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Speeches

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LEGAL ISSUES AFFECTING NEW YORK CITY: THE JUDICIAL SELECTION CRISIS, EMINENT DOMAIN, TORT LITIGATION AND MUCH MORE: HOW SHOULD THE CHALLENGES BE RESOLVED?

SPEECH GIVEN BY MICHAEL A. CARDOZO AT THE WILLIAM B. SANDERS LAW AND PUBLIC POLICY LUNCHEON FORUM FOR ALBANY LAW SCHOOL ON APRIL 20, 2006

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Introduction

I am particularly pleased to have been asked to speak here today because Albany Law School is playing such an important role in what I do. While I admit that my law school ties start with a school 60 blocks to the North of where we are today, I know first hand the important role this Law School, its alumni and its professors are playing in the public policy and legal debates that I deal with every day. In my role as Corporation Counsel of New York City, where I lead an office of 650 attorneys, I am constantly dealing with issues whose most knowledgeable advocates are frequently professors and graduates of this Law School.

Today, I would like to discuss with you some of the many challenging legal issues faced by New York City, and to offer my perspective on how some of those challenges should best be resolved.

Eminent Domain

I would like to start off with a topic that, had I raised the subject before last June, it would probably have sent most of you heading for the exits. The subject is eminent domain. But now that you know the subject please don't leave. Because whether you are a corporate lawyer or a litigator, a legislator or even a lapsed lawyer, there is today virtually no public policy issue facing New York as important as the question of the circumstances under which it should be permissible for the government to condemn private property for the purposes of economic development.

For those of you who may not be aware of the controversy let me briefly highlight it. We all learned in law school – be the Albany Law School or even Columbia – that government cannot take a person's private property unless it is for a public purpose, and unless the government justly compensates the property owner. Using the power of eminent domain, New York State and its local governments have condemned land for hundreds of years for all sorts of public purposes, ranging from the building of the Erie Canal, railroads, government buildings, schools, parks and, as the Court of Appeals recently confirmed, water tunnels. Of course, as a practical matter the government usually tries to buy the land from the property owner, not condemn it, but the possibility of the government acquiring the property by eminent domain to further a public purpose is always present.

Most of us read in law school the famous case of Berman v Parker, a unanimous 1954 Supreme Court decision affirming that economic development was a valid public purpose justifying the exercise of eminent domain. In these situations the government, rather than condemning the land for a school or a public park or some other traditional public purpose, identifies a particular area as deteriorated – the technical word is "blight." Sometimes the government partners with private developers to eliminate the blight and develop the land for housing, theaters or commercial uses. If a particular

property owner within the area refuses to sell his or her land to the developer, the government may acquire it through eminent domain. It was this use of eminent domain that allowed for the creation of Lincoln Center, MetroTech in Brooklyn, and more recently the rebirth of Times Square.

But the power of eminent domain is today under attack. Ladies and gentlemen: If we are not careful, the state and federal governments will pass legislation that will remove a crucial tool of government power, and harm New Yorkers by preventing the development of future Lincoln Centers and Times Squares. How did this crisis come about?

Last June, the Supreme Court, in a case called Kelo v City of New London, upheld by a 5-4 vote the power of the City of New London, Connecticut to condemn private property for an economic development project. By one reading of the law, which is found in Justice Stevens' majority opinion, there was nothing new about the ruling. The Court was simply affirming that the Due Process clause of the Fifth Amendment was not violated if a state condemned property for economic development purposes. After all, Justice Stevens emphasized, the boundaries of an acceptable public use are best determined by state and local governments, and each state was free to limit its eminent domain power, just as New York has done.

But it was Justice O'Connor's dissent that has created nation-wide alarm and misunderstanding. She wrote that as a result of the Court's decision, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton." The public outcry in the wake of this dissent has been nothing short of hysterical. Hundreds of bills that would severely restrict the government's power of eminent domain have been introduced in over 40 state legislatures, at least 17 of them here in New York. Equally disturbing, the United States House of Representatives actually passed a bill that would deny federal economic development funds to a State if the state or a local government within the state exercised the power of eminent domain for economic development. And while that bill is awaiting Senate action, a federal appropriations bill for this fiscal year already prohibits federal funding for any economic development project that involves the use of eminent domain.

Let's take a step back and look at what is going on. Most of you, I am sure, are not too young to remember what Times Square looked like before its transformation in the late 1980s; the great White Way used to be the porno capital of the state, if not the world. In addition, the few of you in this room as old as I am may remember what the west 60s in Manhattan looked like in the 1940s and 50s before Lincoln Center was built, and the surrounding neighborhood became one of the most vibrant in Manhattan. The examples could go on and on. More recently, economic development projects in New York have also included the construction by private developers of thousands of units of vitally-needed low and middle income housing.

What happened in Lincoln Center, Times Square, and scores of other projects is that the government identified the area as blighted, and entered into agreements with private developers who agreed to fix up the property, build on it for various uses, and take on the economic risks. In turn the government condemned, where necessary, the property and fully compensated the property owner. Had this power of condemnation not existed, hold-out owners in blighted areas could block all progress, and the entire area would have continued to remain in its blighted state. Developers have neither the resources nor the patience to wait forever, and by exalting romantic notions of ownership over the needs of an entire community, nothing happens.

In New York, and most other states, eminent domain can only be exercised for economic development purposes if several important restrictions are overcome. Crucially, there must be a finding that the affected area is "blighted," meaning, for example, that it contains unsafe structures, abandoned properties or is environmentally devastated. Acquisition by eminent domain also involves enormous procedural and due process safeguards, to be sure that the affected property owner has notice of the potential condemnation, an opportunity to challenge the blight finding, and of course, to be sure he or she will receive just compensation in the event of condemnation.

But legislation passed by the House of Representatives would end the kind of economic development I just described. One would think, regardless of your views on eminent domain, that this is a state, not a federal issue. Eminent domain and decisions about land use have always been a crucial element of state sovereignty, most appropriately exercised at the state and local levels. But, at least in the House, that is not the view. Indeed there are some in Congress who think that states should be prohibited from using eminent domain for economic development, unless that economic development involves the building of a sports stadium. Now as a former outside counsel to a number of sports leagues I am all for new stadiums. But it does bother me that the United States government may be telling states that they can use eminent domain to build sports arenas, but cannot use that power to build low or middle income housing, or a Lincoln Center complex, or an office center, each of which would replace a run down and blighted neighborhood.

Even if we succeed in avoiding the draconian threats posed by potential federal legislation we must be sure that eminent domain of this type is not halted by the State Legislature. At present there are a number of bills pending in Albany that

would unduly restrict, if not prohibit, eminent domain for economic development purposes. It may be that some procedural improvements can be made in the eminent domain law in this State. But the bills to which I just referred cannot be allowed to become law. If they do, any hope of cleaning up the blighted neighborhoods in our urban areas will die, and with it the prospects of rebuilding those areas into multi use communities where small businesses and middle income housing can thrive.

Three weeks ago light, rather than heat, was shown on the controversy when a State Bar Association Committee headed by your own Patty Salkin issued a very constructive report. "Slow down," that Committee urged. Economic development, and the use of eminent domain that must necessarily go with it, can be a good thing. The Committee called for a wide-ranging study Committee to be appointed to look at how economic development has operated. The findings of that study Committee should then be considered before decisions on what changes, if any, are needed in New York's eminent domain law.

Whether you represent individual land-owners, large real estate developers, or neither, I hope you recognize that this is an issue on which we should be sure the right steps are taken by the Legislature. We should not allow the hysteria of the moment to force ill-considered action. The basic economic development of our State is at stake. I ask you to lend your voices to that of Professor Salkin and urge your state and federal legislators to step back, study the real meaning of Kelo, and determine whether any changes in the law are actually needed to further protect property owners.

Torts

Let me now move to a completely different challenge facing New York City, the almost half a billion dollars New York City pays out each year in tort settlements and judgments. If we could cut that number in half, we would have enough money to pay the salaries of 8,500 firefighters or police officers. We haven't succeeded to that extent, although in the last few years that number has decreased 12%; from $556 million in 2001 to $489 million last year.

These numbers would be even smaller if the State Legislature would enact some of our tort reform proposals, such as modifying the rules on joint and several liabilities, limiting damages for pain and suffering or, ideally, providing that cases against the City, like tort cases against the State, should be conducted in non-jury trials before the court of claims.

But the difficulty of obtaining any reform in this area in Albany is highlighted by our thus far unsuccessful efforts to prevent what we call double dipping. Assume that an employee not covered by workers compensation is injured on the job and is no longer able to work. Assume further that this worker 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 1,200 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 thus far we have been unable to get the Legislature to adopt even this modest proposal, let alone the more far reaching ones I mentioned previously.

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.

Time prevents me from mentioning the numerous other legal challenges New York city faces, which range from our efforts to stop the flow of illegal guns into New York City, the law suits surrounding ground zero, the first amendment challenges posed by subway bag searches and the video-taping of political demonstrations, and the steps the City should take to avoid onerous consent decrees that result in the courts micro-managing city agencies.

These challenges, and those posed by the eminent domain and tort problems I have discussed, have a common theme; the quality of the judges who decide our cases. The compensation to award people whose property has been

condemned, whether to set aside a multi-million dollar jury verdict in a sympathetic case, and how to apply the first amendment in the post 9/11 era are all decisions that in the end are made by judges. It is this issue – how we select New York state Supreme Court justices – to which I now turn.

Judicial Selection

A. *The Problem*

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 you live in New York City, 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, graduates of one of the best law schools in the State.

It boils down to this: Will you please stand up – please do stand – 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]

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.

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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.

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 a trial on the other is pending.

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

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 to 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. Whether you are a litigator or a transactional lawyer, or even don't practice at all, this is a situation that should alarm you. The rule of law is what this country is based on. If our judiciary is not composed of the best and the brightest the rule of law is threatened. What should be done?

Ideally I believe, as does Mayor Michael R. Bloomberg, 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 former New York City Mayor Ed 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 also 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 to it 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.

Conclusion

New York City faces literally hundreds of legal challenges, only some of which I mentioned today. And solving them turns, in large measure, on having quality people serve on our judiciary.

The challenges I have mentioned, and scores of others I did not, 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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