



Statement of Position Judicial Selection for Supreme Court Justices December 2006

Citizens Union has long held that the judicial selection process for Supreme Court justices in the State of New York is deeply flawed and in need of reform. While the great majority of Supreme Court justices who serve the people of the State of New York are fair, honest and qualified to hold office, the judicial nominating conventions that select candidates for the Supreme Court are one of the last vestiges of a no longer acceptable patronage system. The current system has often led to justices who are unqualified reaching the bench and has diminished the public's faith in the judicial system. On more than one occasion in recent memory, the integrity and independence of our state's justices have been seriously called into question, and the public's trust and faith in the system shaken. The bench, statewide, has also not sufficiently reflected the diversity of the communities it serves. The current process for the selection of Supreme Court justices has also discouraged good candidates from pursuing the position as they are not willing to make the sacrifices and commit to the partisan requirements of the process and the position.

The recent decision by Federal District Court Judge John Gleeson issued in the *López Torres v. N.Y. State Board of Elections* suit¹ and its subsequent affirmation by the Second Circuit of the U.S. Court of Appeals held that the judicial convention process is unconstitutional, because it denied voters the right to cast a meaningful vote in the selection of candidates. Noting the historical record and the control exerted over the process by party leaders, the court directed the New York State Legislature to craft a legislative remedy and ordered the state to hold direct primaries for Supreme Court justices as an interim measure until the Legislature acts.

This decision has created an historic opportunity for reform of the judicial selection process. Citizens Union believes it is now incumbent upon the State Legislature to create a new system that would assure that the most qualified judges are selected for all New York courts and that they are allowed to operate independently, without bias and with the highest of ethical standards.

I. BASIC PRINCIPLES

Given this moment in time, Citizens Union, in summary, believes the following:

1. The State Legislature should craft immediately and pass during the next two legislative sessions a constitutional amendment that if supported by the voters would put in place a merit-based appointment system for judges in all New York courts of record.
2. That until such time as New Yorkers vote on a constitutional amendment, which at the earliest would be in 2009, legislation should be enacted concurrently to reform the troublesome Supreme Court nominating convention system by statutory means so as to address the constitutional issues outlined in the decision by Judge Gleeson.

¹ Lopez Torres v. N.Y. State Bd. Of Elections, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d. Cir. 2006)

3. Direct primary elections are not a preferable reform of the convention process as a means of nominating Supreme Court justices and should not be allowed to take place as the default interim measure.

II. MERIT APPOINTMENT

For decades, Citizens Union has advocated that judges in New York should be selected through a merit-based appointment system akin to that used for the New York Court of Appeals, by the Mayor of the City of New York to appoint judges under his authority, and by many other states' models. We reached that conclusion, despite our historic interest in nurturing and improving the democratic process of electing our public officials, because the concept of electing judges is fundamentally flawed. Though voters dutifully elect those who serve in the executive and legislative branches of government, the direct election of judges is troublesome if our state is to protect the independence of the judiciary.

Judges running in elections need funds with which to campaign, and thus would have to court lawyers, donors, and the political parties and their leaders for support to meet increasing campaign fundraising demands that elections would require. This creates a situation where candidates are, or may appear, beholden to political leaders and donors, which could compromise their independence on the bench and very likely create the appearance of favoritism and real conflicts of interest for judges. The influence of money on judicial campaigns is widely-perceived by the public as a problem. A survey by the Commission to Promote Public Confidence in Judicial Elections² (the "Feerick Commission") found that 83% of those polled believed judicial decisions were influenced by campaign contributions.

The mandate and function of our judiciary, as well as its relationship to the public, is quite different from that of the other branches of government, where the campaign process plays a critical role in ensuring that the public is electing the candidates that reflect their public policy views. Judges must apply the facts to the law, and must do so equitably and without bias. Thus, we must have a more selective and rigorous process for selecting those judges than the current system, and we must remove the perception that money influences how judges rule.

Voters frequently complain that they have no information about whom to choose among judicial candidates. That in part would explain the substantial number of voters who will choose candidates for other offices but pass on voting for judges, or simply vote by party label or other characteristic that is not reflective of the merits of the candidates. And while the public can more easily discern the difference between candidates for executive or legislative office based on issues and party label, these two determinants are in many ways not appropriate factors by which to evaluate judicial candidates. Voters cannot as readily determine the judicial fitness of a candidate from information available and have very little to go on in making their decision.

Historically, voters have not had the ability, and in our view rightfully so, to evaluate judicial candidates based on position statements or proclamations of how they will decide specific cases that come before them if elected. Persons appearing in court have the right to appear before judges who have not predetermined and announced their views, and should be able to rely on judges reviewing the facts and the law before rendering any decision. While ethics rules have traditionally offered this protection, the recent ruling by the U.S. Supreme Court in *Republican Party of Minnesota v. White*³ and its progeny suggest that it is unconstitutional to limit what judges say regarding substantive issues while on the campaign

² Report to the Chief Judge of the State of New York, Commission to Promote Confidence in Judicial Elections, June 29, 2004, Appendix E, "A Survey of New York State Registered Voters (December 2003)", p.14

³ *Republican Party of Minn. v. White*, 536 U. S. 765 (2002).

trail. These decisions have increased the pressure on candidates to disclose their positions on various issues relating to likely cases that they then might have to rule on once on the bench, thus undermining the public's perception of the judiciary as fair and unbiased. To the extent judges running for office fall prey to these pressures, the elective system would further erode public confidence in the judiciary.

These weaknesses would be present in any judicial election system. However, to compound these problems, the system for electing judges in New York – and particularly Supreme Court justices – is controlled by party leaders and as party enrollment in most election districts in the state are skewed to favor one party, the endorsement and the nomination by the party and county leaders is tantamount to election. As such, the current system is replete with instances of patronage and cronyism, and political parties mine the judicial system for the spoils of power. The end result is that judicial elections provide little assurance that those who are elected are the right people for the job. This is not how justice should be provided to our citizens.

Under a merit-based appointment system, a commission composed of lawyers and non-lawyers with members appointed by a range of elected and judicial officials or civic organizations and bar associations would be responsible for recruiting, reviewing and recommending eligible nominees for judicial office. At the end of the process, the commission would submit a limited list of the most-qualified nominees to an appointing authority (usually the Governor or local officials), from which appointments would be made, upon approval by the appropriate legislative body. This method ensures the most thorough examination of the qualifications and abilities of judicial candidates and minimizes the role of money and the political parties in the process.

A merit-based appointment system, with commission members who represent the diverse and varied interests of the state, including racial and ethnic diversity and gender balance, would be the most effective means to create a judiciary that is a) insulated from the external pressures of campaigning and the trappings of expensive and often bitter election contests, b) operates outside the confines of the political patronage system, and c) represents the racial and ethnic diversity and gender balance of New York's populace.

We recognize a merit-based appointment system can only be implemented via a constitutional amendment which must be approved by two consecutively elected legislatures and subsequently the voters of the State of New York. However, Citizens Union believes this is the most desirable outcome. This opportunity to achieve real lasting reform should not be squandered for political expediency. In fact, three decades ago, a broad coalition of organizations and interests coalesced around the effort to pass a merit appointment constitutional amendment for the state's highest court, the Court of Appeals, which resulted in that exact outcome – legislation being passed by two consecutive legislatures and approved by statewide referendum. The Court of Appeals is now widely recognized for its quality and integrity. New York's other courts deserve the same.

For these reasons, Citizens Union urges the following:

1. The Legislature should introduce and pass legislation that would create a merit-based appointment system for Supreme Court justices, and for all courts of record, along the lines of the system in place for the New York Court of Appeals. To implement this system, legislation would need to be passed by two consecutive legislatures and then submitted to the voters for final passage. Passage of legislation in 2007 is the first step and should be undertaken as early as reasonably possible in the upcoming legislative session. Second passage could then be

accomplished in 2009, the amendment can be put before the voters that year, and implementation can begin in 2010.

III. CRAFTING an INTERIM MEASURE

While Citizens Union continues to advocate for a merit-based appointment process, we recognize that the immediate concern is to address the López Torres decisions. Under the remedy propounded by the District Court and affirmed by the Second Circuit, in the absence of legislative action, direct primary elections would be used to nominate Supreme Court justices beginning in 2007. Primary elections, as currently configured under State law, are the least appealing option for selection of justices. As we outlined above, they bring forth the worst aspects of the elective system, as they do not remove the influence of the party machinery from the process and they invite the influence of money and political donors to a much greater extent than does the convention system. Therefore, the Legislature should not permit the 2007 election to proceed in this manner. However, whatever the Legislature develops to address the immediate issues should be conceived as an interim remedy that will precede the establishment of a merit-based appointive system.

Citizens Union therefore urges the following:

1. Though Citizens Union has long criticized the judicial nominating convention process, the Legislature should craft an interim measure that provides for a reformed convention system to avoid the direct primary elections as prescribed in the López Torres decision.
2. The interim measure should have a sunset provision, with the legislation to expire in 2010. A sunset provision will help ensure that the Legislature stays focused on the task of creating the best system possible and advancing a merit-based appointment constitutional amendment in 2007 and 2009.
3. Any interim approach that is established should provide for qualifications commissions to evaluate candidates for Supreme Court.

A number of serious proposals have been advanced for addressing the López Torres decisions that are designed to maintain the judicial convention system, but alter its structure and function so as to meet the requirements of the López Torres opinions. In contrast, the State Senate has passed legislation that would establish a direct primary system for Supreme Court nominations.

As previously mentioned, Citizens Union is very troubled by the prospect of such primary elections. We would prefer the interim approach of reforming the judicial convention system to solve the constitutional crisis outlined in the Gleeson decision. We are concerned with whether this approach is feasible, but offer suggestions on how to accomplish this and improve the system until the more satisfactory reform of merit appointment is put in place. We also offer several suggestions on how to minimize the negative impacts of a primary system should the Legislature opt to abolish the convention process. Regardless of which system is put in place we urge the Legislature to establish judicial qualifications commissions to evaluate judicial candidates and outline several ideas on how to accomplish that.

IV. QUALIFICATIONS COMMISSIONS

Citizens Union recommends that whatever interim approach emerges, there be established qualifications commissions to evaluate candidates for Supreme Court. This approach would put in place some mechanism to screen candidates, advising the party leaders, the public and, should they be retained, the judicial conventions, of the merits of the candidates. This step, on its own, should improve the quality of the bench, and should be extended to all New York courts.

We have examined the various approaches that have been advanced with regard to how the commissions should be composed.

Citizens Union urges the following:

1. The Legislature should establish qualifications commissions in each judicial district. Appointments to the judicial qualifications commissions should not be made only by executive, legislative and judicial officials. Rather, to ensure the greater independence of these commissions, some or all of its members should be appointed indirectly, with these officials designating bar associations and civic organizations which in turn would name members to the commissions;
2. The commissions should be composed to reflect the geographical, racial, ethnic and gender diversity of New York and should not be dominated by a single political party;
3. These commissions should have their own staffs and should engage in outreach to encourage candidates to apply; and
4. Each commission should issue a report listing the three “most qualified” candidates for each vacancy; if there is more than one vacancy in a particular district, that commission should add two additional “most qualified” candidates for each additional vacancy. The commission should also issue a report of the persons who submitted their qualifications, and of the other candidates it found qualified.

V. PREFERRED INTERIM REMEDY – Reform of the Judicial Nominating Convention System

Both the Feerick Commission appointed by Chief Judge Judith Kaye, and New York City Mayor Michael Bloomberg with the support of Corporation Counsel Michael Cardozo have drafted proposals designed to maintain the judicial convention system while addressing its constitutional shortcomings. Among the changes that one or both proposals would make to the judicial convention process are: lowering petition signature requirements for judicial convention delegates; electing delegates a year before the convention in which they would serve (allowing judicial candidates more time to address their campaign to them); having them serve three-year terms; allowing candidates to address the convention; and having fewer convention delegates.

While it is debatable whether or not the suggested changes to the judicial nominating conventions are sufficient to overcome the constitutional problems identified in the López Torres decisions, we believe there is a reasonable chance that they would, especially if coupled with several additional suggestions that we offer below. Thus Citizens Union finds this overall approach preferable to the primary system.

Should the State Legislature decide to modify the convention system, Citizens Union urges consideration of the following:

1. Supreme Court candidates should be selected from smaller districts;
2. Signature requirements for delegates should be reduced;
3. The total number of delegates should be reduced and they should serve three year terms;
4. Any registered party member should be eligible to run for election as a delegate except that delegates should not be current or former elected officials, and the delegates should not be eligible for other office for a given period of time after the convention to curb party leverage over their decision;
5. Permit all candidates who submit to review by qualifications commissions an opportunity to argue for their nomination at the convention;
6. Require secret balloting at the conventions;
7. Allow candidates a greater opportunity to win support for their selection by holding the election for delegate at the September primary of the year before the convention is held;
8. If an incumbent is up for re-election and the relevant qualifications commission deems him/her highly qualified, he/she should be the only person recommended by the commission for that vacancy; and
9. Develop and conduct a more expansive voter education program each election season.

VI. ALTERNATIVE INTERIM REMEDY – Direct Primary Elections

While the direct primary mechanism is superficially attractive in that it puts the choice of judicial candidates directly to the voters, Citizens Union has deep reservations about this approach, as expressed above. However, we recognize the Legislature may opt for this solution, though we would discourage it from doing so.

Should the Legislature decide to implement direct primaries, Citizens Union urges the following:

1. Adopt a public financing system for judicial campaigns to ease the concerns of having judicial candidates raise campaign funds;
2. Lower signature requirements to provide candidates easier access to the ballot;
3. Create smaller judicial districts to reduce the cost of campaigning and increase interaction with, and education of, voters;
4. Create judicial qualification commissions to evaluate candidates running for office;
5. If an incumbent is up for re-election and the relevant qualifications commission deems him/her highly qualified, he/she should be the only person recommended by the commission for that vacancy; and
6. Develop and conduct a more expansive voter education program each election season.

In advocating these changes to the elective system, Citizens Union strives to ensure the selection of qualified candidates and to reduce the influence of party leaders in the process. We note that any measures the legislature adopts that would change the current judicial election system would be subject to review under the federal Voting Rights Act. We recognize, however, that these interim remedies fall short of the desired goal of creating a system that restores the public's faith and promotes an honest, fair, independent and impartial judiciary. That is why we will continue to press strongly for a merit-based appointment system as a permanent solution.

Citizens Union looks forward to further deliberation and discussion on these matters as the State Legislature develops a system that would address the López Torres decisions and provide for the most qualified judges who will operate independently, without bias, and with the highest of ethical standards.