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Kaye's judgeship nears end

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ALBANY — New York's Chief Judge Judith Kaye, the first woman and longest-serving judge in the position, has ruled on cases that ended the death penalty in New York and determined the rights of gay couples in the state.

Her biggest disappointments have been in dealing with the Legislature. She has been unable to get lawmakers either to approve a pay raise for judges or rationalize the state's Byzantine court system.

Kaye is resigning at year's end after reaching the maximum age of 70. She will leave of a legacy that includes what her supporters see as expanded rights for New Yorkers, while her critics think she has tried to grab for the court more power than it should have.

Besides being the presiding judge of the Court of Appeals, the state's highest court, being chief judge also means she is the top executive of the state's sprawling court system. The Sullivan County native has occupied the position for the last 15 years.

And while her performance on the bench for the last 25 years (she was an associate judge for 10 years before getting the top job) has been widely praised, she has run into serious problems dealing with the Legislature as head of the court system.

Her top priorities for years have been getting lawmakers to raise the pay of judges that has been frozen since 1999 and also getting them to approve reorganizing the state's court system. (Even names are a problem. The state Supreme Court is not the highest court in New York, but the main trial-level panel. The Court of Appeals is supreme, in function if not in title.) She has been rebuffed by lawmakers on both issues.

"Other than that, Mrs. Lincoln, how was the play?" she remarked in an interview, displaying the depth of her frustration over how lawmakers' failure to grant a raise to judges has affected her tenure.

She took the unprecedented step earlier this year of suing the Legislature to force them to grant the raises. The suit is pending in State Supreme Court in Manhattan.

She said she still hopes lawmakers will approve the raises before the end of the year. But the Assembly, which has consistently insisted on tying judges' pay to their own, seem unlikely to approve higher salaries in the midst of the sharp economic downturn.

But her supporters say that nobody could have forced lawmakers to act and that the controversy shouldn't overshadow what they see as her sterling record on the bench.

"She's been a great chief judge. She brought an intelligence, an energy and a dignity to the court that hadn't been in evidence before," said University at Buffalo Law School Vice Dean James Gardner.

An Albany Law School professor who closely follows the Court of Appeals agreed.

"In the short term, people will remember these frustrations," Vincent Bonventre said of the failures to get action on the pay raise or court reorganization. "In the long run, people will see she was successful at bringing dignity back to the institution."

Dignity was missing from the position when she was picked in 1993. Her predecessor, Sol Wachtler, resigned after he was arrested in a cowboy outfit harassing his former lover. He spent a year in federal prison.

Even before she became chief judge, Kaye had already made her mark on the court. One of the first cases she participated in was deciding that Lemuel Smith, already serving a life sentence for murder when he was convicted of killing prison guard Donna Payant at the Green Haven Correctional Facility in Dutchess County, should not be executed because of protections granted to defendants by the state constitution. The 4-3 vote essentially doomed the state's death-penalty statute.

After the Legislature passed another death-penalty law in 1995, she wrote the majority opinion that essentially threw it out, since, the judges said, it gave incentives for defendants to plead guilty because they could avoid executions that way.

That decision led one senator, George Maziarz, R-Newfane, Niagara County, to vote against her confirmation for a new term last year.

The only other senator to vote against her, Senate Education Committee Chairman Stephen Saland, R-Poughkeepsie, said he was upset by another ruling that Kaye helped decide: that the state should provide billions of dollars in additional aid to New York City schools. He thought lawmakers should make that call.

"I'm very troubled when I view the court, your court or any other court, usurping the legislative function even if for perfectly desirable social ends," he said then.

"I cannot agree that the court does that or I do that," Kaye replied.

Instead, Kaye sees many of her decisions guided by the principle of adhering to the state constitution, which often provides stronger rights of privacy — and in this case gives every child the right to a "sound, basic education."

"I have tried to engender a greater consciousness of the state constitution," she said in an interview. "The state can never have fewer protections (than guaranteed by the federal constitution), but it can have more."

She has consistently defended abortion rights and rights of homosexuals. In 1991, Kaye was in the minority in a decision that banned a lesbian from visitation rights of a child she and her former lover raised together. But Kaye was in the majority four years later when the court said that same-sex partners could adopt children.

She was also in the minority in a 2006 decision that said the state constitution doesn't give same-sex couples the right to marry.

"She clearly ruled from the left side of the aisle," said state Conservative Party chairman Michael Long. "Her activist stance didn't help our society."

But Bonventre said the New York court, under Kaye, led the way in protecting important rights and led other state courts to assert their powers as well.

"When the New York Court of Appeals does something, people step up and take notice," Bonventre

said. "She is one of the best-known judges in America."

Bonventre said Kaye's influence has been blunted by the four more conservative judges on the bench appointed by former Gov. George Pataki, a Republican.

"On criminal justice, civil liberties, gay rights, she wants to go in a more progressive direction," he said.

Kaye would say only that she presides over "a pretty spectacular court. ... They're diligent, careful and attentive."

A commission will deliver seven names to Gov. David Paterson by Dec. 1 from which he'll pick Kaye's successor. He'll announce the pick between Jan. 1 and Jan. 15.

Speculation on a successor has centered on Court of Appeals Associate Judge Theodore Jones.

"He's bright, he's liberal, he's African-American," Bonventre said. "He is well liked in the institution."

His fellow Associate Judge Carmine Ciparik and Jonathan Lippmann, who was formerly the state's chief administrative judge and now the presiding justice of a mid-level trial court, are also in the mix.

Kaye's advice to her successor: "Stay even and cool. Use good sense."

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