

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, CAROL BERMAN,
HELENA MOSES DONOHUE, and EVELYN J.
AQUILA, in their official capacities as
Commissioners of the New York State Board of
Elections,

Defendants.
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**DECLARATION OF BRUCE E. CAIN
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTIVE RELIEF**

Index No. CV 04-1129 (JG)

BRUCE E. CAIN declares as follows:

1. I am the Robson Professor of Political Science and Director of the
Institute of Governmental Studies at the University of California. I submit this
declaration in support of Plaintiffs' motion for a preliminary injunction.

I. Background & Disclosures

2. I have taught at University of California-Berkeley since the Fall
Semester of 1989. Before that, I taught at the California Institute of Technology in
Pasadena, California. My areas of expertise include American politics and electoral
institutions and systems, California and comparative state politics, public opinion
research, direct democracy and campaign finance reform. In my nearly thirty years of

II. Summary of Assignment & Conclusion

5. Judges for the New York State Supreme Court are nominated through a unique and complex system of party convention nomination. Based on my background in elections and democratic theory, I was asked to investigate the competitiveness and openness of this nomination system, and to assess that system in the context of basic principles of democratic elections. Working from delegate lists for the New York City judicial conventions from 1999 to 2002 and outside New York City from 1995-2002, convention minutes from 1994 to 2002 for New York City, convention minutes from 1990 to 2002 for the rest of the state, election results from 1990-2002, and the rules of the Democratic and Republican Parties in New York State, I tried to answer six empirical questions that reveal the degree to which the system is essentially closed to potential challengers. All of those documents which I reviewed to develop my opinions in this matter are included as exhibits to the Declaration of Jeremy Creelan. In addition, I have reviewed the lay witness declarations submitted in support of Plaintiffs' motion.

6. My general conclusion is that New York's convention system for nominating State Supreme court justices is a highly closed and undemocratic process. My empirical investigations reveal that delegates are selected to affirm choices that have already been made by party leaders, and that successful challenges to these selections are all but impossible as a practical matter. As a consequence, there is no record of any successful individual challenges to candidates supported by county party leaders and little competition in the final November election. Given that the rules preclude candidates from petitioning to get on the November ballot with major party labels and that minor party candidates stand no chance of winning, New York State's Supreme Court

nomination system falls well below the threshold of a minimally democratic selection system. In the sections of the declaration that follow I will first answer six empirical questions related to the operation of the State Supreme Court nomination system, and then explain why I believe that the system is not even minimally democratic.

III. Empirical Analysis

7. Through my analysis of the available judicial convention minutes and election results for Supreme Court since 1990, I answered six empirical questions that together address whether Supreme Court candidates who do not have the backing of their local party leaders have been able to compete, successfully or unsuccessfully, for their party's nomination. The answers below are organized in the order in which the Supreme Court selection process proceeds – from delegate selection to judicial convention to general election.

8. The first question is: what percentage of judicial delegates faced challenges in recent years? Under the judicial convention system, delegates for the Democratic and Republican judicial conventions run in a September “primary” election of sorts. They are selected from the various Assembly Districts within each of New York's 12 judicial districts. The local party leaders nominate their slates of delegate and alternate candidates. If a challenger candidate wants to run his or her competing slate, he or she would have to recruit the delegate candidates and then help them each gather signatures from party members who live within the Assembly District. Due to the large number of Assembly Districts, it can require gathering as many as a statutory minimum of 12,000 signatures in no more than 37 days to get slates of challenger delegate

candidates to appear on the ballot (as for example in the case of Second Judicial District Democrats).

9. Given that this is a time-consuming and expensive process, contests for delegate positions are rare, and as a result, party leaders' delegate candidates rarely even appear on the September ballot. Based on the New York City delegate lists obtained from the Board of Elections, from 1999 through 2002, only 14.5% of delegates selected overall actually appeared on the ballot. Only 1% of Republican and 20% of Democratic delegates appeared on the ballot. This is a clear indication that the legal, financial, and logistical obstacles that challengers face in fielding and running enough delegates to defeat the party leadership's slate are formidable, and prevent all but a small number of delegate contests in September. Outside of New York City, my review of correspondence from Albany, Nassau, Suffolk, and Tompkins Counties in response to requests for information indicate that not a single delegate or alternate candidate has been placed on the ballot in those major counties since at least 1999 and likely before. It is clear from this evidence that delegate contests are extremely rare across the state.

10. The second question is how many delegates and alternate delegates actually attend the judicial conventions for which they have been selected. After the September primary, the Democratic and Republican delegates attend a judicial nominating convention. One indicator of whether the convention merely rubberstamps the selections of the party leaders or makes real decisions about candidates is the attendance at the judicial conventions. Using information from the delegate lists and the minutes, it was possible to calculate the convention absenteeism rate for 16 conventions outside New York City between 1995 and 2002: i.e., 32.3%. In other words, one third of

the delegates did not bother to attend. Within New York City, the numbers are similar. In 1999 and 2000, the two years for which data are available, the absentee rate for Democratic Party judicial conventions in New York City was 24.5%. For the three Republican Party conventions between 1999 and 2002 for which data are available, the average absentee rate was 69.1%. Such evidence suggests that many delegates concluded that their votes would not be sufficiently determinative of the outcome of the conventions to justify their attendance, despite the fact that they were selected to attend the convention in question. This evidence reflects the fact that the delegates affirm party leaders' choices at the conventions with little or no dissent.

11. The third question is whether there is any evidence of a successful challenge to a convention chair. Convention procedures are a good indicator of how open and democratic the selection process is. After the convention is convened, the delegates select a temporary and then permanent chairperson. In a competitive setting with hotly contested slates of delegates running against one another, one might expect occasional challenges to the chairpersons who oversee the nomination process. Based on minutes of Democratic and Republican conventions from outside New York City between 1990-2002 and from New York City between 1994-2002, there is no evidence that party chairs have ever been successfully challenged.

12. The fourth question is how long judicial conventions last. One might expect that if the conventions featured meaningful contests between contending delegates supporting different Supreme Court candidates for the same positions that some of the conventions would last for many hours or even whole days. On the other hand, if the conventions were mere formalities, affirming what was a foregone conclusion, one

would expect the meetings to be much shorter. Based on a total of 83 conventions across the state from 1990 through 2002 in which the minutes record the time they began and ended, it appears that they took only 55 minutes on average. For 8 conventions available from 1994-2002, the 2nd District Democratic conventions averaged only 28 minutes, with the 1996 convention lasting only 11 minutes yet nominating 8 candidates. This extreme brevity of the conventions is consistent with other evidence that the conventions do not involve real decision-making.

13. The fifth question is whether there have been any successful challenges for Supreme Court nomination at Democratic and Republican conventions. Perhaps the best indicator of whether challengers have a chance is to calculate how frequently the party leaders' nominees are defeated. To do so, I reviewed all available convention minutes from New York City from 1994 through 2002 and from the rest of the state from 1990 through 2002. I made certain reasonable assumptions in my reading of the convention minutes. First, I assumed that if only one candidate was considered for a position, by definition that seat was not contested. Second, if more than one candidate was considered for nomination, but the candidate who prevailed at the convention did so by unanimous voice vote, then I assumed that that candidate was not a challenger candidate. I believe this assumption to be reasonable for several reasons, most obviously because if that winning candidate were *not* the party leaders' choice then those leaders presumably would have cast at least one vote for their own candidate who lost.

14. The overwhelming majority of nominations at conventions during this period were approved by the delegates by unanimous voice vote, usually without any challenger candidates even being considered. Based on the minutes and election records

for the 584 Supreme Court positions filled from 1994 through 2002, there is no evidence of any successful challenge to those candidates backed by the county party leaders between 1994 and 2002 across the state. (For the New York City Democrats from 1994-2002, that amounts to 137 candidates over 32 conventions without a successful challenge. For the Republicans, it was 133 candidates over the same period.) In addition, the available minutes from conventions outside New York City from 1990 through 1993 also show no successful challenges.¹

15. The only convention at which a candidate who was not supported by the county chairman of the political party obtained the party's nomination was in the Eighth Judicial District in 2000, at which candidates who were supported by a rival faction of party leaders narrowly won the nomination. As confirmed by a contemporaneous press report (*see* Exhibit B attached), this was clearly the result of a major split within the county party leadership that pitted one faction's delegates against the other's, rather than the result of the individual challenger candidates' efforts. Without that fortuitous split, it seems highly unlikely that the successful nominees could have obtained sufficient delegate support to compete in earnest for the nomination.

16. The sixth and last question is about the level of competition in the November election and how likely minor party candidates are to succeed. The last stage in the process is the general election. Based on data from 1990 to 2002, 47% of the State Supreme court judicial races were not contested (meaning that there was only one candidate from the Democratic or Republican Party for a seat). 85% of the races were uncontested during this period in the 1st Judicial District, as were 91% in the 6th and 57%

¹ The minutes for the following conventions were unavailable: the Republican convention in the 8th Judicial District in 1995; Democratic conventions in the 2nd, 11th, and 12th Judicial Districts and Republican conventions in the 1st, 2nd, 11th, and 12th Judicial Districts in 1998.

19. A democratic election is defined as one in which alternatives with more votes are preferred over those with less votes. Often that means the majority prevails, but it can also mean a mere plurality as long as the option with the most support is the one that prevails. A system in which policy options or candidates with fewer votes prevail over ones with more votes would not be democratic. A system can also be undemocratic if it restricts the franchise in a biased and unreasonable way, or if it limits the options voters get to choose from by highly restrictive means. This case deals with the latter problem. If the most preferred alternative cannot make its way onto the ballot, then the system violates basic democratic principles.

20. Many U.S. jurisdictions employ the so-called single member simple plurality rules for choosing electoral winners. This type of system tends to produce a two-party system. In the U.S., the two-party duopoly restricts competition to two major parties (that have reasonable prospects of holding office) while minor parties have largely expressive or spoiler functions. The restriction of competition in the November general election is consistent with democratic principles as long as the major parties are relatively open before that stage. When political parties restrict competition at the nomination phase, however, it can unacceptably restrict voters' choices to such a degree as to conflict with basic democratic principles.

21. This is in effect what the nomination system for the New York State Supreme Court does. By ceding the nomination to county party leaders and making it virtually impossible for challenger candidates to get the party nomination, the State has adopted an undemocratic nomination process. By then precluding other candidates from petitioning onto the November ballot as Democrats or Republicans, the State blocks entry

at the post-nomination phase as well. Without the major party label, candidates stand no chance of election. Without the approval of the county party officials, they cannot win the party label.

22. The process by which the party leaders choose delegates and candidates is neither transparent nor democratic. The selection of alternatives is so narrowly restricted to one slate in most instances that there is no meaningful competition for State Supreme Court judgeships.

23. Denying potentially interested and qualified candidates an opportunity to run in an election for this judicial office deprives voters of their party any meaningful choice among candidates for their party's nomination. With no choice for voters at the nomination stage, moreover, the general elections become simply an undemocratic affirmation of a deal struck by party leaders.

24. There are several paths that might lift this undemocratic process above the democratic threshold. The State could abandon the convention process for a direct primary election. Or individuals could be allowed to petition onto the November ballot as Democratic or Republican candidates. The key is to allow for meaningful competition among a party's candidates and greater transparency. The majority can only prevail if the most preferred options are allowed on the ballot to compete for votes. A system that suffocates choice before the voters even get to decide is not democratic.

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

Dated: Berkeley, CA
June 7, 2004



BRUCE E. CAIN