IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2004

No. 04-7858

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SAMUEL H. SLOAN - PETITIONER

vs.

CHARLES E. KNAPP, GARY SINAWSKI, ROBERT CONROY, LENORA FULANI, KING'S COUNTY INDEPENDENCE PARTY, DIANE HASLETT RUDIANO and against NERO GRAHAM, FREDERIC M. UMANE, WEYMAN A. CAREY, MICHAEL J. CILMI, MARK B. HERMAN, DOUGLAS A. KELLNER, TERRENCE C. O'CONNOR, NANCY MOTTOLA-SCHACHER, STEPHAN H. WEINER, Commissioners of Elections of the City of New York, constituting the Board of Elections in the City of New York,

- RESPONDENTS -

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ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK - APPELLATE DIVISION - SECOND DEPARTMENT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. To what extent may state governments set requirements for US Congress beyond those enumerated in the Constitution, which are only that the person must be 25 years old and have been a citizen for seven years and reside in the state?

2. Under what circumstances may a state or city or county Board of Elections kick a candidate for US Congress off the ballot, as has happened here?

## JURISDICTION

The decision of the Appellate Division Second Department was dated August 19, 2004. http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06408.htm Subsequently, a petition for rehearing was denied and leave to appeal to the New York Court of Appeals was denied. Petitioner has 90 days to file this petition. There are no reported decisions except that the decision of the Appellate Division is reported at 2004 NYSlipOp 06408

## STATEMENT OF THE CASE

Petitioner is a Candidate for Election to the United States Congress for the Tenth Congressional District of New York. The incumbent is Edolphus Towns, a Democrat, who has not faced a contested election for 14 years since 1990.

The complaint resulted from a judgment in the favor on the Independence Party of New York reported as Independence Party vs. Berman, 294 F. Supp 2d 518 (SDNY 2003). That decision relied upon Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

The Petitioner herein, Samuel H. Sloan, wishes to take advantage of and enforce the rights obtained as a result of the aforementioned decisions by running as a candidate in the primary election of the Independence Party of New York and, if he prevails, by running in the general election in November as a candidate of the Independence Party. However, the Independence Party claims, wrongly, that they have opened a one-way street and that they are only allowing non-enrolled voters to vote for their selected candidates. They claim that non-enrolled voters may not run against the candidates they have selected. In short, they claim that they have opened a one-way street and that they have the right to associate with the non-enrolled voters but that the non-enrolled voters have no rights to associate with them.

Petitioner has discovered that many enrolled members of the Independence Party enrolled essentially by mistake. On the form provided by the New York City Board of Elections, they checked the box labeled "INDEPENDENCE PARTY" and not the box labeled "I DO NOT WISH TO ENROLL IN A PARTY" because they wished to register as an independent voter, not as a member of any political party. They were surprised which they started receiving mail from the Independence Party. It is now apparent that the Independence Party is committing a fraud upon the voters. The Independence Party claims to be the third largest political party in New York State and to have 300,000 members, but the party has gotten many of the voters because of mistakes arising from their misleading name. The Independence Party should be required to change their name, if it continues to refuse to allow a truly independent candidate such as Petitioner to run. The Independence Party insiders currently tend to be dominated by Marxists-Leninists, including Lenora Fulani, a former presidential candidate and black nationalist Marxist. The leadership is mostly from the International Workers Party, a Marxist organization. This is a relatively new development, as this group took control of the party in 2002. The party considered running Peter Camejo, an avowed Communist who has been a member

of numerous organizations including the Young Communist League and the W.E.B. Du Bois Club, as its candidate for Vice-President of the United States until Camejo refused their nomination. The Independence Party should not be allowed to keep its present name if it continues to mislead the voters by pretending to represent independent voters such as Petitioner, when it does not.

On April 3, 2004, Petitioner was put in contact with Robert Conroy, the Chairman of the King's County Independence Party. Petitioner declared his candidacy and Mr. Conroy agreed to schedule his appearance before their screening committee. Later, Mr. Conroy invited Petitioner to a candidate's screening to be held on Saturday Morning, May 22, 2004 at 10:15 AM at The Brooklyn Social Therapy office located at 121 Prospect Place, #1 (by Flatbush Avenue). The meeting place was arranged by Lenora Fulani.

Petitioner appeared at 121 Prospect Place at 10:15 AM on May 22, 2004 but the place was empty. Neither Lenora Fulani nor Robert Conroy nor anybody else was there. Petitioner thereafter reached Robert Conroy by telephone. Mr. Conroy told Petitioner that the candidate's screening would have to be postponed but he was invited to a fundraiser at 3:00 PM the same day at the Magnetic Field Cocktail Lounge at 97 Atlantic Ave., Brooklyn Heights, New York. Mr. Conroy requested a donation of $250.

Petitioner attended the fundraiser at 97 Atlantic Avenue with his wife and baby. However, Petitioner did not have $250, and so only donated $20. At that fund raiser, Petitioner met Robert Conroy, Frank MacKay, Lenora Fulani and many other Independence Party Activists, plus other Candidates and Naderites.

The Independence Party claims to be the party of the non-registered voters. Petitioner is one of those voters. Therefore, according to their claims, Petitioner should be allowed to run as a candidate of their party, especially since they have no other candidate.

Petitions were circulated to put Petitioner on the Ballot. These Petitions were filed with the New York City Board of Elections and Petitioner was listed as a candidate on the ballot. However, Charles Knapp of the Independence Party filed objections to the petitions, as a result of which Petitioner was kicked off the ballot.

Petitioner then had three days to file with the New York Supreme Court, which petitioner did. At 4:55 PM the same day the New York Supreme Court, Kings County, issued an order to show cause, but this order only gave petitioner until Midnight the same night to serve the Order to Show Cause. In spite of the extremely short time, Petitioner did succeed in personally serving all the respondents by midnight that night. However, the following morning Judge Joseph Levine dismissed the petition on the ground that Petitioner had not filed Affidavits of Service by 9:30 AM the following morning, even though no such rule had been publicly announced and even though all of the respondents were present and had appeared in the courtroom and had admitted that they had been served.

Petitioner then petitioner for a rehearing. This time, the Kings County judge dismissed the petition on the grounds that Petitioner had served the order to show cause himself, not via a process server. Again, all of the opponents were in court.

Petitioner then appealed to the Supreme Court of New York, Appellate Division, Second Department. The decision of the Kings County Supreme Court was affirmed.

Petitioner then petitioned for leave to appeal to the Court of Appeals of New York. Leave was denied.

In New York State, perhaps more than any other state, the candidates are controlled by the party officials. Almost all elections are uncontested. In addition, as this case demonstrates, the rules and procedures are completely ignored. Petitioner maintains that the entire procedure is unconstitutional. This case has demonstrated that it is not merely difficult but impossible to run against a party machine controlled by a handful of officials in New York State. Petitioner requests review of the entire election procedure, for reasons more fully explained in the attached motions which were filed in the New York courts.

## POINT I

## CPLR 2103 (a) DOES NOT APPLY AND CPLR 2103 (b) APPLIES

The decision of the court below cited CPLR 2103 (a). However, CPLR 2103 (a) was not cited by the court below that. Rather, the original court cited only 308(1). I was caught off guard by the reference to CPLR 2103 (a) and had not looked it up.

The decision by this court was erroneous for a number of reasons, the most important of which was that the decision cited the wrong provision of CPLR. The decision cited CPLR 2103 (a). However the applicable provision is CPLR 2103 (b). This is because the Order to Show Cause required service on Gary Sinawski and Gary Sinawski is an attorneys at law and member of the New York Bar.

CPLR 2103 (b), unlike CPLR 2103 (a), does not require service by a person “not a party” to this proceeding. CPLR 2103 (b) does not require personal service. It allows for service on the office of the attorney, by leaving it with his secretary or if the secretary is not present by leaving it in his mail slot.

This is what petitioner did. In addition, if the Order to Show Cause required personal service, that was impossible because the petitioner did not receive a copy of the Order to Show Cause until 4:55 PM on the last day to file and the Order to Show Cause required him to serve papers by Midnight the same night. This the petitioner did by leaving a copy of the order to show cause on the desk of the secretary of Gary Sinawski, because Gary Sinawski was gone for the day, all before Midnight the same night.

Petitioner later moved for a rehearing. The second order to show cause was signed on August 11, 2004. This time, the court gave the petitioner the more reasonable time of Midnight the following day to serve papers. Petitioner did this.

CPLR 2103 provides, in pertinent part:

> Rule 2103. Service of papers. (a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.
> (b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party`s attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
> 1. by delivering the paper to the attorney personally; or
> 2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney`s last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or
> 3. if the attorney`s office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney`s office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney`s office letter drop or box; or
> 4. by leaving it at the attorney`s residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney`s residence unless service at the attorney`s office cannot be made; or

It is noteworthy that when this case was presented to the Appellate Division, the Appellate Division did not require personal service of the brief on the attorneys. Service by e-mail was sufficient.

The case presented here is essentially an appeal of an administrative order of the New York Board of Elections which removed the name of the petitioner from the ballot.

A requirement that Petitioner serve the objector directly is unfair and unconstitutional when the objector’s counsel refuses to reveal where she lives.

There were three other appeals filed at the same time as Petitioner’s appeal and all of them touch on related issues. In the appeal of Towns vs. Joseph from a decision of the Appellate Division - Second Department dated August 19, 2004, the fact pattern was the same as that of all cases from the King’s County Supreme Court. There were 42 cases on

the calendar there and in all 42 cases Judge Joseph Levine sua sponte questioned the affidavits of service. The case of Towns vs. Joseph had exactly the same facts as the case of Andre Soleil. The only difference is the elder Mr. Towns having one million dollars in campaign contributions every time he runs in an uncontested race for Congress, has a lot of money to pay for an appeal, whereas Mr. Soleil does not. Take a look at http://www.fec.gov/2000/nyhse99.htm which shows that Ed Towns raised and spent $1,148,894 in the uncontested 2000 election.

In the Supreme Court, Judge Levine did not dismiss the original petition because Petitioner served the order to show cause himself, but rather because Petitioner failed to file the affidavits of service BEFORE 9:30 AM. Judge Levine dismissed several other petitions for the same reason. Those others have apparently not appealed, but they could still appeal, as their statutory time has not yet run.

The two Nassau County cases which were also on appeal involve the INDEPENDENCE PARTY OF NASSAU COUNTY. It needs to be explained that the Independence Party of New York has broken into two factions. One faction is the traditional party established by Ross Perot and continued by Tom Golisano. The other is the Fulani Group which has taken over the Manhattan, Queens and Brooklyn parties and only a few weeks ago took over the Staten Island Party as well. Nassau County cases involved the two factions of the Independence Party fighting against each other. In those cases, representatives of the traditional party won, because the judges there ruled in EXACTLY THE OPPOSITE WAY from Judge Levine in the instant case, and yet the Second Department affirmed those two decisions. Although a different panel of the Appellate Division was sitting and the affirmance was on different grounds, Petitioner submits that differing decisions by two different panels of the same appellate division constitutes ground for this Court of Appeals to hear this appeal.

The court in “Matter of Flores v. Kapsis”, decided on appeal on August 19, 2004, Justice Stack ruled:

> Respondents' Application to Dismiss
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> Respondents moved for dismissal of petitioners' application for lack of jurisdiction on the grounds of defective service. Respondents alleged that pursuant to CPLR §2103 "papers may be served by any person not a party [to the action]". They submitted that Michael S. Peregine, a respondent, had served the order to show cause and accompanying documents. This service was made, as ordered, by "delivering a copy thereof to . . . the United States Postal Service . . . waiving the requirement of a receipt signature, to each said respondent's home . . . ." Order to Show Cause, ¶ 4. The same direction for service existed for all respondents.
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> Evidence presented at the hearing demonstrated that counsel for petitioners

> accompanied by respondent Michael S. Peragine, traveled to the Hicksville Post Office where the express mail envelopes were deposited. Each envelope bore the return address of respondent Michael S. Peragine and, in the space provided to waive the receipt signature, he placed his initials.
>
> While it is correct that any envelope not delivered would have been returned to the respondent's home address and equally correct that he controlled the waiver of signature, these factors do not equate with "service by a party." The intent of the statute was clearly to avoid personal service by one party on another. Further, CPLR §312-a states in pertinent part, "As an alternative to methods of personal service . . . a notice of petition and petition may be served by the Petitioner or any other person by mailing to the person . . . to be served." Mckinney's Consolidated Laws, CPLR, Article 3
>
> The cases cited by counsel are inapposite in that they refer to personal service by one party on the other which service resulted in a dismissal of the action. This court does not find respondents' argument persuasive in this regard. Accordingly, respondents' application to dismiss for lack of jurisdiction is denied.

Here it can be seen that the Nassau County Judge decided that the fact that petitioner Peragine served the papers himself was not fatal.

In addition, the requirement by Judge Levine that the papers be served personally, and only seven hours given to do so, was not in conformity with the statute. In his order to show cause, Petitioner copied the exact words of a standard form in the book entitled “Election Law Forms” page 38. A copy of that page is annexed hereto. The order to show cause prepared by Petitioner said:

> and that personal service of the Order to Show Cause together with a copy of the papers upon which it is granted upon the individual respondents-objectors CHARLES E. KNAPP, GARY SINAWSKI, ROBERT CONROY, and KING'S COUNTY INDEPENDENCE PARTY designated as objectors be dispensed with, and that service of a copy of this order upon said respondent-objectors be made by enclosing the same in a securely sealed and duly postpaid wrapper addressed and mailed to each of the said respondent-objectors on or before the 9th day of August, 2004 be deemed good and sufficient service thereof.

As can be seen, that is word for word exactly the same language that is used in the book “Election Law Forms”. The same or very similar language is also used in Bender’s Forms, McKinney’s Forms and every other book of forms dealing with New York Election Law. Thus, Judge Levine made his own special rules, rules which have not been made by any other New York Supreme Court Judge.

The end result was that on August 9, 2004 there were 42 cases on Judge Levine's Election Law calendar and in each and every one of those 42 cases Judge Levine sua sponte raised the issue of affidavit if service, even though in almost every case the opposing party was present in court and was not contesting service. In all but one of those 42 cases, Judge Levine dismissed the petition on affidavit of service grounds. In the remaining case, Judge Levine dismissed the petition on a different grounds. In is important to note that in almost all of those 42 cases, the petitioner was represented by highly paid and highly qualified counsel. It is a remarkable fact that in 42 cases (not counting Petitioner's two cases) none of those 40 attorneys could seem to put together a simple affidavit of service that would satisfy Judge Levine.

The end result of the present cases now on appeal is not merely that the voters in the Tenth Congressional District are deprived of the right to vote for Petitioner. Rather, they are deprived of the right to vote AT ALL.

As a result of these two contradictory decisions, the September 14, 2004 primary was not held and the November 2, 2004 General Election will also be uncontested. Mr. Towns will have been re-elected without facing an opponent. This raises a Constitutional question.

It is noteworthy that Mr. Towns has never faced a seriously contested election since 1990, when Barry Ford last ran. One wonders how many other times Mr. Towns has succeeded in having ALL of his opponents thrown off the ballot. One also wonders what Mr. Towns does with the ONE MILLION DOLLARS he reports to the Federal Election Commission that he has received in campaign contributions every two years to fight these uncontested races. Again, take a look at http://www.fec.gov/2000/nyhse99.htm which shows that Ed Towns raised and spent $1,148,894 in the uncontested 2000 election.

Another appeal, also involving Nassau County, but decided by a different judge, also pertains to an issue in this case. In Fischer v. Peragine, Justice De Maro held:

> "The only issue remaining for the Court to address is the avowed policy of respondents, Chairman, Peragine and Vice Chair Bonnie Green, to add a substantial number of candidate names for Committee members, to nominating petitions, without the permission of such candidate. Where the names of persons are put on the ballot as candidates without their consent there is a "fraud" committed on the voters of the same party. Richardson v. Luizzo, 64 AD2d 942 affd. 45 NY2d 789."

In conclusion, the court found the respondents guilty of this fraud and barred them from holding party office.

All this was obviously a conspiracy to stop Sam Sloan from being the candidate.

This case should be remanded for hearings on these issues.

It is noteworthy that the local press has commented on this situation. For example, Flatbush Life for August 23, 2004, page 10 and at http://www.lidbrooklyn.org/bp082304.htm states:

> "Sloan's effort was an example of how impossible it can be for a non-lawyer to run for office and navigate the legal system on his own."

Please note the repeated use of the word IMPOSSIBLE to describe Petitioner's situation. This raises issues of Constitutional proportions.

POINT II

THE ACTUAL OBJECTOR TO THIS PETITION IS THE CHAIRMAN OF A PARTY COMMITTEE, WHO IS BARRED BY STATUTE FROM OBJECTING.

It is completely clear that the law specifically prohibits the Chairman of a Party Committee, any party, even a different party, from objecting to a petition when that objection would result in a primary election being cancelled.

Election Law Section 16-102 states:

> S 16-102. Proceedings as to designations and nominations, primary elections, etc. 1. The nomination or designation of any candidate for any public office or party position or any independent nomination, or the holding of an unconteste d primary election, by reason of a petition for an opportunity to ballot having been filed, or the election of any person to any party position may be conteste d in a proceeding instituted in the supreme court by any aggrieved candidate, or by the chairman of any party committee or by a person who shall have filed objections, as provided in this chapter, except that the chairman of a party co mmittee may not bring a proceeding with respect to a designation or the holdi ng of an otherwise uncontested primary.

The operative words in the above paragraph are: "except that the chairman of a party com mittee may not bring a proceeding with respect to a designation or the holding of an other wise uncontested primary."

In Soda v. Dahlke, decided August 18, 2004, http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06380.htm , the Appellate Division - Fourth Department ruled that the Chairman of the Democratic Party could not object to a petition with respect to a candidate in the Independence Party.

In each of these cases, the objector was not an opposing candidate, since there was no opposing candidate except for Ed Towns who did not object, but rather the Chairman of

the party through the Party Counsel. Mr. Gary Sinawski representing the King's County Independence Party objected to my Independence Party Petition.

In the case presented here, the nominal objector did not appear. Only the General Counsel to the Kings County Independence Party appeared. Who paid the fees of this attorney? Did the nominal objector pay? I doubt it, since the nominal objector did not come to the hearing. If the Independence Party paid, this may constitute a criminal offense of misuse of party funds.

The nominal objector is just a front. He is not a candidate and has no reason to object. However, the Chairman wants to keep control of his party by making sure that only the persons he designates gets on the ballot and no primary election is held. It is precisely because the Chairman of a Party would want to keep the party under his personal control to the exclusion of the voters and the other members of his party that New York State Law prohibits the Chairman of any Party Committee from objecting to a Petition, if the result is that there is no primary election. The relevant case law is: Davis v. Dutchess County Board of Elections 153 AD 2d 716, 544 NYS 2d 683 (1989 2d Dept.), Matter of Crawley v Board of Elections of County of Rensselaer, 218 AD2d 914, 915, lv denied 86 NY2d 704; Matter of Maltese v Anderson, 264 AD2d 457; Matter of Grogan v Conservative Party of N.Y. State, 77 AD2d 736, 736-737), Soda v. Dahlke, decided August 18, 2004, http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06380.htm In short, this Bibi Khan, who is an employee of the party, is obviously a front. The actual objector is the Party Chairman. The Party Chairman and his counsel have committed a fraud on the other members of his party, on the Board of Elections and ultimately on the voters by putting up this front person to play the role of objector, when the Chairman, who is barred from this activity, is the real objector.

## CONCLUSION

For all of the reasons set forth above, this writ should be granted and the decisions of the New York State Courts must be reversed.

Dated: October 29, 2004

Respectfully Submitted,

Samuel H. Sloan