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Making Sense of the Bronx ‘Switcheroo’



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The “switcheroo” between Bronx District Attorney Robert Johnson and former Appellate Division Associate Justice Darcel D. Clark no doubt has many people—lawyers included—scratching their heads. Putting aside the political aspects of these events, an explanation is in order.

Running for Judge. The first piece of the puzzle is a statutory provision that governs how New York Supreme Court justices are nominated.¹ Unlike almost every other elective office in New York State, there are no primaries for this position. Instead, as has been the law since 1911, the established political parties select their candidates for the November ballot at judicial conventions. A candidate for the Supreme Court also has the option of running in the general

¹ N.Y. Election Law §6-124.

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election as an “independent” without the support of any party. Given the practical reality that only Democrats or Republicans win in November, however, the independent route is, for all intents and purposes, a dead end.²

The judicial convention, then, is where all the action is. Each of the parties in all 11 judicial districts hold a convention in late September,³ consisting of judicial delegates who are elected in party primaries a few weeks earlier. These delegates, routinely unopposed, are usually party stalwarts, often endorsed by the local political leaders. Thus, a convention may have hundreds of delegates, many of whom are connected in some fashion to the party leaders of the counties involved.

This convention process was challenged a few years back as unreflective of voters enrolled in the various parties, and overly dominated by “party bosses.” The U.S. District Court in the Eastern District ruled it unconstitutional;⁴ the U.S. Court of Appeals for the Second Circuit affirmed.⁵ The U.S. Supreme Court unanimously reversed, holding that New York’s law governing the Supreme Court Justice nomination procedure was not an unconstitutional process.⁶

Once District Attorney Johnson had made up his mind to become a Supreme Court justice, he had to gather support of a majority of the judicial delegates at the Bronx Democratic Party judicial convention.⁷ In that he had the support of various party leaders, his campaign proved rather effortless, and he won the nomination unanimously.⁸

Dual Office Prohibition. The catch here was that Johnson had, just a few weeks earlier, won the Democratic Party nomination for Bronx District Attorney.⁹ Of course, as he undoubtedly knew, he couldn’t be the nominee for both public offices. The New York state constitution prohibits,

² In one notable election in New York County in 1982, the now-defunct Liberal Party elected two of its members to the Supreme Court, Harold Baer Jr. and Rose Rubin. See <http://www.nytimes.com/1982/11/04/nyregion/manhattan-liberals-win-supreme-court-race.html>.

³ N.Y. Election Law §6-158(5).

⁴ *New York State Board of Elections v. Lopez-Torres*, 411 F.Supp.2d. 212 (E.D.N.Y. 2006).

⁵ 462 F.3d 161 (2d Cir. 2006).

⁶ 552 U.S. 196 (2008). The Brennan Center litigated on behalf of the challengers to the law; co-author Myrna Perez had no role. The Attorney General of the State of New York defended the statute, and co-author Jerry Goldfeder was Special Counsel in that office during the Supreme Court appeal; he had no role. Goldfeder’s firm, Stroock & Stroock & Lavan, defended the statute; this was prior to Goldfeder joining the firm.

⁷ In Bronx County, as in so many other downstate areas, winning the Democratic Party nomination is tantamount to winning election in November. In certain suburban and upstate regions of the state, winning the Republican nomination likewise means victory at the general election.

⁸ <http://www.newyorklawjournal.com/id=1202738143308/Clark-Nominated-to-Be-Bronx-DA-as-Johnson-Seeks-Judiciary>.

⁹ Robert Johnson was also the District Attorney candidate of the Republican and Conservative Parties.

with minor exceptions, a Supreme Court justice from holding another public office.¹⁰ Indeed, various municipal, county and town charters likewise bar holding more than one incompatible office, and the common law has developed to such an extent that the dual office prohibition is generally “too plain for argument.” Thus, becoming a candidate for Supreme Court rendered Johnson unable to run for District Attorney because, if elected to the court, he would be ineligible to serve as D.A. In the parlance of the Election Law, Johnson’s nomination by the judicial convention “disqualified” him from being the District Attorney nominee.¹¹

Filling the Vacancy for the D.A. Nomination. The next piece in understanding the Johnson-Clark maneuver is a provision in the Election Law that governs vacancies in nominations. According to the statute, when there is a vacancy in a nomination that has been made at a primary election, as was the case here, that vacancy is filled pursuant to the rules of the political party.¹² Because Johnson had been nominated for District Attorney by the Democratic, Republican and Conservative parties, each party’s respective rules govern how it would replace him on the Nov. 3 general election ballot. Of course, in that the Democratic nomination is tantamount to election in the Bronx, only its procedures really mattered. The other parties, which had been behind Johnson, are jointly fielding their own candidate, Robert D. Siano.

The Rules of the Democratic Party of Bronx County provide that its Executive Committee selects a replacement nominee under these circumstances.¹³ To the uninitiated, this means the group of local Assembly District Leaders and officers of its County Committee—in short, the party leaders throughout the borough.

On the same night Robert Johnson secured the nomination at the judicial delegate convention, the county’s Democratic Party leaders, many of whom were judicial delegates, donned their Executive Committee hats and convened to choose a new D.A. nominee. At this meeting, Appellate Division Associate Justice Darcel Clark was unanimously selected as the party’s candidate.¹⁴

The Next Vacancy. Once Clark became a nominee for District Attorney, the state constitution requires that she had to immediately resign her position from the court¹⁵—creating a vacancy

¹⁰ N.Y. Const. Art. VI, §20(b).

¹¹ N.Y. Election Law §6-148 et seq.

¹² N.Y. Election Law §6-148(3).

¹³ Party rules adopted by county political organizations are filed with the New York State Board of Elections, and can be obtained from the agency by a simple request.

¹⁴ <http://www.nytimes.com/2015/09/25/nyregion/bronx-district-attorney-is-tapped-for-bench-judge-is-tapped-for-his-job.html>.

¹⁵ N.Y. Const. Art. VI, §20(b).

on the Appellate Division, First Department. For this, only one person fills the vacancy—the governor.¹⁶

Not Unprecedented. The Johnson-Clark situation is not altogether unique. From time to time, a political party nominates a “placeholder” candidate for a major office, only to have that candidate run for Supreme Court Justice to make way for their new choice. In 2013, for example, the Working Families Party nominated attorney Kevin Finnegan for New York City mayor—in large part because it had not reached a consensus as to the Democratic Party’s major candidates. After Bill de Blasio won the Democratic primary, Finnegan ran for Supreme Court justice, disqualifying himself from continuing as its mayoral candidate. Working Families then filled the Finnegan vacancy with de Blasio as its new candidate.¹⁷

Likewise, when a candidate of a minor party loses the Democratic or Republican Party primary, a switch is sometimes made to benefit the winner. In 2010, for example, Rick Lazio lost the Republican primary for governor to Carl Paladino. Still on the Conservative Party line for governor, Lazio opted to run for Supreme Court Justice. Once he obtained that nomination, he was, of course, no longer able to run as the Conservative Party candidate for governor. The Conservatives filled that vacancy with Paladino to consolidate his support by having both lines.¹⁸

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¹⁶ N.Y. Const. Art. VI, §4.

¹⁷ See <http://www.capitalnewyork.com/article/albany/2014/05/8546250/eve-wfp-convention-no-obvious-outcome>.

¹⁸ An example when this procedural tour de force was not employed occurred during the 2002 gubernatorial election. Andrew Cuomo lost the Democratic Party primary to H. Carl McCall, but was still on the Liberal Party line. Although a lawyer and thus able to run for a Supreme Court Justice nomination a few weeks later, he did not do so. Although he was no longer campaigning for the office, Cuomo was still technically running for governor on the Liberal Party. His vote total was understandably meager, under 50,000, resulting in the Liberals losing their party status in New York.