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By Tapping Jones, Spitzer Reveals Hands-On Style of Picking Judges

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ALBANY - With his first judicial appointment, Governor Eliot L. Spitzer has revealed a hands-on, diversity-conscious approach that may be an indication of what the legal community can expect as the new executive makes his imprint on the judiciary.

Mr. Spitzer on Sunday nominated Brooklyn Civil Term Administrative Justice Theodore T. Jones Jr. ([See Profile](#)) for the Court of Appeals, marking the first time the new governor has selected a judge. The governor's initial appointment would restore a measure of diversity to the Court of Appeals, which has lacked black representation since September, when former Governor George E. Pataki declined to reappoint 14-year-incumbent George Bundy Smith.

Although legal scholars and court observers always watch closely when a governor nominates a candidate for the state's highest court, they paid especially close attention to this one, viewing it as a preview into Mr. Spitzer's modus operandi. At first blush, it appears Mr. Spitzer is taking seriously a duty he considers among his most solemn.

"I have always felt that the judiciary is our most important branch of government," Mr. Spitzer said at a press conference Sunday in Manhattan. "It is that branch that ensures that we maintain the constitutional principles relating to how our government is structured, our civil liberties are protected, our laws enforced and, as a consequence, the capacity to participate in nominating individuals for the state's highest Court is one I take remarkably seriously. It is a branch of government for which I have great reverence."

The governor interviewed all seven candidates and met face to face with four of them - a virtually unprecedented approach, observers say. More often governors interview only the nominee they are favoring or defer to staff. But Mr. Spitzer played an unusually active role, and spent a considerable amount of time interviewing some nominees, explaining what he was inclined to do and why, according to sources close to the process.

Albany Law School Professor Michael J. Hutter, who has applied for several Court of Appeals positions, said he is unaware of any prior governor interviewing all of the nominees. Mr. Hutter, of Powers & Santola in Albany, noted that Mr. Spitzer did not have a representative on the Commission on Judicial Nomination, which screened the candidates before he took office on Jan. 1, and therefore might have felt obligated to inject himself deeply in the process. But Mr. Hutter said it is a practice that should continue.

"He had no appointee on the commission and probably wanted to get his own feel for it, but I think that is a very positive sign that he himself took the time to meet with everyone," Mr. Hutter said.

Justice Jones would replace Judge Albert M. Rosenblatt, who retired as of Jan. 1, giving the governor his first opportunity to name a Court of Appeals judge. Mr. Spitzer grasped the opportunity to appoint a black judge, insisting that race played no role in his decision, notwithstanding the fact that he passed over three well-regarded white appellate division justices and announced the nomination of Justice Jones over the Martin Luther King Jr. holiday weekend.

"I have always believed that government should reflect the diversity of our society," Mr. Spitzer said. "Having said that, race, gender did not play a role in our selection process. I was asked to make a choice for the Court of Appeals based upon who would be the best jurist . . . I chose based on the merits of the individual candidates. I think that is what the public would expect."

Regardless, from the moment Mr. Spitzer received his list of seven from the Commission on Judicial Conduct, pundits assumed the governor would not snub the black community. If Mr. Spitzer did not name a black for this seat, the Court almost certainly would have gone without black representation until 2009.

The list from which Mr. Spitzer had to choose included a second black candidate, Deputy Chief Administrative Judge Juanita Bing Newton ([See Profile](#)).

Justice Jones is older, 62, and therefore would have only eight years before facing mandatory retirement. And he emerged - albeit completely untainted - from the scandal ridden Brooklyn political system. Judge Bing Newton, while deemed intelligent, diligent and innovative, has not worked in a courtroom as either a judge or lawyer in at least a decade.

Also on the list were Justices Richard T. Andrias of the First Department ([See Profile](#)), Steven W. Fisher of the Second Department ([See Profile](#)) and Thomas E. Mercure of the Third Department; Supreme Court Justice James A. Yates ([See Profile](#)) of Manhattan; and practicing attorney George F. Carpinello of Boies, Schiller & Flexner in Albany.

Mr. Spitzer said Justice Jones brings "not only the intellectual skills but also a real-life understanding that you need on the highest court in the state - the capacity to be a superb appellate jurist but also somebody who understands how his writings and the decisions of the Court will be applied in a court of law, will be applied on the street and will percolate through the entire judicial system in a way that will reflect the rule of law as we believe in it."

Election or Selection

The governor favors an appointive judiciary over an elective bench and said he will soon propose a constitutional amendment to that effect. Mr. Spitzer has not yet released the details, but observers expect his proposal will at least roughly mirror the Court of Appeals selection process.

But Norman L. Greene, a partner at Schoeman, Updike & Kaufman in Manhattan and organizer of a Fordham Law School symposium last year that explored merit selection models stressed that there are many different ways to devise a "merit selection" system.

"It is definitely not enough for one to proclaim he supports appointing judges or even that he supports appointing them through a commission, without providing a detailed system," Mr. Greene said. "There is not just one system."

Mr. Greene said that an ideal system would limit picks of the appointing authority, such as the governor, to the judicial nominating commission and restrict communications between them. Among other things, Mr. Greene said he would permit appointments to be made to the commission among a group of elected public officials, mandate consideration of diversity, empower local chief executives to appoint judges to local courts, mandate training of the judicial nominating commissioners and reduce the secrecy of the judicial selection process.

With the nomination of Justice Jones, the merit-selection system seemingly "worked like it was supposed to," Mr. Greene said.

"Another interesting thing to note is that [Justice Jones] is not reputed to be 'close to the governor' in any sense - not having worked with him, not having contributed to his campaign, nothing," Mr. Greene observed. "An appointment system is not supposed to be a redundant system, merely ratifying the candidate who the governor initially said he wanted in view of past relations with the governor."

Justice Jones is a favorite of lawyers, particularly those representing plaintiffs in civil cases. He became known to the public for handling the 2005 Christmas-season transit strike.

With a strict application of the Taylor Law, Justice Jones held union leader Roger Toussaint in contempt of court. The judge rejected the union's argument that the Metropolitan Transportation Authority had provoked the strike, imposed a \$1 million-a-day fine on the union and docked striking workers two day's pay for each day they struck. Shortly after, he was promoted by the Office of Court Administration to Brooklyn administrative judge, taking responsibility for a court that had been rocked by scandal.

Mr. Spitzer said Sunday that while the transit strike matter was perhaps Justice Jones' most publicly prominent, it was the judge's body of opinions and decisions over the last 16 years that swung the pendulum in his favor.

He said that in the transit case, the "public saw a jurist who was in command, a jurist who understood the rule of law, a jurist who understood how judges had to make tough decisions and did not flinch when doing so. But the governor added that Justice Jones had "already earned the respect of those who had worked with over the years in the judicial system."

Support in Community

New York City Bar Association President Barry Kamins of Flamhoft Levy Kamins Hirsch & Rendeiro in Brooklyn agreed.

"I have always found him to be a jurist of exceptional good temperament, who is fair-minded and respects the rule of law," said Mr. Kamins. "He does not bring any agenda to the Court and will decide cases truly on the merits."

New York State Bar Association President Mark H. Alcott said that while racial diversity is a "plus," Justice Jones also brings the diversity of someone who was an active litigator, a seasoned judge and a judicial administrator. He said that combination of qualities helped him to stand out.

Nadine C. Johnson, president of the Metropolitan Black Bar Association, said in a statement that Justice Jones "will bring to [New York's] high court a keen understanding and knowledge of the legal issues the Court is likely to be faced with in the near future. He is known for excellent judicial temperament, a high sense of integrity, intellect and judicial independence, respect for the laws with fair and accurate application of the law."

Senate Democratic Leader Malcolm Smith said in a statement that "while Governor Spitzer made it quite clear that race would not be a factor in his judicial appointments, he also made it clear that he values a diverse judiciary."

Senator Ruth Hassell-Thompson, Ranking Democrat on the Senate's Judiciary Committee, said Mr. Spitzer "has done more to increase diversity on the State's highest Court than his predecessor did in 12 long years." Mr. Pataki never appointed a minority to the Court of Appeals.

Mr. Pataki also left the appellate divisions with only two blacks, neither of them appointed by him, among their nearly 60 justices. Some lawyers and judges say that if diversity had been a more important consideration to Mr. Pataki, and that if he had not stocked the downstate appellate panels with upstate, white Republicans, Justice Jones may well have had appellate experience when the Rosenblatt seat opened.

"Governor Spitzer said in his State of the State address that there are chapters yet to be written in the nation's civil rights movement. I hope this is the first statement of the Governor's chapter." Ms. Hassell-Thompson said.

Albany Law School Professor Vincent M. Bonventre said that some were predicting Justice Jones' pro-employer, anti-union decision in the transit case would derail his chances with a newly elected Democratic governor.

"This shows that Spitzer is willing to make appointments to the Court that don't necessarily please all his Democratic constituents," Mr. Bonventre said. "And maybe Justice Jones' ruling suggests he will be independent, which would certainly be good."

Great Responsibility

Justice Jones and his wife of 39 years, Joan Hogans Jones, a teacher in West Nyack, have two sons, Theodore III, 31, and Wesley, 25. The nominee said he was "humbled by the trust placed in me" and promised to "do my best to live up to that great responsibility."

"I am profoundly aware of the importance of this nomination, and I cherish the position in which I find myself," Justice Jones said. "I know the strength of the competition presented by the [others] who were considered along with me . . . I know of their abilities as scholars and writers, and I am profoundly grateful to have emerged as the nominee under those circumstances . . . I am persuaded that my 34 years of legal experience up to this point put me before you today."

Justice Jones was born in Brooklyn and grew up in Queens. His mother was a teacher and his father worked with the Long Island Rail Road, eventually becoming station master at Penn Station. He saw active duty in Vietnam from 1967-1969 and left the military as a captain.

A graduate of Hampton University and St. John's University School of Law (1972), Justice Jones spent two years with the criminal division of the Legal Aid Society. He clerked for a Court of Claims judge and practiced law in Brooklyn before his election to Supreme Court in 1989. Justice Jones was a member of the Second Department's character and fitness committee from 1978 to 1990 and has taught as an adjunct professor at the City University of New York and St. John's University School of Law.

Justice Jones, like the governor, is a Democrat. If confirmed by the Senate, he will join a bench that now includes two appointees of the last Democratic governor, Mario M. Cuomo (Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick) and four Republicans appointed by Mr. Pataki (Judges Victoria A. Graffeo, Susan Phillips Read, Robert S. Smith and Eugene F. Pigott Jr.).

If confirmed for the \$151,200-a-year position, Justice Jones would become the fourth black judge to sit on the Court of Appeals. The others were Judges Bundy Smith (1992-2006), Fritz W. Alexander II (1985-1992) and Harold A. Stevens (1974).

The Senate is required to take action within 30 days. Mr. Spitzer said he had advised Senate Majority Leader Joseph L. Bruno of his choice, and that the majority leader responded favorably. The Senate has never rejected any governor's nomination for a Court of Appeals position.

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This story is an expanded version of an article that appeared Sunday on www.nylj.com.