COUNTDOWN TO THE CONSTITUTIONAL CONVENTION REFERENDUM: A REPORT ON DELEGATE SELECTION, ELECTION AND ETHICS ISSUES

by THE TASK FORCE ON NEW YORK STATE CONSTITUTIONAL CONVENTION

The New York State Constitution requires that every twenty years the voters of the state vote by referendum whether to convene a constitutional convention. The next occasion for this critically important decision will occur on November 4, 1997, and voters should be in a position to make an informed choice on that question. Not only do voters need to consider the range of current problems that would ultimately be addressed by a convention in the event that one is held—including, for example, education, public safety, state and local relations, and the state's economy—but as a threshold matter it must be decided how the delegates to such a convention will be selected.

The Association of the Bar of the City of New York's Task Force on the New York State Constitutional Convention has spent the past several months studying and debating issues relating to the election of delegates to a convention, including questions of voting rights, election law and ethics. We have consulted with other Association committees and have reviewed the interim and final reports of the Temporary New York State Commission on Constitutional Revision ("Temporary Commission").[1] In the immediate future, no issue deserves greater priority than that of delegate selection. The electorate is entitled to know who will be eligible to serve as a delegate, how delegates will be chosen, and what incentives will be in place to encourage highly qualified candidates. In short, if the electorate is to authorize a convention empowered to propose a revised state constitution, it is entitled to know the types of people likely to serve as its representatives at such a gathering.

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[1] See *The Delegate Selection Process*: The Interim Report of the Temporary New York State Commission on Constitutional Revision (March 1994) (the "Interim Report"); and *Effective Government Now For The New Century*: The Final Report of the Temporary New York State Commission on Constitutional Revision (February 1995) (the "Final Report").

The Task Force proposes the following measures:

1. Prohibition of Dual Compensation[2]

It is the Task Force's view that dual compensation of delegates who are also public officials is inappropriate. The Legislature should therefore act to limit:

(1) by constitutional amendment, the combined compensation for legislators and judges;

(2) by new legislation, the salaries of full-time government employees who are delegates, to the higher of the two salaries;

(3) by new legislation, the salaries of full-time government employees who are convention staff to the salary of the staffer's principal position; and

(4) by amendment to existing pension statutes, pension benefits for delegates and staff who are public employees.

A state constitutional convention should not become an opportunity for individuals who are already on the public payroll to enhance their salaries or pensions. Yet, in the absence of corrective measures, elected and appointed public officials may be motivated, or perceived to be motivated, to serve as delegates for precisely that reason.

New York State Constitution, article XIX, section 2, provides that a delegate to the convention "shall receive for his services the same compensation as shall then be annually payable to the members of the assembly." Members of the Assembly (and the State Senate) currently earn $57,000 per year. Thus, legislators elected as delegates would double their salaries, to $114,000 per year. State Supreme Court justices now earn approximately $114,000 per year; a Justice elected as convention delegate would earn $171,000 the year of the convention—more than the Governor or any other State official. Similarly, high-ranking appointed officials such as commissioners of state or local government would earn far more than their present salaries.

At the last state constitutional convention, conducted in 1967, the delegates included 24 judges and 13 legislators.[3] These two groups together accounted for nearly one-fifth of all delegates. In addition to earning dual salaries, those who were nearing retirement enhanced their pensions significantly: pensions are based upon total earnings in the years just before retirement, and state pension law explicitly includes compen-

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[2] A related issue is that concerning dual office holding. We address this in section 4 because our conclusions flow from the discussions in the first three sections of this report.

[3] *See* Interim Report, Appendix 7, at 121.

sation for service at a constitutional convention as a basis for calculating pensions.[4]

The Task Force believes that the perception of public officials using the convention to engage in "double dipping" would significantly undermine public confidence. The motivation of public officials who seek election as delegates would be subject to question—especially in view of the salary levels involved. If steps are not taken to rectify the problem, the possibility of "double dipping" may itself be a basis for rejection of the convention proposal in 1997.

The State Constitution now provides that neither legislative nor judicial salaries may be reduced during the term of office (N.Y. Const. art. III, § 6; art. VI, § 25). We do not propose amending those provisions, which are grounded in sound public policy. However, the provision of the State Constitution guaranteeing delegates the same salary as Assembly members (N.Y. Const. art. XIX, § 2) should be amended to limit elected and appointed officials to the salaries for the positions to which they were elected or appointed. (Officials earning less than the $57,000 per year salary of an Assembly member might be entitled to an Assembly member's salary, provided it is paid in lieu of their present compensation and not as a second government salary.)

We note that the Temporary Commission recommended a similar constitutional amendment in its Interim Report (p. 27). Since state constitutional amendments must be passed by two separately elected Legislatures before submission to the voters, the Temporary Commission urged first passage in 1994 to enable second passage by the 1995 Legislature and a referendum in November 1995—prior to the 1997 referendum on the convention itself. Unfortunately, the Legislature failed to act on this recommendation.

Even if a proposed amendment is passed by the present Legislature, it would have to be passed again by a separately elected Legislature in 1997 and would not be submitted to the voters until November 1997 at the earliest. The electorate will have an opportunity to vote on the question at the same time it decides whether to authorize the convention, but not before. And those who might vote for the convention only if there is a prohibition against dual compensation will have no guarantee of passage of such a prohibition at the time of the vote.

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[4] Article V, section 7 of the State Constitution provides that the benefits of membership in any state or local pension systems "shall not be diminished or impaired." Several sections of the Retirement and Social Security Law were amended to cover delegates to the 1938 and 1967 conventions by specifically including their service as "government service" when they were delegates. See Retire. & Soc. Sec. Law § 2 (definition of "annual compensation"); § 44 (with respect to 1967 delegates in local pension systems); § 216(a)(regarding re-employment of 1967 delegates); § 302(12)(a)(1)(with respect to members of police and fire pension systems).

While the Legislature's previous inaction on this "double dipping" prohibition is regrettable, it should not be fatal. Legislative action on this issue would be a significant "good government" measure that would contribute to ensuring the integrity of the convention process. We therefore recommend that such a measure receive first passage no later than the end of the 1995 legislative session.

The Temporary Commission's Final Report (p. 23) notes that the Chief Judge of the State of New York may have the power to prevent a sitting judge from collecting a second state salary as a convention delegate. Similarly, state and local laws could be enacted, and state and local administrative regulations adopted, governing compensation for dual service by appointed state officials (*e.g.*, commissioners, members of various boards, staff of executive and legislative officials, etc.) and by elected and appointed local officials. *See, e.g.*, N.Y.C. Charter §1115, prohibiting City office holders from holding any other public office except, where authorized by the Mayor, with respect to an office for which no salary is provided. The Legislature could also amend the pension laws to prohibit use of a convention delegate (or staff) salary to enhance a pension basis where an elected or appointed official is already drawing a public salary. These and similar steps should be carefully considered.

However, in view of the state constitutional prohibition against reduction of legislators' salaries, "double-dipping" by the legislators themselves probably cannot be eliminated without a state constitutional amendment. Unless the Legislature approves such an amendment and presents it to the voters, any convention could be dominated by legislators whose motivation in seeking election as delegates would be subject to considerable public skepticism. A constitutional amendment is therefore imperative.

2. Ballot Access and Campaign Finance

> The Task Force endorses recommendations previously made by the Association's Election Law Committee regarding improved access to the primary ballot, primarily by reducing the number of signatures required to run for delegate and eliminating or modifying existing rules governing petitions and signature invalidation. The Task Force also urges adoption of reasonable limits on the amount any individual can contribute to any candidate for delegate.

In 1986, the Association's Special Committee on Election Law recommended a number of measures to ease access to the primary ballot.[5] For

[5] *See* 41 *Record of the Association of the Bar of the City of New York* 710 (1986).

State Senate districts—the basic unit of election for constitutional convention delegates—the Special Committee recommended reducing the required number of valid signatures from 1,000 to 500 (and reducing the alternative minimum, based upon a percentage of the enrolled party voters in the district, from 5% to 3%). The Special Committee also recommended several other important ballot access measures, *e.g.*, permitting registered voters to sign more than one designating petition for the same office, eliminating various rules invalidating signatures or entire petition pages over minor omissions or errors, and providing for a "grace period" allowing certain technical mistakes to be corrected.

The Task Force strongly urges enactment of these measures by the Legislature in time for the election of convention delegates in 1998. The Association has long been supportive of Election Law reform,[6] which is in fact long overdue for all elective offices. But nowhere is the present state of the law more objectionable than with respect to elections for delegate to a state constitutional convention—elections in which citizens without extensive political experience should be encouraged to participate.

The Task Force also recommends reducing the number of signatures required for independent candidates for delegate in the general election from 3,000[7] to 1,500 (and the alternative minimum, based upon a percentage of votes cast in the State Senate district in the last gubernatorial election, from 5%[8] to 3%). Similarly, the petitioning requirements for election to the fifteen statewide at-large positions should be reduced: for statewide primaries, the number of signatures should be reduced from 15,000[9] to 5,000 (or 3% of the enrolled party voters in the state); for independent candidacies in general elections, it should be reduced from 15,000[10] to 5,000 signatures. The statewide petitioning requirement of at least 100 valid signatures[11] in half the State's congressional districts should also eliminated.

We do not recommend creation of a public campaign finance system just for convention delegate elections. Such a system would be costly and difficult to administer for a single election in a state which has no statewide public finance campaign system at present. However, the Legislature should give serious consideration to development of a statewide voters' guide for primary and general delegate elections, building upon the successful model devised by the New York City Campaign Finance Board. In the interest of eliminating unfair disadvantage to candidates outside the political mainstream, we also urge adoption of reasonable limits on the amount an individual or organization may contribute to a candidate for delegate.

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6 See note 4, *supra*.

7 Election Law § 6-142(2)(f).

8 Election Law § 6-136(1).

9 *Id.*

10 Election Law § 6-142(1).

11 *Id.*

3. Voting Rights Issues

The Task Force concurs with the Temporary Commission's recommendation that a system should be enacted allowing for limited voting for delegates, under which each voter would be entitled to vote for one candidate per Senate District instead of three. The number of delegates elected on a statewide (at-large) basis should remain fifteen, but there should be elimination of slate-voting for these positions, and the names of all fifteen candidates nominated by each party should appear on voting machines.

a. Delegates Elected from State Senate Districts

Most of the delegates to a state constitutional convention would be elected from the sixty-one State Senate districts. Article XIX, section 2 of the State Constitution provides, in relevant part, that "the electors of every senate district in the state . . . shall elect three delegates." Thus, the Senate districts, which are single-member districts for purposes of Senate elections, are converted into multi-member districts for purposes of delegate elections. Historically, each voter has been entitled to vote for three delegates per district.

Although multi-member districts are uncommon in New York State, they are quite common in other jurisdictions. And they have been the subject of considerable controversy. As noted by the Temporary Commission (Interim Report, p. 5), "[m]ulti-member districts are red flags in the voting rights environment and they have been successfully challenged in a large number of voting rights cases." Such districts are suspect under the Federal Voting Rights Act (section 2) because a white majority, voting as a bloc, would be able to outvote a racial or language minority for all seats even though smaller districts might have produced one or more winners supported by minority voters. In New York, there may well be some State Senate districts in which a candidate favored by African-American, Latino or Asian-American voters would be prevented from winning because the multi-member electoral system would enable the white majority to outvote minorities for all three seats.

Any change in the use of State Senate districts for delegate selection, such as switching to Assembly districts as the basic unit of delegate election or sub-dividing Senate districts, would require a constitutional amendment. However, as noted by the Temporary Commission (Interim Report, p. 9), there is a change that in all likelihood can be enacted by statute: a system of limited voting, under which each voter would be entitled to vote for one candidate instead of three per State Senate district. Such a system enhances the opportunities of racial and language minorities to elect candidates of their choice in multi-member districts, and has been accepted as a remedy in vot-

ing rights cases invalidating multi-member districts.[12] A system of limited voting is especially easy for voters to understand—in most elections one vote per office is the rule—and can be easily implemented on voting machines. And, since the electors of each Senate district would as a group still be electing three delegates to the convention, it would be consistent with article XIX, section 2 of the State Constitution and would not require a constitutional amendment.[13]

Although the Temporary Commission recommended enactment of legislation limiting voters to one vote each for one delegate within a State Senate district,[14] the Legislature has not enacted such a measure. More than a year has passed since the Temporary Commission issued its recommendation. Two members of the Temporary Commission have since cited the Legislature's inaction on this issue as a basis for opposing a constitutional convention.[15]

A limited voting system does carry with it the risk that single issue candidates could be more easily elected to a constitutional convention—that is, particular candidates advocating, for example, a constitutional amendment in a specific area such as abortion, the death penalty or gun control. But in

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[12] *See* Briffault, *The Election of Delegates to the Constitutional Convention: Some Alternatives*, Interim Report, Appendix 3, at 88-89 and nn. 5-7 (citing to limited voting plans adopted as settlements in vote dilution cases in Alabama, Arizona and Georgia).

Limited voting has been used in several other jurisdictions, including Connecticut, Pennsylvania and North Carolina; it has also been used in New York City, in 19th century elections for supervisor and alderman and again from 1963-1982 in elections for Councilman-at-Large from each borough. *Id.* at 87-89.

[13] The limited voting system for New York City Councilman-at-Large, under which each party could nominate only one candidate per borough and each voter could vote for only one candidate in the general election—even though two were elected at large from each borough—was upheld by the New York Court of Appeals against a challenge claiming violation of the right to vote "for all officers" (N.Y. Const., art. II, § 1). *Matter of Blakie v. Power*, 13 N.Y.2d 134, 243 N.Y.S.2d 185 (1963). The at-large positions were abolished by Charter amendment in 1983, after a federal court invalidated the Charter provision according each borough two at-large Council seats regardless of population. *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982). That decision, however, was based solely upon the "one person, one vote" requirement of the Fourteenth Amendment of the United States Constitution. In light of *Blakie*, a limited voting system for constitutional convention delegate elections in properly drawn State Senate districts would be in compliance with both the State and United States Constitutions.

[14] *See* Interim Report at p. 9.

[15] *See* Supplemental Statement by Commissioner Peggy Cooper Davis, Final Report at 30; Supplemental Statement by Commissioner Margaret Fung, *id.* at 31.

our view, the need for a convention to be properly reflective of the racial diversity of the state more than outweighs the risk that a change to limited voting will enable single issue candidates to be more easily elected.

Our Task Force is deeply concerned that any election for constitutional convention delegates be conducted in a manner that is fair to racial and language minorities and gives the appearance of fairness as well. Whether or not a federal court would invalidate the present method of delegate selection in a lawsuit brought under section 2 of the Federal Voting Rights Act, the state should not perpetuate an electoral system that is viewed as unfair to the minority community.

We believe that the limited voting system advocated by the Temporary Commission makes good sense as a matter of public policy. It would create a more open election in which candidates outside the political mainstream would have a better chance of participating effectively. It would also avoid the risk of protracted voting rights litigation that could cast a cloud over the convention and its work. The Legislature should enact such a system this session.

b. At-Large Delegates

The State Constitution also provides for the election of 15 delegates on a statewide basis. These 15 delegates amount to only 7.6% of the 198 delegates to the convention. We agree with the Temporary Commission (Interim Report, p. 8) that the statewide seats add a useful perspective to the convention and, being very limited in number, are unlikely to present substantial concerns related to fair minority representation.

However, to make the election of at-large delegates truly meaningful and consistent with its stated purpose, we recommend the elimination of slate-voting for these positions. The names of all 15 candidates nominated by each party should appear on the voting machines (or, if there is insufficient space, on paper ballots.

For the last delegate election, conducted in 1966, the Legislature specifically precluded the appearance of names for at-large delegate on the ballot and made split-ticket voting for the at-large positions extremely difficult. L. 1965, ch. 371. There were numerous reports of irregularities in which those who sought to split their tickets were discouraged or prevented from doing so, or cast ballots that were later destroyed or invalidated. Although the number of at-large delegates is small, the Democratic Party's success in winning nearly all of the at-large seats in 1966 through slate voting provided the margin of that party's control of the convention.[16]

[16] *See* Report of the League of Women Voters, *Seeds of Failure: A Political Review of the New York State's 1967 Constitutional Convention* (1973) at p. 8: "...a substantial number of voters who attempted to exercise their constitutional right to vote for the fifteen candidates of their choice for delegates-at-large were effectively disenfranchised. Objections arose all over the State about the 'impossibility' of splitting the ticket. Those present at the canvass of the vote reported that hundreds of ballots were physically destroyed in jammed machines or otherwise invalidated."

The Temporary Commission (Final Report, p. 23) recommended that the State Board of Elections develop plans to "ease the process of ticket splitting" and "inform voters that ticket splitting is possible" for the at-large delegates. We would go even farther, by eliminating slate-voting levers or boxes entirely and requiring that every candidate's name be displayed on the ballot.

4. Dual Office Holding

The Task Force does not recommend adoption of a constitutional amendment that would prohibit public officeholders from serving as convention delegates.

In sections 1, 2 and 3 we recommend measures that will bring about a more open, fair, and inclusive delegate selection process. These measures are designed to encourage maximum participation by all segments of the community regardless of race, ethnicity, language, religion, party or issue identification.

If these or similar measures are adopted, the Task Force sees no need to prohibit participation simply because a candidate for delegate happens to hold another public office, elected or appointed. Nor do we see any need, as some have proposed, to ban past office holders from running for delegate or preclude delegates from seeking office for a period following the convention.[17]

We fully agree with those who advocate a more open process, one that will discourage office holders from seeking to participate in the convention for personal economic gain, and at the same time will provide outsiders with a fair opportunity to contest efforts by office holders to dominate the convention. If the playing field is leveled in this manner, the voting public will have a fair opportunity to determine an appropriate balance between experienced public officials and enthusiastic newcomers at a convention. We prefer to leave the choice to the voters rather than impose it upon them by statutory prohibition.[18]

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[17] *See* Concurring Statement of Commission Member Malcolm Wilson, Interim Report at p. 33 (advocating a ban on legislators and judges serving as delegates, and a ban on all delegates holding elective or appointive office in state or local government for three or five years after the convention).

[18] We note that there have been legislative proposals to limit the types of people who can serve as constitutional convention delegates. For example, in 1994 then-Senator George Pataki sponsored S. 8118, which would prohibit as delegates to a constitutional convention people who have served as: (1) members or employees of the Senate or Assembly; (2) judges or justices in the court system; (3) registered lobbyists to the Legislature; or (4) political party officials. The bill also included a limitation on campaign contributions to candidates for election as a constitutional convention delegate. This bill was sponsored by Assembly member Brodsky in 1995 as A. 307. Moreover, State Senator DeFrancisco has sponsored a proposed constitutional amendment (S. 1143, introduced January 24, 1995) which would preclude persons who have served as members of the Senate or Assembly, or as state or local officers (including judges) from becoming convention delegates if their government or judicial service occurred during the calendar year in which the electors voted to approve a constitutional convention.

CONCLUSION

The Legislature should act this session in discrete areas that can significantly affect a constitutional convention, should the voters determine in 1997 that a convention is appropriate. The Legislature can make a meaningful contribution to the improvement of the selection of convention delegates, in the specific ways identified by the Task Force, that will have an equally profound impact on a convention by increasing public confidence in the process.

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\+ Dissents from recommendation set forth in section 3(a) of the Report.