



**TESTIMONY OF FREDERICK A. O. SCHWARZ, JR.
BEFORE THE STANDING COMMITTEE ON THE JUDICIARY OF THE
ASSEMBLY OF THE STATE OF NEW YORK (11/15/06)**

I am Frederick A. O. Schwarz, Jr., Senior Counsel at the Brennan Center for Justice at the New York University School of Law.

Together with co-counsel, including Jeremy Creelan and Kent Yalowitz, I represented the plaintiffs and tried Lopez Torres, et al. v. New York State Board of Elections in the Federal District Court for the Eastern District of New York, and argued the appeal in the Court of Appeals for the Second Circuit.

This testimony concerns issues before the Legislature as a consequence of the holdings that New York State's judicial convention system is unconstitutional.

A. The Status Today. On November 7, 2006, a lot changed.

One change is that New York State's unique judicial convention system for nominating candidates for Supreme Court Justice no longer exists.

On August 30, 2007, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision of District Judge John Gleeson that the convention system was unconstitutional because it deprived "rank and file" party members of a role in selecting a party's nominees.

The stay granted by the district court pending appeal expired on November 7. The Second Circuit unanimously denied defendants' motion to extend the stay.

Judicial conventions are no longer the law. They no longer exist.

If the Legislature does nothing, Supreme Court Justices will be nominated in open primaries—as is the case for all other judges elected in New York State, and in the majority of the 38 other states that elect trial judges.

B. The Question Before the Legislature. If the Legislature acts, it must enact a *constitutional* system.

As the Court of Appeals said:

Nothing in the Constitution requires a state to provide for the popular election of its judges ... Nevertheless, once a state exercises its authority to provide for judicial elections, it must comport with constitutional requirements and prohibitions. Specifically, if the state chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles. (462 F. 3rd 161, 183 (2006).)

Both the Second Circuit and the District Court repeatedly noted that the constitutional deficiency is not in the details of the convention system, but in its failure to give “the people,” “rank and file members,” “voters,” “participants” their rightful role. (See the attached appendix for a compendium of quotes from the Courts on this subject.) Indeed, in reaching their decision that the convention system unconstitutionally denied voters their rights, both Courts relied on the admission of defendants’ own expert that having individual candidates recruit delegates “is not the system and it twists the design of the system on its head.” (462 F. 3rd at 173; 411 F. Supp. 2d, 212, 248 (2006).)

Some proposals for enacting a new convention system were made before the Court decisions. Those proposals were not conceived with the idea of bringing the conventions into compliance with the law. They were conceived before Judge Gleeson's decision and the Second Circuit's decision came out. Some of these proposals were promoted (and are still being promoted) by the defendants in the case who denied that there was anything wrong with the convention system as it existed before the Courts struck it down. These proposals suggest that the Legislature re-enact the convention system which has been held unconstitutional and which experience has shown to be corrupt. Re-enact it by tinkering to add a thin veneer of cosmetic changes relating to matters such as the number of delegates and the number of signatures needed to become a delegate.

Such proposals fail the threshold test. They do not cure the constitutional wrong. It would be one thing for the Legislature to try to fix an existing system. It is a far worse thing for the Legislature to enact a new unconstitutional system. Those who contend that cosmetic changes will satisfy the courts have seized on a few details but

ignore the profound and most fundamental constitutional infirmity of the convention system they are promoting: it does not envision a meaningful *opportunity* for voters to actually cast a vote for the candidates they support. Without such an opportunity, no convention system can stand. In any system proposed to you, ask yourselves whether it erects a fence between the candidates and the voters. If there is such a fence, then the system will be subject to strict constitutional scrutiny. It is as simple as that. The constitutional analysis is not technical. It is practical.

Other proposals are being floated by advocates who express concern about the *quality* of Supreme Court candidates. Their core idea is the establishment of Judicial Qualifications Commissions. This is interesting, but irrelevant to the constitutional problem.

No court has held, and the plaintiffs did not argue, that the convention system was unconstitutional because of concerns about quality. Indeed, as the District Court observed:

The issue in this case is whether the voters are accorded their rightful role in the selection of Supreme Court justices. If they are not, that constitutional defect cannot be remedied by a screening panel, even if it has integrity and plays a meaningful role in the quality of judges selected. (411 F. Supp 2d. at 240.)

Moreover, unless there is some opportunity for voters to consider judicial candidates lacking party leader support, many well qualified lawyers will never bother to throw their hats into the ring of a screening panel.

C. Solutions. The fundamental constitutional ailment must first be cured*. *If* it is cured, then the Legislature could also choose to make other useful improvements.

1. Cures to the Fundamental Constitutional Ailment. The fundamental ailment is the exclusion of rank and file party members, the voters, from any meaningful participation in selecting party nominees. Open primaries—used for every other elected judge in the state (and used across the nation)—would solve the constitutional problem.

* We note that Senator John A. De Francisco, Chair of the Senate Judiciary Committee, has announced his support for either of the two constitutional solutions set forth below.

But there is also another constitutional solution. The Legislature could enact a system analogous to the conventions now used to designate nominees for all state-wide offices. This would be applied in each judicial district as follows:

- (i) delegates would be elected by party members the prior fall either on the primary date, or, if the technology permits, at the general election;
- (ii) the convention would be held in May, thereby usefully giving more time for delegates to consider the candidates;
- (iii) anyone who gets more than 50% of delegate votes would be designated as a potential party nominee;
- (iv) as is currently the case for state-wide candidates, anybody who receives more than 25% of the delegates' votes would also get on a primary ballot; and
- (v) also, as is currently the case for state-wide candidates, judicial candidates could petition on a primary ballot.

This solution would give voters and candidates a real voice and a genuine opportunity to participate, while involving political parties in a way that is familiar to all participants in our State.

If such a system were adopted, and if the Legislature agreed that Judicial Qualifications Commissions would be a useful reform, they could be adopted as part of this system. Similarly, the reductions in delegate numbers and delegate petition signatures could be adopted as part of this compromise solution.

2. Other Useful Improvements.

(a) **Smaller Judicial Districts.** Make each of the 62 counties in the State a separate judicial election district from which Supreme Court justices would be elected. This reform would serve three critical goals. First, smaller judicial districts would facilitate the conduct of any primary or general election campaigns that do occur. Candidates could more easily communicate with voters about their qualifications and thus significantly lower the costs of running campaigns in much of the State. Second, smaller counties across the state would also get new opportunities to elect Supreme Court justices rather than just depending upon the occasional generosity of the more populous counties as in the current system. Third, smaller judicial districts would significantly increase the opportunities for candidates of color to compete, particularly in counties with large urban centers such as Buffalo, Syracuse, Albany, and Yonkers. Together, these

reforms would not only render New York's system constitutional by ensuring that voters have the opportunity to have a real say in selecting their parties' nominees, they would also improve the quality and diversity of the bench.

Note that this change makes sense whether the constitutional solution is open primaries or the judicial district analogue to the convention system used to designate candidates for state-wide office.

(b) Money in Judicial Races.

The Brennan Center has played a leading role nationwide in monitoring campaign spending in judicial elections showing that the greatest problems are with elections to a state's highest court. The Legislature cannot constitutionally jettison voter participation in elections on the theory that elections may be expensive. Expense is, in any event, an argument against having any elections, not just against primaries. Moreover, if the Legislature wants to reduce the cost of judicial elections, and otherwise to address perceived concerns about the influence of money in judicial elections, there are many useful and productive programs available. These include: (i) limit the size of contributions allowed to be made to candidates for judicial office; (ii) provide that, either automatically or upon motion a judge shall recuse him or herself if a lawyer in the case has made a contribution of over a certain amount; (iii) adopt limited public financing in judicial elections; and (iv) adopt voluntary expenditure limits with concomitant public financing in judicial elections.

Note that these changes are equally important for all judicial elections without regard to what is done about the nomination of Supreme Court Justices.

D. Incumbent Judges. Supreme Court justices have a fourteen year term, the second longest term of any elected general jurisdiction trial court judges in the country. Thus, our Supreme Court justices already enjoy a significant insulation from electoral politics irrespective of whether conventions or primaries are held to consider their renomination. When the State Constitution was amended to require the election of judges, moreover, a conscious decision was made not to adopt the Federal Constitution's generally admired provision for life-time tenure for judges "during good behavior."

Concern has been expressed about incumbent judges facing re-election. (This, of course, applies in all general elections today.) One proposed solution is that any sitting judge that is regarded as [highly] qualified by the putative Judicial Qualification

Commissions would be automatically renominated. That would be in flat violation of the State Constitution and the Federal Constitution.

* * * *

To sum up: there are many different ways to select judges. Some have called for a constitutional amendment to introduce an appointment system for Supreme Court justices. But that takes years. For now, the constitutional imperatives are plain. As long as New York State has elections for judges, those must be real elections. "A state may not choose to have judicial elections and then stifle the electoral process" (411 F.Supp. 2d at 254). There must be a real voice for voters, and a real chance for candidates disfavored by party leaders to take their case to the electorate. If the Legislature votes to reenact the old convention system, with cosmetic surgery, it will be voting for a system the Courts have already declared unconstitutional.

You have a chance to build a better system—one that gives parties their appropriate role, but gives voters a true voice, as they have in balloting for every other elected office in the state. We urge you to embrace such a system, rather than resist it.

Appendix

FEDERAL COURTS: UNDER FIRST AMENDMENT THE RANK-AND-FILE RANK FIRST

"Nothing in the Constitution requires a state to provide for the popular election of its judges. . . . Nevertheless, once a state exercises its authority to provide for judicial elections, it must comport with constitutional requirements and prohibitions. Specifically, if the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the **participants** in that process the First Amendment rights that attach to their roles." – U.S. Court of Appeals for the Second Circuit. *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d. 161, 183 (2nd Cir. 2006).[†]

[†] All use of italics and bolding for emphasis purposes is added unless otherwise indicated. Likewise, internal quotations, citations, and alterations are omitted without indication.

“Last, given the constitutional infirmity of New York’s **judicial nominating process**, its **continuation** cuts sharply **against the public interest**.” – U.S. Court of Appeals for the Second Circuit *Lopez Torres*, 461 F.3d. at 207.

“[T]he right the plaintiffs assert is not to run for delegate or access the general election ballot as an independent, but rather to compete for their major party’s nomination for Supreme Court Justice by garnering support *among the rank-and-file members*. The issue is whether the First Amendment *guarantees the plaintiffs that opportunity. I conclude it does*.” – U.S. District Court *Lopez Torres v. New York State Bd. of Elections*, 411 F.Supp.2d. 212, 245 (E.D.N.Y. 2006).

“A state may decide whether or not *voters* will be the best choosers of judges. But it may not say one thing...and do quite another, as they have here... Put simply, as applied to this case, the state *may not* pass off the will of party leaders as *the will of the people*. Because that is **exactly** what the judicial convention system does, it violates the First Amendment.” – U.S. District Court *Id.* at 254.

“But the outcome of [the debate over the efficacy of screening panels] is not relevant to the outcome of this motion. The issue in this case is whether the *voters are accorded their rightful role* in the selection of Supreme Court Justices. If they are not, **that constitutional defect cannot be remedied by a screening panel**, even if it has integrity and plays a meaningful role in the quality of the judges selected.” – U.S. District Court *Id.* at 240.

“The Constitution of New York, however, could not state more plainly that an **elective system is required**.” – U.S. District Court *Lopez Torres*, 411 F.Supp.2d. at 255.

“Instead, we must turn a keen eye on how the electoral scheme functions *in fact*; indeed, it is essential to examine in a realistic light the extent and nature of the scheme’s **impact on voters**.” – U.S. Court of Appeals for the Second Circuit *Lopez Torres*, 462 F.3d. at 184.

“This case requires us to peer inside New York State’s political clubhouses and determine whether party leaders have arrogated to themselves a **choice that belongs to the people**.” – U.S. Court of Appeals for the Second Circuit *Id.* at 169.

“All the evidence presented . . . reduces to this bottom line: through a **byzantine and onerous** network of nominating phase regulations . . . New York has transformed a *de jure* election into a *de facto* appointment.” – U.S. Court of Appeals for the Second Circuit *Id.* at 200.

“[T]he First Amendment accords **candidates** and **voters** a realistic opportunity to **participate in the nominating process**, and to do so **free from burdens** that are both severe and unnecessary to further a compelling state interest.” – U.S. Court of Appeals for the Second Circuit *Id.* at 187.

“What New York state and its political parties may not do is **exclude** from the **nominating process** qualified party-member **candidates** and **voters** who wish to support them.” – U.S. Court of Appeals for the Second Circuit *Id.* at 193.

“The result is an opaque, undemocratic selection procedure that violates the *rights of voters and the rights of candidates* who lack the backing of the local party leaders.” – U.S. District Court *Lopez Torres*, 411 F.Supp.2d at 214.

“Particularly where, as here, there are established areas of one-party rule, *voters and candidates have a right to participate meaningfully in the nomination process.*” – U.S. District Court *Id.* at 246.

“An **election** must always retain the **essential qualities of an election**, and in areas of one-party rule, *voters’* and *candidates’* rights of access at the nomination stage of the electoral process take on greater importance.” – U.S. District Court *Id.* at 247.

“This is just such a case: a *vote in the nomination process is the only effective vote that can be cast.*”
– U.S. District Court *Id.*

“Because nominations . . . are the critical determinant in electing Supreme Court Justices in New York, more open and effective participation by *voters* must be allowed at the nomination stage, and *candidates* must be permitted an effective means of appealing to *voters when it counts.*” – U.S. District Court *Id.*

“In my view *Republican Party of Minnesota [v. White]* stands for a principle of transparency. A State may not choose to have judicial elections, and then *stifle the electoral process* . . . as in this case by creating electoral practices that *effectively keep candidates out of contention* . . . in the name of protecting the judicial office from politics.” – U.S. District Court *Id.* at 254.

“Indeed, with respect to *all* elective offices in the state except Supreme Court Justice, New York allows candidates to petition onto a primary ballot by *gathering signatures among the voters.*” – U.S. District Court *Id.* at 216.

“These burdens, taken together, thrust upon judicial **candidates** the Procrustean requirement of establishing elaborate election machinery. It is virtually impossible — and perhaps absolutely impossible — for a candidate to satisfy this series of election laws. Defendants’ own expert, Kellner, admitted as much. Despite the purportedly open nature of the process, he testified that ‘the idea that an individual **candidate** would go out and recruit delegates pledged to that candidate in the primary **is not the system and it twists the design of the system on its head.**’” – U.S. Court of Appeals for the Second Circuit *Lopez Torres*, 462 F.3d. at 197.

“The **chief virtue** of the **primary** system, however, is that it assures that intraparty competition will be resolved in a **democratic fashion.**” – U.S. District Court *Lopez Torres*, 411 F.Supp.2d. at 256.