06-0635-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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, COMMON CAUSE/NY,

Plaintiffs-Appellees,

—against—

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

Defendants-Appellants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association,

Defendants-Intervenors-Appellants,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF EDWARD I. KOCH AS *AMICUS CURIAE* FOR AFFIRMANCE IN SUPPORT OF APPELLEES

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STATEMENT OF AMICUS CURIAE INTEREST

I file this brief as an amicus curiae in support of the appellees, pursuant to Fed. R. App. P. 29(a) and with the consent of all parties.

My political career began in 1956 when I moved to Greenwich Village and volunteered for the presidential campaign of Adlai Stevenson. In 1963, I became the Village's Democratic Party district leader and was subsequently elected to New York City Council (1966) and U.S. Congress (1969-1977). I won election as mayor of New York in 1977 and was reelected in 1981 and 1985. One of my significant achievements as mayor was to implement a merit selection system for criminal and family court judges.

My involvement in all levels of New York politics for the past fifty years has provided me with a unique insight into the election and appointment of public officials in this state. Unfortunately, my personal experiences and observations echo only too accurately Judge Gleeson's conclusions regarding the convention system. Primaries or an appointment system with screening panels are vastly preferable to party leaders' selection of Supreme Court Justices under the convention system.

"We mean by 'politics,'" Adlai Stevenson once said, "the people's business—the most important business there is." In my opinion, these words still ring true. I began my political career as a reformer, seeking to undermine the grasp

of overweening party leaders on local politics. With these pages, I hope to continue a campaign begun five decades ago against those political leaders who arrogate to themselves rights belonging to the people.

ARGUMENT

I. Judge Gleeson Was Correct in Finding that Party Leaders, Not Voters, Select Justices of the Supreme Court.

Appellants strain credulity when arguing that the current system of selecting Supreme Court Justices is "open, democratic and accountable to the state's citizens;"[1] indeed, this statement is laughable. As I once pointed out in a 1976 interview, justices of the Supreme Court in New York are not elected, even though their names are on the ballot. They are selected.[2]

From 1963 to 1965, I was one of the elected district leaders for Greenwich Village. I became familiar with the mechanics of judicial selection in New York City, by, among other things, attending meetings of district leaders at which judgeships were parceled out – sometimes with an eye to ethnic "quotas" and often as a response to political obligations. The county leader made the ultimate decision. Journalists Martin and Susan Tolchin, in a 1972 book on political patronage (for which I was interviewed) accurately described the

[1] Appellants' Br. at 19.

[2] Interview by Ed Edwin with Edward I. Koch, Columbia University Oral History Research Office, at 52 (Dec. 13, 1975), *available at* http://www.columbia.edu/cu/lweb/digital/collections/nny/koche/toc.html.

convention system for Supreme Court Justices to be but "a show of democracy" where "county leaders bargain with each other before they alone decide where the judgeships will go."[3]

The only thing appellants get right in describing the convention system is that the process has "gone unchanged for more than eighty years"[4] – or at least for the forty-plus years that I have been familiar with it. The undemocratic, boss-run system that I observed in the 1960s, and that the Tolchins reported on in the 1970s, appears to operate no differently today than it did back then. The record before the District Court is testimony to this, as is the recent report by the Commission to Promote Public Confidence in Judicial Elections ("Feerick Commission").[5]

It is ironic that defendants champion the Feerick Commission report on account of its recommendation that the convention system be left in place with some modest revisions, rather than abolished altogether. With due respect to the

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[3] Martin & Susan Tolchin, *To the Victor . . . : Political Patronage from the Clubhouse to the White House* 136 (Vintage 1972).

[4] Appellants' Br. at 81. When the judicial convention statutes were enacted in 1921, the Tammany Hall machine dominated and controlled the levers of government in New York City. For historical perspective on judicial selection in that age, with a focus on the infamous case of Judge Joseph Crater, who paid one year's salary for his seat on the Supreme Court bench in 1929, *see* Richard J. Tofel, *Vanishing Point: The Disappearance of Judge Crater and the New York He Left Behind* (Ivan R. Dee 2004). Documents from bar associations before the 1921 change criticized the "distinctly onerous" petitioning requirements for Supreme Court Justice "as creating a special handicap for all but the designees of the party machine." Albert S. Bard, *Some Observations on the Primary and Election Laws of the State of New York*, 15 ABCNY Reports No. 169, at 8 (Mar. 10, 1914). Those hopes proved illusory.

[5] Feerick Comm'n, *Final Report to the Chief Judge of the State of New York* (Feb. 6, 2006).

Commission, I have been in and around politics long enough to know that tinkering with a system as deeply flawed as this one will not cure it. But that judgment is one to be made ultimately by the Legislature and the people of the State. Meanwhile, should Judge Gleeson's decision be reversed, the current momentum for even modest change will soon subside or be ground down.

What is more striking, and relevant, about the Feerick Commission report is the unequivocal support it provides for Judge Gleeson's central finding on the constitutional issues in this case. Delegates to the judicial conventions "do not act thoughtfully or independently in nominating their party's candidates, but simply reflect the decisions already reached by political party leaders"; in other words, they "rubber stamp[] decisions already reached by political party insiders."[6] And control by party leaders is an *inherent* feature of the statutory scheme now in place because "petitioning requirements make it extraordinarily difficult for [judicial convention delegate] candidates without institutional party support to obtain a position on the ballot," and because the short term of office of the delegates and the size of the conventions make it "difficult for delegates to engage in genuine deliberations."[7]

[6] *Id.* at 15, 19.

[7] *Id*. at 17.

One of my successors, Mayor Bloomberg, in his prepared statement to the Feerick Commission, noted that the conventions "are completely shrouded in secrecy with *absolutely no input from the electorate*."[8] In other words, regardless of how the system was intended to operate by the 1921 legislators who put it in place, subsequent decades bear out Judge Gleeson's conclusion that the system places "severe" burdens on "effective participation by voters and on candidates in appealing to them."[9]

I and other reformers fought in the 1960s to loosen the grip of county machine politics on local government. In large part we succeeded, but, shockingly, the machine is alive and functioning in the State's judiciary, thanks solely to the arcane system of judicial conventions. To fix this, the convention system as it currently exists must be discarded.

II. In a System in Which Local Party Leaders Control the Selection of New York Supreme Court Justices, Judicial Integrity Suffers.

One of the charges against King George III listed in the Declaration of Independence was that "[h]e has made Judges dependent on his [w]ill alone."[10] A

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[8] Press release, Office of the New York City Mayor, "Mayor Michael R. Bloomberg Delivers Testimony Before the Commission to Promote Public Confidence in Judicial Elections" (Sept. 16, 2003), *available at* http://www.nyc.gov/html/law/pressreleases/pr091603.pdf (emphasis added).

[9] *Lopez Torres v. New York State Bd. of Elections*, 411 F. Supp. 2d 212, 248 (E.D.N.Y. 2006).

[10] Alexander Hamilton wrote, in greater detail, that "complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . [a Constitution] which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it

similar grievance could be leveled today against local party leaders. My implementation of screening panels while I was mayor grew out of my strong belief in the importance of judges' possessing the autonomy to make decisions based on the facts and the law without undue influence from individual politicians.

Under the New York Constitution, judges in criminal and family courts in New York City are appointed at the sole discretion of the mayor. The only explicit constitutional limit on that discretion is that the candidates must be admitted to practice law for at least five years and must be residents of New York City.[11]

Although committees of lawyers had evaluated the qualifications of Supreme Court Justice candidates during the mayoral terms of Robert Wagner (1954-65), John Lindsay (1966-73), and Abraham Beame (1974-77), these mayors had, on a few occasions, appointed judges to the bench whom their own committees had concluded were unqualified. Vesting the power of judicial appointment solely in the hands of a single political leader chilled judicial independence and impaired the integrity of judges in the criminal and family courts. This process – like the convention system described in Judge Gleeson's opinion – risked making judges hesitant to rule against their benefactors' interests.

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must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[11] *See* N.Y. Const. art. VI, §§ 13(a), 15(a), 20(a).

When I took office as mayor in 1978, I issued an executive order creating the Mayor's Committee on the Judiciary ("the Committee").[12] The Committee consisted of twenty-seven members, predominantly lawyers. I selected the Committee chair and twelve other members; the two presiding justices of the First and Second Departments of the Appellate Division each selected six members; and the deans of two law schools within New York City each selected one member.[13] I therefore appointed fewer than half of the Committee's members.

The most significant aspect of this novel, merit-based system was that I waived my power to submit names for consideration to the Committee. The Committee, rather than I, chose three candidates for each open judicial post.[14] The Committee recruited candidates, and anyone could apply directly to the Committee and ask for a hearing.[15]

After the Committee's selection, I would interview the three candidates before designating one of them as my choice. In the event that none of the candidates met with my approval, I could request that the Committee refer three more. My designee (except in the case of a reappointment of an incumbent

[12] Exec. Order No. 10 (Apr. 11, 1978).

[13] *Id.* § 5(a).

[14] *Id.* § 2(d).

[15] *Id.* §§ 2(a) & (b).

judge) then faced a public hearing, subsequent to which the Committee could reevaluate its choice.[16]

In the interest of judicial independence, I also gave up my control over reappointments. If the Committee and the Association of the Bar of the City of New York ("City Bar Association") recommended that any sitting judge be reappointed at the end of his or her term, I would reappoint the judge without exception. Likewise, if either the Committee or the City Bar Association recommended that a sitting judge not be reappointed, I would follow its advice (and actually did so on at least one occasion), and the vacancy would be filled according to the system for appointing new judges, as described above.[17] Placing the reappointment of incumbent judges in the hands of the Committee and the City Bar Association insulated incumbent judges from retaliation for legally sound but unpopular decisions. My system thereby avoided the appearance of City Hall intruding into the Court.

Despite my personal beliefs regarding the qualifications of certain judges and in spite of political pressure from county leaders who were denied their influence in the selection of judges, I respected the self-imposed restraints on my constitutional power. Although I may have commented on particular judgments,

[16] *Id.* § 3(a).

[17] *Id.* § 2(e).

my viewpoints did not sway judges since only the appellate court decided whether an opinion was legally sound. My motivation in creating the Committee arose from the conviction that judicial candidates should only have to convince their peers on a screening panel that they are worthy of reappointment. Successful candidates did not feel indebted to me, nor were their subsequent opinions designed to please me. Subsequent mayors have continued the screening panels implemented under my administration.[18]

Judge Gleeson correctly reasoned that "[t]he 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."[19] While screening panels cannot remedy the denial of voters' opportunities to elect Supreme Court Justices, my reasons for implementing the Committee highlight an additional problem posed by the convention system: the threats to judicial integrity posed by entrusting the power of judicial appointments to an opaque, political process. When local party and county leaders hand-pick judges, not only do the voters suffer, but so too does our compelling

[18] *See* Exec. Order No. 18 (Sept. 19, 1990) (Mayor D. Dinkins), Exec. Order No. 10 (July 20, 1994) (Mayor R. Giuliani); Exec. Order No. 8 (Mar. 4, 2002) (Mayor M. Bloomberg). Unfortunately, Giuliani, on a few occasions while mayor, both reappointed and failed to reappoint judges who had been approved or disapproved by his own Committee.

[19] *Lopez Torres*, 411 F. Supp. 2d at 240.

interest in maintaining the rule of law, as well as the constitutional and democratic values which it protects.

III. The District Court Did Not Err in Ordering Primaries as a Provisional Remedy.

In seeking to reverse or, in the alternative, vacate the District Court's order as to remedy, appellants argue that a convention system is preferable to primaries. They assert that a primary system was abandoned by the New York Legislature in 1921 "after a failed nine-year experiment."[20] To order primaries as a nomination mechanism is to return New York to the "undignified practices" of holding primaries for the office of Supreme Court Justice.[21] By contrast, a convention system, appellants continue, has "a long history dating back to the 19th century" and has "survived the test of time."[22]

What, however, is "undignified" about judicial primaries? As the District Court noted, except for the office of Supreme Court Justice in New York, "[a]ll other elected judges in New York State are nominated in a direct primary election, rather than in a judicial convention."[23] New York's Legislature has not deemed primaries to be "undignified" for those other elected judgeships, nor does

[20] Appellants' Br. at 15.

[21] *Id*. at 3-4.

[22] *Id* at 15, 17.

[23] *Lopez Torres*, 411 F. Supp. 2d at 216.

the record reflect any prevailing sense that the existing judicial primaries are "undignified" or in some other way unacceptable.

Appellants also attack primaries as inferior to a convention system because primaries will be "noisy, nasty and costly" and will "undermine confidence in the judiciary."[24] To echo this concern, they quote Chief Judge Judith S. Kaye of the New York Court of Appeals who stated that "[n]othing is more destructive of public confidence in the impartiality of judges than the need to raise large amounts of money."[25]

Yet why should we assume that judicial candidates are any more corruptible than other public officials who face primaries? The vast majority of elected public officials are honorable servants of the public. Those that are not will find a way to repay their master, whether that master is a financial donor in a primary system or a party leader in a convention system. If appellants' concern has any basis, every currently elected judicial official who participated in a primary election is beholden to his or her financial donors. Even appellants will agree that is not the case. At least, in a primary system, the individuals to whom a successful candidate are ostensibly indebted can be identified. The current system is opaque, and the lack of transparency is precisely what has helped the patronage-based

[24] Appellants' Br. at 4.

[25] *Id*. at 18-19 (*quoting* Judith S. Kaye, *The State of the Judiciary* 6 (2006)).

system to thrive, even as patronage has been reduced or eliminated in other parts of the government. Moreover, the office of Supreme Court Justice in New York carries a term of fourteen years, which goes a long way to ameliorate the concern that judges will, on a daily basis, worry about being beholden to their contributors.

Indeed, it is disingenuous for appellants to wring their hands over the consequences of permitting judicial candidates to compete directly before the voters in primaries, when, in challenging Judge Gleeson's findings on the constitutional issues in this case, they rely on a claim that the general election itself is a *bona fide* competitive process providing meaningful access to candidates and meaningful input by voters.[26] Appellants claim that "New York's election scheme . . . provides a number of reasonable alternative paths to the ballot,"[27] and that "more than 50% of the general elections for the Supreme Court are contested."[28] Whatever problems appellants foresee with direct primary contests must already be present at the general election stage, if the facts are as they claim.

Appellants' reliance on geographic diversity to argue that a convention system is preferable is also unavailing. Primaries, they argue, only allow a majority winner, whereas in a convention system a non-majority candidate

[26] *Id.* at 1, 14-15, 36, 41-45.

[27] *Id.* at 1.

[28] *Id.* at 14-15.

may win a place on the ballot.[29] However, geographic diversity could, ultimately, be attained in a primary system simply by modifying the judicial districts; it should not be forgotten that Judge Gleeson's remedy is a provisional one.

For example, the number of judges of the county court are allocated by counties, not by the judicial districts currently applicable to Supreme Court Justices.[30] The judicial districts for Supreme Court Justices could be modified to similarly provide for geographic representation by county. In fact, the New York Constitution gives the state legislature authority to change the number or alter the composition of judicial districts[31] – an authority it has exercised in the past.[32]

The parade of horribles appellants attribute to a primary system is ridiculous. While I believe that an appointive system using independent screening panels is the best way to select all judges, there is nothing "undignified" about elections, primary or general. They have been used to select judges, in New York and elsewhere, for far longer than the eighty years the convention system for

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[29] *Id.* at 75-76.

[30] N.Y. Jud. Law. § 182 (McKinney Supp. 2006) (county court judges); *see also id.* §§ 140, 140-a (McKinney 2005 & McKinney Supp. 2006) (judicial districts for Supreme Court Justices).

[31] N.Y. Const. art. VI, § 6(b) ("Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.").

[32] *Compare* N.Y. Jud. Law § 140 (McKinney 2005) (twelve judicial districts) *with* N.Y. Const. art. VI, § 6(a) (eleven judicial districts).

Supreme Court Justices has persisted. Using them temporarily, until the legislature or the people find what they deem to be the optimum solution, is appropriate.

CONCLUSION

For the above reasons, along with those urged in the appellees' brief, the District Court's order enjoining the enforcement of New York Election Law § 6-106 as well as the use of procedures set forth in New York Election Law § 6-124 and calling for the use of primary elections until the New York legislature enacts a new statutory scheme should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2636 words according to the word count feature in Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the body of the brief has been prepared in a proportionally spaced typeface using Microsoft Word (2002) in 14-point Times New Roman font.

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ANTI-VIRUS CERTIFICATION

Case Name: Torres v. NYS Board of Elections

Docket Number: 06-0635-cv

I, Natasha R. Monell, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/15/2006) and found to be VIRUS FREE.

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