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In Opposition to a Constitutional Convention**

Association of the Bar of the City of the New York
Yes or No in November? Discussing a Constitutional Convention for New York

March 22, 2017

Introduction

The Legal Aid Society appreciates the opportunity to address the members of the Task Force in these written comments. We have a grave responsibility to use the collective power of our voices as members of the bar to advise New Yorkers voting on the Constitutional Convention referendum in November. The Legal Aid Society is commencing its one-hundred and forty-second year serving New Yorkers this month. We are the largest provider of free legal services to low-income families and individuals in the nation, if not the world. Our criminal, juvenile justice and civil practices handle 300,000 individual cases, and we serve nearly two million individuals through law reform representation. Our Civil Practice consists of 450 attorneys, advocates, social workers and other staff serving New Yorkers with a combination of direct legal services, affirmative litigation, legislative and administrative advocacy. We have a breadth and depth of expertise in areas that are at the fault line of income inequality and social injustice including housing, immigration, income support, health, homelessness, LGBTQIA rights, consumer, tax, employment and family law.

Judge Kaye described the function of the constitution as being "to preserve a community's most basic values in the face of its transient choices."¹ Now, as much as any time in recent history, it is especially critical for New York State to stand firm for many of the basic values currently under attack from the Executive branch and Congress. Our State constitution is a sturdy foundation for these basic values. It contains provisions that go beyond what the U.S. Constitution protects -- in social welfare, education, labor and the environment² -- precisely those areas for which Washington is showing disdain. The

¹ Judith Kaye, "A Double Blessing: Our State and Federal Constitutions," 30 Pace L. Rev. 844, 846 (2010).

² See, e.g., N.Y. Const. art. XVII, § 1 (social welfare); art. XI (education); art I, § 17 (labor); art. XIV, § 1 (environmental preservation).

current assault on Legal Aid's clients -- immigrants, marginally housed, homeless and disabled individuals and families -- and even our fellow legal services organizations, is especially pronounced.

Despite our shared desire for many of the reforms advocated by convention proponents, we urge the Task Force to recommend voting "no" on a Constitutional Convention. *First*, there is too much at stake in this vote for Legal Aid's clients, millions of low-income New Yorkers, to take risks. *Second*, given the failure to enact delegate election process reform, achieving constitutional reform outside the Convention process is more realistic and presents the least risk to our clients. *Third*, we need to spend our collective energy to get needed reforms passed, while defending our existing hard-fought State rights and at the same time defend New Yorkers from policy changes being pushed in Washington.

We are very much committed to court system and ethics reforms, expanded educational opportunities, LGBTQIA rights and many of the other important reforms the pro convention advocates seek. Indeed, they impact our clients and our work every day. But still, we ask you to question whether pursuing those reforms in the convention process is worth the risk to the most vulnerable New Yorkers, especially at a time when their interests are specifically under a very real and imminent threat. For the most vulnerable New Yorkers, the risk-reward calculus counsels against lifting a constitutional shield against abject poverty, especially when there are other proven paths to reform when we work collectively for change.

1. Opening The State Constitution Puts Vulnerable New Yorkers at Risk

If a convention were held in 2019, any aspect of the current State Constitution would be subject to amendment or even wholesale replacement. In its current form, the State Constitution, in particular Article XVII, section 1, protects access to the safety net for millions of New Yorkers.³ Often prompted by the circumstances of the day -- the deinstitutionalization of the 70s and recessions of the 1980s that fueled homelessness, the roll-back of eligibility for federal benefits effectuated by welfare reform in the 1990s -- we have successfully used Article XVII to support the safety net. We have helped ensure the availability of shelter for homeless New Yorkers.⁴ We have secured State-funded health insurance for legal immigrants otherwise ineligible for federal health benefits.⁵ Moreover, the "right to welfare," as Professor Hershkoff calls it, continues to undergird eligibility for State-funded benefits, not only Medicaid, but state-funded Cash Assistance, which fills the gaps left by federal welfare reform, not only for lawfully present immigrants, but adults with disabilities enduring long waits before they are determined eligible for federal disability benefits, as well as persons who reach federal time limits without having found

³ For a full history of Article XVII, see generally the Statement of Professor Helen Hershkoff dated March 22, 2017 [hereinafter, "Hershkoff"].

⁴ See *McCain v. Koch*, 502 N.Y.S.2d 720, 730 (App. Div. 1986), rev'd in part on other grounds, 511 N.E.2d 62 (N.Y. 1987).

⁵ See, e.g., *Aliessa v. Novello*, 96 N.Y.2d 418 (2001) (excluding lawful immigrants from eligibility for state-funded Medicaid violates Art. XVII of the State Constitution).

wages that pay enough to support a family. Indeed, our lawyers' ability to use certain housing subsidies to avert eviction for clients is conditioned on their eligibility for benefits. Likewise, eligibility for subsidies that enable clients in shelter to move out also depends on benefits eligibility, including subsidies specially designed for households containing disabled household members and survivors of domestic violence.

Should delegates be elected to the Convention who want to weaken this safety net, or who are beholden to those who want to do so, what would this mean for the clients of The Legal Aid Society, and the many firms whose pro bono work is so indispensable to meeting their needs? Quite literally, it could mean disaster: the mushrooming of our already unacceptably high homeless population and adults and children living in the streets; our lawyers in Housing Court lacking remedies for preventing eviction and homelessness; loss of eligibility for subsidies that help families exit shelter; hunger, especially for New Yorkers who do not qualify for federally-funded public benefits like SNAP (namely, lawfully present immigrants); loss of work supports, such as essential child care services; and illness, leading to disability and even death, for those newly excluded from health insurance eligibility. Without a strong safety net in place, religious institutions, charitable organizations, foundations and philanthropists could be maxed out trying to fill the gaps.

Invoking these risks is a far cry from the "fear mongering" of which convention opponents have been accused. Not only is this disrespectful, it is completely erroneous. As Professor Hershkoff lays out in her statement, since 1938 when Article XVII was passed, both inside and outside the convention process there have been concentrated efforts to weaken Article XVII to strip away the rights of low-income New Yorkers.⁶ The threats are real. Moreover, "fear-mongering" also suggests that threats to Article XVII would have a lot of political currency with voters -- the power to invoke fear. We are making the opposite point. The interests of low-income people and other vulnerable constituencies have never been politically popular. If anything, we fear that the opportunity to gut Article XVII may actually be a selling point for certain voters.

2. Prudent Counsel Dictates Advising New Yorkers That Seeking Reform Outside the Convention Process is The Soundest Path

If we open the Constitution to achieve reform, we run the risk that existing fundamental rights will be weakened or lost. In other words, a Convention necessitates that delegates execute an excellent offense and a perfect defense. If the delegates we elect fail on the offense, it would be disappointing, but not devastating. However, the delegates' duty is even greater when it comes to defending against the encroachment on fundamental rights. If they fail, it would literally lead to devastation, not just disappointment. Especially given the flawed delegate election process, none of us, including the members of the Task Force, can offer New Yorkers security that delegates will be elected who can carry out this challenging mandate. Reform via the legislature is the more prudent path.

⁶ See Hershkoff at 7-13.

a. Failure to Implement Election Reforms Means More Risk to Fundamental Rights in the Convention Process

The flawed delegate election process increases the risk that fundamental rights would be limited in the Convention process. The Task Force found in its February 2016 report that a range of Election Law reforms are needed before a 2018 delegate election, and ideally before a 2017 convention vote. These reforms are needed to meet the goal, among others, of helping to "assure that the election of delegates is an open process, by removing additional requirements that could needlessly impede individuals without substantial party backing who seek to run for delegate."⁷ (Indeed, a vocal and powerful proponent of the convention, Evan Davis, has gone so far as to sue the New York City and State Boards of Election, complaining that some of their rules prevent him from running as a credible independent candidate.⁸) As you know, the reforms recommended by the Task Force include:

- eliminating slate voting for at-large delegates (instead of voting for 15 individual at-large delegates, voters are required to pick groups of 15 put forth by each party);⁹
- reducing the number of petition signatures needed to run, for party-affiliated and independent district delegates and at-large delegates (for example, under current rules, independent candidates are required to collect 3,000 signatures and at-large candidates are required to collect 15,000, unless they are subject to alternative minimums);¹⁰
- eliminating the requirement that requires at-large delegates to collect 100 signatures in half of the State's congressional districts;¹¹
- suspending the requirement that persons circulating petitions reside in the district in which the candidate is running;¹²
- allowing voters to sign the petition for more than three candidates;¹³
- issuing a voter guide on the delegate election process and ballot questions.¹⁴

⁷ "Report on Delegate Selection Procedures" at 4, New York City Bar Task Force on the New York State Constitutional Convention, accessible at <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf> [hereinafter, "Task Force Delegate Selection Report"].

⁸ *Davis v. Kosinski*, 16-cv-1750, NYLJ 1202771919818, at *1 (SDNY, Decided November 4, 2016), appeal pending, 16-3822 (2d Cir. filed November 9, 2016).

⁹ See Task Force Delegate Selection Report at 3-4.

¹⁰ *Id.* at 4; Elec. Law § 6-142(2).

¹¹ See Task Force Delegate Selection Report at 4; Elec. Law § 6-142(1).

¹² See Task Force Delegate Selection Report at 4.

¹³ *Id.*

¹⁴ *Id.* at 5.

To date, we are not aware of any of the delegate election process reforms recommended by the Task Force having been implemented via amendments to the State Election Law, and did not hear panelists on March 15 speak of any plan to see those recommendations implemented in time for the delegate election that would occur in November 2018. (Mr. Davis's appeal is pending in the Second Circuit.) Notably, the 1997 Task Force cited the failure to pass these and other reforms as a reason for choosing to recommend a no vote given what was at stake, finding that the failure to adopt critical reforms created "a fundamental impediment to the electorate's ability to elect a fairly representative body of delegates."¹⁵ The critical role of the delegate election process is no less apt to the decision of whether to vote for a convention now, and may be even more important today.

b. There is Much Uncertainty in Today's Political Climate

Whether or not election reforms are passed, if we are to risk sweeping away critical rights in a Constitutional Convention we should be supremely confident of our ability to predict outcomes. But just how confident can we be? The outcome of the recent Presidential election illustrates the fallibility of many more scientific predictions than the assumptions on which the pro constitutional convention advocates appear to rest their faith that the appropriate delegate body would be elected. The inherent uncertainty represented in the delegate election process needs to be considered.

c. Passing Amendments Through The Legislature is a Better Route To Reform

Finally, where, as here, history has proven that critical reforms can be achieved via less risky routes, we are duty bound to follow them. Working to pass needed constitutional reforms through the legislature is the better route to reform.

First, legislative amendment is a proven route. There have been over 200 amendments passed through the legislative process, including measures that directly impinge on entrenched interests like many of the ethics reforms convention proponents seek. For example, in 2014 voters approved the adoption of an amendment that calls for a process of re-drawing the state and congressional districts.¹⁶ In contrast, no amendments have been passed as the result of a convention since 1938.

Second, we know the existing legislature. The current Senate is relatively balanced, consisting of 31 Republicans and 32 Democrats, eight of whom often vote with the Republicans as part of the Independent Democratic Council, and another who caucuses with the Republicans. Indeed, given this relative balance, reaching the majority in each

¹⁵ "Report of the Task Force on the New York State Constitution," 23 The Record of the Association of the Bar of the City of New York at 534 (1997). The 1997 Task Force also found that the system "dilutes minority representation and favors political incumbents. A convention organized under current delegate selection procedures would likely be controlled by the same forces that now control the political status quo." Id. at 535.

¹⁶ See NY Const. Art 3 §§ 4 & 5-b, 2012 Sess. Law News of N.Y. Ch 17 (S. 6736) (McKinney's), subsequently approved November 4, 2014.

house needed to pass an amendment to the State Constitution outside the convention process during two successive terms although daunting, would appear to be a much more realistic goal than the uncertainty involved in electing delegates who are both willing to pass a slate of progressive reforms and not interested in the retrenchment of exiting provisions. Moreover, for any given amendment or legislation we seek, we know or can ascertain who is likely in favor or opposed and can target our energies where they are needed.

Third, we at The Legal Aid Society know that reforms can be achieved via legislation. For example, we have had recent success in getting legislation strengthening due process rights for welfare recipients passed by both houses (including a 57-1 vote in the Senate), and signed by the Governor in December 2015.¹⁷ The law does a number of things, including the replacement of a "mandatory minimum" penalty scheme under which many clients were subject to the loss of benefits for a minimum of six months, with penalties that endure only so long as the client remains out of compliance, thus incentivizing work and independence. Many told advocates of this reform that it could not be done based on the conventional wisdom of State and national politics. While the outcome did require a multi-year campaign and a coalition of allies, including the New York City Bar, religious leaders and other advocacy organizations, such reforms can be enacted when we work together.

Accordingly, where, as here, there is another path for implementing reforms, where less is at stake, we must counsel New Yorkers, as we would our clients, that however exciting the prospect of a delegate election and Convention may be, the inherent uncertainties of the political process mean that we cannot effectively work to ensure the outcome of reform and at the same time adequately protect against the risks to the rights we already enjoy.

3. We Need to Work Together To Achieve Our Goals and Protect The Interests of All New Yorkers

Although we have heard pro convention advocates urge voters not to trust Albany's leaders who have spoken out against the convention, we likewise have reason to question whether the proponents of the convention to date are taking into account the interests of low-income and even middle class New Yorkers.

We can all see the threats from Washington:

- the "Muslim Ban" issued via Executive Order which barred entire categories of lawful non-citizens;
- a draft Executive Order that would put many lawful immigrants at risk of removal for simply receiving any means tested benefit;

¹⁷ See Chapter 562 L. 2015 (12/18/15). See also Chapter 459 L. 2016 (11/25/16) (giving sentencing court judges the authority to grant poor persons' relief for purposes of an appeal; passed Senate 62-0).

- the push to repeal of the Affordable Care Act and its impact on the availability of Medicaid and access to critically needed medical services for low and middle class in New York State;
- the proposal to cut federal funds for housing, which we estimate would put 22,000 low income families in jeopardy of losing rental assistance across New York State, 38 percent of which include elderly individuals; 22 percent including persons with disabilities and 33 percent including households with children; and
- the elimination of protections for transgender youth.

In addition, the President has proposed eliminating all funding for legal services, which would impact the availability of lawyers to address many of the consequences of the above.

We need to spend the wealth of our collective resources using the tools we have, including the State constitution, to protect New Yorkers from these threats. We have a track record of success serving the needs of under-represented clients, including homeless adults and children; LGBTQIA youth, low income immigrants, and many New Yorkers on the precipice of homelessness and of course, in other practice areas, youth in foster care and criminal defendants. The private bar has worked alongside us for many of our victories on behalf of these clients. Now is not the time for a convention. We can succeed without it. Let us use the energy for progressive reform following the 2016 election to finally accomplish important reforms here at home, and at the same time, defend the most vulnerable members of society from the threats they face.

Conclusion

For all these reasons, we urge the Task Force to recommend a "no" vote on whether to hold a Constitutional Convention. New Yorkers simply cannot afford to open our Constitution to the uncertain vagaries of politics. We have other avenues of reform that we can use to achieve our goals, and our resources continue to be needed to defend our clients and the State Constitution that protects them.