

New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More

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THURSDAY, FEBRUARY 14, 2019

NYCOA: Criminal Appeals (Part 2)--Annual Totals Through the Years

We [previously looked](#) at the stark disparity among the Court of Appeals Judges in the number of CLA's (Criminal Leave Applications) they granted last year. Some Judges had comparatively high numbers. Others very low.

These figures underscore what is well known by attorneys who practice before New York's highest court, as well as by those who have worked there and by those who study it. Getting permission to argue a criminal appeal before the Court entails at least as much luck as merit. The chances of receiving the go ahead depend in large measure on which lone Judge was assigned the CLA. Which single Judge happened to receive the CLA in the random and equal distribution system at the Court--a system in which that Judge alone decides yay or nay.

If the CLA happens to land on the desk of a Judge who liberally grants CLA's, the chances are relatively good. If a much stingier Judge is assigned the CLA, well then the chances are much worse. It's a random and equal distribution system with arbitrary and unequal consequences.

Now, next up: comparative annual totals. That is, the annual number of grants by the Judges collectively over the years.

Well, not surprisingly, the annual totals do differ from year to year. Perhaps more surprisingly however, the annual totals have sometimes changed dramatically from one period to another. Indeed, the change has sometimes been so significant, that it is hard to imagine that mere happenstance is to blame. Especially, for example, when a precipitous drop in annual totals coincides with some significant and related event. A fortiori if that drop persists until a counter event occurs.

But whatever the causes, the fact is that the annual totals of CLA grants display stark disparities. Like the grant numbers of the individual Judges, the contrasts have sometimes been striking.

Let's take a look at the annual totals over the course of the last 3 decades. Those 30 years include periods under 4 Chief Judges. They begin with the last 5 years of the Court with Sol Wachtler at the helm, then continue through the era of Judith Kaye, then followed by the tenure of Jonathan Lippman, and finally ending in the present with Janet DiFiore in the center seat.

Here's the data on annual totals displayed:

(click on graph to enlarge)



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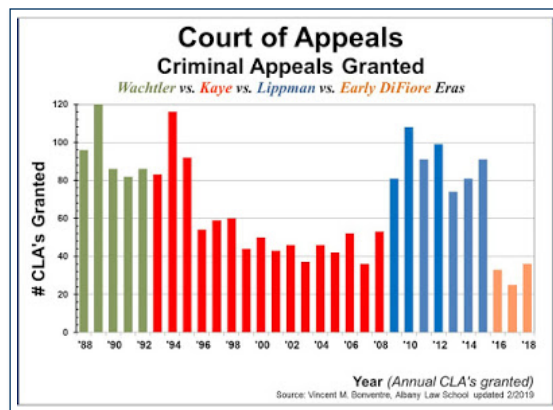
NEW YORK COURT WATCHER: RECENT TITLES

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- NYCOA: Criminal Appeals--Who's Granting & Who's Granting Less
- The 12th Annual Chief Judge Cooke Symposium: Reconsidering the Right to Die
- NY's Court of Appeals in the Era of Trump

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- Cuthbert W. Pound: An Advocate

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- Fuld_Stamley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering
- Ginsburg_Ruth Bader



As the graph makes clear, there was a significant drop in CLA grants, a few years into the Chief Judgeship of Judith Kaye. Years later, there was a sharp rise as soon as Jonathan Lippman became Chief Judge. Most recently, the numbers have again fallen deeply under Chief Judge DiFiore.

The drop in 1996, a few years into the Kaye era, happened to follow immediately upon the newly elected Governor George Pataki's campaign of harsh public criticism against the Court. He and his cronies bashed the Court for being soft on crime, coddling criminals, caring more about criminals than victims, far too liberal...you know. (I.e., the usual demagogic nonsense spewed by pandering politicians who typically don't have much of a clue.)

The Court's criminal decision-making did then take a turn to the right. It became more pro-prosecution. At the very same time, the Judges collectively began granting far fewer criminal appeals. The annual CLA grants actually dropped in half. Hmmm.

(I have studied and written quite a bit about this era and the attendant changes in the Kaye Court. I did briefly discuss it in some related New York Court Watcher posts in the past. See e.g., [NY Court of Appeals: Steep Cut in Criminal Cases \(part 2\)](#); and [Part 2: Dissents--The \(very early\) DiFiore Court \[with graphs!\]](#).)

By the end of the Kaye era, the complaining voices were becoming louder and more numerous. Criminal defense lawyers were rather upset--veritably outraged--that so few CLA's were being granted. Also, there was the realization that getting a CLA grant with some Judges seemed a near impossibility.

Upon Kaye's retirement and the appointment of Jonathan Lippman to replace her, the new Chief Judge expressed his concerns--both publicly and among his colleagues on the Court. Suddenly, CLA grants surged. They actually doubled.

(See Joel Stashenko, "Chief Judge to Review Why Court Accepts Few Criminal Appeals," *NYLJ*, April 22, 2009. [Note: I was a source--on the record--for that article.]; also [NY Court of Appeals: Granting Criminal Appeals--Up, Down, Now Up Again? \[Part 1: Overview\]](#).)

The Lippman effect on CLA's continued throughout his tenure. When he retired, however, the number of CLA grants dropped again. Indeed, they have plummeted as sharply as they had surged under Lippman. In these first few years of the Court under Chief Judge DiFiore, the annual totals are less than half they were with Lippman.

Through Dissent and Debate

- Scrooge v. Robin Hood: A Tale of Two Justices
- The Boomer Decision and Court Calculations

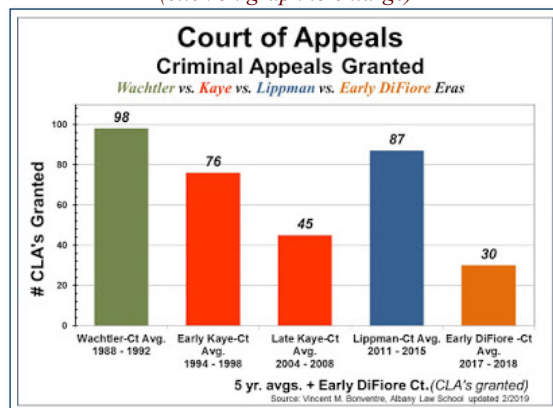
INTERNATIONAL LAW STUDIES

- The Trial of Saddam Hussein
- International Law Studies (ILS) Staff, 2017-2018
- The Asian Infrastructure Investment Bank
- Animal Law: Evolution and the Need for International Protection
- Supervised Release and Illegal Immigration: An Empty Gesture?

- Goats
- Gorsuch_Neil
- GPS
- Graffeo_Victoria
- Great Women_Great Chiefs
- Guest Post
- Guns
- Hancock_Stewart
- Holmes_Oliver W
- Honest Services Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kavanaugh_Brett
- Kaye_Judith
- Kennedy_Anthony
- Korematsu decision
- Lehman_Irving
- Lethal Injection
- Levine_Howard
- Lippman_Jonathan
- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert

Let's now display the foregoing in a more concise and easily digestible form than in the first graph. Let's reduce the amount of data by looking at averages. Let's look at the average annual CLA grant totals for the Wachtler era, the early Kaye and the late Kaye eras, the Lippman era, and the early DiFiore era (i.e., the first 2 full years of DiFiore's tenure, which are the last 2 years). Here it is:

(click on graph to enlarge)



What we just discussed is there in black and white--well, in green and red and blue and rust. A rather high annual total in the Wachtler era (at least when compared to more recent periods). Followed by annual totals beginning to drop in the early Kaye era. Then a more dramatic drop by the latter part of Kaye's term. A sharp rebound during the Lippman era. And finally, back down--even below the late Kaye era--in the current era under DiFiore.

Consider one additional way to look at this data. As we saw in the [previous post](#), two of the Court's seven Judges--Jenny Rivera and Rowan Wilson--granted far more CLA's this past year than their colleagues. No other Judge was even close. But lest it be thought that Rivera and Wilson are being excessive and out of step, the fact is that their CLA grants are actually much more in line with the Court of Appeals' record on CLA grants over the years.

If every member of the Court granted as many CLA's as Rivera and Wilson did last year, the Court's annual total would be much more in line with past records. For only then would the Court's annual total approximate what it was when Wachtler was Chief Judge. What it was during the early years of Kaye's tenure. And what it was while Lippman was Chief Judge.

The math is simple:

The average of Rivera's 13 and Wilson's 10 is 11.5.

Multiply that by 7 Judges and the annual total would be 80.5 CLA grants.

Now that would still be a bit *less* than the annual average of 98 for the Wachtler era.

It would be roughly the same as the 76 figure for the early Kaye era.

It would be slightly *less* than the 87 figure for the Lippman era.

In short, the Rivera-Wilson standard for CLA grants would certainly not be excessive--not even close. Indeed, it would only significantly exceed the late Kaye era. But, as is clear from the data and the 2 graphs, that late Kaye era was an aberration. The CLA grants were atypically low.

AND, the annual grant totals in the DiFiore era are, thus far, also aberrational. Also atypically low. In fact, the grants are even lower than

- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Original Intent
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Die
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights
- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure

they were during the late Kaye era.

What was true when CLA grants plummeted during the Kaye era, immediately following Governor Pataki's harsh criticism of the Court for being too liberal and caring too much for criminals, is also true for the dramatic drop in these first few years of the Court under Chief Judge DiFiore. It is extremely difficult to believe that the change has been mere happenstance. That it is coincidental.

The precipitous drop in CLA grants in recent years evinces either a deliberate policy choice to reduce the number of criminal cases or, at the least, a pressing need once again for a Chief Judge to address such an inordinately high denial of the opportunity to have one's criminal case reviewed by the Court of Appeals.



Labels: Criminal Law, CrimLvApps (NYCOA), DiFiore_Janet, Kaye_Judith, Lippman_Jonathan, NY Court of Appeals, Rivera_Jenny, Wachtler_Sol, Wilson_Rowan

TUESDAY, FEBRUARY 12, 2019

NYCOA: Criminal Appeals--Who's Granting & Who's Granting Less

First, some background.

CLA's (Criminal Leave Applications) are petitions to the Court of Appeals, NY's highest court, asking it to review a decision by a lower court. But, as those who are familiar with Court of Appeals practice know, these CLA's are handled quite differently than other matters.

Unlike other decisions made by the Court of Appeals--whether it be on a case or a motion or even a petition to hear a *civil* appeal--decisions on CLA's are rendered by a single Judge. That's right. Whether or not the Court of Appeals hears a *criminal* appeal is decided by only one Judge. Not by the Court itself.

These CLA's--in excess of 2,000 annually in recent years--are distributed randomly and equally among the Court's 7 Judges. The Judge to whom a CLA has been distributed is the only Judge who decides it. The only Judge who determines whether or not the CLA will be granted or denied. The only Judge who decides whether or not the Court will hear the appeal and review the decision of the court below. In fact, the only Judge who even sees the CLA.

Not surprisingly, at different times, depending on the Court's composition and priorities, the Court has been more generous in granting criminal appeals. At other times it's been more stingy. Beyond that, within the very same times, some Judges have been more generous and others more stingy.

That latter reality is what makes the one-Judge decision-making on CLA's so inconsistent and inequitable. CLA's that are distributed to and decided by a particularly generous Judge are much more likely to be granted. Those that are distributed and decided by a more stingy Judge, much less likely. Indeed, whether or not a criminal appeal will be granted--i.e., whether the Court of Appeals will ever review a decision of a lower court--depends in large measure on the luck of the draw. Was the CLA distributed to a more generous Judge? Or to a more stingy

- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito
- Toal_Jean
- Torture
- Traffic Stops

one?

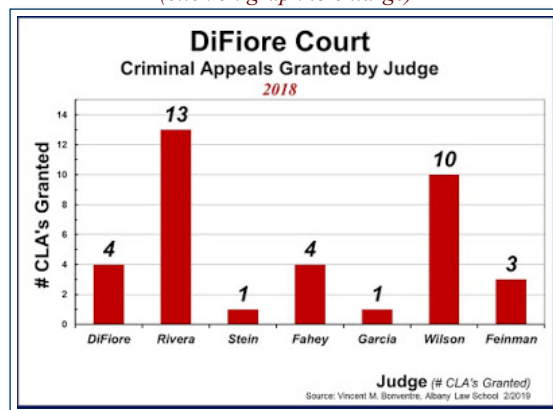
As can be imagined, those who seek review of their criminal cases by the Court of Appeals fervently hope that their CLA's are distributed to certain Judges. And they dread their CLA's being distributed to others.

So let's take a look at records of the Court of Appeals Judges. Which Judges have been comparatively generous in granting CLA's? Which have been less so? To be blunt, for those who seek review of their criminal cases, which Judges give them a better chance? And which Judges make their chances worse?

*(I have done similar studies on CLA's while Jonathan Lippman was Chief Judge [see **NY Court of Appeals: Granting Criminal Appeals--Up, Down, Now Up Again? (Part 10: Who's Granting Now?)**], and the preceding Parts]; and early in Chief Judge Janet DiFiore's tenure [see **NY Court of Appeals: Steep Cut in Criminal Cases (part 2)**, and preceding Part].)*

Here are the figures for the Court of Appeals Judges for calendar year 2018. How many CLA's did each one grant in the immediate past year?

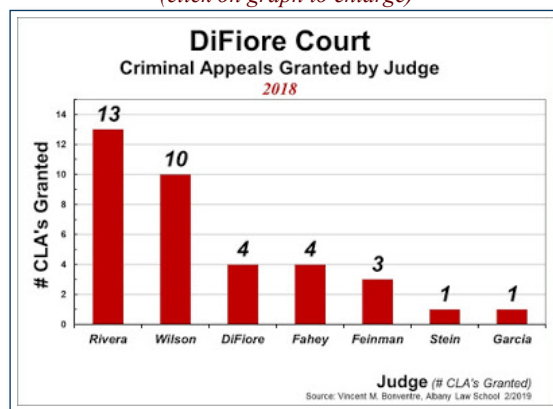
(click on graph to enlarge)



As the graph makes clear, there were sharp contrasts among the Judges. Judges Jenny Rivera and Rowan Wilson granted far more criminal appeals than their colleagues. At the other end of the Court's CLA spectrum, Judges Leslie Stein and Michael Garcia granted the fewest.

For a different perspective, let's just rearrange the data from seniority of the Judges to the number of grants.

(click on graph to enlarge)



From Rivera and Wilson to Stein and Garcia, there was quite a spread. The significance of these figures is underscored by the fact that the CLA's are distributed randomly and equally. There is no indication that some Judges were deliberately assigned the easier CLA's while others

- Trump Investigation
- Trump_Donald
- Unenumerated Rights
- Unions
- Unsigned Memoranda
- Velazquez_Johnny
- Video Games
- Vin's Votes
- Voting Rights
- Wachtler_Sol
- White_Byron
- Wilson_Rowan
- Women's Rights
- Wrongful Convictions
- Zimmerman_George

BLOG ARCHIVE

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the more difficult ones. Nor that some Judges were assigned an inordinate share while others many fewer. Indeed, when each Judge's CLA grants and denials are totaled--as I have done--the number decided by each of them in 2018 was ~300.

With that in mind, the somewhat curious conclusion--if not entirely disconcerting to those who file CLA's at the Court, as well as to anyone who prefers a more equitable system--is the stark disparity in the actual frequency with which the different Judges have granted CLA's. Judge Rivera granted more than 4% of the CLA's assigned to her. Judge Wilson, more than 3%. On the other hand, Judges Stein and Garcia granted less than 1%.

What becomes clear--and what many lawyers who do criminal appeals already know too well--is that it has been much more likely to have a CLA granted if it has been assigned to either Judge Rivera or Wilson. That means a much better opportunity to have the Court of Appeals hear a criminal appeal if one of those two Judges gets the CLA.

And the opposite of course has been true if others on the Court got to decide.

It's no wonder that so many members of the bar, including former Court of Appeals Judges, as well as bar organizations, believe that the CLA system must be changed to insure much greater equal treatment in the process.

Next, we'll look at CLA grants by the Court as a whole over time.



Labels: Criminal Law, CrimLvApps (NYCOA), DiFiore_Janet, Garcia_Michael, NY Court of Appeals, Rivera_Jenny, Stein_Leslie, Wilson_Rowan

SUNDAY, OCTOBER 28, 2018

NY's Court of Appeals in the Era of Trump



New York's highest court must step up.

The reactionary direction in so many areas of national policy and, perhaps most especially, the effect that the two newest appointees to the Supreme Court will have on *federal* constitutional and statutory protections, require heightened vigilance by *state* high courts.



As the final arbiters of their individual *state's* own constitution and laws, *state* courts have the *authority, opportunity, and obligation* to *independently* insure that fundamental civil rights and liberties are enforced, regardless of what the federal high court does under federal law. As has often been true

throughout its history, the New York Court of Appeals should take a--if not *the*--leadership role.