

Supreme Court Justices React Skeptically to N.Y. Judge Selection Challenge

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Law.com
10-04-2007

U.S. Supreme Court justices Wednesday appeared skeptical of arguments challenging the constitutionality of New York's long-standing convention system for nominating New York Supreme Court candidates.

The Court heard oral argument in *New York State Board of Elections v. Lopez Torres*, on appeal from the 2nd U.S. Circuit Court of Appeals, which upheld Eastern District of New York Judge John Gleeson's injunction against the state's 86-year-old system for nominating candidates for the 328 seats on the New York Supreme Court. New York is the only state to use nominating conventions to elect judges.

Opponents argue that the system discourages both voters and candidates from participating in the system. However, attorneys arguing for its defenders emphasized the First Amendment associational rights belonging to political parties.

Andrew J. Rossman of Akin Gump Strauss Hauer & Feld in New York split argument time with former solicitor general Theodore B. Olson, who represents the New York State Board of Elections, the initial defendant in the suit filed by the Brennan Center for Justice in 2004. Rossman is counsel to the state's Republican Party, the New York County Democratic Party and the statewide association of state Supreme Court justices, all of whom intervened to defend the convention system.

Rossman urged the Court to find "inappropriate" the lower courts' application of strict scrutiny to what he called "routine core party associational activity."

"Leaders developing candidates, recommending candidates, endorsing candidates, and fielding delegates who they think are loyal to the interests of the party -- that doesn't deserve strict scrutiny," Rossman said.

Justice Ruth Bader Ginsburg asked about the associational rights also claimed by the "rank-and-file" party members, and the argument that the convention system is "really a sham because nobody is going to run for that except the party faithful, someone picked by the party boss."

Olson, now a partner at Gibson, Dunn & Crutcher in Washington, D.C., argued that a political party has the right to select its leadership, referring to the "special place the First Amendment reserves for the protection by which a party ... selects a standard-bearer."

The Brennan Center's lead plaintiff challenging the system is Brooklyn Surrogate Margarita Lopez Torres, who won countywide Democratic primaries for Civil Court in 2002 and surrogate in 2005, but was unable to secure a nomination to New York Supreme Court over opposition from party leaders. Among the groups that have supported the center's position are the American Civil Liberties Union and the [Washington Legal Foundation](#).

Justice David Souter, in examining the arguments put forth by the challengers of the system, drew a distinction between what he termed "a right to success" within the convention system and "a right to have a chance to influence the process."

"The nub of your case is that the political bosses in effect are controlling the process because they tell the delegates who to vote for," Souter said to Frederick A.O. Schwarz, who argued for the Brennan Center. "Does ... the intending judicial nominee whom you represent have any difficulty in getting to the political bosses and saying: 'I want you to consider me?'"

"Yes. They would not listen to her," Schwarz said of Lopez Torres.

"Sure," Justice Souter replied. "For political reasons, they're saying: 'We don't like you.' There are ... a lot of people who go to United States senators and the United States senators say: 'Scram.'"

Schwarz, a former partner at Cravath, Swaine & Moore, is senior counsel at the Brennan Center.

Justice Antonin Scalia also seemed less concerned with what might be the political reality of influence and competition within the convention system than whether that system would otherwise be constitutional.

"Of course [the system] works the way you say it does. It is designed to work that way," Scalia told Schwarz. "It's a basic judgment not to have judges popularly elected, and your objection amounts to saying: 'No, judges ought to be popularly elected.'"

The argument touched briefly on alternate judicial selection systems for the state. Chief Justice John Roberts asked Schwarz whether a system in which judges are appointed would be "a realistic option in New York."

Schwarz answered that some groups have recommended that as a solution, and that Gov. Eliot Spitzer "has put forward a bill for an appointive system."

"Well, I'm sure he has," Roberts said, drawing laughs from the audience. "I mean, that's in his interest."

Schwarz ended his argument by referring the justices to the amicus briefs filed on the side of the challengers to the convention system.

"It's not very often you find, on a constitutional issue, both the [Washington Legal Foundation](#) and the ACLU coming in ... to assert that this is an unconstitutional statute," he said.

"Well, it's not very often that you have both the Democratic Party and the Republican Party supporting it either," Roberts replied, again prompting laughter.

Efforts to reform the current system have been on hold while the U.S. Supreme Court considers *Lopez Torres*. The heads of the Assembly and Judiciary committees doubted Wednesday that any would be enacted if the Court determined the conventions were constitutional.

Sen. John DeFrancisco said opposition to opening up the process would be formidable in the absence of a court mandate to do so.

"What do I think will happen?" he said. "Nothing will probably happen. There are many who feel the current system is fine. Many people like to have the control over the current system."

"I was sorry that we weren't able to [change the system], despite people saying we should wait for the Supreme Court," said Assemblywoman Helene Weinstein. "We may have missed an opportunity to reform the convention system."

Both Olson and Rossman are handling the case pro bono.

There were 11 amici briefs filed in support of the Brennan Center, and three for the defenders of the system.

The defenders gained the backing of the National Republican Party and the New York state attorney general.

The two sides have split support among groups of black and Asian lawyers, but three Hispanic bar groups have sided with the challengers.

New York Law Journal *Reporter Joel Stashenko contributed to this story.*