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## **The NY Senate Should Have Voted on Judge LaSalle**

In failing to consider and vote upon the nomination, the full senate has abrogated its duty under the state constitution, which requires advice and consent by “the senate,” not one of its committees.

By [Jerry H. Goldfeder](#)



In a remarkable and possibly unprecedented action, the New York State Senate has declined to vote on Justice Hector LaSalle’s nomination as Chief Judge of the Court of Appeals. Instead, it relied on its Judiciary Committee’s disapproval. This was inconsistent with the senate’s constitutional duty.

Let’s start with some salient facts. In a clear and unambiguous provision, Article VI §2(e) of the state constitution provides that the Governor shall appoint a judge of the court “with the advice and consent of the senate.” Also pursuant to the constitution, the nominee must be from among those recommended by the Commission on Judicial Nomination. The Commission having reported seven prospective candidates, on Dec. 22, 2022, Governor Hochul nominated Appellate Division, Second Department’s Presiding Judge LaSalle. The senate then had 30 days to act.

Article III §9 of the constitution provides that “[e]ach house shall determine the rules of its own proceedings.” The state senate having adopted its rules, it fell to the Judiciary Committee to hold a hearing on the nomination. The hearing was held on Jan. 18, 2023. They called one witness, Judge LaSalle, who presented a 10-minute opening statement, answered committee members’ questions for four hours, and then made a closing statement. He was then excused, and the committee voted on the nomination. It was rejected, and the chair adjourned the meeting, declining to entertain a motion to advance the matter to the senate.

In failing to consider and vote upon the nomination, the full senate has abrogated its duty under the state constitution, which requires advice and consent by “the senate,” not one of its committees. Senate leadership thinks otherwise, relying on its constitutional prerogative to enact and follow its own rules. As far as I know, however, no specific senate rule was invoked to allow reliance on a committee’s decision. I presume, then, that the rule they believe gives them such authority is Rule VII §7, “Nominations,” which provides, in pertinent part, as follows:

“[T]he Temporary President [of the Senate] ... shall refer such nominations simultaneously to the Finance Committee, and the appropriate standing committee, *for consideration and recommendation* and such standing committees, other than the Committee on Judiciary shall thereafter refer such nominations to the Finance Committee of the Senate who shall take whatever further actions it deems necessary and thereafter make its report on the nominations to the full Senate.” (emphasis supplied)

Admittedly the rule is inartfully drafted, but the intent seems clear that the Finance Committee and *all standing committees* are to “consider” a nomination and make a “recommendation,” which they then “report” to the “full Senate.” Nowhere in the rule does it appear that any committee may substitute its judgment for that of the full senate. Although it does allow the Judiciary Committee to bypass the Finance Committee, presumably because nominations have no fiscal impact, the rule appears to contemplate that its committees undertake only a consideration and recommendation—and report its views, whatever they might be, to the full Senate.

This is the only interpretation that is consistent with the constitutional obligation of the full senate to advise and consent, and, of course, legislative rules and actions must be consistent with the state constitution. Broadly speaking, a legislative action cannot obviate a constitutional provision, even if the conduct was a good-faith implementation of the body’s rule. The Court of Appeals said as much 40 years ago in *King v. Cuomo*, 81 N.Y.2d 247 (1993). That was a case relating to an action taken by the legislature beyond the constitutional strictures of how laws are enacted. *King* held that employing even a long-time practice is no justification for “departing from *the literal language of the constitutional provision* [emphasis in original; citation omitted].” It went on to say that “[r]equiring that the Legislature adhere to [its] constitutional mandate is not some hypertechnical insistence of form over substance ... .” Similarly, the refusal by the full senate to consider LaSalle’s nomination also does not pass constitutional muster.

It is not as if the senate's committees do not have a role to play. It makes a lot of sense for pertinent committees to review nominations as a prelude to the full senate exercising its constitutional obligation. After all, committee hearings are usually an illuminating and efficient way to proceed. But such procedure cannot upend the constitution by refusing to report its findings to the full senate. In fact, in an instructive case relating to the impeachment of a federal judge, *Nixon v. United States*, 506 U.S. 224 (1993), the U.S. Supreme Court upheld the authority of the U.S. Senate to permit a designated committee to "receive evidence and take testimony" even though the constitution required "the senate" to try an impeachment case. The impeached judge argued that the full senate was required to hold the hearing. The courts disagreed because, in the end, it was the full senate that weighed the findings from the committee and took the ultimate vote to convict. So, too, in the case of Judge LaSalle, it was perfectly appropriate for the Judiciary Committee to hold its hearing. But a committee vote is not the same as a vote by the senate.

Thus, the role of committees in legislatures, though undoubtedly extremely important, is only to assist the full body, especially when there is a constitutional duty at issue. Indeed, the leading treatise on legislative procedure, *Mason's Manual of Legislative Procedure*, which is the gold standard on the subject and has been relied upon by the New York Senate in the past, addresses the limited role of committees. In §615(2), *Mason* states unequivocally that "[a] legislative body cannot delegate its powers to a committee..." and then elucidates the point in §615(4): "The functions of a legislative committee are purely advisory. All its acts are subject to review by the body and may be approved or rejected." Absent any exceptional directive to the contrary in the state constitution, this is as clear a statement of the role of legislative committees as any analysis could hope for.

I offer no view as to whether the Governor, or perhaps a senator or other interested party, should seek a judicial remedy, and do not know if the outcome would be different if the full senate were to vote. It is clear, at least to me, however, that the entire senate ought to have done so.

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