggered terms for the commission  
13 members be eliminated or that the Governor  
14 appoint the chair. First of all, those  
15 changes would require a constitutional  
16 amendment.

17 CHAIRMAN SAMPSON: There was also a  
18 recommendation where, instead of doing  
19 two-thirds vote, make it a majority vote.

20 MR. CARDOZO: Well, again, you do  
21 want to have the most highly qualified  
22 people. And so I would, if there's not a  
23 consensus -- and I understand your point  
24 about a bloc of five. But if there's a

1           seven-to-five vote that the person is most  
2           highly qualified and you have to come up  
3           with four to seven names, that is also not  
4           going to give you necessarily the most  
5           confidence that we have selected the most  
6           highly qualified individuals. So this does  
7           force a consensus among the commission.

8           The last point, though, I don't think  
9           we should be trying to change either the  
10          chairperson or the staggered terms. Because  
11          if you eliminate staggered terms, then  
12          you're saying it's the political party of  
13          the moment that will be selecting --

14          CHAIRMAN SAMPSON:        I would agree with  
15          you there. I would agree with that.

16          MR. CARDOZO:        And the United States  
17          Supreme Court today reflects the concerns  
18          that one could have on that point.

19          There's one last point that I think  
20          should be looked at, and that relates to the  
21          confidentiality of the commission  
22          proceedings, which is mandated today by  
23          statute. Certainly the names of the people  
24          who applied must be kept confidential. You

1           are going to significantly deter people from  
2           applying if they're going to read in their  
3           local newspaper they didn't make the cut.  
4           That's not constructive.

5                     That said, a change in the statutory  
6           language which I think should be studied --  
7           I would not urge it to be done now -- is to  
8           allow the commission to say more of what it  
9           did, how many people applied. Perhaps, you  
10          know, something about the background of the  
11          people.

12                    CHAIRMAN SAMPSON:        I mean, that could  
13          be included within their finding, couldn't  
14          it be?

15                    MR. CARDOZO:         Well, there's a  
16          tension, if you look at the language. If I  
17          were doing it over again, I would draft the  
18          statute to explicitly allow that. I think  
19          you could make an argument both ways. And  
20          the commission did, in Mr. O'Mara's second  
21          letter, try to deal with some of that.

22                    But I think that statutory language  
23          could be looked at to see if it could be  
24          tweaked a little bit to allow the public to



1 start this debate about this issue so we  
2 could start thinking about ways of improving  
3 it, whether it could be through rules or  
4 through statute, just to make sure that we  
5 continue to make sure our judiciary branch  
6 is one where we can always have confidence  
7 in it and that we can rely on its  
8 impartiality with respect to those who seek  
9 redress in that form.

10 MR. CARDOZO: I have devoted my  
11 professional life to that issue, Senator. I  
12 couldn't agree with you more.

13 I have a fairly challenging client  
14 today that I represent in court on a regular  
15 basis, and that client is entitled to  
16 appropriate consideration but not favorable  
17 consideration. It's a fundamental point of  
18 our system. And I agree with the goal.

19 CHAIRMAN SAMPSON: Thank you very  
20 much, Mr. Cardozo, for those words. Thank  
21 you very much.

22 MR. CARDOZO: Thank you for inviting  
23 me.

24 CHAIRMAN SAMPSON: We just have one

1 more individual who didn't have an  
2 application but seeks to speak at this time,  
3 and he will be the last person. At this  
4 point in time, the last person -- although  
5 he was not on the list, but we will allow  
6 those who want to speak to speak.

7 Mr. McKeown, come ahead.

8 Good afternoon, Mr. McKeown.

9 MR. McKEOWN: Good afternoon,  
10 Senator, and thank you.

11 Senator, I believe the nomination  
12 process for judges to the New York State  
13 Court of Appeals is tragically flawed and in  
14 need of correction by this Committee on the  
15 Judiciary. I join those who applaud this  
16 committee and the recent public statements  
17 by Governor Paterson and Attorney General  
18 Cuomo over the failings of the process. The  
19 people of this great state deserve nothing  
20 but the best and representative, fully  
21 representative individuals on the state's  
22 highest court.

23 I have direct knowledge and proof of at  
24 least one of the seven names provided to

1 Governor Paterson that included an  
2 individual who improperly remained silent  
3 and protected well-connected attorneys, a  
4 surrogate judge, and an administrative judge  
5 in a scheme to prevent the repayment of over  
6 \$120,000 in 9/11 donation monies stolen from  
7 the American Red Cross.

8 I respectfully refer this committee and  
9 will provide the April 28, 2006, dated  
10 *New York Times* article that went into full  
11 detail.

12 I believe that it is wrong that the  
13 current judicial selection process does not  
14 allow for public input. It has surely  
15 failed me in this regard and the \$120,000  
16 that is still out there and that is due the  
17 9/11 victims.

18 The nomination process for judges to  
19 the State Court of Appeals should be more  
20 open and provide extremely more public  
21 input, comment, and testimony. I'm  
22 optimistic that this committee will take  
23 whatever action is necessary to ensure that  
24 our highest court only consists of the



1           representative best.

2           Before coming here today, Senator, I  
3           had little faith in anything this state  
4           could put together. I am encouraged,  
5           however, by certain recent events -- you  
6           being where you are today, Senator Smith  
7           being where he is today, and the public  
8           outcry for what we all know: There is no  
9           public confidence in our New York State  
10          judicial system or, in fact, the court  
11          system.

12          Senator, you put it best when you  
13          described the nomination process and what  
14          has happened and what brought us here today,  
15          thanks to you, as a hijacking. When there's  
16          a hijacking you look forward, as we do  
17          today, to how can we improve this. And I  
18          have two or three suggestions. But most  
19          importantly, Senator, you take a step back  
20          and you say, Hold on, should we correct  
21          something that is going on right now?

22          I make the same challenge to you,  
23          Senator, that I made in the first week in  
24          December to the chief counsel of the United

1 States Congress Judiciary Committee, that I  
2 made two weeks ago to the second deputy of  
3 the New York State Inspector General's  
4 office, that I have made to Boyd Johnson,  
5 the chief of the Public Corruption Unit for  
6 the United States Attorney's office in the  
7 Southern District of New York, and I make  
8 this to you, Senator.

9 I would like you to give me five  
10 subpoenas, five willing people who want a  
11 subpoena to come and testify in front of  
12 you. I daresay that out of the group here,  
13 one of those people includes an elected  
14 sitting New York State Supreme Court judge  
15 who has given me a 13-page affidavit and who  
16 has offered to testify before you, before  
17 this committee, before a federal court, and  
18 before the United States Congress as to the  
19 bigger and underlying problem of why we're  
20 here today. The information going to the  
21 nomination committee is flawed.

22 CHAIRMAN SAMPSON: What do you mean  
23 by that?

24 MR. McKEOWN: It is flawed, Senator,

1           when they go to fact-finding and background  
2           searches to the Commission on Judicial  
3           Conduct. An elected sitting State Supreme  
4           Court judge wants to stand before you and  
5           testify to you that the commission on  
6           Commission on Judicial Conduct is  
7           irreversibly corrupt.

8           In addition to that, Senator, two  
9           existing attorneys that work for the State  
10          of New York want to come here, testify  
11          before you. I daresay one, at least one, is  
12          connected to a grievance committee, and she  
13          knows inherently how thoroughly corrupt and  
14          biased the system is and will continue to  
15          be.

16          Senator, stop the hijacking. You can  
17          call for immediate hearings.

18          In addition, a former judge has offered  
19          to come and testify before this body, before  
20          Boyd Johnson, before the State Inspector  
21          General's office, and before the U.S.  
22          Congress.

23          Senator, without your presence and  
24          without the presence of this Governor and

1           Senator Smith, I have sought the appointment  
2           of a federal monitor over the state system,  
3           because it is what everybody here knows,  
4           it's out of control. The lack of  
5           oversight -- and this is what cuts to the  
6           nomination committee. The first thing they  
7           do is call the administrative judge, they  
8           call the ethics committees, they call the  
9           Commission on Judicial Conduct. What do you  
10          have?

11                        When we have state attorneys and a  
12          New York State elected sitting State Supreme  
13          Court judge who will testify that that  
14          information is whitewashed, innocent -- even  
15          judges, something is tragically wrong when  
16          judges can't even rely on their own system.

17                        Senator, you put it best. The question  
18          is, is there faith in our system? We all  
19          know the answer. No. We need to make  
20          corrections, and we need to do it now.

21                        This committee has the power and I  
22          daresay this committee has the strength to  
23          say: Wait a second, we're going to not look  
24          ahead -- which is always important to do --

1 but we're going to start right now, that's  
2 it, start subpoenaing people.

3 I know, I have personally talked to  
4 judges throughout the state who will crawl  
5 from Schenectady, from Albany -- well, from  
6 Albany, from New York City, from Buffalo --  
7 they will crawl here to testify before you.  
8 And I daresay, and we all know this, that  
9 then that will open up the doors.

10 People want to have faith in their  
11 system. We don't, Senator. And I urge your  
12 committee to take a step back and do  
13 something about the hijacking now. Not  
14 preventative only, but right now.

15 The shallow diversity that we're  
16 talking about here is not the answer. It's  
17 part of the problem. We need to take  
18 aggressive action, and we need to do it now.

19 It was an honor to listen to  
20 Mr. Cardozo, and I'd like to just discuss a  
21 couple of the thoughts that I have with  
22 regard to the purpose of today. But there  
23 is a bigger purpose that you brought up,  
24 Senator, and I applaud you for it.

1                   CHAIRMAN SAMPSON:       Why don't you try  
2                   to wrap it up now.

3                   MR. MCKEOWN:       We need more  
4                   transparency, and we need qualified people.  
5                   There's a heck of a lot of qualified people.

6                   With regard to his suggestion of a  
7                   minor form that people can submit, I suggest  
8                   that the good people of this state on the  
9                   judiciary and attorneys statewide and the  
10                  general public can nominate and get more  
11                  involved, but we have to -- people have to  
12                  feel confident in their system.

13                  What you said before, Senator, of  
14                  taking everything into consideration, that  
15                  starts with the most important entities in  
16                  this state as far as the nomination  
17                  committee is concerned, and that is the  
18                  information from ethics bodies. In this  
19                  state it's the Commission Judicial Conduct  
20                  and it's the four departments' various  
21                  grievance committees. They're tragically  
22                  abused and corrupted.

23                  I urge this committee, give me -- call  
24                  me out, Senator. Give me five subpoenas to

1 get state employees, former and current  
2 state employees, that want to tell you how  
3 bad it is.

4 I thank you for your time, Senator, and  
5 I'm hopeful that some good stuff is going to  
6 happen.

7 CHAIRMAN SAMPSON: Mr. McKeown, thank  
8 you very much for your remarks, and we will  
9 follow up with respect to the statements you  
10 have made.

11 And I want to thank you very much, and  
12 I really want to thank all of the witnesses  
13 who have appeared to involve themselves in  
14 this hearing.

15 And as I said earlier, the purpose is  
16 not to challenge the nomination of Judge  
17 Lippman, it's to deal with the process so we  
18 won't run into any problems like this again.  
19 You know, this system has -- some of the  
20 witnesses have indicated that it has worked  
21 before. And, you know, we were improving,  
22 but now we've just hit a bump in the road.

23 So hopefully we can make certain  
24 modifications, whether we do it through rule

1 change or statutorily, so we can proceed  
2 forward and deal with it as I think  
3 Mr. Cardozo was talking about, dealing with  
4 the diversity issue, the outreach issue, and  
5 also the issue of transparency. Because at  
6 the end of the day, the most important thing  
7 is for our people, the constituents that we  
8 all represent, to have faith and confidence  
9 in the judicial system.

10 Hopefully within the next couple of  
11 weeks I will be doing something like this  
12 down in the city and also going upstate,  
13 just to really get the flavor regionally as  
14 to the questions with respect to the  
15 selection process.

16 So once again, I thank everyone for  
17 coming out, and I look forward to seeing you  
18 at other hearings with respect to this.  
19 Thank you very much.

20 - - -

21 (Whereupon, the hearing concluded  
22 at 12:29 p.m.)

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