

John Caher: The term “institutional memory” is probably grossly over-used, but when it comes to Marc Bloustein, it's an understatement. Marc is legislative counsel for the Office of Court Administration, and he's been with OCA for more than 40 years.

For this Amici podcast, Marc has graciously agreed to share his insight on the just-concluded legislative session, the prospects for the next, the status of measures of particular interest to the judiciary, the prospects for a Constitutional Convention—and why those within or interested in New York State court system should care.

Marc, thanks for joining us. I'm a little hesitant to ask my standard first question because I'm afraid it'll consume the entire program. Can you just briefly tell our listeners what exactly it is you do. How long you've been doing it and how you got into it.

Marc Bloustein: John, thanks for having me. Nominally, I'm legislative counsel to the state court system, which means that it's my job to help the Chief Judge of the state and the Chief Administrative Judge of the state pursue legislative initiatives in the state Capitol. I oversee the drafting and presentation of perhaps 100 legislative initiatives a year on behalf of the Judiciary. I've been doing this for, well the legislative session that just concluded was my 43rd session. I've actually been legislative counsel since 1982. You do the math; it's been a long time.

How did I get into this? It was actually serendipitous. I was a law student at Albany Law School in the summer of 1974. Between terms, the Office of Court Administration advertised for a law student to come work in a newly opened office near the state Capitol. I applied for the job. Somehow I got the job.

It turned out that it was the state administrative judge at the time, not the chief administrative judge. The state administrative judge was a legislative creation that was superseded a few years after I began with a constitutional amendment creating the office of chief administrative judge. The state administrative judge at the time was Richard Bartlett, a former assemblyman. He had decided that it would be important for the court system to have a legislative presence more so than it had had up until then. To that end, he decided we best open an office in Albany. We didn't have an office in Albany up until that time.

John Caher: Let me cut you off a minute. Wasn't Judge Bartlett the Chief Administrative Judge, or did he never have that title?

Marc Bloustein: He had that title; he was the first chief administrative judge. At the time I started in 1974, he was the state administrative judge. It would take a considerable bit of time to go into the history of this, but in short, up until 1978 the state had a state administrative judge who was responsible on behalf of the Chief Judge of the state and the Presiding Judges of the four Appellate

Divisions for the superintendence of the trial courts across the state. In 1977, the voters of the state approved a constitutional amendment changing the position from state administrative judge to Chief Administrative Judge. The change was more than just a change in title. The Chief Administrative Judge became responsible only to the Chief Judge of the state, who was given responsibility for overseeing the entire state court system.

John Caher: I see.

Marc Bloustein: The Chief Administrative Judge came into being in 1978. Dick Bartlett had been the state administrative judge until then under Charles Breitel, who was the Chief Judge of the state at the time this constitutional amendment was adopted. Judge Bartlett, for a brief period of time after April 1st, 1978, the effective date of the constitutional amendment, served as the state's first Chief Administrative Judge.

John Caher: I get it. We just finished the legislative session a week or two ago. What did the Legislature do and what did it not do that significantly impacts court operations or the lives of our judges?

Marc Bloustein: As I just mentioned, the legislative session just concluded was my 43rd. I confess that, at least as I look at it, it was not a terribly memorable session, at least in so far as those concerned with the Judiciary and the administration of justice look at it. To put it in context, my job as legislative counsel is to help the Chief Judge

and Chief Administrative Judge promote a legislative agenda on an annual basis. This year, out of some 100 or so legislative proposals that we tendered to the legislature, we saw only seven that were approved by both houses. They are yet to be signed by the governor; hopefully they will be signed by the governor. Seven percent of our work product becoming law is not a good track record.

John Caher: What's more typical?

Marc Bloustein: I don't want to take shots at the present Legislature because I think what we saw this year is part of a trend, a long-term trend. In maybe my first 15 or 20 years with the court system, it was pretty much a regular thing that we would see anywhere between 25 and 33 percent, a quarter or a third of our work product, enacted into law in any given session. Since then, the numbers have tended to drift downward. If we get 10 percent or 15 percent of what we send over...I hate to make this a numbers game, but it does show something here. If we get 10 or 15 percent of what we send over, then I think we consider ourselves lucky. Beyond the matter of numbers, we did see some important things happen.

First of all the court system was able to get its budget, which is always the center-piece of any legislative effort that we undertake during a session. As part of that budget we saw that the budget for civil legal services support -- which was begun in earnest under Chief Judge Lippman and continued under Chief Judge

DiFiore — reached the magic number of \$100,000,000, which was a significant achievement.

Something the legislature did not do, which is also a very significant achievement, in its own way... When the Legislature set up the present system for determining whether judges are to receive pay raises, they set up a system whereby a commission would be formed. This commission would study whether judges need pay raises.

The commission would make recommendations. There would be deadlines for those recommendations. Then those recommendations ultimately would have the force of law if the Legislature did not first come in and abrogate or modify those recommendations. The achievement this year that I'm speaking of is the fact that when the commission, which last sat at the end of 2015, made recommendations for pay raises for judges including a fairly significant one effective April 1st of 2016. The Legislature, in the interim between the time the commission made its recommendation and April 1st of this year, did not come in and abrogate it. This raise took effect, so that's a significant achievement even though the Legislature actually did nothing to make it happen.

John Caher: At least we didn't reenact the scenario when the judges went for, what was it 12 years?, without a raise?

Marc Bloustein: They went from January 1st of 1999 to April 1st of 2012.

John Caher: Part of the problem there of course is that historically judicial and legislative salaries were linked. It wasn't politically palatable for the legislators to give themselves a raise, as it has not been for a great many years. That meant the judges didn't get raises either. Now that you've got a judicial pay commission and a legislative pay commission it almost seems like there's a danger of linking those two things again. Do you see any jeopardy there for the judges?

Marc Bloustein: I must confess I honestly do not understand. I thought about this a great deal.

I don't understand why the Legislature signed onto the statute and enacted a year ago Chapter 6 of the laws of 2015, by which the Legislature put itself into the same commission system that the judges were put into back in 2010, I think it was. The way the statute works, the commission is made up of members appointed by the Governor, by the legislative leaders and by the Chief Judge of the state. When the commission considers pay raises for judges, it is a simple majority vote of the seven. There are seven members of the commission. A simple majority vote of the seven members is all that's necessary to endorse a particular recommendation by the commission.

It's different with the Legislature. You have seven commission members, of which three are appointed by the Governor, two by the chief judge, and one each by the leadership in the two houses of the legislature. In

order for a recommendation for a legislative pay raise to take effect at least one appointee of each of the appointing authorities -- that is to say, at least one of the governor's three appointees, one of the chief judge's two appointees and each of the two appointees of the Legislature must endorse whatever the recommendation is that's being made for a pay raise. That suggests to me that the Governor remains every bit as much in control over the matter of whether the Legislature is going to get a pay raise as he did before there ever was a commission.

It seems to me entirely possible that the Governor may lay out his conditions for his members of this commission in considering whether or not the Legislature should receive a pay raise in the months ahead of us. They're due to make their recommendation by, I think it's November 15th of this year. If they recommend a pay raise, then that pay raise will take effect the following January 1st. It seems to me in advance of the commission undertaking its work, it's entirely possible that the Governor may stipulate, "All right, in order to secure a vote of one of my members which is a requirement, I have to see the following things happen..."

Will the Governor do that? Will the Legislature acquiesce? Who knows? How will it affect the judges? That's a very good question. Some might argue that if the Legislature is stymied through this process and isn't able to make a recommendation for a pay increase for legislators – who, by the way, have now gone since

January 1st of 1999 without a pay raise. That's working on 17 years, or it's going to be 18 years. If there is no raise forthcoming for the legislators, will the Legislature, when the next installment and the pay raise that was recommended for judges is due April 1st 2017, will the Legislature then say, "You know what? If we cannot get a pay raise, that's enough for the judges. We're going to go back to the old system." Some people think that's entirely possible. Some think that given the good government aspect of the commission system, with which it was surrounded when it was created, that the Legislature wouldn't really do that kind of thing. It's anybody's guess because we haven't been down this path before. There's no precedent.

John Caher: It seems that with the judicial pay raises, the judges have received some pretty substantial pay raises over the last several years. I don't know that they have been made whole to the extent that if they received the minimum cost of living increase over those years that they did not receive any raise. I'm not sure they've yet achieved that level.

Marc Bloustein: I think you're right.

John Caher: There's been a lot of talk about parity with the federal judges and using that as a proportion -- that the trial judges -- the Supreme Court judges -- would make the same as a federal district judge. The judges above them would make a certain percentage above that. The ones

below them, a certain percentage below that. Is that what the general plan is or hope?

Marc
Bloustein:

Yes, I think that's accurate. Up until 2005 and I'll explain why I use that year in a second, up until 2005, going back to the late 1970's when the state took the responsibility for paying the salaries of judges, there's been a sense that, and history will second this, that our Supreme Court justices, who represent the highest level of our trial courts, that our Supreme Court justices should earn as much if not more than their federal counterparts, which are the federal district court judges. If you look back at the salaries the judges actually earned between the late 70's and the early 2000's, you'd see it was a period of time when Supreme Court justices occasionally earned more than did federal district court judges.

There were times when they earned a little bit less. I think there was a kind of conventional wisdom that Supreme Court justices and federal district court justices occupy more or less the same stature and ought to be paid in parity.

I said 2005 a moment ago because in 2005, at that point not just the Supreme Justices of New York, but also all trial court judges that were state paid, had gone six years without pay raise. January 1st 1999, they had received a raise. By the time 2005, had rolled around they had not received any further raise, no cost of living, nothing. Judith Kaye, who then was Chief Judge,

decided that she would engage the Legislature and do a more aggressive job promoting pay raises for judges.

One of the things she did was she issued a report -- I think it was in March of 2005 -- in which she studied the history of judicial pay, judicial pay adjustments. She made the point that six years was too long to go without a pay raise, and she made recommendations as to what that pay raise might be. In the text of that report, there is some discussion devoted to precisely what had been informal in the past. She was now recognizing that in fact Supreme Court justices and federal district court judges should enjoy pay parity on a continuing basis. It shouldn't fluctuate, it shouldn't be left to an approximation game which had been the case up until then. They should be kept in parity year by year. That report was issued in 2005.

Nothing happened for the next five years. We had a commission established and the rest was history.

Where we stand is that Supreme Court justices, under the recommendations of the most recent commission, earn 95 percent of what a federal district court judge earns. A federal district court judge earns something like \$201,000 and change, and Supreme Court justices earn \$193,000. If the Legislature does not intervene and adjust, abrogate, modify any of the recommendations that the commission made for the next several increases for judges there'll be a four step increase, one each year. We just had one in 16. There'll be others in 17, 18 and 19. On April 1st, 2018, again

with no intervention by the Legislature, Supreme Court justices in the state will go to 100 percent of what a federal court judge earns. The next installment that follows will continue that. Then, it will be up to the next commission to decide whether they want to perpetuate the pay parity.

John Caher: Of course, there's always a danger there could be that there be some sort of a wage freeze in the federal system. Do we want to be stuck with that? It's not inconceivable that, for whatever political reason, the district judges could go 12 years without a raise. Unlikely, but ...

Marc Bloustein: You're right. You're definitely right. Quite honestly, the struggles that judges have gone through over the course of the last 20 years to see regular pay adjustments -- to see fair pay adjustments and for the Supreme Court justices to see themselves in parity with federal district court judges -- have been so great that right now I think judges are thinking only in terms of maintaining that parity. If in the future it should happen that the feds do a swan dive, I think that will be dealt with at that time.

John Caher: We'll cross that bridge if and when we come to it.

Marc Bloustein: If and when we come to it.

John Caher: Another financial issue I know with the judges and we discussed this offline is the so called death benefit.

Marc Bloustein: Death gamble?

John Caher: Yes, the death gamble, I'm sorry. Can you just explain what that is and what the implications are and what the remedy is, which frankly to me has always seemed fairly simple.

Marc Bloustein: The public employees in New York State become members of the state retirement system. When they do, depending on when they first engage in service and join the retirement system, they're placed into one of several tiers. The tiers were created over time because as time went by it became obvious to budget makers that the state could not afford as much as perhaps it once could have afforded in terms of benefits for public employees when they retire.

What we've seen with each succeeding tier is some small diminution in the ultimate benefit. I'm Tier 2. Tier 2 people are people who began between 1973 and 1976 -- I think it's 1973 and 1976. In Tier 2, my deal is pretty good. I don't contribute to my pension at all.

If I were hired after 1976 and joined the retirement system then, I would have been required to contribute a small amount to my pension. I think with succeeding tiers that amount has been increased. There are other changes as well.

The reason I'm explaining about the tiers is the way the death gamble works, if you remain in service after the

age at which you can retire and begin to collect pension benefits. For me that would have been 55, for others it's 62, again, depending upon your tier. If you remain in service after the date on which you can retire -- in my case 55 -- and then you die while in service, your beneficiary will receive, instead of your pension, he or she will receive a death benefit which equals three times your salary at the time you die.

This is true about everyone who is in Tier 2 and beyond. This can get very complicated and I'm going to avoid the complications. If you began service with the state prior to 1971, then none of this applies to you and it's not of concern. Since most people began their service since 1971, it applies to them. If you die while in service and while eligible to retire, your beneficiary does not receive your pension, but instead receives a death benefit of three times your salary.

If you're an employee who hasn't been in state service all that long, that's probably okay.

If you are like me and you've got 40 plus years of service with the system, chances are your beneficiary, if you pre-decease and your beneficiary lives a normal lifespan, would probably benefit more by being able to take your pension as if you retired the day before you died, because there are options which permit you to say, "All right I want such and such benefit when I retire. If I pre-decease my beneficiary then these benefits continue with my beneficiary." There are options available by which you can do that.

Judges became particularly concerned during the long period of the pay freeze.

When you retire, your pension benefit is based on what we call your “high three,” which is your salary during the highest three years you served. Judges served a long period of time without any pay increase. Naturally they wanted to augment their pay, maximize their pay, so that when they did retire they'd be entitled to the highest pension benefit. The judges went so long without a pay raise, they realized, I'm going to have to outlive this thing, I'm going to have to stay in service, stay in service. As they did with each passing year their chances of dying during the death gamble increase. It's called a “death gamble” for the simple reason that you're gambling you're going to stay alive ...

John Caher: Until you decide to retire.

Marc Bloustein: Until you retire. That's the gamble. Judges were gambling that they'd stay in service, stay in service until finally those pay raises came and they could augment their pension benefits. They weren't foolish; they recognized they were taking a chance.

John Caher: Some guessed wrong.

Marc Bloustein: Fortunately not that many, but some have guessed wrong. In any event, long story short, the court system tried to get the Legislature to modify the death gamble law for judges and their beneficiaries. For judges who died during the death gamble, their beneficiaries would

have the option of taking their pension instead of this death benefit as if the deceased had actually died the day after he or she had retired.

The Legislature wanted no part of it. There are umpteen reasons why. It's very expensive. The Legislature wondered, "Why shouldn't we be able to take advantage of it?" If the legislature took advantage of it, then 190,000 state employees would likewise wonder and it would be impossibly expensive. To this point, efforts to modify or reform the death gamble law have been unsuccessful. If I have a moment I'll tell you what I think is the solution in the future to this problem.

John Caher: Sure.

Marc Bloustein: In the past several years, there was a JSC from New York City who unfortunately died during the death gamble, leaving his widow to receive only the death benefit.

By the way, I said the death benefit is three times your salary. That's not entirely true. It's three times your salary until you turn 60. Once you turn 60, it's three times your salary, less 4 percent a year. Gradually it diminishes over time.

I'm 66, and I'm in the death gamble. My death benefit were I to die now would be three times my salary less 6 times 4%, that's 24%. It's now been reduced to 75% of what it would have been.

In any event this judge died. On his behalf, people were able to push through the Legislature a special bill, which treated his surviving spouse precisely in the same fashion as if the Office of Court Administration's larger bill had passed. It enables her to choose either the pension that her husband would have been entitled to had he retired the day before he died, or to keep the death benefit. The Governor signed this bill into law. One assumes that in the future, and as I said a moment ago fortunately there are not that many incidents...

John Caher: That they can handle it on a case by case basis and just do justice as it comes up?

Marc Bloustein: Exactly. There's a model for this, and John, you probably know this better than I. There's been a long time practice in the Legislature that if a legislator dies early in the legislative session, the Legislature invariably votes for his or her surviving spouse the balance of his or her salary for the year. The Governor signs it into law. It doesn't happen often because it doesn't happen often that somebody dies. When it does happen, that's the practice.

I cannot imagine the Legislature would enact a statute that would basically cover this in the future so that the Legislature wouldn't have to deal with it on an ad-hoc basis. While we deal with it on an ad-hoc basis. I can see the same thing happening here. Politically, it's not in the cards for the legislature to give judges as a group relief from the death gamble law. I can see the

Legislature doing precisely what it did for the judge I just mentioned should future judges die while in service.

John Caher: I understand. One quick thing here that bears on this somewhat. We had a vote a couple of years ago on whether to raise the age of judges and it went down. Do you think that's a dead issue?

Marc Bloustein: That's perhaps a bad choice of words.

John Caher: That was a very bad choice of words!

Marc Bloustein: Is it a dead issue? Yes and no.

For those of the listeners who don't understand this, the Constitution provides that most judges — certainly all the judges of the major trial courts in the state — must retire by December 31st of the year in which they turn 70. There have been a number of efforts in the past to modify this constitutional rule. They've all failed.

Not to make this more complicated, but there are two means by which we can amend our Constitution. One the standard means where a proposal is put in to a legislative session. The Legislature has to approve it. It then has to go before the Legislature after its next election.

The members are elected, then if it gets approved again it goes to the voters of the state, who have the ultimate say on it. In the past, there have been a number of efforts to have this double passage. Some have failed to achieve the double passage and a few have been successful. The Legislature has twice approved a constitutional proposal to amend the mandatory retirement age. Then the voters have resoundingly, in the several instances of which I'm aware, turned it down.

A second way of amending the Constitution is by means of a Constitutional Convention. We haven't had a Constitutional Convention in our state since 1967. Our state constitution actually requires that every 20 years the voters of the state be given the opportunity to say, "Yes" to a Constitutional Convention. They'll have that opportunity again ...

John Caher: Next year.

Marc Bloustein: In November of 2017. You ask me is there any prospect for something like this. My answer would be if we're thinking only in terms of the traditional pass-the-Legislature-twice approach then go to the voters. I would say most likely not. I think there are too many interests already against it. There are interest groups that feel if judges are allowed to remain in service longer than their members, whether it's women, the minority community or whatever, feel as if it depresses the possibility of more of their members becoming judges. They're already against it. I think there are lots

of public citizens, just citizens who think, "You know what? It's okay. Maybe we'll lose an Oliver Wendell Holmes or a Judith Kaye every once in a while because of the constitutional requirement of mandatory retirement. You know what? All things being equal, we need new blood. The circulation of new blood in the system is a virtue. It's something that should be preserved."

John Caher: It sounds like a standalone bill is unlikely, but it could be part of a broader constitutional revision. Then all the cards are on the table.

Marc Bloustein: Absolutely. On the merits, New York has had a mandatory retirement age of 70 for its judges since 1869, that's, what, 147 years?

John Caher: When nobody lived to be 70 anyhow.

Marc Bloustein: When nobody lived to be 70 anyhow. On the merits, without considering any other factors, yeah, maybe it's time for a serious reconsideration of this. I don't think this happens except in the context of a Constitutional Convention when it's viewed against an array of many, many other issues.

John Caher: Let me just in the few minutes we have left to bring up the Constitutional Convention, and what the implications are for the Third Branch of government if the voters were to approve that in November of 2017. What's at stake here?

Marc Bloustein: Everything is ... If there's a Constitutional Convention ...

John Caher: Everything's at stake.

Marc Bloustein: Everything is at stake, everything is potentially at stake. Which I think for some people might be reason why we shouldn't have a Constitutional Convention. The voters last considered -- I said the last convention we had was 1967 -- the voters last considered whether we should have a convention in 1997. They pretty firmly shot it down. A whole bunch of reasons why that happened. I'm sure that one of the reasons is for some people there was a fear that we risk opening a Pandora's box and everything imaginable is on the table. There's always the possibility of a runaway convention and who knows what can happen under those circumstances. It's interesting, the history, if you review the history of the state, and its experience with Constitutional Conventions.

There have been a number of different paradigms that have been followed by conventioners. We've had, I think in the course of our history, something like 10 or 11 conventions. There have been conventions that have studied the full gamut, the full panoply of New York constitutional issues. There have been conventions devoted to limited examination of portions of the constitution. We've seen some of that reflected in the way conventions have decided to put their work product before the voters. Some conventions have, as did the 1967 convention, come up with a new

constitution. A new constitution was presented intact to the voters in 1967 and the voters turned it down. There have been other instances where the convention has said, "All right we're going to propose these 6, 7, 8, 9 changes in these discrete areas.

What we're going to do is we're going to break them down and submit separate propositions to the voters so that the voters have the option of saying yes to this one and no to that one."

That's happened before; it happened in 1938. I just mentioned about the mandatory retirement age in 1869, the convention which actually sat in 1867. What the conventioners did is they put together this constitutional package whereby the judiciary portion of it was held entirely separate from the rest of the Constitution. As it turned out, the voters of the state rejected everything but the judiciary. That's the reason we have age 70 right now. Anything is possible. Anything is on the table.

John Caher: I can see how that'd be scary for some people. Democracy is inherently fickle. The political branches are supposed to pander. The one thing that prevents that from getting out of hand is the absoluteness of a Constitution. Then you really have potentially opened up a Pandora's box.

Marc Bloustein: Absolutely. Absolutely. As I was thinking about this I just made a list of all, just within the context of the judiciary, of all the many, many issues we've seen arise during my 40 years of service, Issues that would be fair

play for everything from the structure of our court system to the way we select our judges to the structure of our appellate court system, a very big issue, to the mandatory retirement age, whether we should continue to permit the use of lay judges, judges who are not lawyers, to serve as judges in our lowest courts, whether we should have the Legislature dictate what court procedures should be or, as many states and the federal government do, they leave it to the highest court of the jurisdiction. There are so many issues, oh and one other issue of course. This is one of my favorites. If you look at the Federal Constitution and look at the article that's devoted to judiciary in the federal government. It's ...

John Caher: Article 3.

Marc Bloustein: Article 3 consists of 330 words: There shall be a Supreme Court and such inferior courts as Congress shall from time to time ordain and establish, and a few other words. And that's it. That's how a court system that covers 330,000,000 people across the span of the United States is established. By contrast, the New York Constitution devotes almost 16,000 words, which is just under one-third of the text of the state constitution, to laying out the structure and the operation of the state judiciary. It's a degree of verbosity, prolixity, wordiness which is, I think, in many ways very counterproductive. It's very challenging.

What it does is it requires anytime there's a need to reform almost anything having to do with our Judiciary.

It has to go through the process of constitutional amendment as opposed to the far simpler process of state legislation or court rule. While there are arguments that one can make for having everything devoted to the Judiciary stuck in the Constitution, which is very, very difficult to amend, there are also arguments that we've thrown the baby out with the bathwater. We've made it so difficult to change the way our court system operates. We cannot possibly keep up with modern trends as it is. We're shooting ourselves in the foot in the process.

John Caher: It'll be an interesting year to see what happens. Marc, I think we're out of time. I really appreciate you taking the time to talk with us and share all that insight and knowledge that you've gleaned over those decades.

Marc Bloustein: Thank you for having me again. I'm not sure how much insight I have.

John Caher: A ton.

Marc Bloustein: It's been an interesting ride. I'm very interested to see — maybe you could tell through the passion in my voice — very interested to see how the voters treat the prospect of having a Constitutional Convention, because if the voters do decide to have it, for those of us that labored in the background in the Judiciary for so many years, here's a chance to see so many issues that we've worked on and dedicated ourselves to really have a day in the sun.

John Caher: Thank you for listening to this edition of Amici. If you have a suggestion for a topic on Amici call John Caher at 518-453-8669 or send him a note at JCAHER@NYCourts.gov. In the meantime, stay tuned.