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*New York Supreme Court, Appellate Division*

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# ARE FIVE HEADS BETTER THAN THREE?: A CASE FOR THREE JUDGE PANELS FOR THE NEW YORK SUPREME COURT, APPELLATE DIVISION

Luke Bierman\*

## I. INTRODUCTION

Since 1990, pursuant to the unprecedented agreement of the Presiding Justices of the New York Supreme Court, Appellate Division, the Second Department has transferred civil cases to the other departments.<sup>1</sup> This extraordinary action was deemed necessary due to the enormous backlog of cases in the Second Department.<sup>2</sup> Indeed,

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In the interest of full disclosure, the author is a Ph.D. candidate in Political Science at the State University of New York at Albany concentrating in public law, and this Article was conceived in connection with this academic work. The author also serves as Chief Appellate Court Attorney for the New York Supreme Court, Appellate Division, Third Department, and has great fondness and respect for the people and institutions which constitute the New York State judicial system. As an employee of the Unified Court System of the State of New York, the author is compelled to acknowledge that the views expressed in this Article are contrary to those endorsed by the Appellate Division Task Force established by Governor Mario M. Cuomo and former Chief Judge Sol Wachtler following extensive study and consideration. The author further acknowledges that the Administrative Board of the Unified Court System remains fully supportive of the current constitutional enumeration concerning the size of Appellate Division panels as appropriate and necessary to ensure that New York State litigants are provided the fullest and fairest appellate review possible. This Article is intended to contribute to the continuing discourse over possible resolutions to the acknowledged caseload crisis in New York's intermediate appellate courts. Finally, and most emphatically, the author wishes to emphasize that the views expressed in this Article are solely his and should not in any way be construed to represent the views of any court or judge.

<sup>1</sup> See N.Y. CONST. art. VI, § 4(g); Gary Spencer, *2d Department Appeals Shifted to Cut Backlog*, N.Y. L.J., Jan. 30, 1990, at 1 [hereinafter Spencer, *Cut Backlog*]. The Appellate Division is New York State's primary intermediate appellate court. N.Y. CONST. art. VI, § 4; N.Y. CIV. PRAC. L. & R. 5701 (McKinney 1978). Although it is a single statewide court, the Appellate Division is divided into four geographically disparate departments, each with its own court membership and facilities. An appeal generally is taken to "the department embracing the county in which the judgment or order appealed from is entered." N.Y. CIV. PRAC. L. & R. 5711 (McKinney 1978).

<sup>2</sup> See Spencer, *Cut Backlog*, *supra* note 1; see also Gary Spencer, *Study of Appellate Divisions Set*, N.Y. L.J., Sept. 21, 1989, at 1. As recently as May 1, 1992, Presiding Justice Guy James Mangano reported that the Second Department's backlog exceeded 4,000 cases. Guy

after more than one year of study, the blue ribbon Appellate Division Task Force appointed by the Governor and Chief Judge characterized the situation as a "crisis of significant proportions."<sup>3</sup> Little, however, has been done to alleviate the acknowledged crisis.

This Article, which endorses one particular suggestion rejected by the Task Force, proceeds from the recognition that there is limited opportunity for institutional reform to resolve the Appellate Division's caseload problem. Of the Task Force recommendations,<sup>4</sup> adding additional departments or altering current departmental boundaries may be the best solutions but political realities make these improvements unlikely.<sup>5</sup> Appointing additional appellate judges may provide some relief but may also contribute to other problems such as exacerbating the trial court crisis by siphoning judicial resources from courts already stressed by backlogs and closed courtrooms and contributing to the court system's financial distress.<sup>6</sup> Given New York's long commitment to broad appealability of civil trial court orders and judgments, limitations on interlocutory civil appeals are unlikely.<sup>7</sup> Continuing to transfer cases from the Second Department to other courts may provide short term relief but cannot be considered a

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James Mangano, *Courts Look to Efficiency to Cope with Caseloads*, N.Y. L.J., May 1, 1992, at S-1. Although the caseload problem has been linked most clearly with the Second Department, it has affected all departments. See NEW YORK APPELLATE DIVISION TASK FORCE, REPORT OF THE APPELLATE DIVISION TASK FORCE (1990) (N.Y. State Libr. No. 91-26229) [hereinafter TASK FORCE REPORT]. When the Appellate Division was created almost 100 years ago the departments were of roughly equal population and "reflected the governmental, social and economic features of the State in the 1890's." *Id.* at 6. Population shifts and other changes have contributed to the caseload imbalance among the departments. *Id.* at 6-16.

<sup>3</sup> TASK FORCE REPORT, *supra* note 2, at 1.

<sup>4</sup> *Id.* at 17-37.

<sup>5</sup> See Gary Spencer, *Legislators Take Up Cost-Savings Measures in Budget Hearings*, N.Y. L.J., Jan. 28, 1992, at 1; Gary Spencer, *Mixed Reaction to Proposal for Fifth Appellate Division*, N.Y. L.J., Nov. 16, 1990, at 1.

<sup>6</sup> See Gary Spencer, *Appointment of 5 Appellate Justices Not Likely Soon*, N.Y. L.J., Oct. 9, 1991, at 1; Gary Spencer, *Court Officials Plan Cuts in Staff in Criminal Parts*, N.Y. L.J., Oct. 30, 1991, at 1; Gary Spencer, *Rehiring Workers, Reopening of Courts Aimed at Backlog*, N.Y. L.J., March 20, 1992, at 1; Gary Spencer, *36 Judicial Vacancies May Go Unfilled, Cuomo Says*, N.Y. L.J., June 11, 1992, at 1. The state constitution requires that Appellate Division justices be "designated by the governor, from all the justices elected to the supreme court." N.Y. CONST. art. VI, § 4(c).

<sup>7</sup> See DAVID D. SIEGEL, *NEW YORK PRACTICE* 815-16 (2d ed. 1991); COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION OF THE ASSOCIATION OF THE BAR OF NEW YORK CITY, *REPORT ON APPEALS OF INTERLOCUTORY ORDERS* (1987).

permanent solution<sup>8</sup> and, in any event, creates uncertainty over the precedential value of court decisions.<sup>9</sup>

The suggestion rejected rather summarily by the Task Force but recommended in this Article is to amend the New York State Constitution<sup>10</sup> to allow the Appellate Division to sit in panels of three judges rather than the five currently used in all departments except the Second Department, where four judge panels have been the norm since the late 1970s.<sup>11</sup> Despite the Task Force's cursory dismissal of this possibility, three judge panels provide an excellent means to improve judicial efficiency without cost or damage to the integrity of New York's system of appellate justice. By considering the reasons behind five judge panels at the Appellate Division, examining some pertinent decisional statistics and applying the lessons learned from this analysis, it becomes apparent that three judge panels make sense for the Appellate Division.

## II. WHY FIVE?

Prior to the establishment of the Appellate Division in 1896 pursuant to the 1894 New York State Constitution, the duties of an intermediate appellate court were exercised by the General Term of Supreme Court, which sat in three judge panels.<sup>12</sup> According to former Third Department Presiding Justice and Court of Appeals Associate Judge Francis Bergan, there was general dissatisfaction with the performance of the General Term of Supreme Court, as well as unacceptable delay in the New York State Court of Appeals.<sup>13</sup> Proposals such as dividing the Court of Appeals into divisions proved unwork-

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<sup>8</sup> See Mangano, *supra* note 2, at S-2.

<sup>9</sup> David D. Siegel, *Departmental Dispute on Whether Surveillance Video Tapes of Personal Injury Plaintiff Are Discoverable*, N.Y. ST. L. DIG., March 1992, at 1-2; David D. Siegel, *The Second Department's Transferred Cases: Whose Law Applies in a Conflict?*, N.Y. L.J., Apr. 23, 1990, at 1,7. In *Doyle v. Amster*, the Court of Appeals, in dictum and without elaboration, indicated that when a case is transferred from one appellate division department to another and there is a conflict between the departments on a pertinent issue of law, the law of the transferor court is to be applied by the transferee court. 594 N.E.2d 911, 913 (N.Y. 1992). Although implementation of this dictum settles the question of whose law applies, it imposes new problems for the transferee court in identifying conflicts, and may well infringe upon the transferee court's institutional independence and integrity.

<sup>10</sup> N.Y. CONST. art. VI, § 4(b) ("[F]our [Appellate Division] justices shall constitute a quorum. . . . No more than five justices shall sit in any case.").

<sup>11</sup> TASK FORCE REPORT, *supra* note 2, at 35.

<sup>12</sup> Francis Bergan, *The Appellate Division at Age 90: Its Conception and Birth, 1894, 57 N.Y. ST. B.J.* 7, 12 (1985).

<sup>13</sup> *Id.* at 8. The New York Court of Appeals is the state's highest court. See N.Y. CONST. art. VI § 3.

able and further increases in the number of its judges were viewed suspiciously.<sup>14</sup> The new concept of the Appellate Division of Supreme Court, patterned after the British Court of Kings Bench and its High Court of Judicature, was introduced at the Constitutional Convention.<sup>15</sup> The Appellate Division was designed as a permanent statewide intermediate appellate court to serve as a screen and barrier to the reestablished Court of Appeals.<sup>16</sup>

Surprisingly little attention was given by the members of the 1894 Constitutional Convention to the number of judges proposed to serve on the Appellate Division.<sup>17</sup> The number of judges to man the reconstituted Court of Appeals, however, generated substantial debate with the original proposal of nine ultimately amended to our now familiar seven.<sup>18</sup> Additional concerns were voiced about the number of trial court judges.<sup>19</sup> But the suggestion of five judges for Appellate Division panels seems to have been accepted rather readily.<sup>20</sup> Some question was raised about the provision for seven judges in the First Department and five in the others but Elihu Root, chair of the Convention's Judiciary Committee and chief architect of the Appellate Division structure, explained that the additional judges were to permit service "in relays, relieving each other," apparently in reference to the then substantially large caseload from the bustling commercial center of Manhattan which was included in the First Department.<sup>21</sup>

Most significant was Root's justification of the increase in the size of a panel from the three judges of the General Term of Supreme Court to the five judges of the Appellate Division so as

to give [the Appellate Division] the opportunity for full discussion, by making it a court of five members; and five members, gentlemen, will have to consult. One of the presiding justices of the General Term said to me some time ago upon the subject: "We cannot do any more work with five judges than we can with three." "Yes," I said, "but if you have five judges, will you not consult?" "Yes," he said, "we will." And, there-

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<sup>14</sup> Bergan, *supra* note 12, at 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 12-13.

<sup>17</sup> 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: MAY 8, 1894 TO SEPTEMBER 29, 1894, at 926-28 (1900) [hereinafter REVISED RECORD].

<sup>18</sup> *Id.* at 979-1031, 1062-1087.

<sup>19</sup> *Id.* at 908-922; 4 REVISED RECORD, *supra* note 17, at 548-557.

<sup>20</sup> See 2 REVISED RECORD, *supra* note 17, at 926-28.

<sup>21</sup> Bergan, *supra* note 12, at 12; 2 REVISED RECORD, *supra* note 17, at 926-927.

fore, I say, though five judges will not do any more work than three, they will do better work and better respected work.<sup>22</sup>

Robust discourse and thorough discussion among Appellate Division panel members were important because the appellate structure devised by the Convention depended on Appellate Division dissent, reversal or modification as screens to filter worthy civil cases for appeals as of right to the Court of Appeals.<sup>23</sup> Root's explanation about the size of the Appellate Division panel apparently was convincing as the members of the Convention expressed no dissent over adopting five judge panels.<sup>24</sup>

Since the establishment of the Appellate Division 96 years ago, preference for five judge panels, and implicitly the underlying rationale for them, consistently has been expressed.<sup>25</sup> In 1973, the Temporary Commission on the New York State Court System recommended a continuation of five judge Appellate Division panels but acknowledged that three judge panels could be appropriate.<sup>26</sup> Commission members suggested that the Court of Appeals might be empowered to grant permission to a department to function in this manner.<sup>27</sup> A 1981 study rejected the proposal to reduce Appellate Division panels to three due to structural, stability, and public perception concerns similar to those voiced at the 1894 Convention.<sup>28</sup> This study did, however, recognize that reduction of panel size could contribute to a less "harried pace of justice."<sup>29</sup> And, of course, the Task Force endorsed five judge Appellate Division panels, even encouraging the Second Department to return to panels with a full complement of judges as soon as possible.<sup>30</sup>

Considering these positions, a three judge panel on an intermediate appellate court might appear to be some radical innovation. To the contrary, three judge panels appear to be the usual configuration for

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<sup>22</sup> 2 REVISED RECORD, *supra* note 17, at 896.

<sup>23</sup> N.Y. CONST. art. VI, § 3(b)(1); *see* Bergan, *supra* note 12, at 12-13. Of course, except for capital cases which currently do not exist in New York, criminal cases are not appealable as of right regardless of the presence of any dissent. *See* N.Y. CRIM. PROC. LAW § 450.90 (McKinney 1983); *People v. Smith*, 468 N.E.2d 879 (N.Y. 1984).

<sup>24</sup> *See* 2 REVISED RECORD, *supra* note 17, at 896-927.

<sup>25</sup> *See infra* notes 26, 28 and 30 and accompanying text.

<sup>26</sup> 2 TEMPORARY COMMISSION ON THE NEW YORK STATE COURT SYSTEM, . . . AND JUSTICE FOR ALL 46 (1973).

<sup>27</sup> *Id.*

<sup>28</sup> ROBERT MACCRATE ET AL, APPELLATE JUSTICE IN NEW YORK 99-105 (1982); *see* 2 REVISED RECORD, *supra* note 17, at 926-28.

<sup>29</sup> MACCRATE, *supra* note 28, at 101.

<sup>30</sup> TASK FORCE REPORT, *supra* note 2, at 35.

intermediate appellate courts.<sup>31</sup> Three judge panels are statutorily prescribed as the preferred composition for the United States Courts of Appeals.<sup>32</sup> Of the 33 states with intermediate appellate courts sitting in panels in 1987, all but New York have been identified as utilizing three judge panels in some if not most or all circumstances.<sup>33</sup> From this perspective, *five* judge panels might be seen as the radical approach. It remains appropriate, then, to consider some decisional characteristics of five judge Appellate Division panels and the potential effects of adopting three judge panels to better appreciate what benefits and costs would result from changing New York's standard practice.

### III. WHY NOT THREE?

Five judge Appellate Division panels, as envisioned at the 1894 Constitutional Convention, would provide robust and thorough discussion of the cases presented.<sup>34</sup> Dissents, reversals and modifications by the Appellate Division would thereby effectively filter worthy civil cases for "appeals as of right" to the Court of Appeals.<sup>35</sup> But the recent amendments to the Court of Appeals' jurisdiction, deleting "appeals as of right" for civil cases with single dissents, reversals and modifications by the Appellate Division,<sup>36</sup> largely have undermined the screening effect. Moreover, recent statistics from the Third Department indicate that Appellate Division judges are most agreeable with each other. As shown on Table A, in 1991, 97.2% of Third Department cases<sup>37</sup> were decided unanimously.

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<sup>31</sup> See 2 TEMPORARY COMMISSION ON THE NEW YORK STATE COURT SYSTEM *supra* note 26, at 46, 47.

<sup>32</sup> 28 U.S.C. § 46(c) (1988).

<sup>33</sup> CONFERENCE OF STATE COURT ADMINISTRATORS, NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION 1987, at 93-100 (1988). Even three judge panels may be too much. New Jersey's intermediate appellate court resolves most appeals using a two judge panel. See NATIONAL CENTER FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING 21-22 (1990).

<sup>34</sup> See 2 REVISED RECORD, *supra* note 17, at 896.

<sup>35</sup> *Id.*

<sup>36</sup> 1985 N.Y. Laws 300; see N.Y. CONST. art. VI, § 3(b)(8).

<sup>37</sup> Luke Bierman, Department Case Statistics (June 1992). The Third Department statistics are derived from the court's statistical database. For purposes of this Article, a case is determined by a record on appeal or review being filed and the matter being disposed after submission or argument. Using this methodology means some cases may be joined for review with a single decision resulting; so long as multiple records were filed, however, multiple cases are counted. Similarly, a case may have multiple dispositions, which reflect the number of appealable documents; a single case may have an appeal from an order and a judgment, for example. Again, this analysis is based on the number of records filed and matters disposed of after argu-

TABLE A  
Third Department — 1991

	N	%
Decided Unanimously	1673	97.2
Decided With One Dissent	25	1.5
Decided With Two Dissents	23	1.3
TOTAL	1721	100

N=Number of Appeals Disposed of After Argument or Submission

%=Percentage of Total

If those Third Department cases decided with only one dissent, which if civil are no longer appealable as of right and thus are jurisdictionally insignificant, are added to this figure, the percentage of cases with substantial agreement among panel members rises to 98.7% (Table A).<sup>38</sup> As shown in Table B, there is little proportional difference between civil and criminal cases.

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ment and submission. Additionally, for the purposes of assessing unanimity in this Article, the few concurrences have been treated as agreeing with the majority. I would like to thank Robert D. Mayberger, the Third Department's Deputy Clerk, for assisting me with compiling statistical information.

<sup>38</sup> Luke Bierman, Department Case Statistics (June 1992). cursory review of recent official *Appellate Division Reports* suggests that the percentages in other departments are comparable. Indeed, the extent of intracourt agreement at the Appellate Division is reflected by the few civil cases which are appealed to the Court of Appeals as of right based on two dissents at the Appellate Division. See N.Y. CIV. PRAC. L. & R. 5601(a) (McKinney 1978 & Supp. 1992). For example, the New York Office of Court Administration reported that in 1990 the Appellate Division decided 11,120 cases after submission to the court while the Court of Appeals decided only 25 civil cases which were appealed as of right due to a double dissent at the Appellate Division. 13 STATE OF NEW YORK ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS, tpls. 12 & 13, at 31, 32 (1991). Although these statistics do not allow precise assessment of the extent of Appellate Division unanimity, the wide disparity in the Appellate Division and Court of Appeals statistics certainly indicates the trend.

TABLE B  
Third Department — 1991

	N	%	N	%
	<u>Civil</u>	<u>Civil</u>	<u>Criminal</u>	<u>Criminal</u>
Decided Unanimously	1334	97.0	339	97.1
Decided With One Dissent	22	1.6	3	0.9
Decided With Two Dissents	18	1.3	5	1.4
TOTAL	1374	100	347	100

N=Number of Appeals Disposed of After Argument or Submission

%=Percentage of Total

Total percentage may not equal 100 due to rounding

It is apparent, then, that even if robust views are advanced among Third Department judges on a five judge panel, Third Department cases generate little substantial disagreement.<sup>39</sup> This seems consistent with what may be the evolving role of the Appellate Division. Recent scholarship suggests that the Court of Appeals, exercising its recently granted discretionary jurisdiction, may have assumed a role like that of the United States Supreme Court, reserving its power to decide cases by choosing to hear only cases of legal, political or social significance.<sup>40</sup> The Appellate Division is then left with the responsibility of keeping the legal processes moving by disposing of a large number of cases and policing the lower courts.<sup>41</sup> Thus, the Appellate Division's work is largely constrained, for example, by higher court precedent<sup>42</sup> and by limited review authority as occurs with assessing administrative determinations,<sup>43</sup> considering lower court discretionary decisions,<sup>44</sup> and reviewing lower court factual resolutions.<sup>45</sup> From this perspective, the Appellate Division should be exhibiting high rates of intracourt agreement, as supported by the Third Depart-

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., Luke Bierman, *When Less is More: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 PACE L. REV. 61 (1992). See also N.Y. CIV. PRAC. L. & R. 5601 commentary at 199-200 (McKinney Supp. 1992).

<sup>41</sup> See Bierman, *supra* note 40.

<sup>42</sup> See, e.g., *Tebbutt v. Virostek*, 477 N.Y.S.2d 776 (App. Div. 1984) (Third Department reluctantly followed recent decisions of the Court of Appeals), *aff'd*, 483 N.E.2d 1142 (N.Y. 1985).

<sup>43</sup> See *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 573 N.E.2d 562, 566 (N.Y. 1991); see also *In re Rivera* 504 N.E.2d 381, 382-83 (N.Y. 1986), *cert. denied*, 481 U.S. 1049 (1987).

<sup>44</sup> See, e.g., *Sawh v. Bridges*, 507 N.Y.S.2d 632, 634-35 (App. Div. 1986) (court indicates trial judge should be given broad discretion in this situation), *appeal dismissed*, 507 N.E.2d 312 (N.Y. 1987).

<sup>45</sup> See, e.g., *De Luke v. State*, 564 N.Y.S.2d 635, 636-37 (App. Div. 1991).

ment's 1991 unanimity statistics.<sup>46</sup> The reason advanced by Elihu Root for five judge Appellate Division panels is effectively undermined under the currently prevailing arrangement of the judicial system as characterized by little robust discourse.

Of course, the adoption of three judge panels at the Appellate Division obliterates the opportunity for civil "appeals as of right" to the Court of Appeals when two Appellate Division judges dissent.<sup>47</sup> The Task Force found this to be a particularly compelling reason to reject adopting three judge Appellate Division panels.<sup>48</sup> At least one Appellate Division justice, however, has argued that the few Court of Appeals reversals in two-dissent cases do not justify the retention of the two-dissent rule.<sup>49</sup> Recent statistics support this conclusion as shown on Table C.<sup>50</sup> In 1988, only about 10% of the Court of Appeals' caseload was predicated on the two dissent rule and only about 3% of its caseload were reversals or modifications in two-dissent cases.<sup>51</sup> Similar proportions occurred in 1989 and 1991 with even smaller proportions in 1990.<sup>52</sup>

TABLE C  
Court of Appeals

	1988	1989	1990	1991
Total Cases with 2 Dissent	39	30	25	30
Jurisdictional Predicate	(10.6)	(10.2)	( 8.7)	(10.2)
Total 2 Dissent Cases	12	6	6	11
Reversed or Modified	( 3.3)	( 2.0)	( 2.1)	( 3.8)
TOTAL CASES	369	295	287	293
	( 100)	( 100)	( 100)	( 100)

Figures in parentheses are percentages of totals

Based on these facts, abrogation of the rule allowing "appeals as of right" in civil cases with two Appellate Division judges dissenting will

<sup>46</sup> *Supra* notes 37-38 and accompanying text. In the leading examination of the federal intermediate appellate courts, Howard identified high rates of intracourt agreement on the United States Courts of Appeals as well. J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* 193 (1981).

<sup>47</sup> See N.Y. CIV. PRAC. L. & R. 5601(a) (McKinney 1978 and Supp. 1992).

<sup>48</sup> TASK FORCE REPORT, *supra* note 2, at 35.

<sup>49</sup> See William C. Thompson, *Streamlining the Appellate Process*, N.Y. L.J., Mar. 7, 1991, at 2.

<sup>50</sup> These statistics are derived from the COURT OF APPEALS OF THE STATE OF NEW YORK, ANNUAL REPORT OF THE CLERK OF THE COURT apps. 1, 4 (1988-91).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

not diminish the integrity of the appellate system and may actually prove beneficial in the following ways. It would further enhance the discretionary jurisdiction now enjoyed by the Court of Appeals, allowing it to weed out those two-dissent cases where the proper result was reached but the issues do not warrant Court of Appeals attention. It would put more of the onus on the Court of Appeals to structure its caseload and remove some caseload pressures exerted by the Appellate Division. Of course, the presence of dissent in the Appellate Division may well provide a cue to the Court of Appeals concerning the need for close examination of whether to accept the case for full high court treatment.<sup>53</sup> This development ameliorates any detrimental effect caused by removal of "as of right" appeals in two-dissent cases ultimately reversed or modified. Three judge Appellate Division panels may well be consistent with the New York State court system as it currently functions.

#### IV. HOW THREE?

Adopting three judge Appellate Division panels, by itself, will not reduce the number of cases for which each judge ultimately is responsible. It will, however, provide substantial reductions in the total number of cases for which each judge is responsible, with concomitant savings in time and effort. This savings could well translate into increased overall productivity to alleviate the caseload crisis. The question remains, how does this work?

Using the Third Department as an example, assume there is a ten-day court term with twenty cases heard per day; this is the court's typical schedule. With five judges sitting each day, fifty judicial sitting assignments must be filled during the term. Spread among the court's nine judges, sitting assignments are distributed so that each judge must sit approximately 5.5 days during the term. Multiplying this figure by the twenty case calendar and distributing primary responsibility for the cases evenly among the panel each day, each judge will be involved in 110 cases during the term with primary responsibility for twenty-two of those cases. With a three judge panel, the total number of cases in which each judge participates is reduced although the number for which each judge is primarily responsible remains the same. Proceeding this way, only thirty judicial sitting assignments are needed during the term. Spread among nine judges,

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<sup>53</sup> See, e.g., Victor E. Flango, *Case Selection in the Georgia and Illinois Supreme Courts*, 12 *JUR. SYS. J.* 384, 390-92 (1987).

each judge sits about 3.3 days during the term. Multiplying this figure by the twenty case calendar and distributing primary responsibility for the cases evenly among the panel each day, each judge will be involved in only sixty-six cases during the term with responsibility for the same number (twenty-two) of cases as with five judge panels.

This reduction in overall workload certainly provides the opportunity to enhance judicial resources. For example, on average, judges will have to familiarize themselves with about forty fewer cases per term. Additionally, judges on nonresident courts,<sup>54</sup> including the Second Department, will need to attend fewer sessions of court. Significant time savings from the reduced number of cases and less traveling should provide more time in chambers for what appellate judges are supposed to do—researching, reflecting and writing.<sup>55</sup> By creating or improving systems to utilize staff attorneys in the hearing and decisionmaking processes, further reductions in the demands on judicial time can be realized. Clearly three judge appellate division panels offer great potential to relieve much of the strain associated with the appellate division caseload.

Although the three judge Appellate Division panel scenario recounted above provides significant resource savings for judges, it does not seem to address the overburdened situation of the Second Department. After all, the same number of cases are being resolved in the three judge panel situation and, with regard to the Second Department, which already sits in four judge panels, any resource savings would be less than in the example comparing three and five judge panels. It may be that to reduce the current caseload backlog in the Second Department additional panels may need to sit for a time, the case transfer program may need to continue, or Appellate Division judges from other departments may need to be called upon to serve temporarily.<sup>56</sup> It may be that all these possibilities need to be utilized as there is an acknowledged crisis. The fact remains that three judge Appellate Division panels offer the opportunity to get more mileage from the same vehicle without detrimentally affecting

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<sup>54</sup> Significant time can be spent traveling from a judge's home chambers to court. For example, the Second Department, headquartered in Brooklyn, includes judges from as far away as Poughkeepsie; the Third Department, headquartered in Albany, includes judges from as far away as Elmira and Buffalo.

<sup>55</sup> See, HOWARD, *supra* note 46, at 277.

<sup>56</sup> See N.Y. CONST. art. VI, § 4(h). The possibility of transferring appellate division judges among departments was explained by Elihu Root, who during the 1894 Constitutional Convention's deliberations indicated that the appellate division was envisioned as "a system elastic enough, arranging for the sending of judges from one department into another, to equalize difficulties." 4 REVISED RECORD, *supra* note 17, at 557.

the system. Perhaps this inexpensive, simple reform can help to alleviate the crisis and return some normalcy to the appellate process.

## V. CONCLUSION

Constituting Appellate Division panels with five judges is an idea fostered almost 100 years ago to accomplish a specific purpose—to ensure a broad exchange of ideas in a system where disagreement, whether between levels of the judiciary through reversals or modifications or within the intermediate appellate court through dissent, played an important part in providing access to the Court of Appeals. As the opportunity for appeals as of right to the state's high court has diminished and the role of the Court of Appeals has changed to reflect a policy oriented court, the institutional fit of the intermediate appellate court has changed. With these alterations come new dynamics in which high rates of unanimity at the Appellate Division may make the extra voices provided by the fourth and fifth judges on a five judge panel less essential. A constitutional amendment allowing three judge panels at the Appellate Division thus seems warranted. A cheap, simple solution, something usually not available to the voters, is at hand to help resolve the current caseload crisis in New York's intermediate appellate court.