NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Speeches

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NEW YORK CITY IN THE COURTS: THOUGHTS OF THE CORPORATION COUNSEL ON THE JUDICIAL SELECTION CRISIS AND OTHER PRESSING ISSUES

SPEECH GIVEN BY MICHAEL A. CARDOZO AT THE CITY LAW BREAKFAST AT THE NEW YORK LAW SCHOOL ON MARCH 24, 2006

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Introduction

Four years ago, when I last spoke at this Breakfast, I had just become Corporation Counsel and, apart from some lofty goals, wasn't quite sure what I was getting into in heading the second largest public law office in the United States. Now that four years have passed, I think I can better assess the challenges faced by my Office, and I welcome the opportunity to discuss some of those challenges with you.

It is obviously impossible to talk about even a cross section of the hundreds of legal issues handled by my Office. Instead, I will address three recurring challenges that I thought would be of interest to you. Of course, during the question and answer session I will be happy to try to answer questions on any other matters you may have.

Judicial Selection

A. *The Problem*

I want to start off talking about how we select state Supreme Court justices – the judges before whom most major civil and criminal cases are tried. I begin on this topic because the success my Office has in dealing with the challenges we face depends, in large measure, on judges and the quality of their decision making.

Before I discuss what I see as the judicial selection crisis we face in this City today let me emphasize as strongly as I can that most judges are honest, hardworking and smart men and women. In discussing the issue of judicial selection, I don't intend in any way to malign those hard working individuals.

Let me begin by explaining very quickly how Supreme Court justices are nominated. To become a Supreme Court justice in New York you don't run in a primary, unlike candidates for the civil court or for surrogate. Instead, in each of the four judicial districts in the City (Brooklyn and Staten Island are considered one district) there is what is called a judicial convention, with the convention delegates elected in the primary about a week earlier. Each party nominates its Supreme Court candidates at the judicial convention and the nominated candidates then run in the general election in November. Of course, in this heavily Democratic City, nomination by the Democratic judicial convention usually means election.

Now, let me move to my point.

Regardless of whom you voted for four months ago, I assume, if I mentioned the names Michael Bloomberg, Freddy Ferrer, Anthony Weiner, Virginia Fields, Gifford Miller and Bill Thompson you would remember which of them you voted for in the primary and general election.

Now I want to pose a question to this sophisticated audience.

It boils down to this: Will you please stand up if you remember the names of two people for whom you voted for judge, in last September's primary or last November's general election.

No one. Think of it, not a single person in this audience can remember the name of even two judicial candidates even though, depending on the borough in which you live, there were from four to ten contested judicial slots to fill.

So if no one here can remember the names of the judicial candidates for whom they voted, then presumably the general public doesn't remember either. In fact, I suspect that many of you – like many in the general voting public – probably didn't vote for judicial candidates at all.[1]

Why don't people vote for judges? I think there are two somewhat related answers.

First, voters don't know anything about the candidates. There is hardly any campaigning for the position. Second, if there is a campaign how are voters to decide? What are judicial campaigns supposed to be about? Someone saying he or she is fairer than the next guy? Simply put, there really is very little basis on which the voter can make an intelligent decision on which judicial candidate he should vote for.

B. *The Consequences*

There has been a terrible, frankly frightening, consequence to this voter ignorance and non-participation in the determination of the people who will become our judges.

The decision on who will become a judge has been left solely in the hands of a small group of people: county political leaders.

As one Supreme Court justice, who was ultimately forced to step down for disciplinary violations, said: "You don't have to know something to be a judge, you have to know somebody. They give you a robe and expect you to know the law."

Shame on us if this is the way we have allowed our judges to be selected.

Certainly the politicians whom we have allowed to select our judges in too many cases don't select their judicial candidates based on merit. Nor do they take into account the opinions of people who might be in a position to determine judicial qualifications.

Last year, for example, 9 of the Brooklyn Supreme and civil court candidates on the ballot were found unqualified by most major bar associations. But the politicians nominated them anyway.

One of those found unqualified was nominated for the bench because he was supported by the former Brooklyn Democratic party leader.

Conversely, a Civil Court judge was denied nomination to the Supreme Court not because she was unqualified but because she had previously refused to hire as her court attorney the district leader's daughter.

Is this the way we want our judges to be selected?

This flawed judicial selection process has consequences far beyond not elevating the best and the brightest to the bench.

For example, in the last four years, three Supreme Court judges in Brooklyn have been charged with a felony; two of them have been convicted, and trial on the other is pending.

Another Supreme Court judge, this one from Queens, has been recommended for removal for improper judicial conduct.

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[1]Of the votes that could have been cast for Surrogate or other judge, only 61% were cast. That's roughly a 40% fall off.

And a number of other Supreme Court judges have been disciplined for improper behavior by the State Commission for Judicial Conduct

And recently, to put the icing on the cake, Federal District Judge John Gleeson declared unconstitutional the judicial convention system I just described. He ruled that given the way convention delegates are selected, it was virtually impossible for a candidate not supported by the party establishment to be nominated by the convention. Hence the system was unconstitutional. He went on to rule that until and unless that defect was solved Supreme Court justices had to be selected in open primaries.

C. *The Solution*

Ladies and gentlemen, there is a judicial selection crisis in this State. The system has not only been found unconstitutional, but it is producing candidates who are clearly not the most highly qualified. What should be done?

Ideally I believe, as does the Mayor, that we should have a merit selection system where judges would be appointed by the chief executive, following nomination of a limited number of candidates to the executive by an independent panel. This is the way Mayor Bloomberg appoints judges to the criminal and family court. An independent panel, of which he appoints a minority of members, recommends three candidates for every vacancy, from which he selects one. This judicial selection method, which has been used by mayors going back to Mayor Koch, has served the city well. A similar method is used in selecting our judges to the court of appeals, the state's highest court.

But to effect such a change for our Supreme Court justices requires a constitutional amendment. Not only will this take at least three years to accomplish but it is far from certain that the legislature would adopt a merit selection amendment.

So we are faced with some very stark choices.

1. We can hold out for merit selection (which may never come).

2. In the meantime:

    a. Judges will be selected in primaries if the 2nd Circuit affirms Judge Gleeson.

    b. And if his decision is reversed, we will be stuck with selecting judges by the flawed system I described a few minutes ago.

3. The alternative is to fix the flawed judicial convention system. The Mayor and I vote for this latter solution.

Let me tell you why.

Imagine a judicial primary in this City. Will you vote for Candidate A because she says she will be fairer than her opponent? Will Candidate B be able to raise more money than Candidate A and by his television ads explain why he would be a better judge? Certainly I hope that in his efforts to garner lots of votes his ads won't say he will always decide for tenants, or promise that he will be a "lock them up" judge. The independence and fairness of our judiciary depends on judges approaching each case with an open mind; campaign promises to the contrary undermine that fundamental principle. And who will contribute to these judicial campaigns? I suspect it will be the very lawyers who will later appear before the ultimately victorious judicial candidate. That certainly won't engender confidence that the judge will be fair or decide the case on the actual merits.

So if we are not going to have a merit selection appointment process, at least for some time, and if primaries are not the answer, the only other alternative that I see is to correct the flaws in the judicial convention nominating system. And this must be done by solving two separate problems.

First we must ensure that the candidates nominated by the convention are those most highly qualified. We can do this by enacting a law requiring an independent judicial qualification committee to tell the convention who the three most qualified candidates are for each vacancy.

Second, we must deal with the federal court's determination that the present convention system is unconstitutional because it is so difficult for candidates opposing the party to have his or her supporters elected as convention delegates. This problem too can be solved – and the solution is highly technical – if a law is passed reducing both the signature requirements to run for delegate and the number of delegates at the conventions themselves.

And of course, while this legislative effort is going on there is nothing – other than political inertia —to prevent the political parties from reforming themselves. They can pass internal rules creating independent screening panels and providing that they will only nominate for Supreme Court justice those found qualified by those panels. Unfortunately, recent experience offers ample proof why we should not wait for parties to correct the problem, and why we must move forward with a legislative solution, NOW.

We cannot afford to wait any longer to reform our judicial selection system. With every additional scandal the public loses more faith in our judiciary. More importantly, the rule of law on which we all rely depends on ensuring that all judges are unbiased and highly qualified. Moreover, there is long overdue momentum for real change in this area; we cannot waste this opportunity.

Consent Decrees

Let me now briefly identify two of the most difficult substantive legal issues with which my Office deals. And the first difficult issue I want to talk about is consent decrees, particularly since our moderator this morning, Professor Ross Sandler, in his book *Democracy by Decree*, has made such a major contribution to the scholarly debate on this issue.

When I became Corporation Counsel four years ago I was confronted with outstanding court orders that, among other things:

- Specified the required wattage of light bulbs in prison cells;
- Mandated the amount of space between beds in prisons;
- Set out the kind of formula to be given to infants in homeless shelters; and
- Required certain special education personnel in the Department of Education to each be supplied with a photocopier, $150 for supplies, a filing cabinet and access to a phone line.

These were court orders, not the operational decisions one would expect a commissioner or mayor to make. Violation of these orders – such as not supplying a file cabinet, or having 40 watt rather than 75 watt bulbs in a prison cell – would result in potential contempt of court.

Each of these orders trace their origin to court orders, usually consent decrees, stemming back to the late 1970s or early 1980s when litigations were settled that alleged, sometimes accurately, that the city had allowed prison conditions to become intolerable, or had not provided adequate shelter for the homeless, or had violated federal law relating to special education.

I told this audience four years ago that I would do my best to prevent the city from being subject to court orders like this in the future.

The issue – and it is of major societal significance – is what the approach should be when the government is accused, sometimes correctly, of this kind of misconduct. We want to bring improper governmental conduct to a halt, but at the same time we don't want to tie the hands of future mayors or commissioners, and certainly don't want to allow the courts, rather than the commissioners, to make day to day operational decisions involving a particular agency.

Let me briefly identify what we have done to deal with this problem.

At the outset let me note that we have done everything possible to prevent lawsuits like those I just described from happening. The Mayor and the commissioners try mightily to meet their legal obligations. And it is my job, when I learn of the potential of a lawsuit, to try to help solve the problem – if it truly exists – to make litigation unnecessary. That does not mean that every time we hear a complaint from a good government or advocate group we capitulate. We by no means agree to every demand a potential plaintiff makes. And when we are sued, and believe we should prevail, we aggressively defend our clients.

But unfortunately there are times when the City cannot resolve suits, and has done something wrong, and we have no choice but to enter into some kind of agreement to resolve the dispute. And when that happens, we must insist that the litigation be ended by an agreement that is limited in both time and substantive detail. We simply cannot allow agreements to control in virtual perpetuity what future mayors and commissioners must do-- some decrees we face today were entered into during the Beame Administration. Nor can we allow the agreements to result in the courts micro-managing the agency or posing a threat of contempt for virtually every arguable agency mistake.

I want to discuss one recent settlement that highlights how we can avoid these problems.

A 2002 class action complaint alleged that the City had not taken sufficient steps to prevent violence in the City prisons. Specific incidents of violence were pointed to and the complaint requested wholesale injunctive relief mandating what the city should do to prevent such action in the future.

We settled this case about one month ago, shortly before trial was scheduled to begin. Rather than entering into a consent decree that would allow the court to continue to oversee how the City was controlling violence in the prisons, we entered into a contract with the plaintiffs. We promised to take certain action, such as installing, over time, more video cameras in the prisons, to deter violence. But if we don't meet our promise (and we certainly expect we will) we will not be faced with the possibility of endless litigation that too many consent decrees have spawned. Instead, the plaintiffs agreed that their enforcement remedy, in the event they allege we did not meet our promises, would be limited to a new breach of contract suit in state court. And in addition, rather than being open ended, the contract specifies that the city's obligation ends in 2009, the end of Mayor Bloomberg's term. Thus this agreement will not bind future mayors.

I think this model offers a constructive lesson for settlements of cases like this in the future.

At the same time that we are trying not to enter into, or at least to limit, consent decrees we have also moving to end those that are still in existence. For example, we have made major progress in reducing the number of obligations imposed on the City under the 1978 prison condition decree I mentioned earlier. We hope to bring that case to an end before the end of this year. And we are also moving to end other cases that resulted in these kinds of decrees, including the homeless and special education cases referred to previously.

Four years in government have taught me that government does not always do things correctly. And when the government stumbles, as it inevitably will, litigation is frequently – although it does not always have to be – the result. The challenge that continues to be with us is how to bring the improper conduct to a halt while at the same time being sure not to tie the hands of government in the future. This is a very difficult issue on which we must all continue to focus.

Torts

While the Corporation Counsel's Office faces many challenges in addition to consent decrees, time allows me to mention only one other, and that is our tort litigation. When I spoke here four years ago city tort payouts for the preceding fiscal year had totaled $556 million, and we had 48,000 pending tort cases. If we could cut that tort payout in half, we could pay the salaries of 8,500 firefighters. And if we could reduce our pending cases, people entitled to payment would receive their monies more quickly, and my lawyers could focus their efforts on defending the cases that could not – or should not – be settled.

I am pleased to report that, primarily as a result of a different approach to tort litigation – where we settle meritorious cases promptly – for the fiscal year ending June 30, 2005 our pending case load has decreased almost 30%, to 33,000 cases, since I was here four years ago. Let me emphasize this does not mean that we settle any case, or pay whatever the plaintiff demands. Quite the contrary. This is seen by the fact that while our pending case load has decreased, so have our payouts. Thus, over this same four year period (excluding the fiscal year that included 9/11) our tort payments declined 12% to $489 million. While this still a huge amount of money, and far too many pending cases, I think we are on the right track.

These numbers would be even smaller if the State Legislature would enact some of our proposals. Let me mention one in particular, that we call the prevention of double dipping. Assume that an employee not covered by workers compensation is injured on the job and is no longer able to work. Let's assume he sues his employer and recovers $1 million for future lost wages. Assume he has a disability pension that will pay him $750,000 in pension payments. As the law stands now, if the employer is in the private sector the $1 million the employee recovers from the employer would have deducted from it the $750,000 in disability payments. The employee's net recovery would be $1 million, the amount of his future lost wages. But if the employer is a public sector employer there is no deduction for his or her pension and the employee, who lost $1 million, would walk away with $1,750,000, three-quarters of a million dollars more than he would have received if he had not been injured. This makes no sense and New York City, along with over 1200 other government entities, is pressing the Legislature to change the law. This change, in and of itself, would save New York City over $30 million a year in tort payouts.

But there is some good news in the legislative area, more particularly on the City Council level. Two years ago the so-called slip and fall law was altered so that the City is no longer liable when someone falls on a sidewalk; instead, except in cases of owner occupied 1, 2 and 3 family homes, the adjoining landowner is responsible. The result is that sidewalk cases filed against the City have plummeted and we expect that when the full effect of the law is seen in a few years, the law will result in an annual City saving of $40 million.

We have over 200 lawyers in our Tort Division defending the City in the different kinds of tort cases brought against us. It is an enormous challenge.

Conclusion

I have touched on just a few of the many challenges my Office faces. Others include our litigation efforts to halt the flow of illegal guns into New York, our on-going efforts to confine to particular locations so called adult use (i.e. peep shows, etc.) establishments, the various environmental cases in which we are involved, and the on-going issues stemming from the TWU strike of the subways last December.

These challenges, and scores of others I could mention, is what makes the job of serving as Corporation Counsel of the City of New York the greatest job any lawyer in this City can have.

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