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Speeches

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TESTIMONY OF MICHAEL A. CARDOZO BEFORE ASSEMBLY STANDING COMMITTEE ON JUDICIARY

NEW YORK COUNTY LAWYERS ASSOCIATION

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Chairwoman Weinstein and members of the Assembly Judiciary Committee, thank you for this opportunity to testify concerning the critical question of how to improve the quality of our judiciary and our judicial selection process. I am the Corporation Counsel of New York City and I appear here today both in that capacity and on behalf of Mayor Bloomberg.

Today we face a judicial selection crisis in this state of unprecedented dimensions. At the same time, this crisis gives us an extraordinary opportunity to enact legislation that will create a better, more highly qualified judiciary that will command the public trust. Today, there is no denying that there is a deepening lack of confidence in this state's judiciary. To compound the lack of confidence, we have a selection system for Supreme Court justices that the federal courts have declared unconstitutional. In the absence of appropriate legislation, we face the prospect of judges being selected not because of their quality, integrity and impartiality, but based on how much money they can raise for their election campaigns. Yet an overwhelming majority of our citizens have told us that they believe judicial decisions are increasingly influenced by the campaign contributions that, in the absence of corrective legislation, may determine who will become a judge in this state. It is therefore no exaggeration to say that these hearings are about the continued adherence to, and confidence in, the rule of law in New York.

More than three decades ago, this state faced another judicial selection crisis. It had endured increasingly expensive and contested campaigns involving judgeships on the New York Court of Appeals. As a result, confidence in our highest court was rapidly declining. To address this problem, then Governor-elect Hugh Carey, 32 years ago almost to this day,[1] appointed a Task Force on Court Reform, headed by the late Cyrus Vance, who later become Secretary of State of the United States. Members of that Task Force included two junior attorneys who went on to have most distinguished careers – Ruth Bader Ginsburg and Mario Cuomo. I was privileged to serve as Counsel to that Task Force, and have spent a great deal of my professional career ever since dealing with this subject.

As a result of the work of the Vance Task Force, and the efforts of numerous others, Article 6, §2 of the State Constitution was adopted, which created a merit appointment system for Court of Appeals judges. Putting the appointment versus election issue aside, central to the Court of Appeals nomination system is

[1] See Thomas P. Ronan, "Carey Picks Panel on Court System," *New York Times,* Nov 21, 1974, p. 27.

a commission that evaluates all candidates for the Court of Appeals and reports out those found most qualified for the job. And it is that commission model – an independent commission that objectively evaluates the qualifications of all candidates and reports out a limited number of names – that is central to the City's recommendations to you today. It is that same independent judicial qualification commission concept that lies at the heart of the highly successful selection system for Family and Criminal Court judges followed by Mayor Bloomberg, and his three immediate predecessors.

The Mayor is deeply committed to judicial reform. He has made it one of his top priorities; he has repeatedly called for reforms in this area, most notably in his testimony before the Feerick Commission to Promote Public Confidence in Judicial Elections in 2003 and in his 2006 State of the City address.

As the Mayor and I have consistently stated, in the ideal world the State would amend its Constitution to provide for merit appointment of judges, and I am sure you will hear more about such an amendment in other testimony today. But there are many who disagree with this solution and, in any event, the crisis we face is now – we cannot wait four years to solve the problem. Yet that is the earliest a constitutional amendment could become effective, assuming a consensus to adopt one could be formed. Therefore, my testimony today will focus on how we can reform the judicial convention system *right now* both to solve the constitutional infirmities identified by the federal courts, and to ensure that we are selecting the highest quality judges in our state.

Judicial Reform is Important in Light of Recent Scandals

I am sure that I do not need to remind this Committee just how important a qualified, unbiased and independent judiciary is to a well-functioning democracy. Nor do I have to remind you how important it is that the public believes in the integrity of the judiciary. A judge should be someone whom a plaintiff or a defendant can look to with respect and confidence when he or she comes to court. The public must trust that the rule of law is being fairly and competently administered by the judge.

But that's simply impossible when the public is inundated with stories of judicial corruption and patronage nominations. How are we supposed to have confidence in our judiciary when many judges are nominated based on factors like who they agree to make their law secretary[2] -- often despite being found not qualified by major bar associations?[3] Or when it is discovered that the basis of a judge's decision is who gave him cigars?[4] And when several judges are removed for improper conduct? [5]

Yet think of what has occurred just in the last several years alone. At least three Supreme Court justices indicted in Brooklyn,[6] a Queens Supreme Court judge removed from the bench because of improper

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[2] See n. 9, infra.

[3] For example, nine of the Brooklyn Civil and Supreme Court candidates on the ballot in last year's election had been found not qualified by major bar associations. See Jill Gardiner, "Credentials Lacking for Nine Nominees to Brooklyn Bench", The New York Sun, Nov. 1, 2005; "Bar Group Ratings of Judicial Candidates in Tomorrow's Contested Primaries," New York Law Journal, Sept. 12, 2005.

[4] Gerald Garson is accused of accepting a box of cigars worth $272 for privately advising a lawyer on how to handle a divorce case being heard before him. See "Lawyer asks to delay former Brooklyn judge's trial," Associated Press, Aug. 16, 2006.

[5] Examples of judges removed for improper conduct include former Surrogate Michael Feinberg, who was removed for steering excessive fees to a friend**;** Supreme Court Justice Reynold N. Mason, who was removed for misusing an escrow account and improperly subletting an apartment; and Supreme Court Justice Luther Dye, who agreed to step down for improper remarks. See Matter of Feinberg**,** 5 N.Y.3d 206 (2005); Leslie Eaton, "Behind a Troubled Bench, an Arcane Way of Picking Judges," The New York Times, June 30, 2003, p. B2; William Glaberson, "Judge Censured for Remarks, And He Agrees to Step Down," The New York Times, Oct. 4, 2003, p.B5. See also n.'s 6, 7, and 8, infra.

[6] Gerald Garson, Michael Garson, and Victor Barron are all judges who were indicted for wrongdoing in Brooklyn. See Andy Newman, "Politics Laid Bare: Success and Scandal in Family of Judges," The New

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conduct,[7] and others disciplined for improper behavior.[8] Qualified judges being denied promotion because they refused to cow-tow to district leaders.[9] Judicial nominations based on friendships or other relationships with district leaders.[10] These stories, and there are far too many of them, do not create public confidence in the judiciary.

The fact today is that too many judges are not the best and the brightest; too many have gotten their seats through backroom political deals and exchange of favors rather than merit; and too many elected judges have later been found biased or unqualified. As a result, we find ourselves in this unprecedented moment of crisis of confidence in our judiciary.

Before going any further, I want to emphasize, as has the Mayor, that most judges in this state are hard working, fair and dedicated to deciding cases fairly. But, as we all know, recent events have demonstrated that our current judicial selection is not assuring quality across the board. And to compound the disaster we face, the federal court has now declared the present judicial nomination system unconstitutional. What should we do?

We Must Act Now

We must put our differences aside and come together to achieve reform *right now*. The current judicial crisis is simply too severe to wait for the day – which cannot be any earlier than 2010 – for a constitutional amendment to take effect. We can't wait for another judge to be indicted; we can't risk another judge receiving his or her appointment because he or she did a favor for a powerful politician; and we can't risk further erosion of the public's trust by allowing more judges found unqualified to be nominated. And we particularly can't wait because, unless we act now, in the interim we will have open primaries and with it judgeships for sale to the highest bidder.

Open Primaries and Senator DeFrancisco's Bill Are the Wrong Approach

If we wait for a constitutional amendment and don't fix things right now, Supreme Court justices – including incumbents running for reelection in November 2007 – will have to run in open primaries, the default selection system if there is no legislative change. In my view, and the Mayor's, this would be a disaster.

First, campaigning and making campaign promises are simply inconsistent with the inherent role of a judge. The concept of a judge or potential judge promising that he or she will, for example, be "tough on crime" or "put an end to corporate corruption" is fundamentally at odds with the neutral, open-minded, unbiased approach to law and facts that is at the heart of an independent and fair judiciary. Second, incumbent judges forced to campaign will be put in an even more difficult position, as they will inevitably have to "run on their record," with the consequence that they may think about that very record each time they decide a case, further compromising their duties as independent and neutral decision makers.

York Times, July 5, 2003; p. B2; Andy Newman "Judge Indicted on Charge of Taking Aunt's Money," The New York Times, May 12, 2005, p. B4; William Glaberson, "Former Justice Pleads Guilty to Bribe Charge," The New York Times, Aug. 6, 2002, p. B1.

[7] Laura Blackburne was removed earlier this year. See Matter of Blackburne, 7 N.Y.3d 213 (2006).

[8] Two Supreme Court justices censured in Queens are Richard Huttner and Acting Justice Robert Hanophy. See Douglas Feiden, "Justice is Blind to Bad Jurists", Daily News, July 8, 2003, p. 8. See also n. 2.

[9] For a description of how Surrogate Margarita Lopez-Torres could not get promoted because she refused to hire a particular person favored by party leaders as her law secretary, see Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178-9 (2d Cir 2006).

[10] See, e.g., "In Bed with Vito Lopez," Daily News editorial, Sept. 18, 2006, p. 30 (noting Brooklyn party leader recently nominated his girlfriend's brother for the Supreme Court).

Third, do we truly believe that the voting public, focused on numerous candidates for numerous elective positions, has a basis – other than name recognition – to decide which judicial candidate to vote for? For example, last week's election saw a respected Appellate Division judge defeated for re-election.[11] I don't think anyone could honestly say that the judge lost because the voters were dissatisfied with him. Instead, his defeat came about because of the landslide Democratic victory in his judicial district.

This leads to the final, and perhaps most important reason, why we should not have open primaries. The financing required for a primary system makes such a system inappropriate for selection of Supreme Court justices. The notion of judges needing to obtain name recognition; seeking election or re-election in a judicial district with as many as 1.5 million voters; having to raise money, potentially from litigants and certainly from the lawyers who will appear before them; creates both the perception of, as well as an actual, conflict of interest. Two years ago, in a campaign for Surrogate in New York County, one candidate raised nearly $600,000, and the other raised just shy of $400,000 to finance the campaign.[12] And it is no secret that most of that money came from the very lawyers who would be appearing before the successful candidate. In too many states in this country, judgeships are going to the candidate who can raise the most money. For example, one justice in Alabama spent $655,000 on 2,300 TV commercials in this year's judicial primary. His opponent spent only $98,000 on TV ads and lost.[13] Further, a recent article in the New York Times reported that one sitting judge in Ohio raised more than $3 million for his re-election campaign, thousands of dollars of which came from parties involved in cases before him. The Times found that the justice voted in his cases for his contributors 91 percent of the time, and that a similar correlation existed between the campaign contributions of other justices on the Ohio bench and the way the justices voted.[14] This is not a situation that we want in New York.

It is telling that the Feerick Commission to Promote Public Confidence in Judicial Elections found that 83% of voters registered in this state believe that having to raise money for election campaigns influences judicial decisions.[15] There has to be a better way than open primaries. Yet if the Legislature does not act, that is how New York State will select its judges. For these reasons, the Mayor and I strongly oppose Senator DeFrancisco's bill, S.55A, that passed the State Senate earlier this year, that would adopt an open primary system for Supreme Court judgeships.

We Must Reform the Convention System Now

We may ultimately favor a constitutional amendment as the perfect solution, but as the Mayor has consistently said, "We cannot let the perfect be the enemy of the good." The good solution, and in fact the best solution today, is to reform the convention system, and to do it now. The system can and must be reformed both to address the constitutional infirmities identified by the Second Circuit, and to ensure that all Supreme Court justices are qualified for the job. And it is my considered judgment that the system can be reformed, and meet constitutional requirements, without the need for open primaries.

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[11] Justice Thomas A. Adams, a Long Island Republican, lost his seat in a startling upset. See Daniel Wise, "As Democrats Cement Gains, Appellate Judge is Defeated", The New York Law Journal, Nov. 9, 2005, p. 1.

[12] See State of New York Board of Elections Disclosure Statements for 2005 for "Kris Glen for Surrogate, Inc." and "Eve Rachel Markewich for Surrogate," respectively, available from the New York City Board of Elections.

[13] See Brennan Center, "Buying Time," June 14, 2006, available at http://www.brennancenter.org/programs/ downloads/buyingtime_061406.pdf (last visited 11/12/2006).

[14] See Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," The New York Times, Oct. 1, 2006, p. A1.

[15] See Report to the Chief Judge of the State of New York, Commission to Promote Public Confidence in Judicial Elections, June 29, 2004, Appendix E, "A Survey of New York State Registered Voters (Dec. 2003)," p. 14.

Key Points the Legislation Must Include

So that you can fully understand what the City proposes as the solution, we have drafted proposed legislation, which is attached to my written testimony as Exhibits A and B. This legislation includes the key points that the Mayor and I believe must be included in any judicial reform legislation both to address the constitutional problems with the current system and to ensure that only the most qualified are nominated to serve.

Judge Gleeson and the Second Circuit have made clear that to pass constitutional muster, a revised convention system must be more open and democratic. To achieve this, the number of delegates elected to judicial district conventions should be reduced to ensure a meaningful convention and to prevent the extraordinary control party leaders now wield. In addition, to make it far easier for a maverick convention delegate to be elected to the convention, the required number of petition signatures should be reduced by at least half from the present statutory requirement of 500 signatures. Further, to elevate the office of judicial delegate, and to afford the delegate adequate time both to be lobbied and to gain an understanding of the issues, delegates should serve staggered, multi-year terms, as distinct from the approximately two weeks they serve today. Finally, candidates who submit their names to a Judicial Qualification Commission should have the right to address the delegates at the convention. The City's proposed bills include each of these reforms.

I want to emphasize again that I do not believe the federal court decisions require that, if these reforms are adopted, an open primary is still needed. The federal decisions ordered primary elections only as the default system "*until* the Legislature enacts corrective legislation."[16] Central to the decisions was that voters and candidates must be guaranteed "a realistic opportunity to participate in the nominating phase free from severe and unnecessary burdens."[17] I believe the changes we propose remove the burdens on voters and candidates under the current system, and fix the system so it would pass constitutional muster, without primaries. Moreover, as I indicated earlier, from a public policy perspective, an open primary is something to be devoutly avoided.

But we cannot stop simply by adopting these changes in the delegate selection process. We must also take steps to ensure that the candidates who emerge from this revised convention are highly qualified. Central to the City's proposal is the statutory creation of independent judicial qualification commissions ("JQCs") in every judicial district to review the qualifications of all candidates for the Supreme Court. The JQCs would evaluate and interview all such candidates and provide a public report in advance of the convention. The report would recommend from the candidates who were reviewed by the JQC the three found by the independent commission to be most qualified to serve as a Supreme Court justice.

The State Constitution, I believe, prevents the statute from requiring that the convention choose only from among these three candidates. However, if the system is statutorily put in place, and with it the widespread dissemination of the JQC's recommendations, I think that, as a practical political matter, the conventions will have to choose one of the three people the JQC has recommended.

The convention would have discretion as to which of the three candidates recommended as the most qualified by the JQC to nominate. Accordingly, the parties could take diversity and geographical concerns into account in deciding whom to choose, particularly when, as is usually the case, there are multiple Supreme Court vacancies to fill.

The only exception to the requirement that the JQC report out the three candidates most qualified for the position would be where a sitting Supreme Court justice is seeking re-election. Under the City's proposal, in order to foster judicial independence, and to reward outstanding service, the JQC would be required to recommend only the incumbent justice for nomination where the JQC has found the justice highly qualified.

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[16] Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 205 (2d Cir. 2006).

[17] Id. at 187.

Thus creation of JQCs would address the patronage and lack of merit issues inherent in the current system, while protecting sitting justices, who have not been involved in politics for 13 years, from having to raise money and campaign.

Under the City's proposed legislation, the number and composition of the JQCs would take one of two forms. In the first version, attached as Exhibit A, a single JQC would be established for each judicial district, to review the qualifications of all candidates regardless of party affiliation. Each such JQC would be composed of 15 members serving staggered three-year terms, would include some non-lawyers, and would be appointed by a combination of the Governor, the Legislature, the Judiciary, the president of the New York State Bar Association, and law schools and bar associations, if any, in the district.

Alternatively, in the second version of the City's bill, attached as Exhibit B, there would be established in each judicial district a separate JQC for each major political party. The members of each JQC would be selected, in a system similar to that used by the Manhattan Democratic Committee, by bar associations, civic and community associations and law schools in the district. The Governor, the party leaders, the chief judge and the presiding justice in the district would designate which such organizations would appoint the members, but the organizations themselves would appoint the members. Again members would serve three-year staggered terms.

There are advantages and disadvantages to both of these approaches, which time does not permit me to discuss now. However, the most important points about the JQCs are that: members are selected in a way that ensures their independence; they are representative of the communities they serve and include lay participation; commissioner terms are staggered and limited; the JQCs apply consistent, rigorous, and public criteria to all candidates; their proceedings are governed by uniform rules; and most importantly, that the JQCs are charged with the responsibility of recommending to the convention the three candidates found most qualified to serve.

If adopted, this approach would be quite similar to the extremely successful approach that Mayor Bloomberg and his three predecessors all have employed for selecting the Family, Criminal and Acting Civil Court judges that the State Constitution authorizes the Mayor to appoint. Central to that process has been an independent screening committee that nominates the three most qualified candidates for each vacancy, among which the Mayor chooses. Under his Executive Order governing judicial appointments, the Mayor appoints a minority of the members of the nominating committee, ensuring its independence. The result of the Mayor's system has been the appointment of a diverse and highly qualified group of judges. Of the 29 candidates who have been appointed to the bench by the Mayor, more than half have been women; 8 have been minority; and 2 have been openly gay.

Based on the success of this model, the Mayor has been calling for a similar approach in the context of statewide judicial elections since 2003, when he testified to that effect before the Feerick Commission. If the last few years have proven anything, it is that those independent commissions are needed now more than ever.

Chairwoman Weinstein's Proposed Bill

Let me briefly comment on A.7-B, Chairwoman Weinstein's bill that passed the Assembly last year. While the Mayor and I applaud the bill's goals, we believe it suffers from several flaws, which our proposed legislation tries to address. First, it makes it mandatory for the parties to select one of the candidates reported as the most qualified by the judicial qualification commission. We do not believe this is permitted under the State Constitution.[18] Second, A.7-B applies to the selection of all judges in the state rather than just Supreme Court justices. Not only does this interfere with the Mayor's power, found in the State

[18] Requiring the approval of a screening panel as a mandatory prerequisite to nomination for judicial office effectively creates an additional qualification to be a judge. The legislature may not prescribe additional qualifications for office where there are constitutional provisions on the subject. See In re Callahan, 200 N.Y. 59 (N.Y. Ct. App. 1910); In re Yevoli, 66 Misc. 2d 156 (Sup. Ct. Nassau Co. 1971). The State Constitution prescribes the exclusive qualifications for judicial office in Article VI. See, e.g., New York State Constitution, Article VI, § 20(a) (providing certain judges, including Supreme Court justices, must be admitted to practice law in the state for at least 10 years).

Constitution, to appoint Family and Criminal Court judges,[19] but it attempts to address in one fell swoop how all judges in the state should be selected. We believe the legislative solution should focus only on the selection of Supreme Court justices, as that is what the Second Circuit decision addressed, that is where the crisis is, and that is where we need the legislative solution the most and certainly the most urgently. Finally, A.7-B includes what we believe to be an unnecessary bureaucratic addition, specifically a board that would oversee all the JQCs. Instead, we suggest, and our bills reflect, that the rules to which the JQCs would have to adhere should be promulgated by the Court of Appeals, thereby rendering this added bureaucracy unnecessary.

Conclusion

As the Mayor told the Feerick Commission in a passage that the Commission felt was worthy enough to cite at the beginning of one of its reports, "The surest way to stop progress is to come out four square in favor of it, but never agree on any one improvement because it is not perfect."[20] We urge you to take advantage of this opportunity to find consensus and then move as quickly as possible to adopt legislation along the lines described. Such legislation may not be perfect, but it will go a long way toward restoring the public's faith in our judges, ensuring a high quality judiciary, and addressing the legal weaknesses of the current system as identified by Judge Gleeson and the Second Circuit.

We cannot afford to wait any longer. With your commitment, your Committee has the power to blaze a path to reform. I can think of no greater public service at this decisive moment. I would be happy to answer any questions you may have.

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[19] See New York State Constitution, Article VI, §§ 13(a) and 15(a).

[20] See Report to the Chief Judge of the State of New York, Commission to Promote Public Confidence in Judicial Elections, June 29, 2004, Introduction, p. 1.