

Testimony of Joseph P. Awad, President

*THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION*

Before the

New York State Assembly Standing Committee on Judiciary

SELECTION OF NEW YORK STATE SUPREME COURT JUSTICES

December 15, 2006

I am Joseph P. Awad, President of the New York State Trial Lawyers Association, and I appear here today on behalf of the NYSTLA Board of Directors and our 4000 lawyer members who practice in the trial and appellate courts throughout the state. We thank Chairperson Helene Weinstein for convening this series of hearings and beginning the thoughtful process needed to respond to *Lopez-Torres v. New York State Board of Elections*, and to the broader issue of public confidence in our judicial selection system.

I want to begin by acknowledging, on behalf of NYSTLA, the tremendous efforts of Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman in making our justice system more accessible and responsive to all New Yorkers. The State of New York owes a great debt of gratitude to Judge Kaye and Judge Lippman, and NYSTLA looks for opportunities such as this to publicly recognize that debt. They have demonstrated a commitment to the American ideal of justice, where ordinary citizens, like the most powerful, will find in the courtroom a place where their pleas will be received with respect, and justice will be delivered in an impartial and transparent manner.

Judge Kaye set out to elevate public trust in our courts and respect for the legal profession by working tirelessly to improve the experience of everyone who enters the courtroom door. As part of this effort, she has also recognized the need for reform in the selection process to ensure that the trial bench is qualified and reflective of the populations it serves. To this end, in 2003 she formed the New York State Commission to Promote Public Confidence in Judicial Elections, appointing a diverse and experienced panel of 29 individuals. Chaired by Dean John Feerick of Fordham University School of Law, to study the relationship between public trust and the judicial selection process, and to make recommendations for improvement in the way we choose our judges. The Commission has since issued three reports to the Chief Judge, with the last and final report published in February of this year. In our own deliberations within NYSTLA, we have found much commonality with the views expressed in the "Final Report to the Chief Judge of the State of New York" regarding public financing of judicial campaigns and the judicial nominating convention. We also agree with its emphasis on the importance of public confidence in the courts, and believe that the democratic election of judges is basic to that confidence.

Our first recommendation is for public financing of judicial elections as the very best way to assure public confidence in the judiciary and its selection process. Our collective experience as the primary users of the civil branch of State Supreme Court is that the overwhelming majority of the judges we practice before conduct themselves in accordance with the highest standards of ethics and are in no way influenced by donations to their campaigns. It simply

stands to reason that the skilled and credentialed individuals who give up their private practices and other employment opportunities to pursue a career on the bench have a sincere respect for the rule of law and a commitment to public service. Such individuals are worthy of the public trust. Unfortunately, the rare instances of judicial corruption raise questions for the average citizen about the judicial system as a whole and, more specifically, the connection between electoral contributions and judicial fairness.

While the flow of money can be an avenue for distortion in any deliberative body, it is generally understood and accepted that legislators naturally identify with various groups of people, such as local constituents and individuals and organizations that share particular values. It is the very nature of a legislative campaign to let voters know where a candidate stands in the hope of attracting both contributions and votes. Judges, on the other hand, are not supposed to represent or attempt to advance particular constituencies, ideologies or causes - quite the contrary. Still, the election of judges needs to be preserved, as it gives the public the opportunity to participate in the make-up of the justice system and offers the People the opportunity to review judicial performance as part of the system of checks and balances so essential to our democracy. Public financing of judicial elections would serve to enhance the confidence in the judiciary that elections are meant to provide by eliminating the threat to public confidence that private contributions can pose.

While the potential impact on public confidence is the most important reason for public financing of judicial campaigns, there are other reasons to exempt judicial candidates from the burden of electoral fundraising. The 2001 report of the American Bar Association Commission on Public Financing of Judicial Campaigns explored these in some depth, first noting that the money spent on judicial campaigns is escalating, often involving expensive television advertising and other campaign strategies previously confined to legislative elections. This forces both sitting and aspiring judges to accept more and larger campaign contributions, which may raise an appearance of impropriety. The high cost of campaigning also results in many judicial candidates having to borrow money, and a narrowing of the field of candidates who can afford to run. The Commission expressed an overriding concern that, in conducting campaigns for judges in the same way we run campaigns for the other branches of government, we are inappropriately politicizing the judiciary.

In the absence of full public financing, a system of matching public funds, along the lines of the New York City system of financing campaigns for municipal office, provides the next best alternative. Although special interests will continue to play a role, that role is significantly muted when public funds provide a large portion of campaign support.

We agree with the Feerick Commission that, in the absence of public financing for judicial campaigns, the focus should be on improving the use of conventions for nominating our judicial candidates. We believe the statutory changes suggested by the Commission would overcome the constitutional objections of *Lopez-Torres* by making the judicial nomination process more open, accessible and accountable.

The Feerick Commission reforms would fundamentally change the convention system by giving it a more focused and deliberative function. This would be achieved, in part, by elevating the position of delegate to the convention, making the position sufficiently meaningful to attract candidates independent of the political party leaders and local power brokers. Delegates would serve three-year terms instead of the current 10-day term and

would stand for election a year prior to their first convention, assuring them time to study the requirements of the job and the credentials of the candidates. Instead of packing 100 or 200 delegates into each convention, voters would elect only two delegates from each Assembly District, resulting in conventions of a more manageable 25 to 50 delegates and allowing for a more collegial and expansive deliberation. Delegates would be prepared for thoughtful discussion with materials provided by the Office of Court Administration, outlining the election rules and the parameters of the nominating process, including the characteristics that they will be looking for in a qualified candidate. The Commission also recommends that candidates for judicial nomination be permitted to address the delegates at the convention for the judicial district in which they hope to run. Under these circumstances, independent-minded citizens with a genuine interest in the quality of the judiciary would be attracted to the delegate role, replacing the hand-picked place-holders of political leaders.

The *Lopez-Torres* ruling has placed a cloud over the nominating convention as a vehicle for producing judicial candidates, and has, thus, advanced the cause of those who prefer privately-financed open primaries. But a shift to an open primary system would potentially substitute the influence of well-heeled private interests for the selection process that the *Lopez-Torres* decision derides. The State Legislature has the opportunity to devise a significantly improved system. Open primaries supported by full public campaign financing for judicial elections would bring New Yorkers the healthiest, most democratic alternative. Even if only matching public funds were available, the primary system could still be a strong alternative to the present system. In the absence of public financing, however, the suggested Feerick Commission reforms offer real promise for transforming the judicial nominating conventions into a respectably open and democratic institution.

In endorsing the election of judges, either in the context of a publicly funded primary system or improved nominating conventions, we explicitly oppose the selection of judges through appointments. We also strenuously object to the term "merit selection" as applied exclusively to this approach and the inference that judges who attain their status by popular vote are somehow necessarily less capable than judges who have attracted the attention of participants in an appointments process. The fact is. our elected judges in New York, over the course of decades, have created a body of jurisprudence that is second to none in the nation. The self-congratulatory label, "merit selection," as synonymous with judicial selection by appointment, also implicitly denigrates the ability of the „voter to make discerning judgments about candidates —if there is a problem with the lack of information available to voters about judicial candidates, that problem can be specifically addressed without resorting to a rejection of democratic ideals.

We support judicial election as central to our American democracy and true to the constitutional history of our State. In 1846, New York's constitutional convention replaced the judicial appointments system in favor of an electoral system. The research, analysis and thought that took place in the context of subsequent conventions in 1915, 1921, and 1938 supported the reaffirmation of that decision and the continued rejection of an appointments approach to judicial selection. To reverse this time-honored commitment to the election of judges would be to take away the power from the people and place it exclusively in the hands of a few.

We wish this committee good luck in enacting the reforms needed to get beyond (the highly public rebuke to our judicial system that the *Lopez-Torres* decision represents. In the

meantime, I would like to strongly urge that, in revisiting the judicial selection process, official judicial screening committees not be made the gatekeepers of the judicial branch of government in New York State. We endorse and applaud the work of voluntary screening committees that evaluate judicial candidates selected through the democratic process, but strongly disagree with use of official bodies to select candidates in the first instance. Again, we support a fully democratic process for the nomination of candidates, a process that can be enhanced with voter education and the advice of committees made up of thoughtful individuals from the legal community who volunteer their services to undertake a thorough-going evaluation of candidates. To this end, there is a need for greater outreach to the civil trial bar across the state in order to educate individual attorneys about judicial opportunities and to cultivate organizational interest in playing a role in the election of judges. And, as we look to this Committee to craft legislation in response to Lopez-Torres, in the interim we, feel strongly that NYSTLA should be included on the judicial qualifications panel proposed in the Assembly's Judicial Qualification Act and on the Commissions created under the Chief Administrative Judge's recent rule. Within the civil trial bar, NYSTLA represents the greatest number, greatest diversity, and far and away the greatest trial and appellate experience serving individual New Yorkers in State Supreme Court. We would welcome opportunities to (participate in the evaluation of nominees and otherwise assisting in the modernization of the selection process — and we believe we could contribute significantly to these endeavors. Members of the State trial bar should be recognized as both the primary users of the justice system and as the officers of the court who are particularly in touch with the plight of the average citizen in seeking justice. This is simply because it is our members who represent citizens from every life experience, every day, in every courtroom from the tip of Long Island to the Niagara frontier and the Northern regions of the Adirondack Mountains.

Finally, before leaving, I must once again comment, as I and other NYSLA representatives have on so many occasions in the past few years, on the need for judicial pay increases. It is certainly relevant to the subject of judicial selection because we need to continue to attract to the judiciary the best and brightest among the Bar. We agree with Judge Kaye and her plan and recommendations to separate the need for judicial fair compensation from the political process. It has been eight years since any judge elected to a court in the State of New York by the people of the State of New York has received a cost-of-living increase. This is ridiculous, and a sure recipe for future discouragement of those who might otherwise aspire to the bench. Attorneys who decide to perform public service by seeking election to the judiciary rarely do it for financial gain, but it is understandable that talented attorneys among us might be discouraged from pursuing the formidable responsibilities of a judgeship with the prospect that they and their colleagues will have to plead for reasonable pay increases, and, perhaps, work for years without receiving one.

I again thank you for the opportunity to testify here today, and, on behalf of NYSTLA, its Board of Directors and its members, offer our assistance and support in the improvement of the judicial selection process.

WWW.ASK4SAM.NET