

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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MARGARITA LÓPEZ TORRES, STEVEN
BANKS, C. ALFRED SANTILLO, JOHN J.
MACRON, LILI ANN MOTTA, JOHN W.
CARROLL, PHILIP C. SEGAL, SUSAN LOEB,
DAVID J. LANSNER, and COMMON
CAUSE/NY,

Plaintiffs,

v.

NEW YORK STATE BOARD OF ELECTIONS;
NEIL W. KELLEHER, HELENA MOSES
DONOHUE, and EVELYN J. AQUILA, in their
official capacities as Commissioners of the New
York State Board of Elections,

Defendants.
-----X

**DECLARATION OF BENJAMIN
OSTRER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF**

Index No. CV 04-1129 (JG)

BENJAMIN OSTRER declares as follows:

1. I am an attorney admitted to practice in the State of New York and submit this declaration in support of Plaintiffs' motion for a preliminary injunction.

Background

2. I am a principal of the firm of Benjamin Ostrer & Associates, P.C., located at 111 Main Street, Chester, New York. I graduated from New York Law School in 1976 and was admitted to practice in New York in 1977. I am also admitted in the U.S. District Courts for the Southern and Eastern Districts of New York. I am the Town Attorney for the Town of Chester and attorney for the Village of Harriman. I am a Director of the Legal Aid Society of Orange County and a member of the ABA, NYSBA, National and New York Associations of Criminal Defense Lawyers.

3. I am a resident of the Town of Chester, Orange County, New York, which is part of the 9th Judicial District.

4. The 9th Judicial District consists of Westchester, Rockland, Orange, Dutchess and Putnam Counties.

5. I have been a registered Republican since approximately 1980.

6. I have served as a member of the Town of Chester Republican Committee for 15 years and also serve as a member of the Executive Committee of the Orange County Republican Party.

The Selection of Judicial Delegates

7. I have served as either a judicial delegate or alternate delegate to each of the 9th Judicial District Republican Judicial Conventions since 1990.

8. My selection as a delegate to the Judicial Convention is an honor that is generally bestowed upon a registered committee member by party leaders. Most of the delegates are attorneys, elected officials or senior party members.

9. The county party leaders control the selection of delegates and alternates to the judicial convention. In my experience, there has never been a contested delegate or alternate race. This is not surprising given the fact that there is little point in being elected as an individual delegate or alternate without the party leaders' support because you would not have any significant influence over the outcome of the convention.

10. Even assuming a challenger Supreme Court candidate were to seek the nomination without their Party chairperson's support – an event that has not occurred in the 9th Judicial District in recent history – the barriers to running and electing

challenger delegates and alternates are practically impossible to overcome. One would have to run slates of delegate and alternate candidates in all or nearly all of the Assembly Districts within the Judicial District. The 9th Judicial District includes, in whole or in part, 17 Assembly Districts and five counties. Accordingly, a challenger candidate would have to recruit large numbers of willing delegate and alternate candidates – an impossible task.

11. Even if one were able to recruit such candidates, the burdens of petitioning them onto the ballot would be prohibitive. For an individual to petition onto the ballot as a candidate for delegate, a minimum of 500 signatures must be gathered from members of the individual's political party who live within the Assembly District. To avoid being successfully challenged, however, that means gathering many more signatures beyond the minimum. In the 9th Judicial District a challenger would have to establish and pay for a petitioning operation that could gather a statutory minimum of 8,500 signatures – and a real minimum of over 25,000 – a nearly impossible burden. The challenger candidate would also have to expend substantial funds to hire an election lawyer to review the gathered petitions for accuracy before submission to the county board of elections and to defend those petitions against challenges in court.

12. Even if a challenger somehow successfully placed slates of delegate and alternate candidates on the ballots, that would still only secure the *possibility* of electing a majority of delegates and alternates to the convention. It does not secure a place on any ballot for the Supreme Court challenger candidate. The totality of circumstances makes a contested election at a Judicial Convention a fanciful proposition.

The Selection of Supreme Court Candidates: The Westchester Republican Party Chairman's Dominance

13. The Westchester Republican Party Chairperson is the single most important individual in selecting Supreme Court justices in my Judicial District. This is true for two reasons. First, in the 9th Judicial District Republican Party candidates usually prevail in general elections for the Supreme Court and have won each of these elections since 1996. The last Democrat to successfully run for Supreme Court was Emmett Murphy of Westchester County. Prior to Judge Murphy, the only Democrats elected during the 1990s were Donald Silverman in 1992, John Diblasi in 1994, and Joan Lefkowitz and Frank Nicolai in 1990. Justice Nicolai, who now serves as the Presiding Justice in the 9th Judicial District and Howard Miller, a Republican, were each cross-endorsed in 1990. They were the last candidates to obtain endorsements of both major parties in the District. The Republican plurality in the northern counties of Orange, Dutchess and Putnam has for more than two decades usually been sufficient to offset the superiority of the Democratic vote in Westchester and (to a lesser extent) Rockland Counties. The Republican nomination and ballot line is the most significant credential for election.

14. Approximately 45% of the registered Republican voters in the Judicial District reside in Westchester. Under existing Republican Party rules, there are delegates assigned for every 2,500 votes cast for the party's gubernatorial candidate in the most recent general election. For this reason, Westchester possesses the largest block of delegates and alternates to each Judicial Convention. An alliance between

Westchester County and any one of the other counties within the Judicial District provides sufficient delegate strength to ensure the nomination of a particular candidate.

15. I am informed that in response to objections raised by the Northern Counties, however, an agreement was reached between the various Republican Party county organizations in the 1980s whereby courtesy was to be extended to the Republican chairperson of the county in which a vacancy was to be filled in the coming election. This understanding perpetuated the imbalance in favor of Westchester but stemmed further transfer of seats to Westchester.

16. Despite this arrangement, given the imbalance in power within the District no county would dare mount a contest or support a candidate other than one who has been deemed acceptable by the Westchester Committee. The penalty for such a challenge was demonstrated in 2003. Although Justice Joseph G. Owen, a resident Orange County jurist, reached retirement age last year and his judicial seat was to become vacant, Orange County's Republican chairperson was denied the opportunity to name a candidate to succeed him. In retaliation for efforts by the Orange County Chairman to obtain an additional seat, an alliance between Rockland and Westchester County substituted a candidate from Rockland, thereby further reducing Orange County's bench strength.

17. As a result of Westchester's dominance, there are currently 17 regular sitting Supreme Court Justices from Westchester and only six from the other four counties combined. This ratio is far beyond even what the population strength of Westchester would dictate and reflects instead the political dominance of the Westchester Party organization within the District. A chart setting forth the judicial distribution is

annexed hereto as "A".

The Selection of Supreme Court Candidates: The Absence of Challenges

18. In my 14 years as a judicial delegate, there has never been a challenger candidate for Supreme Court even considered for the Republican Party's nomination at a convention.

19. Generally, the county chairman of the Republican Party in the county that controls the seat selects a candidate. While many qualified justices are chosen and I would not suggest otherwise, the manner of selection is not designed to produce the best bench. Legal experience and acumen and judicial temperament and personal integrity all matter less in the selection of candidates than the blessing of a county chairman. Many individuals who would be fine judicial candidates have literally no opportunity to attain the bench. By contrast, primaries for County, City and Town judicial positions offers an opportunity for individuals to submit their respective qualifications to party regulars.

20. The judicial conventions are merely a formality. Because the nominees are selected by the Party's leaders in advance of the convention, the convention actually functions as a social gathering at which time the choices of the party leaders are merely ratified. At each of the 14 conventions at which I have served, the candidates selected by the party chairpersons were approved by unanimous acclamation by the delegates.

21. During my tenure as a delegate from Orange County there was only one aborted attempt at the establishment of a screening committee to review judicial candidates. The party chairpersons for each county within the Judicial District select

their choice of candidates without any formal or public process of any kind.

22. Despite numerous scripted formalities that must be dispensed with, no time is spent on any kind of real deliberations or debate concerning the candidates. Because as delegates we are fully aware that our role is limited to ratifying the party leaders' choice of candidates, the absentee rate for delegates and alternates is much higher at the Judicial Conventions than at the Republican Party county conventions I have participated in. In my experience, about one third of all the delegates do not attend the convention despite the fact that this is their only real duty as delegates.

23. The state party chairperson for the Republican Party initiates the convention proceedings by designating a "convenor" in writing, usually a week prior to the convention.

24. The convenor calls the convention to order and obtains a roll call to ascertain whether a quorum of delegates is present. There has been a quorum at each convention I have attended. The convention delegates then accept a nomination from the convenor to elect a temporary chairperson and a temporary secretary, whose function is to oversee the subsequent election of a permanent chairperson and secretary. In most cases, the chairperson who presides over the convention is one of the county Party chairpersons. Westchester Chairs Anthony Colavita and Senator Nick Spano presided for several years. In my experience, there have been no challenges to the selected chairperson at any of the judicial conventions.

25. After several formalities, the chairperson then calls for nominations for Supreme Court Justices. In my experience, there have never been any nominations that are not known and supported by the county Party chairpersons before

the convention begins.

26. The chairperson calls upon a delegate selected in advance to nominate a specific nominee. Often the nominating delegate gives a brief speech highlighting the candidate's virtues. Then another pre-selected delegate seconds the nomination or each of the County chairmen is called upon to do so.

27. At most conventions, the chairperson then invites a motion to close nominations for that position, the motion passes by voice vote, and the candidate is announced as the party's nominee. The convention then repeats this process for each remaining open position.

Conclusion

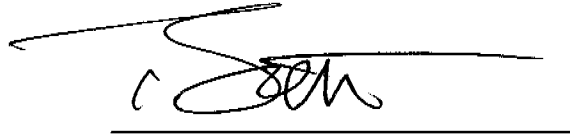
28. For someone who wants to seek the Republican Party's nomination for Supreme Court, the *only* path is to obtain the support of his or her county Party chairman and then seek the blessing of the Westchester County chair. Regardless of how well qualified or popular a candidate is, without such support from his or her County chairperson, there is literally no realistic opportunity in the current system to obtain the Party's nomination to appear on the ballot.

29. The delegates who are chosen, while conscientious and able, are not presented with a choice of candidates. Even if a contest were to arise, the failure to support the candidate enjoying the favor of the Chairmen would likely produce an end to future invitations to serve as a delegate, at the very least. There is simply no realistic possibility that a challenger candidate without the support of the county Party chairpersons could obtain a majority of delegates' support at a convention. The structural burdens imposed by the current statutory judicial convention system of selection are

simply impossible to overcome for such candidates.

I swear under penalty of perjury that the foregoing is true and correct.

Dated: Chester, New York
June 4, 2004



BENJAMIN OSTRER

9th Judicial District

	Westchester	Rockland	Orange	Dutchess	Putnam
Population	923,459	286,753	341,367	280,150	95,745
Population per Sitting Justice	41,975	95,584	113,789	93,338	95,745
Justices	Angiolillo Barone ^ Bellantoni Colabella Dillon Donovan LaCava Lefkowitz Murphy Nastasi Rosato Rudolph Tolbert DiFiore Smith Walker Jamieson Dickerson West ^ Molea** O'Rourke*** Horowitz ^^	Miller* Sherwood Bergerman Garvey	Ritter* Owen ^ McGuirk Patsalos^	Marlow* Sprout Brands	Sweeney*

* Appellate Division does not hear trial cases

** Court of Claims sitting in Westchester

*** Westchester Resident sitting in Rockland County

^ Certificated- sitting beyond retirement

^^ Westchester County Resident sitting in Orange