

For Immediate Release

CORPORATION COUNSEL SPEECH TO THE AMERICAN JEWISH CONGRESS

Corporation Counsel Michael Cardozo on Judicial Reform during a ceremony honoring Sandy Litvack, recipient of the Louis Brandeis Award

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New York, November 9, 2005 -- It is my pleasure to speak to such a distinguished audience at an event sponsored by such a special organization as the American Jewish Congress. I am particularly pleased to join in honoring Sandy Litvack, who is such a worthy recipient of the Louis Brandeis Award. I first met Sandy in the early 1980s, shortly after he left the Justice Department. The meeting was fraught with danger for me and opportunity for Sandy. I had told an important client that a particular action it proposed taking was illegal. The client, as clients do from time to time, decided the problem was not its proposed action but rather its lawyer. The solution was obvious.

So Sandy, with heralded credentials as the former head of the Antitrust Division, was consulted. He could have taken the opportunistic approach, could have counseled the action was lawful, or at least not clearly unlawful, and snared a major client. Instead, after having the problem explained to him Sandy firmly told the client that my advice was absolutely correct and counseled him to follow it. It was then, almost 25 years ago, that I realized Sandy Litvack was a lawyer of not only brilliance -- after all he agreed with my legal analysis -- but integrity. Ever since, whether representing him personally or working with him while I represented Walt Disney in certain matters, through today, I have counted him as a special lawyer and a very good friend.

It is fitting that Sandy, who has shown such integrity and dedication to public service throughout his career, is being honored here today with an award named after Justice Louis Brandeis, another great public servant.

While not even senior citizens like Sandy and I were around when Justice Brandeis was nominated for the Supreme Court in 1916, we all know that Brandeis faced a heated confirmation battle. The importance of the rule of law, integrity and quality were almost drowned out by the vicious anti-Semitism that surrounded that nomination. Today, the importance of the quality and integrity of our judges is again an issue that should be of vital concern to everyone in this City, particularly lawyers. As Justice Brandeis wrote, "in a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously."¹ Having served as the Corporation Counsel of New York City for almost four years, I can tell you without fear of contradiction that without impartial judges of outstanding quality the rule of law is in danger of not being observed scrupulously.

While my subject is judicial selection, I do not intend to talk about the battle now being waged in Washington over the confirmation of Judge Alito. Nor am I referring to the selection of lower federal court judges before whom you may appear if a federal claim or diversity is involved. Rather, I want to discuss the method used to select judges in our State courts, a method that results in people assuming the bench on whose ability and integrity your every professional action depends.

Let me start with yesterday's election. I assume that you recognize the names Michael Bloomberg and Fernando Ferrer. I won't ask which candidate you voted for; although I will admit I was at a pretty raucous victory party last night. But how

¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis J., dissenting).

many of you can tell me the names of the supreme court candidates you voted for? And do you know that those candidates were selected not in a primary, but in a so-called judicial convention whose candidates you couldn't vote for and which was totally controlled by party leaders?

The situation in Brooklyn is particularly disturbing although the problems are city-wide. Nine of the Brooklyn civil and supreme court candidates on the ballot yesterday had been found not qualified by most major bar associations. Even worse is how some of the Brooklyn judicial candidates and their predecessors had been selected. A civil court candidate, for example, was nominated for the bench not because the bar associations had found him qualified -- he had been found unqualified -- but because he was supported by the new Brooklyn Democratic leader. Nevertheless he was elected because he faced no opponent. Another judicial candidate, this one for Surrogate, whom the bar associations did find qualified, also had no opponent. She will be the Surrogate because she won a Democratic primary in which less than 8% of all the registered voters in Brooklyn voted. Her predecessor had been removed from the bench because he had authorized the payment of \$8 million of fees to a friend. A second Brooklyn Surrogate will begin a 14-year term in a new judgeship that was created in a backroom deal made by the County Machine; he was not selected by the voters or an executive following a merit based appointment system.

The examples could go on and on. Even if judicial candidates are qualified, how are voters to intelligently choose between them? That issue aside, judges are too frequently selected for reasons having nothing to do with their abilities, but instead because they pay a tithe to the local political leader, or agree to hire someone as his or her law clerk. And we have read too often of corruption, of cases being decided on the basis of whom you know, and for whom you bought cigars.

Let me just emphasize as strongly as possible that I believe that most judges in this City -- elected and appointed, Surrogates and judges of the civil, supreme, family and criminal courts -- are highly dedicated and qualified jurists, committed to deciding cases as best they know how. However, there are unquestionably some who are not qualified to sit on the bench, and too many who were selected not because they had been found qualified by either the executive or the voters, but because of some shady backroom deal.

This undermines the rule of law upon which we all depend, and which Justice Brandeis so eloquently emphasized. The quality of the judges in this City is vitally important to all of us, particularly lawyers. Whether we are litigators or commercial lawyers, or practice tax or trusts and estate law, we assume that if a dispute arises the will or contract or tax law will be enforced in compliance with a body of law that an intelligent and impartial judge will apply. When the law is in danger of not being enforced on the merits the basic underpinnings of our society are threatened.

How can we fix this problem and improve the method of judicial selection? One model I suggest is the merit system by which the judges of New York City's family and criminal courts, and interim judges of the civil court, are selected. According to the State Constitution those judges are to be appointed by the Mayor. I know that merit is the sole criterion for appointment of these judges because four years ago Mayor Bloomberg issued an Executive Order that provides that he will appoint to the bench only one of the three people nominated as highly qualified by the independent Mayor's Advisory Committee on the Judiciary. Of the 19 members on that Committee, the Mayor appoints less than half.

I am confident that because of this selection system and the thorough review process engaged in by the Advisory Committee, the people the Mayor has appointed are highly qualified. And yesterday's election results confirm that this process of selecting criminal, interim civil and family court judges will continue for the next four years.

But Surrogates and Civil and Supreme Court justices, unlike the judges the Mayor appoints, are selected in a process that can hardly be described as merit-based. In my view, we should amend the State constitution so that all judges are appointed under a merit appointment system.

But constitutional amendments take time. There is, however, one thing that the Mayor and I believe can and should be done, right now -- establishing independent judicial qualification commissions. Such commissions should determine and report to the political parties and the public whether or not candidates running for judge are qualified to serve. Ideally the parties should agree not to nominate anyone not found qualified by the commissions. The existence of such commissions would promote public confidence and informed voter participation and would go a long way to preventing, as is too often the case now, unqualified candidates running to be a judge.

It is time for action. We can't wait for the creation of a perfect merit appointment system. We can't wait for another judge to be indicted for accepting a bribe, or removed from the bench for approving millions of dollars of fees to friends. The political parties in each borough should voluntarily create these commissions--IMMEDIATELY. If not, in January, the Mayor and I plan to make a major push in Albany to have this proposed reform, which has already been endorsed by

some legislators and Chief Judge Kaye's Commission to Promote Public Confidence in Judicial Elections, enacted into law.

I want to mention one other issue involving the courts that gives the Mayor and me, and I believe should give you, concern. That is the problem of delayed judicial decision making in this City. It is a problem that afflicts private litigants, and is a scourge on government litigants.

As you know New York City is frequently sued; in fact, it is sued on the average of 200 times a week. And while I will always advocate for my client, I must admit that on occasion some of those suits have merit. But while people have a right to sue the city, the city, and its taxpayers, have a right to a prompt decision. Let me give you one, of literally scores of examples, where the City has suffered enormous damage because of delay in decision making.

In the summer of 2002 a temporary restraining order was entered enjoining the enforcement of new zoning regulations that would have limited so-called adult use entertainment establishments -- porno shops -- to certain locations. The legal issue presented did not require a trial -- it was only one of law, not of fact -- and turned on whether those regulations violated the first amendment. Despite the passage of more than three years the case has still not been resolved. It took almost a year for the legal issue to be decided by the Supreme Court. It took the Appellate division almost another year to then decide the appeal. It will not be until later this month that the case will finally be argued in the Court of Appeals. In the meantime, the value of the neighborhoods in the areas where adult use establishments would be prohibited, assuming the regulations are constitutional, continues to deteriorate.

The plaintiffs certainly had a right to bring their case. But that does not mean that the case should languish. All parties, including the City, have a right to a prompt decision. I could cite example after example of this kind of delay but I don't want to be accused of another kind of delay, preventing you from returning to your offices.

Too often we simply accept these judicial delays, thinking there is nothing we can do. But we must take steps to reform the system and to impress upon judges the need to decide matters more promptly.

Please join the Mayor and me as we strive to improve our justice system -- to improve the method of selection of judges and to solve the problem of delay. Let us work together to make a difference, with Albany, with opinion leaders, and with the public. Together, let's build a coalition to strengthen the rule of law in our State and to make Justice Brandeis proud. Thank you.

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