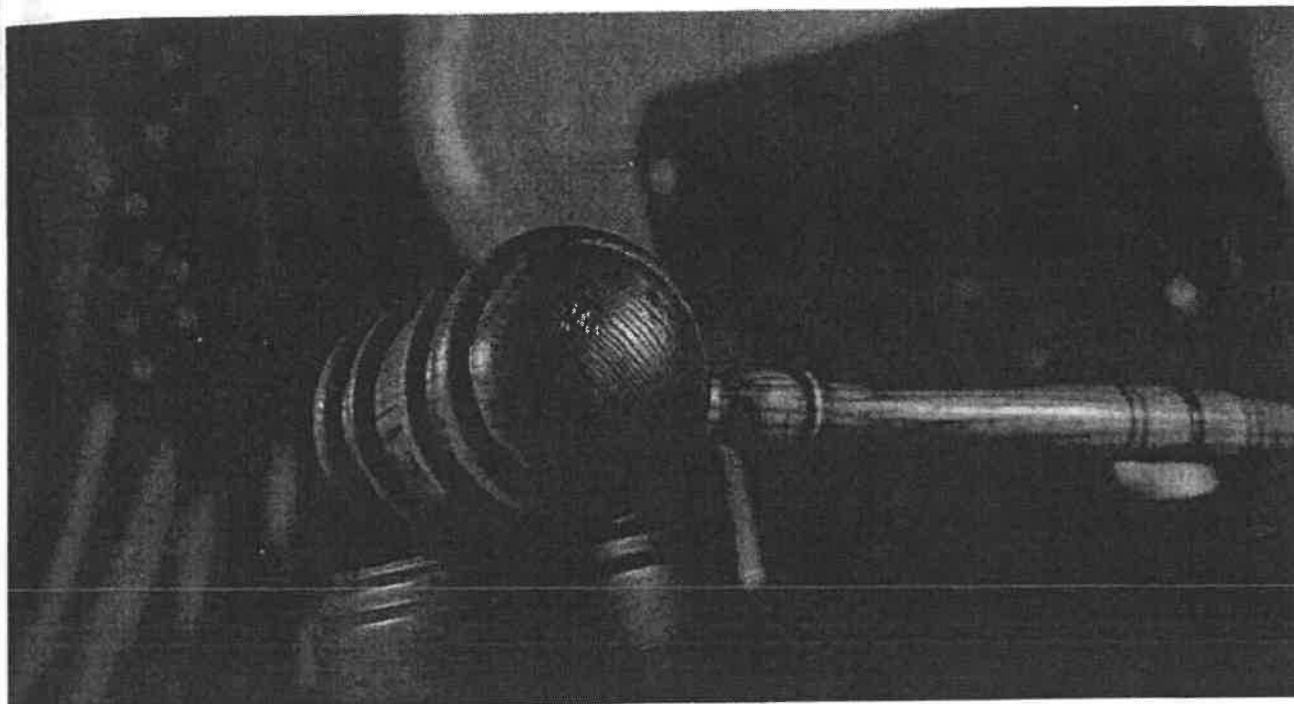


Bringing About Structural and Jurisdictional Change to New York's Appellate Division

By Hon. David B. Saxe



Chief Judge Janet DiFiore should be lauded for acting so promptly to create a task force to focus on next year's referendum on a constitutional convention, that can engage in a thorough review of the Judiciary Article (Article VI) of the New York State Constitution and propose possible revisions for the improvement of our state court system. She has specifically asked the appointed group to propose possible revisions that would alter the structure, organization and jurisdiction of our state courts to make them more modern, efficient and accessible.¹

This is the optimal time to articulate specific proposals to amend the state Constitution, because the Constitution mandates that every 20 years a referendum be placed on the ballot asking voters whether to hold a statewide constitutional convention;² such a referendum will appear on

the 2017 general election ballot. If the voters in November 2017 approve holding such a convention, the process of arranging for a constitutional convention would begin, starting with the election, one year later, of delegates to the convention, which would then be held in April 2019. Prepared proposals to amend the Constitution could then be put forward.

Of course, this effort to improve the structure of our state court system is not a new endeavor. There have been a number of recommendations for substantial alterations to the New York State court system during the past two decades, most prominently the one begun by then-Chief

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Judge Judith Kaye's 1997 and 1998 court restructuring plan to consolidate and simplify the New York trial court system,³ followed by Judge Kaye's appointed Special Commission on the Future of the New York State Courts, which issued a report in 2007 recommending a range of court reform proposals.⁴ Many aspects of the proposals would involve altering the court structure directed by

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our state Constitution, making those proposed changes dependent on the complicated constitutional amendment process; other proposals would only require legislative enactment. So, while the task force studies what, if any, amendments to our state Constitution to recommend, it may also be useful for those interested in making real improvements to the courts to consider not only what needs fixing, but possible alternative methods of alteration, including some changes that would not require amendments to the Constitution.

Restructure the Appellate Division

Now that a broad effort is underway to revise the structure of the court system, I take this opportunity to offer some ideas and thoughts, not as to the entire court system, but in the narrower area of improving the structure, organization and jurisdiction of the Appellate Division.

The current geographical structure of the four Appellate Division departments is largely the same as that created by the Constitution of 1894, which directed that the First Department be made up of just New York County – which, since 1874 had included the portion of the Bronx west of the Bronx River,⁵ the 1894 Constitution further directed that the other three departments be formed by the legislature, with approximately equal populations.⁶ Legislation creating the boundaries of the other three departments was enacted the following year. Subsequent constitutional amendments did not echo any requirement that the size of the departments be kept balanced, and the geographical lines created in 1895 were largely continued, despite the enormous changes in population in some areas. So, although the populations of New York's counties are vastly from what they were in 1894, the geographic boundaries of the four Appellate Division departments created at that time remain in place.

The wildly uneven population growth that occurred primarily in the New York City suburbs, many decades

after the creation of the departments, created a pronounced imbalance in the departments. The 10 counties of the Second Department – Kings, Queens, Nassau, Suffolk, Richmond, Westchester, Putnam, Dutchess, Rockland and Orange – have grown into populous suburbs of the New York City metropolitan area. Now, those 10 counties that make up the Second Department contain over 50 percent of the state's residents,⁷ with a population of more than 10 million people, more than three times that of each of the other three departments.

A Fifth Department

Due to this imbalance, in addition to the stopgap measure of bringing the number of justices in the Second Department up to 22 through the appointment of "additional justices,"⁸ many, including former Chief Judge Kaye and the Special Commission she created in 2007, have suggested that the imbalance should be remedied by a constitutional amendment creating a Fifth Department of the Appellate Division.⁹ Although we may presume that the intention of the plan is that a number of counties would be extracted from the Second Department to make up the new Fifth Department, these plans do not actually specify how the counties should be reallocated to create the new Fifth Department. The logical and simple means of creating a Fifth Department, if population alone were considered, and politics ignored, would probably be to set Kings, Queens and Richmond counties in the Second Department, and include all the other counties in the new Fifth Department. That would effectuate the division of the Second Department into two separate departments of roughly equal size, by population.

But, of course, it cannot be accomplished that simply. As explained in the February 2007 report by Judge Kaye's Special Commission on the Future of the New York State Courts, a large obstacle to changing the structure of the Appellate Division departments is concern about creating a department containing a population with a large majority concentration from one or the other political party, making it likely that most of the judges of that department will be affiliated with that political party.¹⁰ Recognizing how contentious the issue is, and the complicated political pressures the decision would entail, that issue is usually left open for determination by the legislature.¹¹

But there are other alternatives that are equally reasonable and perhaps better in some ways. It seems to me that a variety of specific proposals could be valuable to anyone addressing the possibilities, and I therefore offer my own thoughts here in the hope that they may be useful.

Redistribute Counties

The total population of New York State is more than 19 million. The First Department, consisting of New York County and Bronx County, has a population of about three million residents, and the population of the Third

and Fourth Departments, combined, is in the neighborhood of six million. In contrast, the current Second Department has more than 10 million residents. Another means of reducing the size of the Second Department, while to some degree equalizing the size of the remaining departments, would be to redistribute the counties among the existing departments. The Second Department would probably have to contain, at a minimum, Kings, Queens, Nassau and Suffolk, because assigning any of those counties to another department would be unrealistic for practitioners from those counties. That would bring the size of the Second Department down to approximately 5.8 million. Richmond, Westchester, Putnam, Rockland and Orange counties could be reassigned to the First Department, which would bring the population covered by the First Department to almost five million.

Another possibility would be to add only Richmond, Westchester and Rockland to the First Department, and add the more northerly of the current Second Department counties, Orange, Putnam and Dutchess, to the Third Department; if that created an imbalance with the Fourth Department, some of the western counties now in the Third Department, such as Tompkins, Tioga, Chemung and Schuyler counties, could be shifted into the Fourth Department.

Redistributing the counties among the departments would not require a constitutional amendment; the Constitution authorizes the legislature to alter the boundaries of the judicial departments and judicial districts once every 10 years.¹² Of course, the same political concerns about altering the balance between the parties would arise in the legislature in this context as well. But at least these redistribution proposals would allow for each department to contain both an urban center and suburban areas.

A Divided New York City

While we are considering redistribution of counties among the four departments, another factor that I have not seen addressed is the problem that is created by having one city, the City of New York, divided into two separate judicial departments. That situation originated inadvertently with the 1894 Constitution, which provided that the First Department would be made up of only New York County, while the other three departments were to be made up of New York State's remaining counties. Of course, in 1894 New York City did not yet consist of the five boroughs. The western part of the Bronx was considered part of New York County and New York City in 1874, while the eastern part of the Bronx was at that time still part of Westchester; the Bronx did not exist as a separate entity until 1898,¹³ when Kings, Queens, Richmond and the entire Bronx were consolidated into New York City. Yet, at no time after the five boroughs were consolidated into one city was any alteration made to the

judicial departments in response to this division of the city into two separate Appellate departments.

As a result, we are left with an unusual situation in which the residents of one city are subject to two different sets of common law rulings and interpretations of law, depending on which judicial department their borough is in. This is not merely a theoretical problem; it has real consequences. For example, it was recently pointed out that the First and Second Departments have come to different conclusions about which law – the Vehicle and Traffic Law or the New York City Department of Traffic Rules and Regulations – should be applied by a jury in cases where a pedestrian is hit by a motor vehicle. This difference of opinion alters the law applicable to a jury's deliberations, because a violation of the VTL constitutes *per se* negligence while a violation of a traffic regulation merely "may" support a finding of negligence.¹⁴ New York City residents, to whom all the same traffic rules and law apply, may nevertheless have different outcomes in lawsuits under identical circumstances, depending on the department in which the action is heard.

If considering the adjustment of the boundaries of Judicial Departments is appropriate, and especially if a Fifth Department continues to prove unfeasible, it may be worth considering whether New York City should be covered by one undivided Judicial Department. It would, of course, be quite large, covering more than eight million people, but it would still not be nearly as large as the current Second Department. Consolidating the New York City counties into one department would leave the Second Department without Kings, Queens and Richmond counties, but with the Long Island and northern suburban counties, covering an area with a population of just fewer than five million people.

Other Possible Constitutional Amendments Impacting the Appellate Division Court Merger

I am in favor of the widely supported court merger plan, under which judges of the County Court, Civil Court, Family Court, Court of Claims and Surrogate's Court would be merged into the Supreme Court, which would be organized to contain Divisions such as the Probate Division, Family Division, etc. One specific aspect of that plan that seems to me particularly beneficial is that it would make all those new Supreme Court justices – including Court of Claims judges, Surrogate's Court judges and lower court judges serving as Acting Supreme Court justices – eligible for consideration to be designated to the Appellate Division. This would, as the 2007 Special Commission report pointed out, significantly expand the pool of available candidates, and make that pool far broader and more diverse.¹⁵ In fact, I would propose expanding the applicant pool for Appellate Division justices in that way even without court merger. I think any Acting Supreme Court Justice, Court of Claims

judge or Surrogate who has served in the trial court for at least five years should be eligible for consideration. Of course, the thorough screening process for appointment to the Appellate Division would ensure that any such candidates possessed the requisite capabilities for consideration.

Civil and Criminal Courts of the City of New York; in the Second Department, Appellate Term also hears appeals from cases originating in District, City, Town and Village Courts, as well as non-felony appeals from the County Court.²² If, for example, we collapsed the Appellate Term, First Department, into the Appellate Division, and made

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Re-designation for "Additional Justices"

Another alteration regarding the Appellate Division that should be considered in the context of these broader Constitutional changes is to make the "additional justices" – those justices who are not among the seven justices authorized by the Constitution – subject to the same five-year designation term as now applies to the Constitutional Justices. It is an odd quirk of our current legal framework for the Appellate Division that the authorization for adding new justices as the workload increases¹⁶ does not require that these justices be re-appointed if their appointment lasts more than five years. Since such a re-designation is required for Constitutional Justices, as the 2007 Report of the Special Commission comments, this oddity "[t]urn[s] the Constitution on its head."¹⁷

Expanding Jurisdiction

On the issue of the Appellate Division's jurisdiction, this would be a golden opportunity to consider expanding the jurisdiction of the Appellate Division by (1) providing for en banc review by the Court, and (2) expanding the Court's authority on Article 78 review, to allow for reversal in the interest of justice. Providing for en banc review would allow our court, in appropriate circumstances, to deal with conflicting decisions between two or more panels on the same legal issue.¹⁸ Expanding the Appellate Division's authority in Article 78 proceedings would mitigate to some degree the severe construction of CPLR 7804's "abuse of discretion" standard imposed in *Matter of Pell v. Board of Education*,¹⁹ which only permits relief from excessive penalties where the abuse of discretion is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness."²⁰

Consolidate Appellate Term

And, while we are considering other types of court consolidation, it may be worth considering folding Appellate Term back into the Appellate Division, which the Appellate Division has full authority to do at any time.²¹ Currently, Appellate Terms in the First and Second Departments hear appeals from cases originating in the

all the justices currently sitting in Appellate Term part of the Appellate Division, I think that in the long run, such a consolidation of intermediate appellate operations would have a streamlining effect on both courts' operations. ■

1. See https://www.nycourts.gov/press/PDFs/PR16_11.pdf; see also Joel Stashenko, *Benefits of Changing NY Constitution: Are Focus of Task Force*, N.Y.L.J., July 20, 2016 at 1, col 5.
2. N.Y. Const. art. XIX § 2.
3. See Jonathan Lippman, *Court Reform – Now; Perspective*, N.Y.L.J., June 16, 1997 at 34, col. 3.
4. See www.nycourtreform.org/reports.shtml; http://nycourts.gov/reports/courtsys-4future_2007.pdf.
5. See <https://www.nypl.org/about/divisions/milstein/vital-records>.
6. N.Y. Const. of 1894, art. VI, § 2.
7. See <https://www.nycourts.gov/courts/ad2/aboutthecourt.shtml>.
8. *Id.*
9. See, e.g., www.nycourtreform.org/court_re_bill.pdf.
10. See *A Court System for the Future*, http://nycourts.gov/reports/courtsys-4future_2007.pdf.
11. See, e.g., Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y. L. Sch. L. Rev. 915, 954 (1999/2000).
12. Article VI, §§ 4, 6(b).
13. See <https://www.nypl.org/about/divisions/milstein/vital-records>.
14. See Maurice Recchia, *Car Accidents With Pedestrians: Conflict in the Departments*, N.Y.L.J., Sept 12, 2016 at 4, col 4.
15. See Report, *supra* note 10, at 72.
16. N.Y. Const. art. VI, § 4(e).
17. See Report, *supra* note 10; at 25–26.
18. See Saxe, *Perspective: En Banc Review in the Appellate Division*, N.Y.L.J., August 21, 2006 at 29, col 6.
19. 34 N.Y.2d 223 (1974).
20. See Saxe, *Article 78: Expand Appellate Divisions Authority*, N.Y.L.J., June 12, 2006 at 34, col 3.
21. N.Y. Const. art. VI, § 8.
22. See www.nycourts.gov/courts/lowerappeals.shtml.