

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED**

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U.S. DISTRICT COURT E.D.N.Y.

★ SEP 29 2004 ★

BROOKLYN OFFICE

MEMORANDUM OF LAW

04-CV-1129(JG)

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; CAROL  
BERMAN, 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.

THE STATUTORY SCHEME FOR THE NOMINATION  
AND ELECTION OF JUSTICES OF THE NEW YORK  
SUPREME COURT UNJUSTIFIABLY VIOLATES THE  
CONSTITUTIONAL RIGHTS OF THE VOTERS TO VOTE  
EFFECTIVELY FOR THE CANDIDATES OF THEIR  
CHOOSING.

New York Election Law §§ 6-106, 6-124, and 6-158 severely burden the rights of the electorate to vote effectively for the candidates of their choosing for the office of justice of the Supreme Court. See Burdick v. Takushi, 112 S.Ct. 2059 (1992). Because the statutory scheme is not narrowly tailored to advance *any* compelling state interest, the provisions violate the electorate's First and Fourteenth Amendment rights to associate, to have candidates of their choice placed on the ballot, and to vote

effectively in the general election. Accordingly, the relief sought by the Petitioners should be granted.

In view of the role that New York State plays in every aspect of national and international business and the economy, the significance of the role served by the justices of the Supreme Court of the State of New York cannot readily be overstated. The Supreme Court has original trial jurisdiction both in law and equity, exclusive original jurisdiction over all crimes prosecuted by indictment in New York City, and original jurisdiction over all new classes and actions created by the legislature. N.Y. Const. Art. V, § 7(a), (b). Justices of the Supreme Court, although locally elected, have statewide jurisdiction, and they constitute the exclusive pool of candidates for both temporary and permanent appointment by the governor to the Appellate Division of the Supreme Court. N.Y. Const. Art. V, § 4. The jurisdiction of the justices of the Appellate Division encompasses questions of law and equity, and in many cases exceeds the jurisdiction of the New York Court of Appeals, which is largely discretionary and limited to questions of law. N.Y. Const. Art. V, § 3.

Reflective of the importance of the Supreme Court, Article V, section 6 of the State Constitution directs that the justices of the Supreme Court shall be chosen by the electors of the judicial district in which they are to

serve. As documented so starkly in the petitioner's affidavit, however, that constitutional mandate has been sabotaged by the Legislature, which, since 1911, has ensured that the leaders of the majority political party or parties in the counties comprising the judicial districts exercise exclusive and absolute control over who secures nomination for election and election to the Supreme Court.

In 1911, the New York State legislature implemented a unique method of nominating candidates for the Supreme Court. While the Election Law provided that the voters would vote directly for candidates for other elected judgeships at party primary elections, the Legislature chose to put into place an indirect nominating system for Supreme Court justices. Under that system, which is in place today, the public votes only for delegates, who then, in turn, nominate candidates at judicial district conventions that are not open to the public.

The candidates for delegate to the judicial district convention are not linked on the primary ballot to the names of individuals who are seeking party nomination for Supreme Court judgeships. In fact, the names of the candidates for judgeships appear nowhere on the primary ballot. So, when voters enter the voting booth on primary day, they are confronted with the names of anonymous people who are seeking election as delegates to the

judicial nominating convention. Once elected, the delegates are theoretically free to vote for anyone – regardless of qualifications or acceptability to the electorate -- at the conventions. In reality, the delegates act at the direction of the party leaders, who secured the delegates' positions on the primary ballot. Because the conventions are not open to the public, there is no constraint on the power of the party leaders to influence and control the delegates' votes. The conventions are concluded in a matter of minutes -- without debate or discussion about the pool of candidates and their qualifications -- because the delegates vote at the direction of the party leaders.

In practice, this method of selecting candidates for the state Supreme Court has effectively disenfranchised the voters in every judicial district. Whether in judicial districts where the predominant registration is in either major party, or in judicial districts where there is cross-endorsement of candidates by the two major political parties, the nomination of candidates at the party's judicial district convention renders the candidates' victory at the ensuing general election a *fait accompli*. The political parties therefore make, at most, only a token show of informing the electorate of the qualifications of the candidates on the general election ballot, because the candidates are assured of victory.

Thus, the county leaders of the major political parties effectively *appoint* every justice of the Supreme Court. No compelling or even arguably legitimate state interest justifies this violation of the voters' fundamental right to vote effectively for the candidates of their choosing. Although a blind eye has been turned for more than 80 years on this blatant usurpation of the rights of the voters to choose who shall serve on the Supreme Court, it cannot be allowed to continue in violation of both the Equal Protection and Due Process clauses of the United States Constitution.

The legislative archives in Albany do not reveal what motivated the Legislature in 1911 to reserve to the political parties the power to control the outcome of Supreme Court elections through the mechanism of the judicial district convention nominating system. No such statutory scheme was implemented for other elected judgeships. In 1920-21, the Election Law was briefly revised to provide for the statewide party convention nomination of Supreme Court candidates, before the Legislature returned in 1922 to the judicial district convention nomination process that remains in effect to this day. It can be surmised that the members of the State Senate and Assembly, in ensuring that the local party leaders would dictate the election of their chosen candidates, was influenced by both the broad jurisdiction of the Supreme Court over both criminal and civil cases and by the fact that the

justices of the Supreme Court constitute the pool of candidates for appointment to the powerful Appellate Divisions.

Clearly, therefore, the method by which candidates for election as justices of the New York Supreme Court are nominated by anonymous delegates at judicial district conventions is a remnant of an era during which powerful "bosses" of private political clubs freely and openly dictated the result of general elections through their control of the nominating process. These so-called "conventions" are mere charades orchestrated by the party leaders and designed to put a legitimate face on back room political maneuvering. No legitimate state interest has ever been established justifying the retention by the political party leaders of control of this critical judicial office. The resulting burdens imposed upon voters by this system are overwhelming, because the system not only undermines fundamental right to vote effectively for the office of justice of the New York State Supreme Court, it effectively denies it, while creating the omnipresent threat that the justices of the Supreme Court are not independent of outside influence.

For most of the nineteenth century, political parties were elite private clubs that chose their own nominating procedures and implemented those procedures subject only to their own rules. This view coincided with the

view that the right to nominate candidates was not a part of the elective franchise. The result was that party leaders could and did dictate the outcome of general elections through their control of armies of party workers and the nominating process, and “it was no more illegal to commit fraud in the party caucus or primary than it would be to do so in the election of officers of a drinking club.” V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 411 (4<sup>th</sup> ed. 1962).

Admirably, New York State was in the vanguard of states that adopted the expansive view that the individual’s right to vote effectively included the right to participate substantively in the party nomination process, because in “safe” election districts party nomination equaled a victory in the general election. This conclusion dictated state regulation of political parties and the nominating process. See *People ex rel. Coffey v. Democratic General Committee*, 58 N.E. 124 (N.Y. 1900). Indeed, the first laws regulating political parties and party nominating practices were enacted in New York in 1882. By 1911, the Election Law that is now in effect had largely been enacted, including provisions providing for the indirect nomination of candidates for the Supreme Court at judicial district conventions.

However, as in any state, “the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in

state legislatures.” Anderson v. Celebrezze, 460 U.S. 780, 803, n.30 (1983). Thus, although the Election Law, as a whole, limits the power of party leaders in New York to dictate the outcome of elections, it cannot be assumed that every provision of the Election Law was motivated by a “legitimate state interest.” Id. Therefore, “the manner in which election laws are enacted requires that courts ‘pass judgment’ on the ‘legitimacy and strength’ of the state’s proffered interests.” Molinari, et al. v. Powers, 82 F.Supp.2d 57, 77 (E.D.N.Y. 2000) (quoting Schultz v. Williams, 44 F.3d 48, 58 [2d Cir. 1994]; Anderson v. Celebrezze, 460 U.S. at 789).

As made clear by the Petitioners’ motion and affidavit, the judicial district nominating scheme cannot survive such scrutiny. The New York Constitution provides that the electorate shall vote directly for the justices of the Supreme Court, yet through the judicial district convention nominating procedure, the party leaders have maintained their 19<sup>th</sup> century ability to dictate the outcome of the nominating process and the general election.

Advocates of the judicial district convention system assert that it advances the State’s legitimate interest in ensuring the election of a diverse and qualified Supreme Court bench. This argument is startling for what it implicitly concedes, for it presupposes that the Legislature has concluded that largely anonymous political party leaders, who operate in secrecy and in

furtherance of self-serving agendas known only to themselves, are in the best position to determine the diversity and qualifications of the individuals who preside over arguably the most important courts in the State.

Even assuming the legitimacy of the claimed goal of the current statutory scheme, the judicial district convention is far from a reasonable or appropriate means of achieving it. Indeed, the rationale begs consideration of what would legitimately motivate the Legislature to employ the judicial district convention system to conceal from the electorate that their votes are meaningless and to conceal from the public how the goal of selecting a qualified and diverse Supreme Court judiciary is supposedly being met. If, indeed, the Legislature concluded early in the 20<sup>th</sup> Century that the electorate cannot be trusted to select qualified candidates for the Supreme Court, why has not the Legislature at some point in the past 80 years acted to amend the Constitution to provide for the appointment rather than the election of Supreme Court justices? Instead, although the Legislature has twice enacted major revisions of the Election Law (in 1949 and 1976), the provisions governing the nomination process for Supreme Court judges have not been

substantively modified since 1922. Indeed, the Legislature has on more than one occasion chosen to ignore express calls for reform.<sup>1</sup>

It must be concluded that the Legislature's implementation and steadfast retention of the judicial district convention nominating system furthers only the illegitimate goal of allowing party leaders to hand pick the justices of the Supreme Court in derogation of the rights of the voters. That this system has produced some outstanding jurists is irrelevant. The voters of this State have the right to vote effectively for the justices of the Supreme Court, and that right has been denied for far too long.

Accordingly, I respectfully ask this Court to grant the Petitioners' motion. The voters are entitled to choose judicial candidates of the highest merit whose qualifications have been put before the voters prior to the

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<sup>1</sup> In 1973, the Joint Legislative Committee on Court Reorganization recommended a constitutional amendment to provide for the appointment rather than the election of Court of Appeals Judges. In its report to the Legislature, the Joint Committee also took note of the manner in which candidates for the office of Supreme Court judge were nominated, commenting that "city voters say that even for the local judgeships . . . the candidates are in most cases unknown to them. . . . They convey the sense that as a part of the selection process they are ciphers: they are ignored when party leaders pick candidates and their power of choice is non-existent because the leaders so frequently agree on cross-endorsements, effectively disenfranchising the voters from any choice on those candidates."

In 1988, Governor Mario Cuomo (backed by Chief Judge Sol Wachtler and the State Commission on Government Integrity) proposed to amend the Constitution to eliminate the elective system for judges of the Supreme Court, Civil Court, and Surrogate's Court, and to replace it with an appointive system based on the method for appointment of Court of Appeals judges enacted in 1976. The proposal was not adopted by the Legislature.

In 1993, the New York State Bar Association proposed the merit selection of Supreme Court judges.

general election. The current method of electing justices to the Supreme Court should be replaced with the same system of primary elections that is in place for other judicial and non-judicial offices.

**CONCLUSION**

**THE RELIEF SOUGHT BY THE PETITIONERS SHOULD BE GRANTED.**

Dated: Brooklyn, New York  
September 14, 2004

Respectfully submitted,

  
CHARLES J. HYNES  
District Attorney  
Kings County

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MF 5685

MARGARITA LÓPEZ TORRES, STEVEN BANKS, C.  
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AFFIRMATION OF SERVICE

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I, Monique Ferrell, declare under penalty of perjury, that I have on this date served, by United States mail, a copy of the attached notice of motion and supporting affirmation and memorandum of law upon:

*Counsel for Plaintiffs*, Frederick A.O.Schwarz, Jr., Burt Neuborne, Deborah Goldberg, Jeremy Creelan, Esqs., whose address is Brennan Center for Justice, New York University School of Law, 161 Avenue of the Americas, 12<sup>th</sup> Floor, New York, N.Y. 10013; and

*Counsel for Defendants*, Todd Valentine, Esq., whose address is New York State Board of Elections, 40 Steuben Street, Albany, New York 12207.

Dated: September 15, 2004  
Brooklyn, New York



MONIQUE FERRELL  
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