

ATTACHMENT 7

Memorandum discussing constitutional considerations in establishing judicial pay levels

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CONSTITUTIONAL CONSIDERATIONS IN ESTABLISHING JUDICIAL PAY LEVELS

Constitutional principles surrounding judicial compensation tend to be complex and evolving, both in New York and nationally. As recent cases regarding judicial salaries demonstrate, some of these constitutional principles broadly concern the amount of judicial compensation and the process of determining those amounts, while others implicate pay disparities between similarly situated judges and courts.

As a general matter, five constitutional interests appear to frame the judicial compensation issue for purposes of the Commission's deliberations:

1. **Non-diminution.** Most state constitutions, including the New York Constitution, forbid reducing judicial compensation as one of the many protections of the separation and balance of powers. To date, this prohibition has been understood in New York and most other jurisdictions to prohibit any reduction in nominal judicial compensation but not to affirmatively require steps to insulate the purchasing power of judicial salaries from gradual erosion by inflation. This ban on reducing judicial compensation also has been understood to include certain non-salary benefits. In New York and a number of other jurisdictions, the prohibition applies only to the judicial term of office, thus allowing – as a constitutional matter – pay reductions to take effect at the start of a new judicial term of office. In some other jurisdictions (*e.g.* Pennsylvania), judicial salaries may be reduced if the reduction broadly and equivalently extends to other branches of government, so as not to target the Judiciary for disparate treatment.

2. **Adequacy.** While at times in the past the New York Constitution fixed judicial compensation directly, today the Constitution relegates the amount of judicial compensation to determination by the Governor and Legislature, to be established and periodically adjusted “by law.” Debates from New York constitutional conventions narrated that this change from constitutional fixity to statutory discretion was to better protect judicial compensation against the vagaries of inflationary erosion and potential for political neglect (because the Constitution is more difficult and time-consuming to amend than a statute). In service of this motivation and the sound discretion it necessarily implies, the New York Constitution makes no express statement about the amount of judicial compensation and provides no fixed guidelines to guide deliberations. However, the separation-of-powers premise of a co-equal, independent and effective Judiciary has prompted some states – whether by express constitutional directive or court action – to require that judicial compensation must be “adequate.” In the words of the highest court of a sister state, “Without adequate compensation, a competent judicial system is not

possible.” Adequacy, in turn, might be gauged by various measures and policy goals, including but not limited to –

- recruiting and retaining sufficient numbers of suitably skilled and experienced attorneys for judicial service (based, for example, on the labor market for comparably skilled and experienced attorneys – for most courts at least 10 years’ admission to the New York bar);
- preserving the authority and functional station of judges vis-à-vis other professionals appearing in their courtrooms (*e.g.* the private bar, expert witnesses, prosecutors, defenders, etc.); and
- safeguarding the effective administration and management of the Judiciary in relation to the compensation paid to non-judicial personnel serving with or under judges.

3. Rationality in disparate judicial pay levels. Where judges are paid different salaries, the Constitution requires that these disparities must have at least a rational basis: equal protection principles require that judicial pay distinctions cannot be arbitrary. This principle prompted a series of successful lawsuits in New York that challenged pay disparities between judges of mainly county- and city-level courts doing comparable if not identical work. In some cases, courts found that laws fixing judicial salaries county by county and city by city were irrational to the extent that they paid judges different salary levels even though the counties or cities in which they presided had similar living costs and dockets. While to date these principles have applied mainly to pay disparities *within* courts (*e.g.* Family Court, County Court, City Court), they also may be relevant to pay disparities *between* courts that share comparable or overlapping jurisdiction but carry different compensation levels.

4. Independent merits-based analysis. Separate from the amount of judicial pay, the Constitution requires that adjustments to judicial pay be considered on the merits and not “linked” to either legislative or executive pay levels or extraneous policy issues. This result flows from the Judiciary’s constitutional status as a co-equal branch of government whose independence would be undermined if judicial salaries fixed by the other branches of government turned on irrelevant factors within the sole political control of the other branches. So held the Court of Appeals in the 2008-2010 judicial pay litigation, but the Court did not fully explicate which factors are appropriate policy considerations that the Legislature properly may weigh. As of this date, therefore, we know only that the particular combination of political events to which judicial salaries had

been “linked,” which conspired to frustrate enactment of a judicial pay adjustment, involved injection of inappropriate considerations.

5. Public confidence in the effective operation of the Judiciary. The separation of powers requires that the Judiciary be funded and operated in a manner that ensures its effective operation as a branch of government able to successfully discharge its constitutional and statutory responsibilities to litigants, the other branches of government and the public. This criterion overlaps with constitutional interests in pay “adequacy,” but arguably extends further to include the sensitive matter of public confidence in the courts. As with so much concerning the Third Branch, public confidence in the fairness, expertise, neutrality and timeliness of court operations is a concern of the highest order because it goes to the Judiciary’s core identity, purpose and legitimacy. If the public or the press reasonably perceives that the amount of judicial compensation or its manner of adjustment may impair judicial expertise, or cast doubt on judicial independence or neutrality (whether as to the other branches of government or any other subset of litigants), that result would impair public confidence in the courts and with it the Judiciary’s constitutional legitimacy as government’s neutral arbiter of legal disputes. Judicial pay levels, and the process of setting them, therefore should be fashioned so as to promote public confidence in the Judiciary that is one of the chief hallmarks of a healthy justice system.