

COURTING COURT REFORM: LOOKING BACK, MOVING  
FORWARD

HONORABLE HUGH R. JONES SIXTH MEMORIAL LECTURE

*Richard J. Bartlett\**

I am honored to have been asked to give the Sixth Annual Honorable Hugh R. Jones Lecture this afternoon. My thanks to Modern Courts and Albany Law School for giving me this opportunity to express my admiration and respect for Judge Jones, for whom this annual Lecture is named, and to talk about the affectionate regard Claire and I had for Hugh and his wonderful wife, Jean.

I have been associated with Modern Courts for many years as a Director, and now as Director Emeritus of the Committee for Modern Courts. My association with Albany Law School began in 1974, when I spoke at the graduation that year and received your honorary degree of Doctor of Laws. Thereafter, I served as a trustee and was honored to serve as President and Dean of the school from 1979 to 1986. Shortly after my tenure here, the space left by the moving of Shaeffer Library to the new building was converted to this wonderful room, the Alexander Courtroom. I am very pleased to be here this afternoon.

I first became acquainted with Hugh Jones in 1965, when he was serving as chair of the New York State Board of Social Welfare, and the legislature was considering proposals to establish Medicaid in New York. Hugh played a significant role in the prolonged negotiations between Governor Rockefeller and Speaker Travia as to the specifics of that huge new program to provide healthcare to the indigent. I was not involved in the negotiations, but came to know and admire this very able lawyer from Utica, who demonstrated his considerable skill at getting others to work out

---

\* Chief Administrative Judge of the State of New York, 1974–79. Dean and Professor of Law at Albany Law School, Union University, 1979–86. B.S., Georgetown University, 1945; LL.B., Harvard Law School, 1949.

their differences, a skill that I am sure served him well on the Court of Appeals, years later.

Claire and I knew Hugh and Jean socially through meetings of the New York State Bar Association in New York and Lake Placid. They were a wonderful couple, and were always fun to be with. I cannot count the number of times Hugh would say in one context or another, "Dick and I both married way over our heads!" I know he had it right as to me.

After the rioting at Attica Prison in 1971, Hugh Jones was named chair of the Select Committee on Corrections by Governor Rockefeller. I served as a member of that committee, succeeding Hugh as chair when he resigned in 1972 to run for the Court of Appeals. Needless to say, Hugh provided excellent leadership of that inquiry into correctional programs and practices in New York and a fine report resulted, prepared by our very able executive director, Peter Preiser. At the same time, Hugh was President of the New York State Bar Association and managed to provide outstanding leadership to our profession in that capacity—a huge workload for any ordinary mortal, but Hugh pulled it off without apparent effort.

It was through the Hugh Jones campaign for election to the Court of Appeals, with his running mates Judge Gabrielli and Judge Wachtler, that Claire and I got to know Hugh and Jean even better. I had agreed to serve as the informal chair of Hugh's campaign in the Third Department and we had planned a get together at our island camp at Lake George for a campaign strategy meeting. Hugh and I drove up from New York City on a windy, rainy night, expecting to call our wives when we arrived in Bolton Landing for a boat ride to the island. When we got to Bolton, we found that the telephone service was dead! The prospect of sitting in my car until morning was not appealing, so we drove to the marina I used and found an outboard powered boat that did not require an ignition key to start. Desperate circumstances beget desperate acts, and so the candidate for the Court of Appeals and his area campaign manager "borrowed" the boat to reach Fourteen Mile Island that night. Needless to say, the boat was returned early the next morning before its absence was noted, and my profuse apologies were accepted by the marina owner.

There were many other wonderful times spent together at Lake George, New Hartford, and points in between. Claire and I last saw Hugh and Jean when we drove them back to their new apartment at

the Masonic Home in Utica after Hugh received the John McCloy Award from Modern Courts in May 1998. It was less than three years later that Hugh died.

It has been suggested that recounting the events of Judge Breitel's years as Chief Judge of the Unified Court System, as I remember them, may be of interest to you. My memory of these events would not qualify as a history of what took place in the court system of New York during those early years of court administration, but rather as a series of anecdotes reflecting my personal recollection of these events. Webster defines "anecdote" to be "a usu[ally] short narrative of an interesting, amusing, or biographical incident."<sup>1</sup> So far so good, but it got better, or at least more accurately descriptive when I read a definition of "anecdotal" as "based on . . . reports . . . of [an] *unscientific* [nature]."<sup>2</sup>

The notion that this is an appropriate subject for a Jones Lecture came from several sources, the last of which was Victor Kovner. All emanated originally, I suspect, from our wonderful Chief Judge, Judith Kaye. And, it must be said that Judge Jones had a strong commitment to court reform as well.

It is certain that I would not have undertaken this if my oral history was not at least in the draft form it is. I am very indebted to two old friends for doing my oral history: Professor Sandy Stevenson and Steve Younger were the organizers of that effort, and the interrogators who extracted from me my recollection of my life, some of which must be excised in the editing process, as better left unsaid, or rather, left unwritten. Suffice it to say that I have relied heavily on the oral history draft in preparing these remarks.

The story begins in the fall of 1973, when then Associate Judge Charles D. Breitel was the Republican candidate for Chief Judge of the Court of Appeals, running against Jacob Fuchsberg. Judge Breitel spoke at a meeting in Saratoga and outlined his vision for a reformed court system. I spoke briefly at the same meeting as a candidate for supreme court justice for the fourth judicial district, having been given an interim appointment by Governor Rockefeller in September of that year. Neither of us, I am sure, gave the slightest thought to the possibility that I would become Judge Breitel's lieutenant in his court reform effort. However, I found that Judge Breitel's vision resonated with me and I may have said so at

---

<sup>1</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 47 (11th ed. 2003).

<sup>2</sup> *Id.* (emphasis added).

the meeting.

After the November election, Judge Breitel, as the Chief Judge-elect, began to put together his team and he first gave attention to the appointment of a new state administrator of the courts, for which he formed a search committee. I received a call from Bob MacCrate, an old friend, who asked if I would be interested in being considered for that role. My response was affirmative and I was then interviewed by the search committee in New York City with other candidates. I received a call from Judge Breitel in which he said that he was concerned that a supreme court justice serving as state administrator of the courts would raise problems as to whether that constituted another "public office" forbidden by the State Constitution, and would I please do a memorandum of law addressing that concern. It will not surprise you to know that my memorandum found no impediment, constitutional or otherwise, to a supreme court judge also holding the state administrator role. I was never sure whether this assignment was a form of test or a sincere inquiry as to the constitutional issue. I suspect the former.

I then received a second call from the Chief Judge telling me that the search committee had recommended my appointment, that he was happy to concur in that recommendation, and would I accept? My reply was "yes," of course. I was then sitting in a civil trial term in Schenectady when he called me there, and I shut down the part that day, ending a promising career as a trial judge, less than four months after it began!

The next several weeks remain a blur in my memory, so much having happened in so short a time. On January 15, Judge Breitel convened a press conference in the Court of Appeals Judges' conference room in Albany to announce my appointment, with the advice and consent of the four Presiding Justices of the Appellate Divisions constituting the administrative board. He used some extravagant language in describing what he expected me to accomplish, ending by saying, "He will be worthy of being canonized if he succeeds." We certainly had some successes over the next five years, but fell far short of deserving that lofty designation. At least I can say I never heard a word from Rome!

The legislature then passed and Governor Malcolm Wilson signed a bill amending the Judiciary Law to declare that a justice of the supreme court could also serve as State Administrative Judge, which "shall be deemed one of his judicial functions and shall not

constitute holding a public office.”<sup>3</sup> This was probably unnecessary, but it did provide some comfort, at least to me.

The Chief Judge then met with the four P.J.’s and persuaded them to have their respective Appellate Divisions name me as the Administrative Judge of each of the judicial departments, with the responsibility of overseeing and coordinating the administrative judges of each department. This included overseeing the New York City Administrative Judge David Ross, who in turn oversaw the courts in New York City.

I know that many of you are hoping my memory of these events will include some insight as to how Chief Judge Breitel managed to persuade the four P.J.’s and their courts to agree to my appointment, which at least gave the appearance of creating a single state administrator of the court system. I am sorry to disappoint you, but I can only speculate with you as to how this happened.

First, Judge Breitel, while slight in physical stature, was a giant among the judges of our state and highly respected by his peers. He had served as a prosecutor in the New York County District Attorney’s Office when Thomas Dewey was district attorney; as counsel to Dewey when he was Governor; and as a supreme court justice for sixteen years, most of which were served on the Appellate Division, First Department. And then he served on the Court of Appeals for seven years, before being elected Chief Judge. He was a very cerebral judge without being bookish. He had a deserved reputation for absolute integrity.

Judge Breitel conducted a vigorous campaign in the 1973 election, in which he insisted that major changes needed to take place if the court system of New York could truly be described as the Unified Court System. He deplored the existing political process by which judges were chosen, and the cumbersome mechanism for dealing with judges who misbehaved. He promised change. There was a good deal of public support for Judge Breitel’s proposals, and strong editorial support from the leading newspapers of the state. But I was not present at the administrative board meeting at which he pulled off this major coup, and can only conclude that there was a *miracle worker* involved in these significant changes which began to take place in the courts of New York—his name was Charles D. Breitel.

---

<sup>3</sup> Act of Jan. 31, 1974, ch. 4, 1974 N.Y. Laws 23.

The next remarkable event in the early weeks of the Chief Judge's term was his address to the legislature delivered on February 27. It was the first of its kind in New York, and afforded Judge Breitel the opportunity to lay out what changes he believed were necessary to make the court system of the Empire State what it should be—the best in the nation.

He spoke first about court administration, applauding what the four Presiding Justices had agreed to just weeks before in naming me Administrative Judge of each department, and naming David Ross New York City Administrative Judge. He urged that there be a constitutional change to confirm the new, stronger role of the Chief Administrative Judge, who was to be appointed by, and responsible to, the Chief Judge.

Second, he urged merger of the Family Court, the County Court, the Surrogate's Court, and the Court of Claims into the New York State Supreme Court, to end the constitutional fiction of a Unified Court System.

Third, the Chief Judge declared a central court budget funded by state revenue essential for the Unified Court System to be a reality. He pointed out that a single Unified Court budget was included in a pending constitutional amendment, and that centralized management was impossible without it.

Fourth, Judge Breitel urged merit selection of our judges, to be appointed by the Governor and confirmed or rejected by a confirmation commission, which he preferred to a nominating commission. He noted that the administrative board agreed with him with respect to an appointed Court of Appeals, as did the six other members of the Court at that time. All, I am sure, had in mind the recent spectacle of the 1973 race for Chief Judge, which soured most observers on the elective process for choosing members of our high court. Judge Breitel later noted, however, that it was ironic that the Court of Appeals, which needed the appointive process least, got it first.

Finally, the Chief Judge supported the creation of a Judicial Conduct Commission to receive and investigate complaints against judges, doing away with the cumbersome and seldom used Court on the Judiciary, and allowing final authority to discipline judges to rest in the courts themselves.

The ideas advanced were not new—they had been advocated by many organizations devoted to court improvement, such as Modern Courts and the League of Women Voters. They were supported by

the organized bar. They have yet to be fully realized, but packaging them as he did in the first ever State of the Judiciary address provided an agenda for change, which outlined what needed to be done in the years ahead.

1974 and 1975 marked the establishment of the Office of Court Administration, which I can proudly say was staffed by outstanding people of exceptional ability. They surely made me look good! Counsel's Office was headed by Michael Juviler, who had come to us from the New York County District Attorney's Office where he had been Chief of the Appeals Bureau, and he was ably assisted in our New York office by Michael Colodner, who succeeded him as Counsel. Fred Miller became Legislative Counsel in Albany, assisted by Marc Bloustein, who later succeeded Fred.

I want to especially thank Marc for helping me in preparation of this assignment. I mentioned earlier that I relied heavily on my own oral history draft in putting together these anecdotal recollections, but Marc provided me with documents, which in some cases corroborated my recollection, and in other cases contradicted what my now feeble memory recalls. Thank you, Marc.

My first deputy administrator of the courts was Peter Gray, a non-lawyer who had a Ph.D. in management from M.I.T. Peter was succeeded by Sue Johnson, another brilliant non-lawyer who put together a super group of analysts and planners, which included my oral history interrogator, Steve Younger.

Peter Preiser had just completed an assignment as state corrections commissioner when he joined us in 1975 as deputy administrator for New York City, keeping tabs on what was going on at 80 Center Street and serving as liaison to Judge Ross. I want to observe that his prior experience as corrections commissioner had nothing to do with his being selected for this role! Peter and I had had a long history of working together, starting with his involvement with the Penal Law Commission when he was responsible for all the sentencing provisions, and a good deal of the Criminal Procedure Law.

Judge Robert Sise became my deputy state administrator for the courts outside New York City, and later served as Chief Administrative Judge. I had known Bob by reputation when he was a family court judge in Montgomery County, and that reputation was that he was a very able, energetic judge, who was in constant demand to serve in other counties, in family court or in county court, to try difficult cases. That reputation was buttressed by his

excellent work in supreme court in New York City.

And of course one cannot speak of the Office of Court Administration (“OCA”) in its early years, or for that matter, throughout most of its existence, without mentioning the wonderful contribution of Mike McEneny, the jack-of-all-trades of court administration, whose good humored advice was always welcome.

There were so many others who made major contributions to our mission—I shall not try to recall them today—but in summary, let me say that the support I had from so many very able, dedicated people accounted for whatever successes court administration enjoyed during my years there.

I do not want to convey the impression that the orders of the four Appellate Divisions, naming me as Administrative Judge of each department, carried with them the full authority to manage the courts state-wide—far from it. Note the conditioning language of each order: “in consultation with this Court and its Presiding Justice.”<sup>4</sup> I soon learned that “consultation,” in that context, meant getting prior approval for each proposed change, which was often negotiated over weeks and sometimes months. I got to know the four P.J.’s very well—Owen McGivern, Frank Gulotta, Clarence Herlihy, and John Marsh—and I spent a good deal of time in their chambers, especially in Manhattan and Brooklyn. There was little enthusiasm for our programs, but over time they got used to my being around.

I did enjoy a special relationship with J. Clarence Herlihy, the P.J. of the Third Department. We were both from Glens Falls, his mother and my grandmother were close friends, and he considered himself my mentor, which, in a way, he was. This gave us a leg up, at least in the Third Department.

It should also be clear that this new presence, the Office of Court Administration, was not embraced immediately by the judges and non-judicial personnel of the court system. It provoked strong hostility in some cases. The Appellate Division and Court of Appeals Reports for those years list “*Bartlett*” as respondent in at least twenty cases, in which I was sued in Article 78 proceedings by judges or unions representing staff. Happily, most of the litigation was resolved in our favor.

I recall one episode when a group of senior supreme court justices

---

<sup>4</sup> See, e.g., *Blyn v. Bartlett*, 348 N.E.2d 555, 559 (N.Y. 1976) (noting the language of the First Department’s order).

in the First Department wanted to discuss some proposed change, and came to 270 Broadway as a delegation for this purpose. They knew I had to be in Albany that day, but said they still wanted to meet with staff to voice their concerns. They met with Michael Juviler, my counsel, and with Peter Gray, my deputy administrator, and the discussion was less than cordial. Finally, one member of the group said, "Juviler, I know you came from a D.A.'s office, and Gray, where did you practice before coming to work for Bartlett?" Peter explained, I am sure politely, that he was not a lawyer. The judge who asked the question got to his feet, picked up his papers, and stormed out of the meeting, saying as he left, "What are we doing discussing changes they want to make in how we run our parts with a guy who is not even a lawyer?"

Changes we proposed in the civil service rules for non-judicial personnel often met with fierce opposition. For instance, we proposed to open the court clerk position to women and Hispanics, who were then largely excluded. We wanted to change the promotional process, which in New York City meant that you were a court officer first, then a court clerk. It was a major change, and it evoked strong protests from the court officers. They picketed our apartment and the Breitel apartment in the city. They picketed our Glens Falls home, and they even showed up at our summer camp on Fourteen Mile Island in the middle of Lake George.

In New York City, the marchers carried a coffin draped in black and a sign saying, "Breitel, Drop Dead" or "Bartlett, Drop Dead," depending on where they were picketing. I remember it as having been a bit intimidating, but it did not deter us from going forward with the changes.

There were objections voiced upstate too. Early on I visited each of the judicial districts to meet with the administrative judges already in place, and these visits included a trip to Syracuse to meet with Justice Bill Roy, the administrative judge of the fifth judicial district. After our meeting, I agreed to meet with a group of lawyers, and I was ushered into the main courtroom, which was packed to the rafters with what must have been most of the lawyers in Syracuse. I was introduced by Bill Roy, and before I could say a word, a lawyer got up and said he had been asked to speak on behalf of the Onondaga County Bar. His words, as I remember them, were: "I don't want you to take this personally Judge, but the truth is, they may need court administration in New York City, they may even need court administration in Buffalo, but we sure as hell don't

need it in Syracuse. You worry about the rest of the state and we'll worry about Onondaga County." The speaker later became a good friend, and served with distinction as Chief Judge of the U.S. District Court for the Northern District of New York.

Court reform received a big boost from Governor Hugh Carey after he took office in January 1975. He appointed a task force on court reform chaired by Cyrus Vance, which issued its report in March 1976, calling for sweeping constitutional changes including appointed judges, merger of the major trial courts, a judicial conduct commission to replace the Court on the Judiciary, a centralized court administration with a chief administrator appointed by and responsible to the Chief Judge, and finally, a unified court budget funded with state revenue.

It should be noted that the Vance Task Force recommendations closely followed the court reform proposals urged by Chief Judge Breitel in his 1974 address to the legislature, and again in a speech a year later to a citizens' conference on court reform organized by the Modern Courts and American Judicature Society. There were differences in detail, of course, but the essentials were the same: merit selection, court merger, a judicial conduct commission, centralized court administration, and a state-funded unified court budget.

On May 3, 1974, Governor Carey sent the Vance proposals to the legislature with a special message urging first passage of the constitutional amendments, and then passage of the bill establishing a unified court budget. The message brought no response from the legislature, with no sign that the proposals would be acted upon in that session.

A series of discussions took place over the next couple of months, in which Judge Breitel and I were involved. There were also discussions going on between the Governor's Office and the legislative leaders' offices, all of which resulted in the Vance proposals being trimmed back to what was believed to be passable by the legislature. Judah Gribetz, Governor Carey's Counsel, was very much involved in all these talks. At one such discussion the Governor advised us that he was going to call a meeting with the legislative leaders and asked the Chief Judge and me to attend.

The meeting took place in the Governor's New York City office and the Governor told the leaders that there must be action on court reform "this year" to afford for second passage of the constitutional amendments by the 1977 legislature and with voter approval to be

sought at the November 1977 general election. The leaders were not happy campers, especially Speaker Stanley Steingut, when the Governor told them that he was going to call an extraordinary session of the legislature for that purpose.

Speaker Steingut reflected the view of the New York City political leaders—that they should not be cut out of the judge-making process, that judicial staff positions should continue to be filled in consultation with district leaders, and that the court system is fine just the way it is, thank you. Which is not to say that the view differed all that much from some Republican leaders in the rest of the state.

Senator Warren Anderson was more supportive of change. Senator Bernie Gordon, Chairman of the Judiciary Committee and sponsor of the 1975 step toward an improved judicial conduct process, was generally supportive. Others, including Senator John Dunne, favored the reform measures, and I am sure they influenced Warren in that direction.

My admiration for Hugh Carey went up several notches that day. If he had not called a special session, heaven knows when something would have happened to move along court reform. It is not that Hugh Carey, Stanley Steingut, and Warren Anderson had not collaborated before in major achievement, because they had. The rescue of New York City from the brink of bankruptcy in 1975 was still freshly in mind.

So the extraordinary session called on August 4, 1976 resulted in the approval of the proposed constitutional amendments and the court financing bill was adopted. Needless to say, Governor Carey signed the court financing bill the next day, and for the first time, starting in 1977, a single unified court budget would be adopted by the legislature, with first instance appropriations for all of the operations of the court system and with local charge backs phased out over time.

It is difficult now to understand what factors came into play in the legislature's approval of the court reform package. There was strong, vocal support from the organized bar and from citizen groups like the Fund for Modern Courts, the League of Women Voters, and Citizens Union, and there was nearly unanimous support from the newspapers of the state. That the task force from which the proposal emanated was chaired by a distinguished leader, Cyrus Vance, was helpful. And that the proposals were consistent with the court reform measures, urged by a very respected Chief

Judge Charles D. Breitel, added weight to the arguments for passage.

But the single most important factor, in my view, is that Governor Carey pushed the legislature to act. Although his special message of May 3 was largely ignored on the third floor of the Capitol, the Governor forced the issue by calling the special session. I have always believed that Judah Gribetz played a key role in urging strong action by Governor Carey.

And fast forward now to the 1977 legislative session when the legislature gave second passage to the constitutional amendments and adopted the first unified court budget in our state's history. The state budget, which over time replaced local funding with state appropriations, except for capital improvements, became an important management tool as we worked to standardize civil service positions and to establish staffing patterns that were consistent throughout the court system.

The constitutional amendments were on the ballot on November 8, 1977, and for a couple of months the Office of Court Administration at 270 Broadway transformed itself into a political action headquarters to support passage of the amendments. Judge Breitel's good friend, former federal judge Simon Rifkin, agreed to chair the committee to raise funds for this effort. Enough funds were raised to hire David Garth's firm to advise us and to pay for some TV ads, posters, and flyers. It was a lean campaign, but proved to be enough. "Vote for Amendments One, Two, and Three for Better Courts" became our battle cry and was featured in all our material. We can thank David Garth for boiling down our campaign to that simple slogan.

Of course, we had very strong editorial support from the press of the state, and we had the enthusiastic support of the League of Women Voters, Modern Courts, the Citizens Union, the State Bar Association, and the Association of the Bar of the City of New York.

Two recollections come to mind from that campaign that I will share with you. The first was our eating corned beef sandwiches in one room at David Garth's office during an evening strategy meeting there, while in an adjoining room, Ed Koch and his group ate Chinese take-out in their strategy meeting for Ed's first run for mayor. And the second is of Mike Seymour, a former President of the New York Bar Association, all 6'5" of him, passing out flyers for Amendments One, Two, and Three at a subway stop in midtown Manhattan.

In any event, the amendments passed, and on April 1, 1978, the State Administrative Judge became the Chief Administrator of the Courts pursuant to that amendment. We then engaged in a series of negotiations with the legislature regarding implementing legislation in which we probably lost more than we gained. But there was no watering down the essential changes, now embedded in our State Constitution.

To summarize them again:

1. Appointment of Court of Appeals Judges by the Governor from persons proposed by the new Commission on Judicial Nomination, a body of twelve members, four each to be named by the Governor, Chief Judge, and legislative leaders.<sup>5</sup>

2. An eleven member Commission on Judicial Conduct whose members are appointed by the Governor, Chief Judge, and legislative leaders to investigate and hear complaints of misconduct and to determine if the judge should be admonished, censured, or removed from office.<sup>6</sup> Such determination is to be reviewed by the Court of Appeals if not accepted by the judge involved.<sup>7</sup>

3. A Chief Administrator of the Courts, appointed by and responsible to the Chief Judge to supervise the administration and operation of the courts, such appointment to be with the advice and consent of the administrative board.<sup>8</sup> Standards and administrative policies to be established by the Chief Judge, in consultation with the administrative board, and promulgated after approval by the Court of Appeals.<sup>9</sup>

All of this happened thirty years ago, in the five years from January 1, 1974 to December 31, 1978. There are so many other memories of these years I would like to share with you, but my stamina is waning and your patience with this recital must be wearing thin too.

So here we are in 2007, still urging fundamental change in the court system of New York. What are the lessons to be gained from our efforts of thirty years ago? What is the relevance of that experience then to the cause of court reform today, and how should we now proceed?

There are some striking similarities between then and now.

---

<sup>5</sup> N.Y. CONST. art. VI, § 2.

<sup>6</sup> *Id.* art. VI, § 22.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* art. VI, § 28.

<sup>9</sup> *Id.*

First, we have an extraordinarily energetic, respected leader of the Unified Court System in our Chief Judge, Judith Kaye, committed to achieving merger and merit selection, and who will remain in office through 2008. We have a new Governor, Eliot Spitzer, who in his State of the State Address committed himself to achieving the same goals, and has sent proposed constitutional amendments to the legislature. We have members of each house of the legislature, who will tell you they support these reforms.

We have the excellent report of the Special Commission on the Future of the New York State Courts, proposing the merger of Family Court, County Court, Surrogate's Court, and Court of Claims into the New York State Supreme Court.<sup>10</sup> A new district court is proposed to replace the lower courts in New York City, the district courts in Nassau and Suffolk Counties, and the city courts outside New York City.<sup>11</sup> A new Fifth Department is proposed to relieve the very heavy caseload in the Appellate Division, Second Department, which now includes half of the state's population.<sup>12</sup> I plead guilty to having a personal interest in these recommendations, as a member of the Commission, which is ably chaired by Carey R. Dunne.

The Dunne Commission submits no proposals for appointment of judges, leaving that to another day. Passage of a constitutional amendment providing for merit selection may be more likely down the road, if merger takes place and it is seen that the sky does not fall in. The cause for an appointed judiciary will also be strengthened if Governor Spitzer continues to make judicial appointments to those judgeships now filled by appointment, based on merit. That certainly would appear to be his record so far, based on my experience as a member of two of his judicial screening committees, the Statewide and Third Department Committees.

Now back to the proposals of the Dunne Commission. Governor Spitzer has expressed his unqualified support for the constitutional amendment urged by the commission for merger-in-place and the creation of a Fifth Department. What is needed now is the forging of a new partnership, a Spitzer-Kaye team-up, to which the Governor is willing to commit his full clout as the chief executive of

---

<sup>10</sup> SPECIAL COMM'N ON THE FUTURE OF THE N.Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 10 (2007), *available at* [http://www.nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://www.nycourts.gov/reports/courtsys-4future_2007.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

this state, to achieve first passage of the Dunne amendment in 2008. That would remind one of the Carey-Breitell team of thirty years ago, pushing the Vance proposal amendments through to passage. Let us hope and pray that this piece of court reform history repeats itself, and without the need to call the legislature into extraordinary session.

The legislature has given first passage to a constitutional amendment before, which provided for merger-in-place. In 1986, a proposed constitutional amendment<sup>13</sup> gained first passage in the closing hours of the legislative session.<sup>14</sup> It was based on a 1985 Senate plan, which was sponsored by another Dunne, Senator John Dunne, chair of the Judiciary Committee, and the majority leader, Senator Warren Anderson. Regrettably, the amendment did not receive second passage, and so was never put before the voters. But this bit of history is evidence that a merger proposal can pass the legislature, and gives us hope that this will occur with the commission proposal in 2008.

There have been important improvements in our Unified Court System since 1978, and many of these have taken place on the watch of Chief Judge Kaye and Chief Administrative Judge Lippman, directly due to their leadership. While these have not required constitutional amendment, there has been great success in implementing the Court Facilities Act to provide funding for forty new or refurbished courthouses throughout the state;<sup>15</sup> overhauling our jury system by eliminating occupational exemptions and easing jury duty as to frequency and duration;<sup>16</sup> creating continuing legal education (CLE) requirements for lawyers;<sup>17</sup> and creating special parts or divisions such as those for domestic violence and commercial cases.

An issue which is not part of the court reform agenda, but which is very important to our court system, is that of judicial salaries—which have not been increased since 1999. I am told by an informed source in the legislature that there is still hope that, when the legislature returns to Albany next week, a compromise may be reached by the Governor and the two houses on a campaign finance

---

<sup>13</sup> See 1986 N.Y. Sess. Laws XXVIII, XXX (McKinney).

<sup>14</sup> See N.Y. LEGISLATIVE DIGEST, 209th Reg. Sess., S. 9618 (1986) (bill summary).

<sup>15</sup> See Act of Aug. 7, 1987, ch. 825, 1987 N.Y. Sess. Laws 1553 (McKinney).

<sup>16</sup> See Act of June 28, 1995, ch. 86, 1995 N.Y. Laws 2592, 2593–94.

<sup>17</sup> See Ann Pfau, *CLE for New York Attorneys: Ensuring the Tradition of Professionalism*, N.Y. ST. B.J., Jan. 1999, at 8, 8–9.

bill and that, in turn, will free up the judicial pay raise package and a legislative salary increase proposal. Do not ask me to explain the relationship between judges' salaries and campaign finance reform. What would appear to be totally separate, unrelated matters become joined at the hip and one may not be passed without the other.

Appropriate salary raises for judges are long overdue, and it would be a shame to not have them enacted this year, when everyone involved says that they are for them, but manages not to act on identical proposals that will produce actual increases in judicial salary paychecks.<sup>18</sup>

While this may not be thought to be part of court reform, our obligation to assure quality representation of indigent defendants is critical to the fair administration of justice in New York. Article 18-B of the County Law was adopted over forty years ago to require counties to provide for defense of indigent defendants.<sup>19</sup> It was New York's response to the requirements of *Gideon v. Wainwright*<sup>20</sup> and the New York case of *People v. Witenski*.<sup>21</sup> Based on the names of its sponsors in the legislature, the new law became known as the Anderson-Bartlett Law everywhere except in Glens Falls, where, not surprisingly, it was called the Bartlett-Anderson Law! After forty years of experience, it is now clear that our indigent defense program is badly in need of replacement. The three-plan approach to representation of the poor in criminal cases, dependent as it is on each county's ability to finance and degree of commitment to the program, results in widely disparate representation. As one goes on the Thruway from New York City to Buffalo, from county to county, one finds in some cases a full-time experienced lawyer, and other times a part-time real estate practitioner. Some lawyers might have investigators, others will not. In some counties you might get a lawyer the first time you appear in court, and in others you may be held in jail for days or even weeks before you see a lawyer. The proper response to fixing our public defense system is the creation of a state-funded, independent public defense commission, which has been proposed by yet another commission appointed by Chief Judge

---

<sup>18</sup> The legislature did not act on judicial salaries in 2007, but there is still hope that there will be a pay raise for judges and legislators in the current session.

<sup>19</sup> See generally N.Y. COUNTY LAW §§ 722–722-f (McKinney 2004 & Supp. 2008).

<sup>20</sup> 372 U.S. 335, 342 (1963) (finding the right to counsel “fundamental,” and therefore extended to states via the Fourteenth Amendment).

<sup>21</sup> 207 N.E.2d 358, 395 (N.Y. 1965) (finding that criminal defendants must be “clear[ly]” informed that a lawyer will be made available to them if they cannot afford representation).

Kaye in 2004 to look into the problem.<sup>22</sup> A bill has been introduced in each house,<sup>23</sup> and what is needed now is again to have the Governor, the Chief Judge, and the legislative leaders get on the same page to see to it that the bill becomes law.

Wait, there is one more matter which deserves mention today. The *López Torres* case was just heard by the U.S. Supreme Court, and if seasoned observers are correct, the court will probably reverse the Second Circuit and leave us with the present judicial convention system for nominating candidates for supreme court justice.<sup>24</sup> This, in spite of the excellent arguments raised in support of the Second Circuit decision, including an amicus brief filed by three former Chief Administrative Judges of New York—Bellacosa, Milonas, and Bartlett!<sup>25</sup>

But even if the current method of nomination is found not to offend the Constitution, the process cries out for improvement, and the proposals of the Feerick Commission should become law.<sup>26</sup> While this would not produce merit selection as we understand that term, it would make judicial elections more merit-based than now.

Now it seems that this senior citizen is full of advice for everyone in sight—including the Governor, the Chief Judge, and the legislature—on every issue touching on our courts. I suggest that one of the privileges people of advanced years have is to give advice.

For progress to be made on any of these proposals to improve our judicial system, it is necessary for the Governor and the legislature to get back to business. It is sad, indeed, to see the Governor and the Senate majority each hire expensive outside counsel, charged to the taxpayers, to advise them in their squabble about who leaked what to whom and when. It should not be too much to ask that

---

<sup>22</sup> See COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 27, 32 (2006), available at [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

<sup>23</sup> See S. 4311, 230th Leg., Reg. Sess. (N.Y. 2007) (Senate proposal); Assemb. 9087, 230th Leg., Reg. Sess. (N.Y. 2007) (Assembly proposal).

<sup>24</sup> As was predicted, the U.S. Supreme Court reversed the Second Circuit and, while critical of our judicial convention system, did not find it unconstitutional. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 800–01 (2008), *rev'g* 462 F.3d 161 (2d Cir. 2006). The nominating process still needs fixing.

<sup>25</sup> See Brief of Former New York State Judges and the American Judicature Society as Amicus Curiae in Support of Respondents at 7–27, *López Torres*, 128 S. Ct. 791 (No. 06-766), 2007 WL 2065265.

<sup>26</sup> See COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 30–35 (2006), available at <http://www.nycourts.gov/whatsnew/pdf/FerrickJudicialElection.pdf>.

accusations and counter-accusations cease, that civility return to the dialogue as we thought it had last January, so then agreement can be reached on the important issues facing us. Such agreements will require compromise, but without dialogue there can be no compromise. Legislation is still the art of the possible.

Only then can we expect to move forward with needed constitutional changes of our court structure, with adoption of critical legislation, including judicial and legislative pay raises and the myriad of other important matters yet to be addressed by the Governor and the legislature. End of sermon. Thank you for listening.