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Crisis as Opportunity: Responding to the Pandemic, Systemic Racism and Threats to Our Democracy

Rolando T. Acosta, Presiding Justice of the Appellate Division, First Department, writes that we must be committed to seeing the opportunity that lies within every crisis and making the changes that are sorely needed.

By **Rolando T. Acosta, Presiding Justice, Appellate Division, First Department** | January 15, 2021



Justice Rolando Acosta, Photo: Rick Kopstein

2020 was a year of tremendous tragedy and challenge, and this year began ominously, with a lawless mob storming the U.S. Capitol to disrupt the democratic process. A string of seemingly unending and unthinkable crises has tested our institutions and our resolve, laying bare harsh truths about our social compact and the many weaknesses, deficiencies, and injustices that persist in all areas of our government, including the judicial branch. We have been forced to confront the fragility of our society and to constantly remind ourselves that societal norms are threatened when people (with or without justification) feel disenfranchised, ignored and powerless. It is difficult to talk of “bright spots” in the throes of a pandemic that has killed millions of our fellow human beings—including my father—or “silver linings” in the continuing string of deaths of people of color at the hands of those sworn to protect. Nonetheless, we can find some comfort in the strength of our courts in the face of injustice, a public health crisis, and the barrage of dangerous nonsense that flooded the court system and threatened our democracy. I see cause for optimism as we enter 2021. I do not delude myself that everything is and happens for the best, but I am hopeful, based on our willingness and ability to improve, that we can make a hard-edged, realistic assessment of our flaws and take concrete steps to address them. For in a crisis, we can forge opportunities.

What gives me such hope? Our resourcefulness, for one. We have all marveled at the way in which the scientific community rallied to the cause and developed vaccines in record time. In my corner of the world, where I preside over the Appellate Division, First Department, we cannot lay claim to anything that momentous. But I was impressed by how well our judges, our staff, and the lawyers who appear in our court adapted to the new reality that was thrust upon us last March. When the COVID-19 crisis began and in-person appearances at the First Department were no longer safe, we expeditiously switched to a virtual court model, conducting oral arguments, pre-argument settlement conferences, and admission ceremonies remotely. Although I miss the personal contact with my colleagues and counsel, virtual arguments have proven quite successful. And while many challenges remain, particularly given the attrition in our judicial ranks that has required us to reduce the number of oral argument sessions to two or three per week, I would not be surprised if there is significant interest in continuing with virtual arguments after the pandemic is over.

Regarding innovation in the courts more generally, last June, Chief Judge Janet DiFiore appointed a Commission to Reimagine the Future of New York’s Courts and asked me to chair its Appellate Practice Working Group. We released our initial report last month. *New York State Unified Court System, Commission to Reimagine the Future of New York’s Courts, Initial Report of the Working Group on Appellate Practice* ([//www.nycourts.gov/LegacyPDFS/publications/RWG-AppellatePractice_Cover_12.7.20.pdf](http://www.nycourts.gov/LegacyPDFS/publications/RWG-AppellatePractice_Cover_12.7.20.pdf)) (December 2020). Towards the goal of our top priority, which is the establishment of a robust and uniform technological infrastructure for the appellate courts, the Working Group’s key proposals include creation and rollout of a single appellate case-management system for the Court of Appeals and the four Departments of the Appellate Division; enhanced technology training for appellate justices and staff; development and implementation of best practices on the use of technology; and the combination and coordination of virtual and in-person operations to allow easy transition to in-person operations and vice versa as needed amid the pandemic and beyond. Moving forward, the Working Group plans to assess what substantive changes to appellate practice might benefit attorneys and litigants, and how to ensure that pro se litigants are not left behind as we increase the use of technology in our public-facing operations. While the courts have long been focused on improving their technological capabilities, things have not always moved as quickly as they should; yet the pandemic crisis pushed that goal to the forefront, and we are making great strides.

This year also brought a renewed focus to the persistent issues of racism, which pervade all segments of our society. The killing of George Floyd sent shockwaves throughout the world. It was, tragically, one of many police killings of people of color. However, it triggered a new awareness and a greater sense of urgency to reexamine the existence of explicit and implicit racism in our country, both symbolic and substantive. Sports teams changed offensive names, and states removed confederate flags and monuments, all symbolic actions that told the world that we may finally realize in this country that it is way past time to stop being complicit by ignoring the obvious.

Substantively, the movement that grew out of the killing of Mr. Floyd led Chief Judge DiFiore to commission an independent evaluation of New York State Courts' policies, practices, and programs as they relate to issues of racial and other forms of bias. The evaluation, led by former U.S. Secretary of Homeland Security Jeh Johnson in his role as Special Adviser on Equal Justice in the Courts, provided a sober assessment of the problems that persist. He reported that "this is a moment that demands a strong and pronounced rededication to equal justice under law by the New York State court system." New York State Unified Court System, Report from the Special Adviser on Equal Justice in the New York State Courts ([//www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf](http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf)) (Oct. 1, 2020) [hereinafter Special Adviser Report]. Secretary Johnson emphasized that there must be "a commitment from the top" to embrace a policy of zero tolerance for racial discrimination and, to that end, Chief Judge DiFiore has ordered implementation of his recommendations, including "[m]andating comprehensive bias training for all judges and court staff on issues of implicit bias and cultural sensitivity, ... strengthening policies and procedures for investigating complaints of racial bias and discrimination, ... eliminating barriers to diversity in the areas of recruitment and outreach, ... [and] [e]nhancing trust between our Court Officers and our litigants and communities of color." New York State Unified Court System, Letter from Chief Judge Janet DiFiore to court system staff ([//nycourts.gov/whatsnew/pdf/JDFletter-jehjohnson.pdf](http://nycourts.gov/whatsnew/pdf/JDFletter-jehjohnson.pdf)) (Oct. 29, 2020).

At the First Department, eager to get a head start on addressing many of these issues, I asked Justice Dianne T. Renwick to chair a new Committee on Bias in the Courts, which is composed of judges and non-judicial staff from the Court and our auxiliary agencies. I am proud to say that the work of the Committee is already underway. For example, the Committee is planning trainings on implicit bias and similar issues for judicial and non-judicial staff alike, developing an annual staff survey on diversity and inclusion matters, reviewing our hiring processes and internal policies on reporting and addressing workplace discrimination, and evaluating whether the court's historical artwork and architecture ought to be contextualized to further inclusivity and the cause of justice.

It is troubling that some of the problems that Secretary Johnson identified in 2020 had previously been reported in 1991 by the New York State Judicial Commission on Minorities, appointed by then-Chief Judge Sol Wachtler. Special Adviser Report, *supra* at 3, 27. Some may ask, so why will this time be any different? My answer is simple. This time will be different because it has to be, and because our judiciary is far more diverse today than it was in 1991. See Rolando T. Acosta, *Court Consolidation: An Opportunity to Increase Judicial Diversity* (<https://www.law.com/newyorklawjournal/2020/01/24/court-consolidation-an-opportunity-to-increase-judicial-diversity/>), NYLJ, Jan. 24, 2020. As I have previously written, a judiciary that reflects the makeup of the citizenry lends credibility to a system that has far too often failed to achieve justice for marginalized groups. The integrity of the judiciary is as important today as it has ever been and, fortunately, there are now more stakeholders involved who are motivated to achieve equal justice for all.

Courts are where rights are delineated, where justice is administered, where evidence and truth prevail over empty rhetoric. Recently, we witnessed an alarming capacity for millions of Americans to be convinced of a supposed fraud (and some incited to violence) even though the repeated claims of fraud were not based in reality or truth but were instead cynically made for political gain. Disturbingly, many in our country are attempting to blur the line between fact and opinion. But the truth is, there are no "alternative facts." If there were, for example, the same Yankees' game could be shown on two television networks and two sets of viewers could reach different conclusions as to who won and who lost. It has never been clearer that preservation of our government requires trust, truth, vigilance and courage. Thankfully, courts across this country stood as a bulwark against an onslaught of baseless attacks on the electoral process, deciding each case not on the rhetoric but on the facts, and, in so doing, upheld the rule of law.

Nevertheless, confidence in our courts and our democracy is eroded by pervasive falsehoods, systemic racism, and unequal treatment. We must be committed to seeing the opportunity that lies within every crisis and making the changes that are sorely needed. Commission recommendations are like a vaccine; they only help if you inject them into the system. Still, I fervently believe there are enough earnest people of good will

and intention to solve our biggest problems and restore our fellow citizens' faith in our institutions. "Change will not come if we wait for some other person or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek." Transcript, *Barack Obama's Feb. 5 Speech* (<https://www.nytimes.com/2008/02/05/us/politics/05text-obama.html>), NY Times, Feb. 5, 2008.

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