

Report and Recommendations of the
**New York State Bar Association Committee on the New
York State Constitution**

**The Judiciary Article of the New York State Constitution
- Opportunities to Restructure and Modernize
the New York Courts**



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“There shall be a unified court system for the state.”

New York State Constitution Art. VI, § 1

INTRODUCTION AND EXECUTIVE SUMMARY

Article VI of the New York State Constitution, known as the Judiciary Article, creates the structure and organization of the Unified Court System in New York. It controls a wide range of important issues regarding New York’s Judiciary, such as: a) the number and jurisdiction of our trial and appellate courts, and the interrelationships between those courts and cases that are filed in them; b) how our State’s courts are managed, financed and administered; c) the number of judges of each of the State’s courts; d) how New York’s judges are selected and disciplined, their eligibility for office, their terms, their retirement ages and how their compensation is fixed; and e) which particular courts the families, individuals, corporations, non-profits and government agencies who have disputes must turn to for judicial resolution, which sometimes results in the need to turn to multiple courthouses.

In short, the Judiciary Article sets out the operating structure for our State’s sprawling court system – ranging from:

- Town and Village Courts upstate;
- To District Courts on Long Island;
- To the Courts of New York City;
- To other City Courts around the State;
- To County, Family and Surrogate’s Courts;
- To the Supreme Courts and Court of Claims across the State;
- Up to the four Appellate Divisions; and
- Ultimately, to our State’s highest court, the Court of Appeals.

But there is much more than that in Article VI. In fact, the Judiciary Article contains approximately 16,000 words – representing almost 1/3 of the entire State Constitution. Because of the manner in which the State Constitution was drafted and amended – spanning a period of more than two centuries, the Judiciary Article continues to contain various anachronistic or superseded concepts. These include: a) a mandate that, when called on to make a placement of a child, courts will place children in an “institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child”; and b) a provision specifying that there shall be only 11 Judicial Districts of the Unified Court System and laying out which counties fall into which District, even though the Legislature has since provided for 13 such Districts.

For various reasons, decades have gone by without any successful effort to restructure and modernize the Constitutional underpinnings of our State’s court system. The result has been a Unified Court System that has 11 different trial courts, resulting in an overly complex, unduly costly and unnecessarily inefficient court structure.

The New York State Constitution provides that the question “[s]hall there be a convention to revise the constitution and amend the same” will be presented to voters every twenty years.¹ The next such vote will occur on November 7, 2017.

In July of 2015, the then President of the New York State Bar Association (hereinafter “New York State Bar” or “State Bar”), David P. Miranda, created a Committee on the New York State Constitution to: a) serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; b) make recommendations regarding potential constitutional amendments; c) provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and d) promote initiatives designed to educate

¹ N.Y. Const. art. XIX, § 2.

the legal community and the public about the State Constitution.² Thereafter, that Committee created a Subcommittee to analyze Article VI of the State Constitution and its provisions affecting New York’s Judiciary.³

Perhaps due to the cumbersomeness, complexity and length of Article VI, as well as its importance to members of the New York State Bar, the State Bar has long taken positions supporting amendment or reform of various provisions of this Article.⁴ As a result, the vast majority of the issues addressed in this Report are already the subjects of established State Bar policy that will be summarized – but not re-assessed – in this Report.

What follows is an analysis of Article VI and a discussion of issues that potentially could be addressed at a future Constitutional Convention should one be held. This assessment is not a determination as to whether changes should be made to the Judiciary Article through a Constitutional

² N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm’n on a Constitutional Convention (2015), at 4, *available at* <http://www.nysba.org/nysconstitutionreport/>.

³ The positions taken herein have been reached by the Committee on the New York State Constitution (“Committee”) as an entity and should not be attributed to any particular member of the Committee or to any groups, committees, or affiliations associated with a member. As an example, Hon. Alan D. Scheinkman, a member of the Committee, has been named by Chief Judge Janet DiFiore to serve as Co-Chair of the Judicial Task Force on the New York State Constitution. In addition, the work of the Committee was ably assisted by the input and historical knowledge of Marc Bloustein, who is First Deputy Counsel of the Office of Court Administration and a counsel to the Chief Judge’s Task Force. Any positions asserted in this report are not necessarily positions taken by Justice Scheinkman or the Judicial Task Force.

⁴ Other groups, such as the New York City Bar Association, have noted that “[t]he need for constitutional revision of Article VI is great (whether accomplished by constitutional convention or legislative amendment), and the risk of adverse change in this area is small.” New York City Bar Assn., Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

Convention – or what particular changes should be made from the many available options for reform of the Unified Court System.

This Report is divided into four sections. Part I summarizes the background of the State Bar’s Committee on the New York State Constitution and the issuance of this Report. Part II contains an overview of the current Judiciary Article of the State Constitution and summarizes the history of that Article in New York, including its key provisions in prior versions of the State Constitution. Part III discusses the issues involving the Judiciary Article that the Committee deemed to be most deserving of consideration for reform or revision. Finally, Part IV sets out the conclusions of the Committee’s Report.

I. BACKGROUND OF THE REPORT

A. Background on the State Bar’s Committee on the New York State Constitution

On July 24, 2015, then State Bar President David P. Miranda announced the creation of the Committee on the New York State Constitution. This Committee has identified various issues that would be worthy of consideration should a Constitutional Convention be convened in New York.

The Committee has already accomplished a great deal in the nearly 17-month period since its inception. On October 8, 2015, the Committee issued a report entitled “The Establishment of a Preparatory State Commission on a Constitutional Convention.”⁵ That Report was approved unanimously by the State Bar House of Delegates on November 7, 2015.⁶ A

⁵ N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm’n on a Constitutional Convention (2015), *available at* <http://www.nysba.org/nysconstitutionreport/>.

⁶ Press Release, N.Y. State Bar Assn., New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017 (Nov. 13, 2015), *available at* <http://www.nysba.org/NYSConstitutionVote/>.

second Report concerning Constitutional Home Rule was issued on March 10, 2016. That Report was approved by the House of Delegates on April 2, 2016. Another Report, concerning the Environmental Conservation Article of New York's Constitution, was issued on August 3, 2016. That Report was approved by the House of Delegates on November 5, 2016.⁷

B. The Subcommittee's Work Regarding the Judiciary Article

The Committee's Subcommittee on the Judiciary Article sought to consider the views of multiple interest groups both within and outside the Judiciary. For example, the Subcommittee invited members of the Judiciary who represent New York City and/or statewide judicial organizations to share their views on the Judiciary Article.⁸

- The Subcommittee held its first meeting on May 12, 2016. At that meeting, then President David Miranda addressed the Subcommittee and reminded its members of the importance of the Judiciary Article and the work they were about to undertake.
- Chief Administrative Judge Lawrence K. Marks addressed a June 2, 2016 meeting of the full Committee on the New York State Constitution. At that meeting, Judge Marks discussed his opinions on topics such as the utility of court consolidation as it impacts the administration of justice, the problems caused for the court system as a result of the Constitution's

⁷ See N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV) (2016), *available at* <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68757>.

⁸ Various judicial organizations declined invitations to address the Subcommittee, whether due to scheduling or other concerns. The Subcommittee was informed that the Franklin Williams Commission, Judicial Friends, the Latino Judges Association, and the New York State Family Court Judges Association have decided not to take positions at this time on a potential Convention as it relates to the Judiciary Article. The views of those groups that did address the Subcommittee are summarized in this Section of the Report.

cap on the number of Supreme Court justices, and the need for improvements in the Town and Village Courts.

- The Subcommittee again met on June 15, 2016 and heard comments from Hon. Jonathan Lippman, former Chief Judge of the State of New York. Chief Judge Lippman emphasized the importance of a convention as a means to accomplish some form of court consolidation. When discussing judicial selection, Chief Judge Lippman noted that any form of selection is only as good as the entity or entities doing the selecting. He also noted the potential benefits to be achieved if a Fifth Department of the Appellate Division were to be created. Consistent with his support for the 2013 judicial retirement age proposal, discussed in Section II.b.12 below, he explained that raising and unifying the retirement age for all judges could be a productive use of a Convention.
- The Subcommittee's next meeting was held on July 21, 2016. The meeting began with a discussion with Michael A. Cardozo, a former New York City Corporation Counsel who was involved in the 1977 court reforms discussed in Section II.b.9 below. Cardozo highlighted, *inter alia*, how a Constitutional Convention could be a useful springboard for court reform in New York. He advocated for merger in place, which would combine New York's trial courts into a single court of original jurisdiction. This single court would share a retirement age of 76, including two-year re-certifications. In addition, a Fifth Department could be created, and the Justices of the Appellate Division could be chosen from among all the judges in this new, unified trial court.
- At its July 21st meeting, the Subcommittee also was addressed by Hon. Paul Feinman of the Appellate Division, First Department, on behalf of the statewide Association of Supreme Court Justices. Justice Feinman is a Past Chair of the Judicial Section of the New York State Bar. Justice Feinman indicated that the Association of Supreme Court Justices supports the current elective system for Supreme Court Justices and supports restricting eligibility for the Appellate Division to Supreme

Court Justices. He agreed with creating a Fifth Department to cure some of the caseload difficulties experienced in the Second Department.

- The Subcommittee also met on October 25, 2016 to discuss the Report and receive an update on the status of potential speakers.
- On November 8, 2016, the Subcommittee met and heard from Hon. Sarah Cooper, President of the New York City Family Court Judges Association, and Hon. Erik Pitchal, a New York City Family Court Judge who is assigned to Kings County. Judges Cooper and Pitchal discussed the operations of the Family Court. Although their Association does not have a formal position on a Constitutional Convention, in a poll about potential issues, their members expressed a desire to bring parity to the Judges of the Family Court in New York City. Such parity could cover a variety of issues, including: judicial pay, retirement age, term in office and other aspects of a Family Court judgeship. They supported consolidating the Family Courts with the Supreme Court and expanding Family Court jurisdiction to include divorces and certain criminal matters.

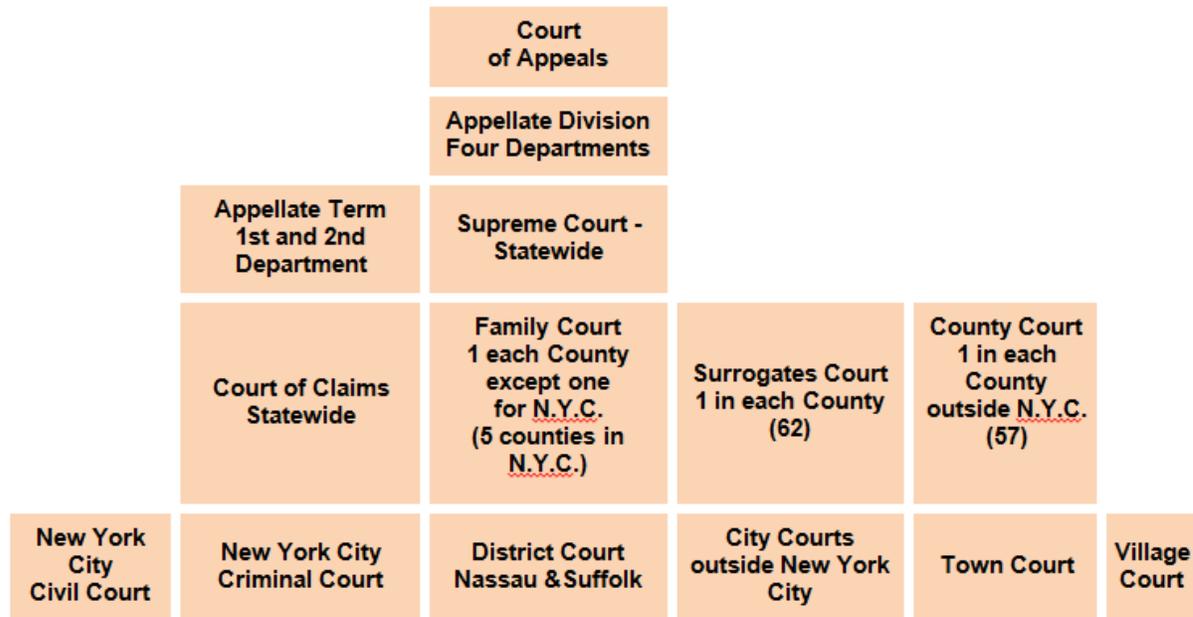
II. OVERVIEW OF THE JUDICIARY ARTICLE AND ITS HISTORY IN THE STATE CONSTITUTION

A. Overview of the Current Judiciary Article

Article VI as it exists today establishes a “unified court system”⁹ for the State of New York. This court system is comprised of a) at the trial level: the Supreme Court, the Court of Claims, the Family Court, the Surrogate’s Court, New York City-specific courts, such as the New York City Criminal Court and the New York City Civil Court, County Courts outside New York City, District Courts in Nassau and Suffolk counties, various City Courts, and Town and Village Justice Courts around the State; and b) three appellate-level courts: the four Appellate Divisions of the

⁹ N.Y. Const. art. VI, § 1.

Supreme Court, which are New York’s principal, intermediate appellate courts; two Appellate Terms in the New York City metropolitan area; and finally, the Court of Appeals, which is the State’s highest court.¹⁰ As shown in a chart on the Unified Court System’s website,¹¹ the New York Courts are organized as follows:



The Unified Court System is led by its Chief Judge, who is also a member of the Court of Appeals, and by a Chief Administrator, who need not be but typically is a judge. The State is divided into four Departments of the Appellate Division of the Supreme Court and thirteen Judicial Districts. Each Department is headed by a Presiding Justice. The Chief Judge and the four Presiding Justices of the Appellate Divisions together form the Administrative Board of the Unified Court System.

Article VI prescribes the jurisdiction for each of New York’s courts and establishes the criteria governing how judges are selected, the duration

¹⁰ All of these courts, except for the Appellate Terms, are expressly mentioned in Section 1 of Article VI; the Appellate Terms are branches of the Supreme Court. *See* N.Y. Const. art. VI, § 8.

¹¹ <http://www.courts.state.ny.us/ctapps/outline.htm>.

of their respective terms and how their compensation is set.¹² Through a Commission on Judicial Conduct and other provisions, the State Constitution provides for the discipline and removal of judges where necessary.

Article VI provides the framework that defines today’s Judiciary and both its structure and operations in New York. Within that framework, the Legislature has enacted a number of laws – such as the Judiciary Law and various court and procedural acts – which flesh out the details of this system.

Despite its name, the Unified Court System is anything but – with its patchwork quilt of 11 different trial-level courts and multiple levels of appellate courts. As a result, it has been observed that “[n]o state in the nation has a more complex court structure than New York,” with resulting cost and inefficiency.¹³

As discussed below, a Constitutional Convention, if one were held, would provide an opportunity to re-examine the structure of our Unified Court System and to bring long overdue change that could modernize, simplify and bring greater efficiency to the operations of New York’s Judiciary.

B. History of the Judiciary Article

Today’s Judiciary Article is the culmination of a long history of statutes and previous versions of the State’s Constitution. The initial New York State Constitution was drafted over the course of 1776 and 1777 and was promulgated in 1777. Since then, there have been eight other constitutional conventions held in New York in 1801, 1821 (ratified in

¹² Article VI, § 25(a) provides that judges’ compensation “shall be established by law and shall not be diminished during the term of office....” *See Maron v. Silver*, 14 N.Y.3d 230 (2010).

¹³ The Committee for Modern Courts, “Court Simplification in New York State: Budgetary Savings and Economic Efficiencies”, at 1 (2012), *available at* <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>.

1822), 1846, 1867-68, 1894, 1915, 1938, and 1967. Several additional constitutional commissions sought to revise and rewrite specific portions of the State Constitution. These conventions and commissions have produced several altogether new State Constitutions and many amendments to existing constitutional provisions.

1. The Colonial Era

During the Colonial era, New York had a primarily English-based court system, with some Dutch antecedents. In 1683, following the 1674 Treaty of Westminster, the Assembly in New York passed a bill creating a court of law called the Court of Oyer and Terminer and a court with equity jurisdiction called the Court of Chancery.¹⁴ In addition, there was a Court of Sessions in each county of New York¹⁵ and a Petty Court in each town.¹⁶

¹⁴ This split between law and equity jurisdiction continues to have relevance today. Article VI, § 7 (specifying that the jurisdiction of New York’s Supreme Court is to encompass law and equity). *See, e.g., IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009) (applying different statutes of limitations to determine the timeliness of a claim depending on whether the claim is legal or equitable in nature); *see also Waldo v. Schmidt*, 200 N.Y. 199 (1910).

¹⁵ *See* <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-sessions-1684.html>.

¹⁶ *See* <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-petty-1684.html>. The law of England applicable in the Colonial era still has implications for today’s legal system. As the Court of Appeals has explained: “The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province.” *Melcher v. Greenberg Traurig*, 23 N.Y.3d 10, 14-15 (2014) (quoting *Bogardus v. Trinity Church*, 4 Paige Ch. 178, 198 (1833)). For example, New York’s Judiciary Law § 478 has been traced by the Court of Appeals to the “first Statute of Westminster . . . adopted by the Parliament summoned by King Edward I of England in 1275.” *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 12 (2009).

In 1691, a Supreme Court of Judicature was established in New York.¹⁷ At that time, there also was a Court of Common Pleas,¹⁸ Courts of Sessions¹⁹ and Justice of the Peace Courts.²⁰

2. State Constitution of 1777²¹

New York's first State Constitution, which was promulgated in 1777, did not contain an article on the Judiciary. Instead, the initial State Constitution combined aspects of the Declaration of Independence with other provisions typical of a state constitution of its day. That original version of New York's Constitution: a) continued the colonial office of Supreme Court Judge, b) created the new judicial office of Chancellor, c) provided that all judicial officers be selected by a Council of Appointment, and d) established a retirement age of 60 years old for the Chancellor, for the other Judges of the Supreme Court and for the first judge of each County Court in every county.²² The 1777 Constitution barred the Chancellor and Judges of the Supreme Court from holding any other office except for Delegate to the general Congress "upon special occasions."²³

¹⁷ See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-supreme.html>.

¹⁸ See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-common-pleas.html>.

¹⁹ See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-quarter-sessions.html>.

²⁰ See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-justice-peace.html>.

²¹ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1777-NY-Constitution.pdf.

²² N.Y. Const. art. XXIV (1777).

²³ N.Y. Const. art. XXV (1777).

A Court for the Trial of Impeachments and Correction of Errors, commonly known as the Court of Errors, was also created as a body to hear appeals from certain cases in the Supreme Court.²⁴

Otherwise, the 1777 State Constitution provided little in the way of specifics about the structure and operations of New York's Judiciary.

3. State Constitution of 1821²⁵

Our State's second Constitution was considerably more specific with respect to the Judiciary than the 1777 version. It established a court system with: a) a Supreme Court consisting of a Chief Justice and two other Justices²⁶ and b) judicial circuits with a Circuit Judge appointed in each and with the same tenure as Justices of the Supreme Court.²⁷ The Supreme Court was granted jurisdiction over some appeals from Circuit Courts, and the Court for the Correction of Errors had the final word in appellate matters. This new Constitution also continued the office of Chancellor,²⁸ and provided that the Governor was to nominate and appoint all judicial officers, except justices of the peace.²⁹

Nonetheless, the 1821 version of the Constitution contained nothing similar to our State's current form of Article VI.³⁰

²⁴ N.Y. Const. art. XXXII (1777).

²⁵ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1821-NY-Constitution.pdf. The Historical Society of the New York Courts and most other sources refer to it as the Constitution of 1821, as it was drafted in and dated that year. However, because the Constitution was voted on and went into effect the next year, it is also "often cited as the Constitution of 1822." *Id.*

²⁶ N.Y. Const. art. V, § 4 (1821).

²⁷ N.Y. Const. art. V, § 5 (1821).

²⁸ N.Y. Const. art. V, § 3, 7 (1821).

²⁹ N.Y. Const. art. IV, § 7 (1821).

³⁰ The first judiciary-related amendment was passed in 1845, which established a procedure for removing judicial officers.

4. State Constitution of 1846³¹

Article VI of today's State Constitution had its genesis in the framework found in the State Constitution that was ratified in 1846.

The 1846 State Constitution abolished the Court of Chancery and the position of Chancellor, and provided for “a supreme court, having general jurisdiction in law and equity.”³² For the first time, a Court of Appeals was established, consisting of eight Judges (four elected for an eight-year term, and four chosen from the “class of justices of the supreme court with the shortest time to serve.”).³³ The elected Judges of the Court of Appeals were chosen by the “electors of the state,” whereas the Supreme Court Justices were to be elected by the electors of the various judicial districts.³⁴ The Constitution directed the Legislature to develop procedures for the selection of a Chief Judge from among the four elected judges and for selecting the Supreme Court Justices.³⁵ In the event that a judicial vacancy arose before a term ended, the Governor was charged with filling the vacancy until the next election took place, at which time a judge would be elected for the remainder of the term.³⁶ With the establishment of the Court of Appeals, the Court for the Trial of Impeachments and the Correction of Errors was abolished.

³¹ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1846-NY-Constitution.pdf.

³² N.Y. Const. art. VI, § 3 (1846).

³³ N.Y. Const. art. VI, § 2 (1846). For a history of the Court of Appeals, see Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* (1985) and Bernard S. Meyer *et al.*, *The History of the New York Court of Appeals, 1932-2003* (2006).

³⁴ N.Y. Const. art. VI, § 12 (1846).

³⁵ N.Y. Const. art. VI, §§ 2, 12 (1846).

³⁶ N.Y. Const. art. VI, § 13 (1846).

The 1846 State Constitution established eight Judicial Districts across the State.³⁷ The First District was to be New York City, while the others were to be based on groupings of counties, with those Districts to be as compact and close in population as possible.³⁸ The Judicial Districts could be restructured at the first session after the return of every state enumeration,³⁹ but no more than one District could be eliminated at any one time. Each District was to have four justices, but eliminating a District would not remove a judge from office.⁴⁰

Moreover, this Constitution included a section guaranteeing judicial compensation,⁴¹ although the procedures for setting the amount of such compensation were left to the Legislature. In addition, Judges were directed not to hold “any other office or public trust.”⁴²

The 1846 Constitution also established a four-year term for County Court Judges.⁴³

5. 1869-82 Amendments to Article VI⁴⁴

The State’s Constitutional Convention held in 1867-68 was largely a failure. The sole proposition of the 1867-1868 State Constitutional Convention that was approved by the people was a new Judiciary Article. The people by a vote of 247,240 to 240,442 endorsed a new Judiciary Article VI to replace the Judiciary Article adopted in 1846. Elements of this new Article VI included: a) an authorization for the election of seven judges

³⁷ N.Y. Const. art. VI, § 4 (1846).

³⁸ *Id.*

³⁹ N.Y. Const. art. VI, § 16 (1846).

⁴⁰ *Id.*

⁴¹ N.Y. Const. art. VI, § 7 (1846).

⁴² N.Y. Const. art. VI, § 8 (1846).

⁴³ N.Y. Const. art. VI, § 14 (1846).

⁴⁴ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

of the Court of Appeals, each for a term of fourteen years;⁴⁵ b) a provision for a Commission on Appeals to aid the Court of Appeals in the disposition of its backlog;⁴⁶ c) the establishment of 14-year terms of office for Justices of the Supreme Court, and six-year terms of office for County Judges;⁴⁷ d) the establishment of age 70 as the mandatory retirement age for judges;⁴⁸ and e) a provision for two 1873 voter referenda on the questions of whether judges of the Court of Appeals and of certain lower courts, respectively, should be appointed.⁴⁹

Eight additional amendments were put to a vote during the 25 years between the 1869 amendments and a new State Constitution that was adopted in 1894. Successful amendments during that period included an 1872 amendment relating to the Commission of Appeals⁵⁰ and an 1882 amendment creating a Fifth Judicial Department.

6. State Constitution of 1894⁵¹

The 1894 State Constitution introduced many aspects of the framework found in today's Judiciary in New York.

⁴⁵ N.Y. Const. art. VI, § 2 (1869).

⁴⁶ N.Y. Const. art. VI, § 4 (1869).

⁴⁷ N.Y. Const. art. VI, §§ 13, 15 (1869).

⁴⁸ N.Y. Const. art. VI, § 13 (1869).

⁴⁹ N.Y. Const. art. VI, § 17 (1869).

⁵⁰ The Commission of Appeals, originally created through an 1869 constitutional amendment, was given jurisdiction over the remaining appeals pending in the New York courts prior to 1870 in order to allow the newly-created Court of Appeals to begin its work with a new docket. During this time period, both the Commission and the Court of Appeals were co-equal "highest" courts. Although the Commission was supposed to end in 1873, the 1872 amendment extended the Commission of Appeals' jurisdiction for another two-year period.

⁵¹ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1894-NY-Constitution.pdf.

Under the 1894 Constitution, the Judges of the Court of Appeals – chosen by state electors and serving 14-year terms – were continued as provided under the 1869 amendments.⁵² The Court’s jurisdiction was limited to questions of law, except for cases involving a judgment of death.⁵³ Appeals of right to the Court of Appeals – aside from judgments of death – were confined to certain appeals from final judgments or orders, or appeals from orders granting new trials in which the appellant was willing to stipulate that an affirmance would result in a final judgment against the appellant.⁵⁴

The 1894 Constitution continued the pre-existing judicial district system from the 1846 Constitution.⁵⁵ Those districts were combined into four Departments – similar to what we have today. The First Department was comprised of New York City, including New York County. The Legislature was instructed to create the other three Departments by grouping counties into Departments which were approximately equal in population.⁵⁶ The Legislature was prohibited from creating additional departments.⁵⁷

The court system was to include a Supreme Court having general jurisdiction.⁵⁸ Each Department was to have an Appellate Division, with seven Justices in the First Department and five Justices in each of the other three Departments.⁵⁹ The Justices of the Appellate Division were to be

⁵² N.Y. Const. art. VI, § 7.

⁵³ N.Y. Const. art. VI, § 9.

⁵⁴ *Id.* This provision is akin to a current form of appeal to the Court of Appeals under CPLR 5601, involving a stipulation to “judgment absolute.”

⁵⁵ N.Y. Const. art. VI, § 1.

⁵⁶ N.Y. Const. art. VI, § 2.

⁵⁷ *Id.*

⁵⁸ N.Y. Const. art. VI, § 1.

⁵⁹ N.Y. Const. art. VI, § 2.

designated by the Governor from the pool of Supreme Court Justices⁶⁰ – similar to the manner of selecting justices for today’s Appellate Divisions.

Supreme Court Justices were to be elected to their positions. In addition, the then-current Justices and specified other judges were to be transferred into the Supreme Court as a result of this restructuring of the courts.⁶¹ These Justices would serve 14-year terms.⁶²

Various lower level courts, such as the Superior Court of the City of New York, the Superior Court of Buffalo, and the City Court of Brooklyn were abolished, with pending actions and judges being transferred to the Supreme Court.⁶³

Additional provisions of the 1894 Constitution included guaranteeing that judges would be paid and continuing the judicial retirement age at 70.⁶⁴ Other provisions continued the County⁶⁵ and Surrogate’s⁶⁶ Courts.

Multiple amendments to the 1894 Constitution were put to a vote in subsequent years, including: a) several failed amendments to increase judicial salaries, b) a failed amendment to create a new judicial district, and c) successful amendments in 1921, which established the Children’s Courts and the Domestic Relations Courts.⁶⁷

⁶⁰ N.Y. Const. art. VI, § 2.

⁶¹ N.Y. Const. art. VI, § 1.

⁶² N.Y. Const. art. VI, § 4. Thereafter, in 1897, the Legislature changed the name of the Board of Claims to the Court of Claims, but that Court did not then have status in Article VI. The Legislature would again replace the Court of Claims with the Board of Claims in 1911, only to revive the Court of Claims again in 1915.

⁶³ N.Y. Const. art. VI, § 5.

⁶⁴ N.Y. Const. art. VI, § 12.

⁶⁵ N.Y. Const. art. VI, § 14.

⁶⁶ N.Y. Const. art. VI, § 15.

⁶⁷ The Court of Domestic Relations is the original predecessor to the Family Court system in New York. The Children’s Courts were a statewide court system similar to the Children’s Part, previously a section of the Court of Special Sessions, in New York City.

7. Constitutional Convention of 1915

Although the voters rejected the new Constitution that was proposed as a result of the 1915 Convention, its provisions affecting the Judiciary Article were largely incorporated in a new Article VI that the voters approved in 1925. This new Article VI continued many of the basic elements of the Judiciary as had been adopted in the 1894 Constitution, but it added some new matters, including:

- 1) establishing the Appellate Term as a permanent constitutional court;
- 2) increasing the number of permanent seats on the Appellate Division, Second Department to seven;
- 3) modifying the Court of Appeals' jurisdiction; and
- 4) changing the ratio that governed the maximum number of Supreme Court Justice positions that the Legislature could create in a particular Judicial District.

8. Constitutional Amendments of 1938⁶⁸

In 1938, another Constitutional Convention was held. Although the outcome of the Convention was considered to be a new Constitution, the voters only approved six of the proposed 57 amendments.

As a result of the amendments that did pass, Article VI of the 1938 State Constitution:

- 1) continued the Court of Appeals, with seven Judges chosen by state electors;⁶⁹

⁶⁸ Available at http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1938-NY-Constitution.pdf.

⁶⁹ N.Y. Const. art. VI, § 5 (1938).

- 2) Maintained limitations on the Court of Appeals' jurisdiction as to certain appeals as of right from final judgments and orders as well as judgments of death;⁷⁰
- 3) called for four Judicial Departments, each with an Appellate Division, and made no provision for the creation of any additional department;⁷¹
- 4) maintained the four Appellate Divisions of the Supreme Court, each with Justices designated by the Governor from among the Supreme Court Justices in the State, and required that the Presiding Justice and a majority of the Justices designated in any Appellate Division be residents of that department;⁷²
- 5) established a general jurisdiction Supreme Court, with Justices elected by Judicial District;⁷³
- 6) capped the number of Supreme Court Justices in any Judicial District at one Justice per each sixty thousand or fraction over thirty-five thousand persons within that District, as determined by the last federal census or state enumeration;⁷⁴
- 7) authorized the First and Second Departments to create Appellate Terms "to hear and determine all appeals now or

⁷⁰ N.Y. Const. art. VI, § 7 (1938).

⁷¹ N.Y. Const. art. VI, § 2 (1938).

⁷² *Id.*

⁷³ N.Y. Const. art. VI, § 1 (1938). Although a proposed amendment to establish the Court of Claims as an Article VI court failed in 1938, thereafter, in 1949, the electorate approved the creation of the Court of Claims as an Article VI court under the State Constitution. N.Y. Const. art. VI, § 23 (1949). *See Easley v. N.Y.S. Thruway Auth.*, 1 N.Y.2d 375 (1956) (sustaining validity of a statute passed under Section 23 of Article VI with regard to Court of Claims jurisdiction over claims against the Thruway Authority); *see also* http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

⁷⁴ N.Y. Const. art. VI, § 1 (1938).

hereafter authorized by law to be taken to the supreme court or the appellate division other than appeals from the supreme court, a surrogate's court, or the court of general sessions of the city of New York[.]" with Appellate Term Justices to be selected by the Appellate Division;⁷⁵ and

- 8) set terms of judicial office at: a) 14-year terms for Judges of the Court of Appeals⁷⁶ and Supreme Court Justices;⁷⁷ b) the remainder of their term in office as a Supreme Court Justice as the term for the Presiding Justice of each Appellate Division;⁷⁸ and c) a five-year term for other members of the Appellate Division.⁷⁹

The State Constitution as of 1938 also continued other trial-level courts, such as the County and Surrogate's Courts.⁸⁰

9. 1962 Judiciary Article

In November 1961, New York's electorate voted on whether to revamp the Judiciary Article and the court structure. Passing by an overwhelming margin, this new Judiciary Article ushered in the era of the "unified court system," a term that appeared for the first time in this version of Article VI.

The Article's 1962 revisions largely adopted previously unsuccessful recommendations made by the Tweed Commission following its review of the courts conducted in the 1950s.⁸¹ Among other changes, this new

⁷⁵ N.Y. Const. art. VI, § 3 (1938).

⁷⁶ N.Y. Const. art. VI, § 5 (1938).

⁷⁷ N.Y. Const. art. VI, § 4 (1938).

⁷⁸ N.Y. Const. art. VI, § 2 (1938).

⁷⁹ *Id.*

⁸⁰ N.Y. Const. art. VI, §§ 11-15 (1938).

⁸¹ *See* A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State

Judiciary Article created the Administrative Board of the Judicial Conference, comprised of the Chief Judge of the Court of Appeals and the Presiding Justices of each Appellate Division. The Administrative Board was charged with establishing statewide policies and procedures for the Unified Court System. The Article also formalized the trial-court system in the State and granted the Appellate Divisions day-to-day oversight over the trial courts located within their respective Departments.

One new feature of this modified trial-court system was the Civil Court of the City of New York, which was formed by combining the City Court and the Municipal Court of the City of New York.⁸² Thereafter, in 1972, a Housing Part was established within the Civil Court⁸³ out of what had been previously known as the Landlord and Tenant Part. This Housing Part is known today as the Housing Court.

In addition, the 1962 court reforms eliminated the Courts of General Sessions in New York City, which had criminal jurisdiction.

10. 1976 Unified Court Budget Act

In response to increasing caseloads and expense throughout the State's judicial system, including the impact of the New York City fiscal crisis, the Legislature passed the Unified Court Budget Act during a special

Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf. The "Tweed Commission" was formally named the New York State Temporary Commission on the Courts. It was formed by Gov. Thomas E. Dewey in 1953 and was chaired by Harrison Tweed. In 1954, the Tweed Commission delivered its preliminary report to the Governor and the Legislature, but its recommendations were largely not implemented.

⁸² See <https://www.nycourts.gov/COURTS/nyc/housing/civilhistory.shtml>.

⁸³ New York Civil Court Act § 110 (McKinney Supp. 1974); L. 1972, ch. 982. Currently, Housing Court Judges are not provided for in Article VI of the State Constitution and they are therefore not Article VI judges.

session held in 1976.⁸⁴ The Act provided for State funding of the Unified Court System in New York – aside from Town and Village Justice Courts – and replaced the historical system of local funding of local courts that had been used in New York State for centuries. As a result, all judges and local court employees in these newly state-funded courts became state employees. By passing this Act, the Legislature relieved local-level governments from the burden of paying a substantial portion of the court budget. Although the Unified Court Budget Act transferred court operational costs to the State, it left the obligation to maintain court facilities in the hands of the localities.

11. 1977 Court Reforms

The most recent amendments to the Constitution’s Judiciary Article that have major significance were adopted in 1977. These amendments were the product of a Task Force on Court Reform appointed by then Governor Hugh Carey and chaired by Cyrus R. Vance, known as the Vance Commission.

On December 23, 1974, the Vance Commission issued a report to then Governor-elect Hugh Carey on “Judicial Selection and Court Reform.” That report concluded that Governor Carey’s administration should give “top priority” to court reform in order to “restore public confidence” in the Judiciary and “assure the high caliber judicial system to which New Yorkers are entitled....”⁸⁵ Accordingly, the Vance Commission made a series of recommendations for reforming the court system, including that:

- 1) the Governor support “passage of a constitutional amendment requiring merit selection of judges through judicial nominating

⁸⁴ Judiciary Law §39 (1976); L. 1976, ch. 966. This legislation resulted from a 1974 report by the Governor-Elect’s Task Force on Judicial Selection and Court Reform, which was headed by Cyrus R. Vance.

⁸⁵ “Report of the Governor-Elect’s Task Force on Judicial Selection and Court Reform” (1974), p.1.

commissions” with the Governor selecting from candidates recommended by those commissions;⁸⁶

- 2) pending a constitutional amendment, political parties “be urged to adopt nominating procedures which would ensure that only qualified persons are presented as potential nominees to the judicial district conventions”;⁸⁷
- 3) the Governor support “a Constitutional amendment establishing a unified system of judicial administration supervised by a chief state court Administrator appointed by and responsible to the Chief Judge...”;⁸⁸ and
- 4) the Governor support a measure “dealing with removal and discipline of judges.”⁸⁹

Thereafter, on June 26, 1975, the Vance Commission issued another report, entitled “The Integration and Unification of the New York State Trial Courts,” finding that New York’s then and still “present trial court system... generates unnecessary procedural confusion and results in inefficient and expensive court administration.”⁹⁰ As a result, the Vance Commission recommended a comprehensive court merger plan.⁹¹

⁸⁶ *Id.* at 1-2.

⁸⁷ *Id.* at 2.

⁸⁸ *Id.*

⁸⁹ *Id.* That report of the Vance Commission also recommended “centralized state funding of the courts” – which became the Unified Court Budget Act, as discussed in Section II.B.10, *supra*.

⁹⁰ The Integration and Unification of the New York State Trial Courts: A Report by the Governor’s Task Force on Court Reform, (1975), at 1.

⁹¹ *Id.* at 3-10. Previously in the 1970s, the Legislature had created what is known as the Dominick Commission headed by then N.Y.S. Senator D. Clinton Dominick. Among other recommendations, that Commission proposed a court merger plan and the creation of a Fifth Department. *See* Temp. Comm’n on the State Court System,...and Justice for All (Pt. 2) (1973). Ultimately, the Legislature failed to enact these proposals.

Ultimately, the Vance Commission recommendations led to a package of Constitutional amendments that were approved by the Legislature. Originally, another possible amendment was discussed which would have consolidated New York's courts but that proposal was not pursued – leaving it for later discussion.

Then Governor Hugh Carey and Chief Judge Charles D. Breitel both met with legislators to encourage passage of the proposed constitutional amendments.⁹² As part of this effort, Chief Judge Breitel gave a speech to the Legislature urging support of court reform.⁹³

Three amendments relating to the Judiciary were approved by the voters in 1977.

The first – passing by nearly 200,000 votes – created a Commission on Judicial Nomination for the Court of Appeals. That 12-member Commission on Judicial Nomination provides lists of candidates to the Governor for nomination to fill Court of Appeals vacancies. The creation of this Commission in 1977 brought about a “merit selection” system of appointment for selecting judges to the State’s highest court.⁹⁴

The second – which passed by more than 425,000 votes – a) provided for statewide court administration under the leadership of the Chief Judge of the State of New York, who was made “the chief judicial officer of the unified court system,” and b) created a new position of Chief Administrator of the Courts.⁹⁵ The Chief Administrator was granted the power to run the system of trial courts throughout the State, which had formerly been

⁹² See Linda Greenhouse, *Compromises Speed Windup of Legislature in Albany*, N.Y. Times (June 30, 1976), at 41, available at <http://www.nytimes.com/1976/06/30/archives/compromises-speed-windup-of-legislature-in-albany.html>.

⁹³ See Richard J. Bartlett Oral History, Session 2 (May 13, 2005) (recalling address to the Legislature by Chief Judge Breitel about restructuring the courts).

⁹⁴ N.Y. Const. art. VI, § 2(c) – (f) (1977).

⁹⁵ N.Y. Const. art. VI, § 28 (2016) (1977).

exercised by the Appellate Divisions. At the same time, the Chief Judge became responsible for promulgating standards and administrative policies to be applied to courts statewide. This power had formerly been exercised by the Administrative Board of the Judicial Conference, which now was renamed the Administrative Board of the Courts and given more limited responsibilities.

The third – passing by more than 750,000 votes – created an 11-member Commission on Judicial Conduct to supplant the former Court on the Judiciary.⁹⁶ That Commission⁹⁷ was granted the power to sanction or remove from office members of the Judiciary, subject to review by the Court of Appeals.⁹⁸

12. 1985 Amendment Providing for Certified Questions to the Court of Appeals

In 1985, a constitutional amendment was passed modifying the jurisdiction of the Court of Appeals in order to permit it to answer certified questions from certain courts outside the Unified Court System.⁹⁹ That amendment enabled “the United States Supreme Court, federal courts of appeals and high courts of other states to send unsettled questions of New York law to the state Court of Appeals for authoritative resolution.”¹⁰⁰

⁹⁶ The Court on the Judiciary previously held the power to remove New York’s major court judges in the event of misconduct. *See* Raymond J. Cannon, *The New York Court on the Judiciary 1948 to 1963*, 28 Alb. L. Rev. 1 (1964).

⁹⁷ Despite this amendment, other provisions for removing judges continue to appear in the State Constitution. *See, e.g.*, N.Y. Const. art. VI, § 23 (2015). *See also* Section III.M, *infra*.

⁹⁸ N.Y. Const. art. VI, §§ 22 and 24 (1985).

⁹⁹ N.Y. Const. art. VI, § 3(b) (1985).

¹⁰⁰ Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 373 (2000), available at <http://ir.lawnet.fordham.edu/flr/vol69/iss2/3>. *See also* Sol Wachtler, *Federalism is Alive and Well and Living in New York—Honorable Hugh R. Jones Memorial Lecture*, 75 Alb. L. Rev. 659 (2012).

This process allows New York’s highest court to give certain federal and out-of-state courts conclusive answers to questions of New York law that are raised in federal and state disputes being litigated outside the New York courts. Prior to the passage of that amendment, those legal issues were subject to being resolved without sufficient authority or clarity, or being resolved in different ways in different jurisdictions – until such time as a given issue were to come before the Court of Appeals on a direct appeal within New York’s Unified Court System.

13. 1986 First Passage of a Court Merger Proposal

In 1986, the Legislature voted for first passage of a comprehensive constitutional amendment calling for a “merger-in-place” of New York’s trial courts – which would involve: a) merger into the Supreme Court of the following courts: the Court of Claims, County Court, Family Court, Surrogate’s Court and the New York City Civil and Criminal Courts, and b) preservation of existing methods of selection for the judges who thereby would become Supreme Court Justices. That amendment also would have authorized the Legislature to create up to two new Judicial Departments. The amendment failed to gain second passage in the Legislature when it came up for consideration in 1987.

14. Lopez Torres Litigation

Under existing election law provisions enacted under our current State Constitution, Supreme Court Justices are nominated and elected through a three-step process and are not subject to the primary election process that is applicable to non-judicial or other judicial candidates. First, delegates to a political party’s Judicial Nominating Convention are selected as delegates at the time of the primary elections. Second, a week or two after the primary election – usually in September – each party holds its Judicial Convention to decide who will be selected as the party’s Supreme Court nominee.¹⁰¹

¹⁰¹ Election Law § 6-158(5) (2016).

Finally, the vote of the electorate at the general election determines who will serve as a Justice of the Supreme Court.

In 1992, Hon. Margarita Lopez Torres was elected to the New York City Civil Court for Kings County. Thereafter, unable to obtain a nomination for Supreme Court in ensuing party judicial conventions, she brought suit challenging the constitutionality of the convention system of nominating candidates for election to the Supreme Court. Justice Lopez Torres asserted that she would not cooperate with party leaders' demands following her election to the Civil Court, and alleged that this resulted in her being blocked from being nominated at the Supreme Court Judicial Conventions held in 1997, 2002, and 2003. She further alleged that she lacked any available means to run independently as a candidate for Supreme Court without being nominated at a Judicial Convention.

In 2006, both the U.S. District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit agreed with Judge Lopez Torres's claim on First Amendment grounds and enjoined New York's judicial convention system for nominating Supreme Court Justices.¹⁰² This led to various initiatives seeking to reform the method of nominating candidates for Supreme Court in New York and trying to promote appointive systems for the selection of Supreme Court Justices.

Before any of those initiatives came to fruition, in 2008, the U.S. Supreme Court unanimously reversed the Second Circuit and sustained the constitutionality of the New York's Judicial Convention system. The Court's majority opinion, written by Justice Scalia, reasoned that, although the political party's process must be "fair" when the party is actively given a role in the election process,¹⁰³ "[s]election by convention has never been thought unconstitutional [and] has been a traditional means of choosing

¹⁰² *Lopez Torres v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006); *Lopez Torres v. N.Y.S. Bd. of Elections*, 462 F. 3d 161 (2d Cir. 2006).

¹⁰³ *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008).

party nominees.”¹⁰⁴ According to the Court, because Judge Lopez Torres and all potential judicial candidates still had an opportunity to obtain the requisite signatures and be placed on the general election ballot as independent candidates, there was no constitutional violation.¹⁰⁵

In one concurring opinion, Justice Stevens, quoting Justice Marshall, commented with regard to the wisdom behind the nominating convention process, noting: “[t]he Constitution does not prohibit legislatures from enacting stupid laws.”¹⁰⁶ In another concurrence, Justice Kennedy wrote: “When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.”¹⁰⁷ Justice Kennedy thus concluded: “If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now. But... the present suit does not permit us to invoke the Constitution in order to intervene.”¹⁰⁸

15. Special Commission on the Future of the New York State Courts

In 2006, before the U.S. Supreme Court’s decision in *Lopez Torres*, New York’s then Chief Judge Judith S. Kaye appointed the Special Commission on the Future of the New York State Courts, headed by Carey Dunne (known as the “Dunne Commission”). From July 2006 through February 2007, the Dunne Commission reviewed New York’s court system

¹⁰⁴ *Id.* at 206.

¹⁰⁵ *Id.* at 207-08.

¹⁰⁶ *Id.* at 209 (Stevens, J., concurring).

¹⁰⁷ *Id.* at 212 (Kennedy, J., concurring).

¹⁰⁸ *Id.* at 213 (Kennedy, J., concurring).

and assessed what changes should be made, focusing particularly on the structure of the courts.

In February 2007, the Dunne Commission issued a report, entitled “A Court System for the Future: The Promise of Court Restructuring in New York State.”¹⁰⁹ That report called for: a) creating a two-tiered, consolidated trial court system in New York; b) creating a Fifth Department of the Appellate Division; c) removing the population cap on the number of Supreme Court Justices; and d) giving Housing Court Judges in New York City status under Article VI of the State Constitution but changing their selection to appointment by the Mayor of the City of New York (as is currently the case with the New York City Criminal and Family Courts).¹¹⁰ The report recommended a system of “merger in place” – meaning that its proposal would combine and simplify the various trial-level courts without changing how particular judges were to be appointed or elected or what the terms of those judges would be.¹¹¹

¹⁰⁹ A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

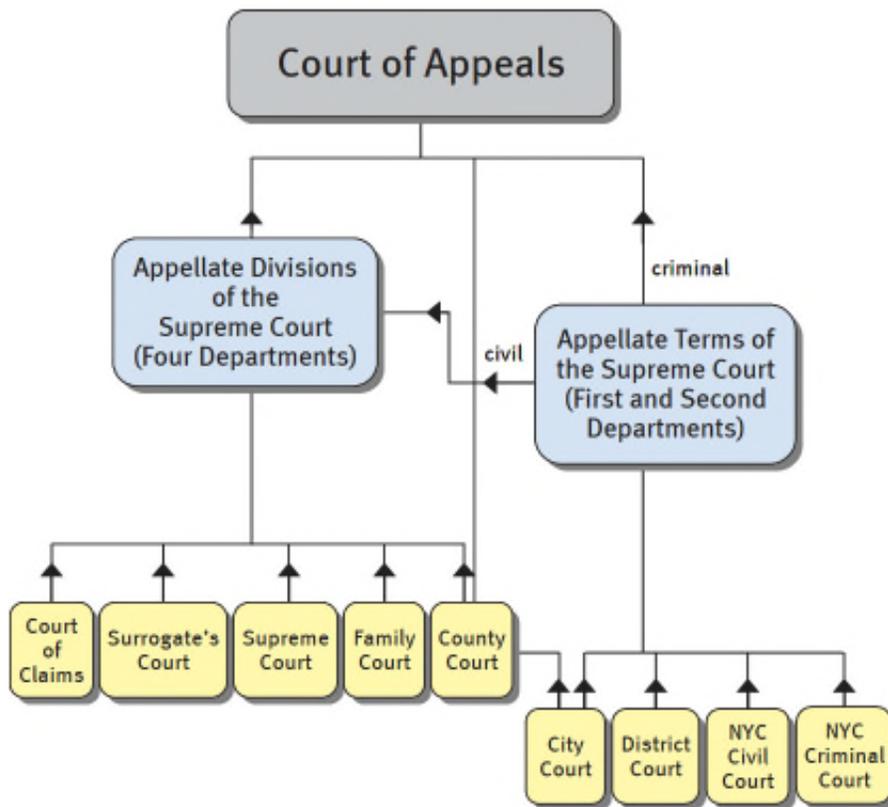
¹¹⁰ *Id.* at 10. Legislation was introduced, but not passed, which proposed to amend the State Constitution in order to implement these Dunne Commission recommendations. Senate Bill S5827 (2007); Assembly Bill A1266 (2007).

¹¹¹ In 1982, the Legislature created the Twelfth Judicial District, consisting of Bronx County. In addition, in 2007, the number of Judicial Districts was further increased to 13 through an act of the Legislature, which passed N.Y. Judiciary Law § 140, creating a Thirteenth Judicial District for Staten Island. As a result, the actual number of judicial districts in New York is greater than the number provided for in the State Constitution and counties are allocated to judicial districts somewhat differently from what the Constitution provides.

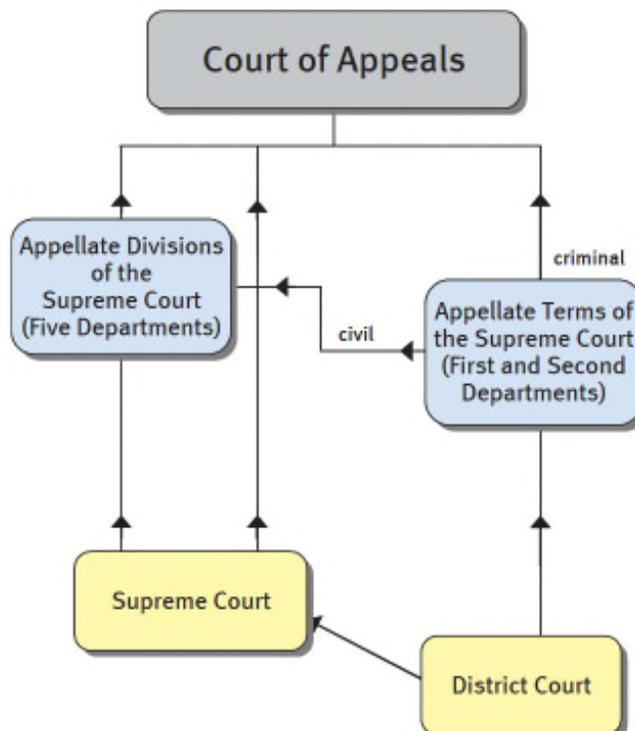
The court system as proposed by the Dunne Commission would have modernized and simplified today's Unified Court System, as shown in the diagrams appearing on the following page:¹¹²

¹¹² Town and Village Justice Courts and direct appeals are excluded from the current court structure diagram that is set forth in the Dunne Commission's report. In the Third and Fourth Departments, criminal appeals from the City Court proceed to the County Court and can be further appealed to the Court of Appeals. The Town and Village courts were the subject of their own report by the Dunne Commission, entitled *Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts* (Sept. 2008). The Town and Village Justice Courts are discussed in Section III.I, *infra*.

CURRENT STRUCTURE



PROPOSED STRUCTURE



Although the proposals made by the Dunne Commission gained substantial support, particularly within the legal community, they ultimately were not enacted into law.

16. 2013 Judicial Retirement Proposal

In 2013, the Legislature proposed a constitutional amendment that would have allowed Court of Appeals Judges to finish their 14-year terms, although they would not have been able to serve past age 80.¹¹³ Similarly, under this proposal, Supreme Court Justices would have been eligible to be re-certified for five two-year periods, from age 70 through age 80, instead of the three two-year periods that are currently available to them. Other members of the Judiciary were not covered by this proposed amendment, including Court of Claims Judges, Surrogates, Family Court Judges, County Court Judges and Judges of the New York City Criminal and Civil Courts.¹¹⁴

In a November 2013 referendum, the voters failed to pass this retirement age amendment.¹¹⁵

III. JUDICIARY ARTICLE ISSUES THAT THE COMMITTEE CONSIDERS TO BE RIPE FOR CONSIDERATION

A. Court Reorganization

The judicial system in New York is a mixture of various types of courts, each with its own particular jurisdiction (although sometimes

¹¹³ Assembly Bill 4395 (2013); Senate Bill S886A (2013).

¹¹⁴ At the time when this retirement age proposal received second passage, the Legislature alternatively could have passed a separate proposal that would have raised judicial retirement ages in the Unified Court System to a uniform age of 74 – through a proposed amendment that had previously received first passage by the Legislature. *See* Senate Bill S4587A (2011). That proposal was consistent with the policy of the State Bar. *See* Section III.D, *infra*. However, that age 74 retirement proposal failed to receive second passage from the Legislature.

¹¹⁵ *See* James C. McKinley Jr., *Plan to Raise Judges' Retirement Age to 80 Is Rejected*, NY Times (Nov. 6, 2013).

overlapping the jurisdiction of other courts), practices and policies. Many of these courts have their own rules, structure, judicial terms of office, and levels of judicial compensation. Significantly, New York has 11 different courts at the trial level alone, which is far more than the typical court structure in other states.

A wide range of groups has long advocated for the consolidation or merger of these trial-level courts in order to reduce or eliminate the unnecessary costs, undue inefficiencies and even confusion that this complex structure engenders.¹¹⁶ The New York State Bar has done so for over 35 years.¹¹⁷ The State Bar has consistently supported efforts to simplify the structure of the Unified Court System, based on the Association's belief that it will: a) make the State's courts more accessible to litigants; b) reduce the cost and burden to clients and their counsel involved in navigating the State's multi-faceted court structure; c) remove obstacles to effective case management that are associated with the current trial court structure, and d) result in more cost-effective and efficient courts.¹¹⁸

In 1997, then-Chief Judge Judith S. Kaye and then-Chief Administrative Judge Jonathan Lippman proposed a plan to consolidate New

¹¹⁶ The Fund for Modern Courts has repeatedly called for court simplification, and in 2011, the Fund organized a broad-based coalition, which was supported by the State Bar, to advocate for this reform. See <http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/>.

¹¹⁷ New York State Bar Association – Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection (dated 1979).

¹¹⁸ See, e.g., November 4, 2011 New York State Bar Association Executive Committee Minutes, at 3 (noting that the “current court structure creates inefficiencies that waste time and money for judges, lawyers and litigants[.]”). In 2012, the Fund for Modern Courts' Court Restructuring and Simplification Task Force concluded that court system reforms in New York could result in savings of over \$56 million annually. The Committee for Modern Courts, “Court Simplification in New York State: Budgetary Savings and Economic Efficiencies” (2012) at Appendix C, available at <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>.

York's court system. That proposal would have consolidated our State's patchwork quilt of trial courts into just two levels of courts: a) Supreme Court, which would have original jurisdiction over most cases around the State, including most criminal, civil, family and probate matters; and b) District Courts, which would handle housing and minor criminal and civil matters.¹¹⁹

A 1998 State Bar resolution endorsed reorganizing the State's courts using this two-tier trial court system, and this remains State Bar policy today.¹²⁰ Under this reorganization proposal, the present Supreme Court, Court of Claims, County Court, Family Court, and Surrogate's Court would be merged into a single Supreme Court with Judicial Districts around the State. The New York City Civil Court, New York City Criminal Court, and

¹¹⁹ Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. Times (Mar. 20, 1997), available at <http://www.nytimes.com/1997/03/20/nyregion/chief-judge-offers-a-plan-to-consolidate-the-court-system.html>. The New York City Bar Association has frequently supported consolidating all trial courts into a single trial court of general jurisdiction. See September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); "Legislative Proposals on Court Merger and Merit Selection of Judges," by the Committee on State Courts of Superior Jurisdiction, 35 *The Record* 66 (1980); December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration); September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration). In 1997, the City Bar, under its then President Michael A. Cardozo, supported Chief Judge Kaye's plan to create a two-tier trial court in New York. Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted," available at http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46.

¹²⁰ April 1998 New York State Bar Association House of Delegates Minutes; May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. See also Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007).

City Courts and District Courts outside New York City would be merged into a statewide District Court.

As noted previously,¹²¹ in 2007, the Dunne Commission similarly proposed merging the same courts into a statewide Supreme Court and regional District Courts.¹²² The State Bar found the Commission's recommendations to be "consistent with the Association's positions and recommended that the Association endorse the Governor's program bill."¹²³

During 2011-12, the State Bar participated along with a broad-based coalition in advocating for court simplification and promoting the adoption of a two-tier trial court.¹²⁴ Although this effort was not successful, it

¹²¹ See Section II.B.15, *supra*.

¹²² A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf; NYSBA Committee on Court Structure & Operations: Report by Subcommittee on Court Reorganization (dated Sept. 6, 2011). *See also* II.B.15, *supra*.

¹²³ May 31, 2007 New York State Bar Association Executive Committee Minutes. While not addressed specifically at that time, the State Bar has also long advocated for raising the age of criminal responsibility in New York to age 18. For a recent discussion of this issue, *see* January 21, 2015: Statement on Raising the Age of Criminal Responsibility from President Glenn Lau-Kee, *available at* <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=54267>. As a result, a discussion at a Convention about reorganizing the Unified Court System could also include a consideration as to where best to place courts that address charges involving youthful offenders and related issues.

¹²⁴ The New York State Bar continues to be listed as a supporter of this effort on the Fund for Modern Courts website. *See* <http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/>. This is consistent with the position taken by the Executive Committee in 2011, reaffirming the State Bar's policy on court restructuring from April 1998. *See* November 4, 2011 New York State Bar Association Executive Committee Minutes. Nonetheless, as indicated by a 2011 letter from the State Bar's Judicial Section, some concern has been raised in the past about this form of court restructuring. *See* Letter from Hon. D. Karalunas, Presiding Member of the Judicial Section, to President V. Doyle, III of the New York State Bar Association (dated Nov. 1, 2011).

received wide support from: a) a broad range of bar groups across the State who urged reform of the courts; b) good government groups who sought to improve the State’s court structure; c) advocates who work in the Family Court and groups opposing domestic violence who experienced difficulties resulting from the Family Court’s limited jurisdiction; and d) business groups who were concerned about the inefficiencies that the State’s complex court structure creates for business litigation in New York. While restructuring the Unified Court System would require an initial expense, there would be substantial long-term savings for the courts, litigants and counsel resulting from the increased efficiencies of a simplified court structure.¹²⁵

The potential to simplify the State’s court system, promote access to justice and reduce unnecessary costs and inefficiencies make the issue of court consolidation one that is ripe for consideration at a Constitutional

¹²⁵ The Committee for Modern Courts, “Court Simplification in New York State: Budgetary Savings and Economic Efficiencies” (2012) at Appendix C, *available at* <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>. That effort focused particularly on: a) benefits to be attained in the Family Court from court simplification, especially for victims of domestic violence who otherwise may need to access multiple courts, b) benefits to the business community from simplifying commercial litigation, and c) benefits to be attained in certain litigations involving the State where overlapping cases need to be filed in the Court of Claims against the government but also separately in the Supreme Court as to private actors.

In 2004, the Unified Court System experimented with a “merger” model for criminal cases in Bronx County. The project survived a court challenge when the Court of Appeals affirmed the Chief Judge’s authority to implement this program. *People v. Correa*, 15 N.Y.3d 213, 220 (2010). In 2012, this project was disbanded as unsuccessful. See Daniel Beekman, “Court administrators will undo ‘experiment’ that merged Bronx courts in 2004 and created backlog,” New York Daily News, Apr. 12, 2012, *available at* <http://www.nydailynews.com/new-york/bronx/court-administrators-undo-experiment-merged-bronx-courts-2004-created-backlog-article-1.1060088>. However, this experience is not germane to the State Bar’s position on court restructuring. Significantly, the Bronx criminal court model did not involve the structure proposed by the Dunne Commission – *i.e.*, in Bronx County, the handling of felony cases was merged with misdemeanors, whereas the Dunne Commission proposed placing misdemeanors in a lower level court and continuing felony cases in the Supreme Court.

Convention, should the voters choose to hold one. In short, a Constitutional Convention could provide a unique opportunity to re-design, restructure, modernize and simplify our State’s Unified Court System – whether using the Dunne Commission merger-in-place model or some modification of that plan.¹²⁶

B. Creation of a Fifth Department

Under Article VI, New York’s Unified Court System is currently divided into four Departments, *i.e.*:¹²⁷

First Department: Made up of the First Judicial District as established in the State Constitution and the Twelfth Judicial District created by statute.

Second Department: Made up of the Second, Ninth, Tenth, and Eleventh Judicial Districts established in the State Constitution and the Thirteenth Judicial District created by statute.¹²⁸

Third Department: Made up of the Third, Fourth, and Sixth Judicial Districts.

Fourth Department: Made up of the Fifth, Seventh, and Eighth Judicial Districts.

¹²⁶ While the State Bar has not yet formally addressed such issues directly, a review of various appellate jurisdiction issues could also be in order in connection with a Constitutional Convention. This could include whether the manner of granting leave to appeal to the Court of Appeals in criminal cases ought to be reconsidered. *See* Minutes of the Executive Committee of the New York State Bar Association (Nov. 2009); New York State Bar Association, Recommendations of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (June 10, 2009), at 1-3. In addition, a Convention could consider such matters as: a) whether the finality limitation on the Court of Appeals’ civil jurisdiction continues to be consistent with its current role as a *certiorari* court, and b) whether to provide for *en banc* review of Appellate Division decisions, as is the practice in U.S. Circuit Courts of Appeal.

¹²⁷ N.Y. Const. art. VI, § 4 (2015).

¹²⁸ N.Y. Judiciary Law § 140 (2016).

As noted in Section II.B.6, *supra*, since 1894, the State Constitution has prohibited increasing the number of Departments which make up the Unified Court System. As a consequence, despite major population changes, the allocation of judicial districts, courts and caseloads within these Departments has not been changed for more than a century.

As a result, certain of these Departments have long been facing significant burdens, particularly the Second Department. The 2007 Dunne Commission Report noted that the Second Department then contained approximately half of the State's population and had a larger caseload than the other three Departments combined.¹²⁹ These caseload issues have only been exacerbated since that time. In 2015, there were 8,623 civil and 2,977 criminal appeals filed in the Appellate Division, Second Department, for a total of 11,600 appeals; whereas, the First Department, the next busiest Department in the State, had only 3,072 combined civil and criminal appeals as of the same time period.¹³⁰ The Second Department's 11,600 combined appeals stands out when compared to the 6,340 total appeals in all of the three other Departments combined – representing over 80% more filings in the Second Department than the rest of the Appellate Divisions taken together.¹³¹

One proposal that has been made several times in the past has been to create a Fifth Department on Long Island, splitting up the Second Department and relieving some of the Appellate Division, Second Department's substantial caseload. The New York State Bar has long supported establishing a Fifth Department. For example, the same State Bar resolution that supported the 1998 court merger framework included a

¹²⁹ A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

¹³⁰ The New York State Unified Court System, 2015 Annual Report, at 23.

¹³¹ *Id.*

resolution advocating for the establishment of a Fifth Department.¹³² The creation of a Fifth Department was also recommended by the Dunne Commission's report in 2007, which was deemed to be consistent with State Bar policy.¹³³ Because of political considerations involved in establishing a Fifth Department, it has typically been recommended that the particular boundaries of that Department be left to the Legislature.¹³⁴

As an alternative to creating a Fifth Department in order to better balance the caseloads allocated to the four Departments, a Constitutional Convention could decide instead to realign the Judicial Districts that are assigned to the four Departments. As an example, there has been discussion in the past of moving all or parts of the Ninth Judicial District from the Second Department to another Department so as to provide greater balance in population and caseload across the four existing Departments of the State's courts.

While political complications have left this issue unresolved for many years, it is one that could be addressed at a Constitutional Convention as part

¹³² April 1998 New York State Bar Association House of Delegates Minutes; Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007); May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. The New York City Bar has also supported a Fifth Department. *See* Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted" (*retrieved* at http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46).

¹³³ A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf. *See also* May 31, 2007 New York State Bar Association Executive Committee Minutes.

¹³⁴ *See, e.g.*, A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts at 73 n. 149 (noting that past proposals have called for the Legislature to draw boundaries for the State court system's four Departments).

of an overall court restructuring effort. History has shown that judicial restructurings have been tackled successfully at previous Constitutional Conventions and that a Convention could provide an opportunity to address what has long been an intractable issue.

C. Selection of Judges

1. Choice of Appointive or Elective Systems for Selecting Judges

Currently, New York's Judiciary, as constituted under Article VI, reflects a mixture of elected and appointed judges. As presently structured, the judges of the Court of Appeals,¹³⁵ the Appellate Divisions of the Supreme Court,¹³⁶ the Court of Claims,¹³⁷ the New York City Criminal Court,¹³⁸ and the Family Court within New York City¹³⁹ are appointed.¹⁴⁰ In contrast, the voters elect the judges of the Supreme Court,¹⁴¹ the County Court,¹⁴² the Surrogate's Court,¹⁴³ the Family Court outside New York City,¹⁴⁴ the District

¹³⁵ N.Y. Const. art. VI, § 2(e) (2015).

¹³⁶ N.Y. Const. art. VI, § 4(c) (2015).

¹³⁷ N.Y. Const. art. VI, § 9 (2015).

¹³⁸ N.Y. Const. art. VI, § 15(a) (2015).

¹³⁹ N.Y. Const. art. VI, § 13(a) (2015).

¹⁴⁰ While the Chief Administrative Judge appoints Housing Court Judges in New York City, those judgeships are not created by Article VI of the State Constitution but are instead creations of statute. *See* Section III.F *infra*.

¹⁴¹ N.Y. Const. art. VI, § 6(c) (2015).

¹⁴² N.Y. Const. art. VI, § 10(a) (2015).

¹⁴³ N.Y. Const. art. VI, § 12(b) (2015).

¹⁴⁴ N.Y. Const. art. VI, § 13(a) (2015).

Courts,¹⁴⁵ and the New York City Civil Court,¹⁴⁶ and many of the Justices of Town Courts, and most City and Village Courts¹⁴⁷ outside New York City.¹⁴⁸

The New York State Bar has frequently advocated for “merit selection” of New York’s Judiciary.¹⁴⁹ For example, in the October 2006 edition of the *State Bar Journal*, then-President Mark H. Alcott noted that one of the opportunities for the State Bar following the *Lopez Torres* lower court decisions (*see* Section II.B.14, *supra*) was “to reform New York’s dysfunctional method of selecting Supreme Court” Justices.¹⁵⁰ The “better way,” as endorsed by President Alcott and the State Bar, was “[m]erit selection, in which the chief elected official of the state, city or county appoints judges from candidates designated by non-partisan nominating commissions, subject to confirmation by the Senate or local legislative body.”¹⁵¹ Alcott’s President’s Message noted the State Bar House of Delegates’ prior endorsements of “merit selection” in 1973, 1979 and 1993.

¹⁴⁵ N.Y. Const. art. VI, § 16(h) (2015).

¹⁴⁶ N.Y. Const. art. VI, § 15(a) (2015).

¹⁴⁷ N.Y. Const. art. VI, § 17(d) (2015).

¹⁴⁸ New York’s Town and Village Justice Courts are discussed more fully at Section III.I, *infra*.

¹⁴⁹ *See, e.g.*, April 3, 1993 New York State Bar Association House of Delegates Resolution (“RESOLVED, that this House of Delegates hereby endorses and reaffirms the position adopted by the New York State Bar Association in 1979 in support of the concept of merit selection[.]”)

¹⁵⁰ “President’s Message: Promoting Needed Reform, Defending Core Values,” NYSBA Journal, at 5, October 2006. As discussed in Section II.B.14, *supra*, the *Lopez Torres* litigation involved a challenge to New York’s judicial nominating convention system for the election of Supreme Court Justices. *Lopez Torres, v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff’d*, 462 F. 3d 161(2d Cir.), *rev’d sub nom. N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008). Although the Eastern District and the Second Circuit found that the convention system violated the First Amendment, the Supreme Court ultimately upheld the constitutionality of that system. *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008).

¹⁵¹ *Id.* at 6.

In 1993, the State Bar had approved a “Model Plan” for selection of all judges, which was similar to that used for the Court of Appeals, except that it provided for a retention election at the conclusion of an incumbent’s term.¹⁵²

In 2007, Program Bill #34 was introduced in the Senate.¹⁵³ Drafted with input from the State Bar, the bill called for “justices of the appellate division” to be “appointed by the governor . . . for terms of fourteen years.” Similarly, the legislation provided for Supreme Court Justices to be appointed by the Governor for 14-year terms. Under that bill, County Court judges, Surrogates and Family Court judges also were to be appointed by the Governor for 14-year terms. The Legislature did not pass that legislation. Nonetheless, the State Bar has continued to support commission-based appointment systems for the Judiciary.

Some have pointed to diversity issues as a factor weighing in favor of judicial elections versus appointive processes for selecting members of New York’s Judiciary. It is beyond the scope of this Report to determine whether statistical data support this conclusion. However, it appears that geography and the particular selecting authority – regardless of whether the system is

¹⁵² April 3, 1993 House of Delegates Resolution. Similarly, for courts of record, the New York City Bar has long supported “merit selection,” defined as “the nomination of a limited number of well-qualified individuals for a judicial vacancy by a diverse, broad-based committee composed of lawyers and non-lawyers, appointed by a wide range of executive, legislative and judicial officials and possibly individuals not associated with government, guided by standards that look to experience, ability, accomplishments, temperament and diversity.” New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 596, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>. In that report, the City Bar concluded, *inter alia*, that the judicial elective system may discourage those who have not been previously active in politics from serving in the Judiciary. *Id.*

¹⁵³ Senate Bill S06439 (2007).

an elective or appointive one – are the biggest factors in promoting diversity within the Judiciary.¹⁵⁴

In 2014, the State Bar’s Judicial Section prepared a report, entitled “*Judicial Diversity: A Work in Progress*,”¹⁵⁵ discussing the progress and need for further improvement in diversifying the Judiciary. According to that report, the percentage of judges of color in each Department varied from 35% in the First Department to just 1% in the Third Department.¹⁵⁶ At that time, although 52% of New York’s population was female, the percentage of women judges varied from a high of 46% in the First Department to only 19% in the Third Department.¹⁵⁷ That report concluded that the Section hoped its report would “serve as a call to corrective action by the decision makers in both the elective and appointive judicial selection systems.”¹⁵⁸

Based on the latest data received from the Office of Court Administration (“OCA”), the percentage of female jurists has improved somewhat, to a high of 52% in the First Department and a low of 23% in the Third Department. The percentage of jurists from diverse backgrounds has similarly improved slightly since the time of the Judicial Section’s report. Based on the most recent OCA data, that percentage varies from 38% in the First Department to just 3% in the Third Department.

On the Appellate Divisions, there has been significant progress in advancing diversity since the time of the Judicial Section’s report. For

¹⁵⁴ It has also been suggested that the size of the geographic area from which a judge is chosen could affect the diversity of a given court. For example, courts drawing from smaller areas – such as a single county – may be more diverse than courts having jurisdiction over a multi-county district which covers a much larger geographic area.

¹⁵⁵ Available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html. The report was approved by the State Bar’s Executive Committee on September 17, 2014.

¹⁵⁶ *Id.* at 5.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Id.* at 47.

example, according to recent OCA data, a majority of the current Justices on the Appellate Division, First Department (not including those who are certificated) are female and 36% of them are ethnic minorities. On the Appellate Division, Second Department, 35% of the current Justices are female and 35% are minorities. While half of the current Justices of the Third Department are female, the remaining diversity statistics for the Third and Fourth Departments are still in need of improvement.

In addition, in New York City, the Mayor's Advisory Committee on the Judiciary was initially formed in 1978 under Mayor Ed Koch "to recruit, to evaluate, to consider and to nominate judicial candidates fully qualified for appointment and to evaluate incumbent judges for reappointment[.]"¹⁵⁹ Still today, the Mayor's Committee nominates and provides to the Mayor a list of qualified candidates from which the Mayor chooses a candidate to appoint as a judge on the New York City Criminal and Family courts.¹⁶⁰ Data provided by the Mayor's Committee has also shown improvement in the diversity of appointed judges to these New York City courts over the past ten years. From 2006 to 2011, there were 36 total Mayoral appointments to these courts. Of these appointees, 53% were female and 31% were ethnic minorities. From 2012 through 2016, there were 64 such appointments. Of this group, 63% of the appointees were female and 42% were minorities.

Statistics from the Court of Appeals nominations process also suggest that there has been improvement in promoting diversity and opportunities for underrepresented groups. A March 7, 2013 press release from the Commission on Judicial Nomination listed demographic data for both applicants to the Commission and nominees to the Governor with respect to vacancies on the Court of Appeals occurring between 1997 and 2008 and

¹⁵⁹ Executive Order No. 10: Mayor's Committee on the Judiciary (Apr. 11, 1978).

¹⁶⁰ Executive Order No. 4: Mayor's Advisory Committee on the Judiciary (May 29, 2014).

two additional vacancies in 2012 and 2013.¹⁶¹ At the time of the 1997 vacancy, only 18% of the Commission’s interviewees were female and 9% were ethnic minorities; in comparison, as of 2013, 41% of the interviewees were female, and 41% were ethnic minorities. While only one of the Commission’s seven nominees was female and one of the seven nominees was an ethnic minority in 1997, in contrast, in 2013, three of the seven nominees were female and three of seven were ethnic minorities.¹⁶²

The December 1, 2016 press release of the Commission on Judicial Nomination, reporting on the most recent vacancy on the Court of Appeals, reflects similar data. That press release stated that: a) the Commission had received 35 applications for that particular vacancy, b) 34% of the applications were from female candidates, and c) 25% were from candidates of diverse backgrounds.¹⁶³ The Commission further reported that: a) it had interviewed 21 of these 35 applicants; and b) of the 21 interviewees, 38%

¹⁶¹March 7, 2013 Press Release, State of New York Commission on Judicial Nomination, *available at* <http://nysegov.com/cjn/assets/documents/press/Jones%20Vacancy%20Report%20Press%20Release%203-7-2013.pdf>.

¹⁶² After former Chief Judge Judith S. Kaye became Chair of the Commission on Judicial Nomination in 2009, the Commission: a) adopted an express rule that the “commission will strive to identify candidates who reflect the diversity of the citizenry of the State of New York”; b) specifically embraced a commitment to diversity in many characteristics, including, but not limited to, “diversity in race, ethnicity, gender, religion, sexual orientation, community service, nature of legal practice or professional background and geography”; and c) adopted rules that encourage greater publicity of vacancies on the Court of Appeals. 22 N.Y.C.R.R. §§ 7100.6, 7100.8(e). Prior to that time, the Commission had considered diversity as part of the factors listed in Article VI for determining whether candidates were “well qualified” to serve on the Court of Appeals, including by their “professional aptitude and experience.” N.Y. Const. art. VI § 2(c). *See* Feb. 3, 2009 Testimony of Hon. John F. O’Mara before the Senate Standing Committee on the Judiciary on the Nomination Process for Judges to the New York State Court of Appeals, at 10, *available at* http://nysegov.com/cjn/assets/documents/press/Prepared_Testimony_of_Judge_OMara.pdf.

¹⁶³ December 1, 2016 Press Release, State of New York Commission on Judicial Nomination, *available at* <http://nysegov.com/cjn/assets/documents/CJN-Vacancy%20List%20Press%20Release%20and%20Report.pdf>.

were female candidates and 29% were ethnic minorities.¹⁶⁴ Moreover, three of the seven nominees forwarded to the Governor in December 2016 were female, with one nominee being a minority.

Additionally, the seven-member Court of Appeals has had in the past and again has today a majority of female judges. The Court currently has, among its 7 members, one African-American judge and two judges of Hispanic heritage.

Accordingly, although it appears that diversity within New York’s Judiciary has continued to improve – including among judges selected through appointive systems – there is still much work to be done.

Whether to appoint or elect members of New York’s Judiciary has long been a fractious issue. While a wide range of groups successfully coalesced to support appointive selection of Court of Appeals Judges in 1977, the issue has gained the level of traction needed to achieve wider-scale reform of judicial selection in other courts. As a result, in 2007, the Dunne Commission advanced its “merger in place” proposal, which would have continued the election of certain of New York’s judges as part of its court consolidation proposal. While the issue of judicial selection drew substantial attention in connection with the *Lopez Torres* litigation and related events, ultimately, systemic change was not accomplished once the U.S. Supreme Court upheld New York’s judicial convention system in 2008.

A Constitutional Convention could provide an opportunity to revisit how best to select judges in New York, either as part of an overall restructuring of the Unified Court System or as a stand-alone issue.

2. Methods of Electing Judges in Elective Systems

In the event that certain of New York’s judges continue to be elected, an additional question arises – *i.e.*, how are these judicial nominees to be selected? As discussed in Section II.B.14, *supra*, the current elective system

¹⁶⁴ *Id.*

for the Supreme Court involves: a) selecting delegates to a judicial nominating convention at a primary, b) followed by a judicial convention at which those delegates choose candidates for nomination, and c) thereafter, a general election to choose the winning candidates. This system – which ultimately survived the First Amendment challenge raised in the *Lopez Torres* litigation¹⁶⁵ – may not be the optimal one for nomination and election of Supreme Court Justices if New York continues to elect Supreme Court Justices. Even if a Constitutional Convention were to choose to continue the election of Supreme Court Justices, it could also consider whether: a) to retain this current nominating system for judicial elections (which is statute-based);¹⁶⁶ or b) to switch to another system – whether the pure primary election system advocated by Judge Lopez Torres in her lawsuit or some other method of designating or nominating candidates for election to the bench.

In contrast to the judicial convention procedure for nominating and electing of Supreme Court Justices, candidates wishing to serve as judges of the Surrogate’s Court, the New York City Civil Court, the County Court, Family Courts outside of New York City, and the District Courts are nominated through party primary elections and are thereafter elected at the general election.¹⁶⁷

The New York State Bar has opposed the use of primaries for judicial elections. In 2007, then-State Bar President Mark Alcott testified before the New York State Senate that the primary system risks the “prospect of judicial candidates promising in advance how they will decide politically-

¹⁶⁵ *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

¹⁶⁶ Election Law §§ 6-124, 6-126 (2016).

¹⁶⁷ See New York City Bar, “Judicial Selection methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process,” at 23-24 (Mar. 2014) (“Under the election method, which is a partisan political process, candidates must first win the nomination of their political party through a primary election or, in the case of New York State Supreme Court Justices, through a judicial convention.”).

charged cases, or at least being pressured to do so by special interest groups, and negative advertisements attacking judicial candidates for their real or imagined positions on hot-button issues.”¹⁶⁸ Concerns were also raised about the cost of waging primary campaigns for judicial election. Instead, the State Bar endorsed reforms to the judicial nominating process in an effort to make it more transparent and to promote an improved judicial selection process.¹⁶⁹

In the event that elections are continued as part of New York’s system for selecting members of the Judiciary, the particular form of judicial election system that New York should embrace is ripe for further discussion, and a Constitutional Convention could serve as a vehicle for such a review.¹⁷⁰

¹⁶⁸ Mark H. Alcott, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007). The New York City Bar Association similarly cautioned that “primary elections by themselves (*i.e.*, without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system” and concluded that such a system would make elections “undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates[.]” Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York* (December 2006), at 21.

¹⁶⁹ The State Bar’s House of Delegates ultimately endorsed recommendations such as: a) providing judicial convention delegates with information about judicial elections, b) providing convention delegates and the general public with a list of candidates at least ten business days before the convention, and c) giving candidates for judicial nomination the opportunity to speak with the convention delegates. *See* New York State Bar Association, Report by New York State Bar Association Special Committee on Court Structure and Judicial Selection on Recommendations Contained in the Report of the Commission to Promote Public Confidence in Judicial Elections of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (2006); June 24, 2006 New York State Bar Association House of Delegates Minutes (noting passage of report on a voice vote).

¹⁷⁰ Although the State Bar has not taken a direct position on the matter, there is also a question as to whether caps on spending for judicial elections should be implemented in New York. In 2015, the U.S. Supreme Court held that it does not violate

3. Systems for Appointing Appellate Judges

In addition to the broader-scale issue of whether a Convention could call for changes the methods of electing or appointing trial-level judges, the Committee considered the current method of selecting appellate judges.

As a result of the 1977 court reforms, the process for selecting Judges of the Court of Appeals was changed to an appointive system using a Commission on Judicial Nomination, which reports a limited number of candidates for consideration by the Governor.¹⁷¹ The State Bar supported those amendments to the State Constitution when they were enacted in 1977.¹⁷²

To be eligible for nomination for appointment to the Court of Appeals, an applicant need only be a New York resident admitted to the New York Bar for at least 10 years and be found by the Commission to be “well qualified” to serve on the Court.¹⁷³ As a result, the Commission can consider for recommendation to the Governor any members of the Judiciary who serve on any court within the Unified Court System or any qualified members of the New York bar.

the First Amendment for states to prohibit judicial candidates from soliciting campaign contributions personally from supporters. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). Delegates to a Constitutional Convention delegates could have the opportunity to determine what types of restrictions ought to be placed on the financing, running or administration of judicial campaigns.

¹⁷¹ N.Y. Const. art. VI, § 2(c)-(f) (2015). The Judiciary Law gives the Commission the power to promulgate its own rules. Under former Chief Judge Judith S. Kaye, who was the Commission’s last Chair, the Commission’s rules were updated and modernized. See 22 N.Y.C.R.R. Part 7100.

¹⁷² Apr. 16, 1977 New York State Bar Association House of Delegates Minutes (urging the Legislature to give second passage to an amendment providing for merit appointment of judges to the Court of Appeals, improved court administration and management, and strengthened judicial discipline processes).

¹⁷³ N.Y. Const. art. VI, § 2(c), (e) (2015).

In contrast, with respect to the appointment of Justices of the Appellate Divisions, the State Constitution provides for a Presiding Justice in each Department, seven Supreme Court Justices in each of the First and Second Departments, and five Supreme Court Justices in each of the Third and Fourth Departments, all of whom are appointed by the Governor from among the State’s Supreme Court Justices.¹⁷⁴ The Governor has the power to designate additional Justices of the Supreme Court to the respective Appellate Divisions.¹⁷⁵ While not bound to do so, Governor Andrew M. Cuomo has (as have Governors in the recent past) implemented a screening committee mechanism for this appointment process in order to screen candidates for designation and re-appointment to those appellate courts.¹⁷⁶

Currently, the Governor can only designate a Justice to the Appellate Division from among the existing group of elected Supreme Court Justices, thereby narrowing the pool of potential applicants to the Appellate Division. A potential benefit of court restructuring could be a broadening of the eligible pool for the Appellate Division to include judges who are appointed or elected to other trial-level courts within the Unified Court System – or even qualified members of the bar who are not serving as judges, as is possible with nominations to the Court of Appeals.¹⁷⁷

¹⁷⁴ N.Y. Const. art. VI, § 4(b) (2015).

¹⁷⁵ N.Y. Const. art. VI, § 4(e) (2015).

¹⁷⁶ Executive Order No. 15, Establishing Judicial Screening Committees, dated Apr. 27, 2011. The Governor’s screening committees also review candidates for the Court of Claims.

¹⁷⁷ Although the State Bar appears not to have taken a specific position as to who ought to be eligible to serve as Appellate Division Justices, it did conclude that the Dunne Commission’s report on court restructuring was “consistent” with the Association’s position. May 31, 2007 New York State Bar Association Executive Committee Minutes. In that report, the Dunne Commission noted that one of the “benefits” of its “merger in place” plan was the expansion of the pool of potential Appellate Division Justices to include the judges of all courts that would be merged into the newly expanded Supreme Court; this would include: Court of Claims Judges, County Court Judges, Family Court Judges, Surrogate’s Court Judges, and Judges in the New York City Civil and Criminal

With respect to the Appellate Term, Article VI provides that the Chief Administrative Judge has the power to appoint Justices to the Appellate Terms, with the approval of the Presiding Justice in the respective Appellate Division. As with appointments to the Appellate Division, each appointee to the Appellate Term must be a Justice of the Supreme Court; in addition, such appointees must reside in the Judicial Department of the Appellate Term to which they are appointed.¹⁷⁸ There is no formal screening committee mechanism currently in place for appointments to the Appellate Term.

A Constitutional Convention would provide an opportunity to consider broadening the eligibility criteria for candidates for appointment to the Appellate Division and the Appellate Term.

D. Judicial Retirement Age

The State Constitution sets a judicial retirement age of 70 for any “judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate’s court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court[.]”¹⁷⁹ This leaves only Town and Village Justice Courts and Housing Court Judges without a constitutionally-mandated retirement age. Justices of the Supreme Court have an additional option that is unique to their positions – even though they must retire at age 70, they can continue to be

Courts who were serving as Acting Supreme Court Justices. *See* A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts, (dated Feb. 2007), at 51-53, *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

¹⁷⁸ N.Y. Const. art. VI, § 8(a) (2015).

¹⁷⁹ N.Y. Const. art. VI, § 25(b) (2015).

certificated to continue in office for successive two-year periods up until age 76.¹⁸⁰

These retirement age restrictions have led to calls for reform. For example, in 2013, there was a failed attempt in 2013 to amend the State Constitution to allow certain Court of Appeals Judges (depending on when their terms commenced), and Supreme Court Justices to continue in serving through age 80.¹⁸¹

In 2007, the New York State Bar adopted a report advocating a raise in the retirement age for all judges in the Unified Court System to age 76, with two-year re-certification periods available to all judges – other than Court of Appeals Judges, who would need to retire from the Court at age 76.¹⁸² In calling for higher judicial retirement ages across the board, the State Bar pointed to: a) today's longer lifespans as compared to those when New York's Constitution adopted the age of 70 as the retirement age; b) the need for experienced judges to handle an ever-increasing workload in the courts; and c) the desire for parity in retirement ages for all judges within the Unified Court System.¹⁸³

A Constitutional Convention could provide an opportunity to re-examine judicial retirement ages in New York, whether as part of an overall restructuring of the Unified Court System or as a stand-alone issue.¹⁸⁴

¹⁸⁰ *Id.* While rarely exercised, this certification process also applies to Court of Appeals Judges who reach age 70 but they must serve on the Supreme Court after age 70.

¹⁸¹ See James C. McKinley, Jr., "Plan to Raise Judges' Retirement Age to 80 is Rejected," *NY Times*, Nov. 6, 2013, at A20, available at <http://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html>.

¹⁸² March 31, 2007 New York State Bar Association House of Delegates Minutes.

¹⁸³ March 31, 2007 New York State Bar Association House of Delegates Minutes; "Report and Recommendations of the New York State Bar Association Task Force on the Mandatory Retirement of Judges" (Mar. 2007).

¹⁸⁴ At a 2015 State Bar House of Delegates meeting, the House adopted a resolution which advocated changing an aspect of judges' retirement practices so that judges would not be put in the difficult position of needing to retire when they suffer a

E. Limited Number of Supreme Court Justices

The State Constitution allows the Legislature to increase the number of Justices of the Supreme Court once every 10 years; however, such increases are subjected to a cap so that the number of justices in any judicial district “shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration.”¹⁸⁵ This cap is only minimally reduced from the cap that was originally established in 1925.¹⁸⁶ The New York State Bar, like the Dunne Commission, has advocated for removing this cap on the number of Supreme Court Justices.¹⁸⁷ This cap – as well as the burdens it causes to the courts, litigants and the bar – has long been a concern of the State Bar and the legal community at large.¹⁸⁸

terminal illness in order to prevent their survivors’ pension rights from being jeopardized. Nov. 2015 New York State Bar Association House of Delegates Minutes (*approving* 2015 NYCLA Report on the Death Gamble and Section 60 of the New York Retirement and Social Security Law). A Convention could also provide a vehicle to discuss other judicial retirement issues such as this one or also whether judges should have a separate retirement plan, an issue the State Bar has not yet considered.

¹⁸⁵ N.Y. Const. art. VI, § 6(d) (2015).

¹⁸⁶ In 1925, the cap was fixed at one justice for 60,000, or fraction over 35,000, of the population.

¹⁸⁷ *See, e.g.*, April 1998 New York State Bar Association House of Delegates Minutes (“The population cap limiting the number of Supreme Court Justices per district should be abolished.”); May 31, 2007 New York State Bar Association Executive Committee Minutes (finding the Dunne Commission report consistent with State Bar policies); November 4, 2011 New York State Bar Association Executive Committee Minutes (resolving that “[t]he population cap limiting the number of Supreme Court Justices per judicial district should be abolished[.]”).

¹⁸⁸ *See, e.g.*, *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (seeking a “judicial re-apportionment” designed to eliminate court delays in the Supreme Court and other trial-level courts of various counties in the State, and asserting allegations about the insufficient number judges assigned to courts in certain New York counties). In the past, the issue of whether there have been too few judges available to litigants has also been alleged to violate the U.S. Constitution. *See, e.g.*, *Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967) (alleging on behalf of a group

The Committee is cognizant that this cap on the number of Justices and the heavy caseload experienced by the Supreme Court – particularly in the First and Second Departments – already has resulted in a “work around” system through designations of Acting Supreme Court Justices. Under this system, many judges of the Court of Claims, the New York City Civil Court, Criminal Court and Family Court, and other courts outside New York City frequently are designated as Acting Supreme Court Justices. This is often done to mitigate case management problems presented by the court system’s growing caseload, while technically complying with the constitutional cap.¹⁸⁹

A Constitutional Convention also could consider whether to: a) remove the population-based cap on the number of Supreme Court Justices; and b) authorize the Legislature to establish the number of judges at a level that is sufficient to dispense justice properly and to meet the needs of the litigants who utilize New York’s courts.

F. Status of New York City Housing Court Judges

Housing Court Judges handle the Housing Parts of the New York City Civil Court but are not Article VI judges. Unlike most other judges in the Unified Court System, Housing Court judges only serve 5-year terms.¹⁹⁰ These judges are not subject to any mandatory retirement age, nor are they subject to the jurisdiction of the Commission on Judicial Conduct.

Given the duties performed by Housing Court Judges, many have advocated bringing these judges within the purview of a re-drafted Article

of litigants that the limited number of justices assigned to a particular Judicial District, given the overall population numbers in Queens County, irreparably harmed litigants in that area).

¹⁸⁹ See *Taylor v. Sise*, 33 N.Y.2d 357 (1974) (rejecting a challenge to the system of long-term, temporary but open-ended administrative assignments to the Supreme Court of judges from other trial-level courts).

¹⁹⁰ New York City Civil Court Act § 110(i)(2016).

VI.¹⁹¹ Although the New York State Bar has supported promoting parity among trial-level judges within the Judiciary through consolidation of trial-level courts (*see* Section III.C.1, *supra*), as far as we can determine, the State Bar has not taken an official position on this specific issue. The State Bar did conclude that the report of the Dunne Commission as a whole, which included a recommendation to include Housing Court Judges within the provisions of Article VI, was consistent with State Bar policy.¹⁹²

New York City Housing Court Judges are appointed by the Chief Administrative Judge from a list of qualified applicants compiled by the Housing Court Advisory Council.¹⁹³ The Dunne Commission also advocated vesting this appointment authority in the New York City Mayor as part of an overall court restructuring.¹⁹⁴

A Constitutional Convention could provide a forum in which to reconsider the current status of and method of selecting Housing Court Judges, particularly in the context of an overall court restructuring effort. Such reconsideration could also include determining whether Housing Court Judges: a) should be included within Article VI of the State Constitution, b) should be eligible to serve longer terms, c) should be subject to a

¹⁹¹ *See, e.g.*, A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* http://nycourts.gov/reports/courtsys-4future_2007.pdf.

¹⁹² May 31, 2007 New York State Bar Association Executive Committee Minutes.

¹⁹³ The Housing Court Advisory Council screens and interviews applicants for Housing Court judgeships. The Council then submits a list of approved candidates to the Chief Administrative Judge from which judges are selected. The Council consists of 14 members – representing a broad range of interests in the City – 12 of whom are appointed by the Chief Administrative Judge. *See* <https://www.nycourts.gov/COURTS/nyc/housing/advisory.shtml>.

¹⁹⁴ *Id.*

mandatory retirement age, and d) should be subject to oversight by the Commission on Judicial Conduct.¹⁹⁵

G. Terms for Trial-Level Courts

Trial-level judges throughout New York are elected or appointed for differing terms of office. Supreme Court Justices¹⁹⁶ and New York City Surrogates¹⁹⁷ are elected for periods of 14 years. Court of Claims judges are appointed for terms of nine years.¹⁹⁸ Judges of the New York City Civil and Criminal Court,¹⁹⁹ County Court,²⁰⁰ Family Court,²⁰¹ Surrogates in counties outside New York City,²⁰² and full-time City Court judges²⁰³ have ten-year terms of office. As discussed in Section III.F, *supra*, Housing Court judges serve five-year terms. District Court judges²⁰⁴ and part-time City Court judges²⁰⁵ serve six-year terms. Town and Village Justices are elected (and, in some instances, appointed) for terms of four years.²⁰⁶

¹⁹⁵ Previous statutory attempts to subject Housing Court Judges to the Commission on Judicial Conduct have been vetoed. *See* New York State Commission on Judicial Conduct 2016 Annual Report, at 7, *available at* <http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2016annualreport.pdf> (noting that “[l]egislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s”).

¹⁹⁶ N.Y. Const. art. VI, § 6(c) (2015).

¹⁹⁷ N.Y. Const. art. VI, § 12(c) (2015).

¹⁹⁸ N.Y. Const. art. VI, § 9 (2015).

¹⁹⁹ N.Y. Const. art. VI, § 15(a) (2015).

²⁰⁰ N.Y. Const. art. VI, § 10(b) (2015).

²⁰¹ N.Y. Const. art. VI, § 13(a) (2015).

²⁰² N.Y. Const. art. VI, § 12(c) (2015).

²⁰³ Uniform City Court Act § 2104(d) (2016).

²⁰⁴ N.Y. Const. art. VI, § 16(h) (2015).

²⁰⁵ Uniform City Court Act § 2104(d) (2016).

²⁰⁶ Village Law § 3-302(3) (2016).

As noted above in the context of judicial selection (*see* Section III.C.1, *supra*), depending on what actions may be taken regarding court restructuring, the appropriate terms of office for judges is an additional issue that could be discussed in a Constitutional Convention. If New York’s court system were to be restructured in the manner that the State Bar has advocated or along similar lines – but without standardizing the differentiated terms of office within the Judiciary – a restructured Supreme Court would include justices having a variety of different term lengths.²⁰⁷

Whether as part of a comprehensive court restructuring effort or otherwise, a Constitutional Convention could provide a mechanism to address parity in judicial terms across the Unified Court System.

H. Family Court Jurisdiction

Currently, Family Court Judges lack the broad range of jurisdiction that is necessary to address fully matters affecting victims of domestic violence. As a result, in some Judicial Districts of the State, Acting Supreme Court Justice status is granted to a limited number of Family Court Judges as a “work around.” For example, the Unified Court System has implemented Integrated Domestic Violence Parts in some Judicial Districts to address these serious issues.²⁰⁸ Nonetheless, these solutions are not uniform throughout the State and there remain areas of the State where victims of domestic violence who seek resort to the courts are hampered by the Family Court’s limited jurisdiction.

²⁰⁷ Notably, the State Bar previously found the Dunne Commission report that endorsed “merger in place” – including maintaining different term lengths for New York’s judges – to be consistent with the Association’s prior positions. *See* May 31, 2007 New York State Bar Association Executive Committee Minutes.

²⁰⁸ For a discussion of these courts, *see* <https://www.nycourts.gov/ip/domesticviolence/>; <http://moderncourts.org/education-and-outreach/integrated-domestic-violence-courts/>. In November 2016, Chief Judge Janet DiFiore announced an innovative program permitting domestic violence victims in certain counties to obtain orders of protection by video-link. *See* http://www.nycourts.gov/press/PDFs/PR16_14.pdf.

Should the Family Court be merged into the Supreme Court as part of an overall court restructuring, this issue would necessarily be resolved as a consequence of such a merger. Otherwise, the impact of the Family Court's limited jurisdiction in domestic violence cases would be an issue that would be ripe for consideration should a Constitutional Convention be held.

In addition, New York's Family Courts currently lack jurisdiction over divorce matters, which jurisdiction is vested only in the Supreme Court. In some districts of the State, this dichotomy has been addressed by designating certain Family Court Judges as Acting Supreme Court Justices so that they may exercise divorce jurisdiction.

The Family Court routinely deals with a wide range of topics affecting families that are ancillary to divorce cases (such as custody of minors, child and spousal support, guardianship of minors, paternity and termination of parental rights). As a result, the exclusion of divorce jurisdiction – and jurisdiction over various related matters that are incidental to a divorce case – from the Family Court appears to be inconsistent with the interests of judicial economy. Although the rise of no-fault divorce may have reduced somewhat the impact of the Family Court's limited jurisdiction *vis-à-vis* divorce cases themselves, there remains a potential for inconsistent or even conflicting rulings particularly with respect to issues of custody, visitation and support.

Accordingly, it would also be appropriate for a Constitutional Convention to address whether Family Courts should be given sole or concurrent jurisdiction over divorce cases and their ancillary matters.²⁰⁹ Nonetheless, as discussed above, if the Family Court were merged into the Supreme Court as part of a court consolidation plan, this issue would resolve itself.

²⁰⁹ This Report takes no position on whether Family Courts should have sole or concurrent jurisdiction over divorces or over matters that are ancillary to divorces.

I. Town and Village Justice Courts

Outside of New York City, Justice Courts – also known as Town and Village Courts – are found in many municipalities across the State. “These courts have jurisdiction over a broad range of matters, including vehicle and traffic matters, small claims, evictions, civil matters and criminal offenses.”²¹⁰

Currently, the State Constitution grants the Legislature the power to “regulate [town and village] courts, establish uniform jurisdiction, practice and procedure for city courts outside the city of New York and [] discontinue any village or city court outside the city of New York existing on the effective date of this article.”²¹¹

The Legislature has exercised this authority in limited instances, such as: a) specifying the terms of office for Village Court Justices (four years by statute);²¹² b) limiting the number of such justices in each town or village;²¹³ and c) imposing residency requirements for elected justices.²¹⁴ But there remain substantial issues regarding and proposals for reform of these courts. Most notably, unlike other judges in New York, there is no requirement that these justices be members of the Bar, although they must receive some judicial training after election, the extent of which depends on whether they are members of the Bar.

Given the authority of these Town and Village Justice Courts – especially in criminal matters – many have suggested that New York should require that these judges be attorneys who are admitted to practice in New

²¹⁰ <http://www.nycourts.gov/courts/townandvillage>. Note that in some areas of the State, the jurisdiction of Town or Village Justice Courts is more limited, and the District Courts have jurisdiction over many of these matters.

²¹¹ N.Y. Const. art. VI, § 17(b) (2015).

²¹² Village Law § 3-302(3) (2016).

²¹³ Village Law § 3-301(2)(a) (2016).

²¹⁴ Public Officers Law § 3 (2016); Town Law § 23 (2016).

York. Supporters of the present system point to, among other issues, the practical difficulty in finding resident attorneys to serve as justices in many jurisdictions where Town and Village Justice Courts sit and also New York's long tradition of such local "citizen judges."

In 2001, the New York State Bar adopted the position that all judges in our State's Justice Courts should be lawyers, concluding that: "[i]t is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law."²¹⁵

A September 2008 Report by the Dunne Commission entitled, "Justice Most Local: The Future of Town and Village Courts in New York State," concluded that there were serious flaws in New York's Town and Village Court system. However, the Report found no compelling basis to eliminate these courts altogether or to require that the justices serving in them be admitted attorneys. Instead, the Dunne Commission issued multiple recommendations to ensure that the Town and Village Courts function as intended and to protect the citizens of New York, including: a) developing minimum standards for these courts; and b) developing panels to discuss court consolidation within the Town and Village Court system.²¹⁶

²¹⁵ William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. Times, at B8-B9 (Sept. 27, 2006)

²¹⁶ Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008), at 83-104.

Thereafter, in 2009, the Legislature passed a bill, which was proposed by then-Attorney General Andrew M. Cuomo, allowing for (but not mandating), *inter alia*, petitions and votes on whether to reorganize local government by consolidating or dissolving Towns, Villages and certain other local governmental bodies in the State. See "New N.Y. Government Reorganization and Citizen Empowerment Act" (2009), codified at Gen. Mun. Law art. 17-A (2010). At present, this statutory authority could be invoked to seek to consolidate overlapping Town and Village Justice Courts in particular communities of the State.

Three months thereafter, the State Bar's Committee on Court Structure and Judicial Selection prepared a report addressing the Dunne Commission's recommendations. This State Bar Committee agreed with the Dunne Commission that: a) requiring Town and Village Court justices to be lawyers was no longer feasible; b) that development of minimum standards for all Town and Village Courts was an important goal; and c) that consolidation of these courts was a worthy topic of discussion.²¹⁷

At that time, the State Bar's House of Delegates did not agree with all of the Dunne Commission proposals. For example, the House of Delegates disagreed with the specifics of the proposed minimum eligibility criteria for justices of these courts – as to which the State Bar proposed a minimum age of 30 plus a four-year college degree whereas the Dunne Commission proposed a minimum age of 25 plus a two-year degree.²¹⁸

Given the complexity of the issues concerning New York's Town and Village Courts and the important due process issues involved in proceedings that are held in those courts, discussion of issues affecting the Town and

²¹⁷ See January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State but rejecting one recommendation in the Committee report in favor of the original recommendation set forth in the Dunne Commission Report); Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008). See also Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

²¹⁸ Compare January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State except rejecting one recommendation for the original recommendation found in the Dunne Commission Report) with Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008); Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

Village Court system would be appropriate for a Constitutional Convention.²¹⁹

J. Court Budgets

Under Article VII of the State Constitution, the Chief Judge is to transmit the Judiciary’s budget to the Governor by December 1st of each year for inclusion in the Executive Budget.²²⁰ The Governor is obliged to transmit the Judiciary Budget to the Legislature “without revision but with such recommendations as the governor may deem proper.” Once before the Legislature, the Judiciary Budget is subject to customary budget deliberations and negotiation. If the Legislature adds new expenditures to the Judiciary Budget, such expenditures can thereafter be vetoed by the Governor.²²¹

As a consequence of this budgeting process, the Judiciary is subject to the outcome of budget negotiations between the Executive Branch and the Legislature. The budgeting process in New York often involves a give and take between legislative representatives and the Executive Branch in which the typical sorts of political horse-trading can take place. As an independent branch of government, the Judiciary should necessarily remain at a distance from this negotiation process to a significant extent.

This year, on December 1, 2016, state court officials released a Judiciary Budget seeking \$2.18 billion for the Unified Court System’s 2017-18 spending plan; neither Governor Andrew M. Cuomo nor the

²¹⁹ Another major issue affecting the Town and Village Courts involves arraignments and the cost of indigent criminal defense. Those issues are outside the scope of this Report. Certain aspects of those issues are the subject of legislation passed during the Legislature’s 2016 legislative session. *E.g.*, Assembly Bill A10360 (2016) (providing for off-hours arraignment); Senate Bill S07209-A (2016) (same). This bill was signed by Governor Cuomo on November 28. Joel Stashenko, *New Law Allows Centralized Arraignments Outside New York City*, N.Y.L.J. (Nov. 29, 2016).

²²⁰ N.Y. Const. art. VII, § 1 (2015).

²²¹ N.Y. Const. art. VII, §§ 1, 4 (2015); *see* N.Y. Const. art. IV, § 7 (2015).

Legislature has weighed in publicly on the court budget as of the time of this Report.²²²

At times in the past, this constitutional construct has led to friction, if not outright budget disputes, between the Judiciary and other branches of government. For example, in 1991, a budget stand-off between the then-Chief Judge and the Governor led to litigation captioned *Wachtler v. Cuomo*. In that lawsuit, then Chief Judge Sol Wachtler challenged Governor Mario Cuomo's unilateral action to reduce the Judiciary's budget submission to the Legislature for the 1991-92 State fiscal year.²²³

Following the 2008 fiscal crisis, the American Bar Association ("ABA") established a Task Force on Preservation of the Justice System, noting that "many of our state court systems have been in a crisis because of severe underfunding."²²⁴ Through several initiatives, the ABA sought to

²²² In reporting on the Judiciary's 2017-18 budget proposal, the New York Law Journal noted previous conflicts between the Governor and the Judiciary over past budget proposals. See Joel Stashenko, "Judicial Budget Proposal Calls for 200 Hires, Security Gear," *N.Y.L.J.* (Dec. 1, 2016), available at <http://www.newyorklawjournal.com/home/id=1202773591040/Judicial-Budget-Proposal-Calls-for-200-Hires-Security-Gear?mcode=1202617075062&curindex=0>.

²²³ No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991). See Walter E. Swearingen, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 Pace L. Rev. 153, 155-56 (1994). In response to this litigation, the State Bar's House of Delegates authorized the Association's Executive Committee to file an amicus brief (although the case was resolved before such a brief was needed). See November 2, 1991 New York State Bar Association House of Delegates Minutes. This House resolution followed a discussion within the Executive Committee, in which members "noted that the budgetary problems and the current impasse among the three branches of government were essentially political and would likely require negotiations outside the context of litigation if a successful, long-term solution is to be found." October 7, 1991 New York State Bar Association Executive Committee Minutes.

²²⁴ This ABA Task Force issued a "toolkit" to address funding issues affecting state courts across the country. This "toolkit" can be found at http://www.americanbar.org/groups/committees/american_judicial_system/task_force_on_the_preservation_of_the_justice_system/Court_Funding_Toolkit.html.

explore this underfunding and supply solutions and ideas designed to ensure that state courts receive their necessary funding. In 2012, the Task Force on Preservation of the Justice System worked with the National Center for State Courts and Justice at Stake to produce a report, entitled “Funding Justice: Strategies and Messages for Restoring Court Funding.”²²⁵ The suggestions made in that report included: a) developing a year-round relationship with those involved in enacting laws within the Executive and Legislative branches of state government; b) proposing credible court budgets for state court systems; and c) presenting data about court systems in ways that could easily be understood by branches of government that are unfamiliar with – or perhaps unsympathetic – to the budgetary woes of the Judiciary.

A Constitutional Convention would provide an opportunity to look afresh at the process through which the Judiciary Budget is determined in New York and to help ensure that the Judiciary receives adequate funds to support its operations and to promote access to justice in this State.²²⁶

In 2011 and thereafter, similar issues affected New York’s Judiciary after the court budget was cut. *See* March 30, 2012 New York State Bar Association Executive Committee Minutes (noting efforts to inform legislators of the “negative impact on individuals and businesses that are seeking nothing more from the court system than a fair and timely resolution to their legal problems”). *See also* New York County Lawyers’ Association Task Force on Judicial Budget Cuts, “Preliminary Report on the Effect of Judicial Budget Cuts on New York State Courts,” *available at* https://www.nycla.org/siteFiles/Publications/Publications1475_0.pdf (highlighting the delays, increased workloads, and reductions in service that were visible months after the Judiciary budget cuts were made in 2011).

²²⁵ This National Center for State Courts’ report was intended to set forth important lessons about: a) how the public views the courts and their funding needs; and b) how to tell the story of the courts, and why they matter to the citizenry at large. *See* http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63CA32368.pdf.

²²⁶ Each year the State Bar President appears before the Legislature at hearings on the court budget, frequently to support the budget allocations requested by the Chief Judge.

K. Commission on Judicial Conduct

As a result of the 1977 court reforms, the State Constitution provides for a Commission on Judicial Conduct which is authorized to: “receive, initiate, investigate, and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system.”²²⁷ Given the need to safeguard the appearance of fairness and justice in the court system, a well-functioning Commission that reviews these sensitive matters helps assure our State’s citizenry that the judicial process is sound. But any such safeguard for the judicial system ought to be careful not to encroach on the independence of the judicial process. Moreover, unless there is a fair process for investigating, reviewing and adjudicating judicial disciplinary complaints, the work of the Commission could carry the potential to do more harm than good.

In 2009, the Task Force on Judicial Independence of the New York County Lawyers’ Association (“NYCLA”) issued a report on the Commission on Judicial Conduct.²²⁸ This report assessed the Commission’s operations and made various suggestions and recommendations which were intended to preserve judicial independence while maintaining a robust oversight function for judicial discipline. These recommendations included: a) establishing and maintaining a “firewall” between the prosecutorial and adjudicative roles of the Commission; b) giving respondent judges in the disciplinary process notice of Commission inquiries; c) affording respondent judges subpoena power so they can compel the production of documents and witnesses in matters before the Commission; d) strengthening confidentiality protections for the Commission’s process; and e) modifying the

²²⁷ N.Y. Const. art. VI, § 22(a) (2015).

²²⁸ See New York County Lawyers’ Association Task Force on Judicial Independence, “Report on the New York State Commission on Judicial Conduct,” available at http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf.

Commission's standards and processes to better match the ABA's Model Rules of Judicial Disciplinary Enforcement.²²⁹

NYCLA's Board of Directors approved this report on September 14, 2009.²³⁰ After the Commission agreed to adopt certain of NYCLA's recommendations, but not others,²³¹ the State Bar's House of Delegates adopted the remaining recommendations in January 2011.²³²

A Constitutional Convention may provide an appropriate opportunity to review the functions of the Commission on Judicial Conduct and the extent of the due process protections that are afforded to subjects of Commission investigations.²³³

L. Participation of Judges at a Constitutional Convention

While qualifications for members of a constitutional convention are to be established from time to time by the State legislature, the State Constitution specifically permits judges to serve as members of a

²²⁹ ABA Model Rules of Judicial Disciplinary Enforcement (1994), *available at* http://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement.html.

²³⁰ *See* New York County Lawyers' Association Task Force on Judicial Independence, "Report on the New York State Commission on Judicial Conduct," *available at* http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf.

²³¹ *See generally* 22 N.Y.C.R.R. 7000.1 *et seq.*

²³² *See* January 28, 2011 New York State Bar Association House of Delegates Minutes (approving NYCLA's recommendations regarding sanctions, liability insurance for judges, training for referees, separation of Commission functions, and certain recommendations on notice and discovery in the Commission process). *See also* "NYCLA Recommendations Regarding Commission on Judicial Conduct Adopted by NYSBA," https://www.nycla.org/siteFiles/Publications/Publications1423_0.pdf.

²³³ Additionally, the State Constitution still references convening a Court on the Judiciary (N.Y. Const. art. VI, § 22(j) (2015)) and the availability of a Court for the Trial of Impeachments within the Legislature (N.Y. Const. art. VI, § 24 (2015)). Should a Constitutional Convention be called, any potential redundancy in these provisions could be cleared up as well. *See* Section III.M, *infra*.

constitutional convention.²³⁴ Nonetheless, some have raised concerns that earlier conventions encountered potential conflict issues when judges served as convention delegates while also serving on the bench.²³⁵

Recently, on June 16, 2016, the Unified Court System’s Advisory Committee on Judicial Ethics issued an opinion addressing a judge’s potential activities around a constitutional convention.²³⁶ That Advisory Committee recognized that the State Constitution specifically permits judges to seek election to serve as a delegate. The Committee also drew attention to the seeming inconsistency between: a) permitting judges to engage in “publicly discuss[ing] the need for judicial reform and a constitutional convention, as these are matters relating to the law, the legal system or the administration of justice”, while b) prohibiting judges from discussing anything that would “cast reasonable doubt on the judge’s capacity to act

²³⁴ N.Y. Const. art. VI, § 20(b)(1) (2015).

²³⁵ *See, e.g.*, The Delegate Selection Process: Interim Report of the Temporary New York State Commission on Constitutional Revision (March 1994) (quoting concurring statement of commission member Hon. Malcolm Wilson that “there is no logical basis for permitting judges to serve as Convention delegates”), reprinted in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 434 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); William J. van den Heuvel, Reflections on Constitutional Conventions, 40 N.Y.S.B.J. 261, 266 (June 1968) (“No single group of delegates [at the 1967 Convention] came in for more criticism both from the public and from themselves than did the judges. The public image of the judiciary is of a non-partisan branch of government delicately weighing the needs of justice and rendering those impartial decisions far removed from political pressures and interests. Suddenly these robed men become gladiators in a political arena-and even worse, they seem to enjoy it. And then comes the debate on the judiciary article. Instead of divorcing themselves from the committee in which the article is drafted, they dominate it; and in the public debate, all of the rivalries and resentments which are hidden by the heavy curtains of the courts are suddenly revealed.”). Concerns have also been raised regarding the potential receipt of dual salaries both as a convention delegate and as a judicial officer.

²³⁶ Opinion 16-94 (June 16, 2016). *See also* Opinion 96-146 (Mar. 19, 1997) (confirming that a judge can serve as a delegate to a State constitutional convention).

impartially as a judge, detract from the dignity of judicial office, or otherwise interfere with the proper performance of judicial duties.”²³⁷

Some discussion of the participation by judges in future conventions would be ripe for consideration if a Constitutional Convention were to be approved in 2017.

M. Length, Style, and Outdated Portions of the Judiciary Article

The text of the Judiciary Article alone comprises approximately 16,000 words – representing almost one-third of the State Constitution as a whole. The City Bar’s 1997 Report of the Task Force on the New York State Constitutional Convention called the article “substantially more comprehensive and detailed than any other part of the Constitution.”²³⁸

Some provisions of the Judiciary Article appear to be outdated or potentially inappropriate for a modern court environment. For example, Section 32 of Article VI mandates that, when called on to make child placements, courts are to place children in “an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.” Other provisions appear to be anachronistic. As an example, the number of Judicial Districts provided for in the Judiciary Article is less than the number actually specified by the Legislature pursuant to its authority to make such changes; and Article VI still references a Court

²³⁷ Opinion 16-94 (June 16, 2016). This is different from judges being involved in a public group that develops proposals for how to change the State Constitution prior to a convention being called; the language of this ethics opinion language suggests that judges are prohibited from engaging in this type of activity. Opinion 16-60 (May 5, 2016).

²³⁸ New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>. *See also* Peter J. Galie & Christopher Bopst, “Constitutional ‘Stuff’: House Cleaning the New York Constitution – Part I,” 77 Alb. L. Rev. 1385, 1424 (2013 & 2014) (“[T]here are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article.”).

for the Trial of Impeachments which includes judges and a Court on the Judiciary, despite the creation of the Commission on Judicial Conduct 40 years ago.²³⁹

In addition, the Judiciary Article contains minute details – such as the location of particular courts and the numbers of judges assigned to them. Those details could be more appropriate subjects of legislative action, thereby permitting such provisions to be updated more readily.

In the event that a Convention is called, a re-drafting effort addressed to the Judiciary Article would be appropriate, with a goal of simplifying and updating Article VI. This sort of re-drafting could prove to be beneficial for the Judiciary, users of the court system and the bar.²⁴⁰

²³⁹ N.Y. Const. art. VI, §§ 22(j), 24 (2015).

²⁴⁰ If delegates to a Convention were to decide to make certain other changes to the Constitution noted in this Report, it may of necessity result in simplifying and shortening Article VI before separate attention is paid to the length and language of the Article's remaining provisions.

IV. CONCLUSION

At present, the Judiciary Article represents an unnecessarily large and complex portion of the State Constitution. Article VI governs a multitude of critical aspects of New York's legal system – certain of which are ripe for discussion if a Constitutional Convention is called in 2017. Moreover, other issues that are central to the functioning of a statewide court system are not adequately addressed by the existing Judiciary Article. Certain other issues affecting the Judiciary are currently treated at the constitutional level when they might better be addressed by the Legislature, from time to time as may be needed.

A theme that is common to many of the most significant reform issues concerning Article VI, is the opportunity that a Convention would provide to reorganize, modernize and simplify the constitutional structure of the Unified Court System. If the voters were to decide in 2017 to call a Constitutional Convention, various other changes to Article VI could be considered in order to improve the Judiciary in New York, and those reforms could be tied to an overall court restructuring effort.

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