New York Law Journal

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Denial of Raise Is Ruled Unconstitutional

Court Faults Linkage to Unrelated Issues; Judges' Salary Must Be Decided on Merits
By failing to grant the state's judges a raise for 11 years, the Legislature has created a "crisis" that violates the separation of powers doctrine, the Court of Appeals ruled yesterday. However, the Court declined requests to order an immediate raise or to fashion another remedy for the constitutional breach other than the "appropriate and expeditious legislative consideration" of the issue on its merits alone.

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02-24-2010

ALBANY - By failing to grant the state's judges a raise for 11 years, the Legislature has created a "crisis" that violates the separation of powers doctrine, the Court of Appeals ruled yesterday.

The Court concluded, 5-1, that the continued linking of judicial pay to unrelated issues was threatening the judiciary's independence.

Arguments and Briefs in the Cases Before the Court of Appeals

Oral Arguments in *Matter of Maron v. Silver / Larabee v. Governor / Chief Judge of the State of New York v. Governor*

Briefs in *Chief Judge v. Governor*

Brief of the Chief Judge

Defendants' Brief

Defendants' Reply Brief

Brief in *Maron v. Silver*

Appellants' Brief

Brief in *Larrabee v. Governor*

Appellants' Brief

However, the Court declined requests from the judge-plaintiffs and the court system in three pay cases to order an immediate raise or to fashion another remedy for the constitutional breach other than the "appropriate and expeditious legislative consideration" of the issue on its merits alone.

"By ensuring that any judicial salary increases will be premised on their merits, this holding aims to strike the appropriate balance between preserving the independence of the Judiciary and avoiding encroachment on the budget-making authority of the Legislature," Judge Eugene F. Pigott Jr. wrote for the majority. "Therefore, judicial compensation, when addressed by the Legislature in present and future budget deliberations cannot depend on unrelated policy initiatives or legislative compensation adjustments."

Judge Pigott noted that the courts are reluctant to intrude on the functions of other co-equal branches of government. But he stressed that although setting judicial salaries is "within the province" of legislators, the Court could still intervene if its ruling is not followed.

"It [the Legislature] should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court," the judges ruled yesterday, citing *Marbury v. Madison*, 1 Cranch 137 (1803). "We therefore expect appropriate and expeditious legislative consideration."

See Associated Articles: Another Round of Lobbying Anticipated in Legislature **and a timeline of** Key Developments in Judges' Pay Cases.

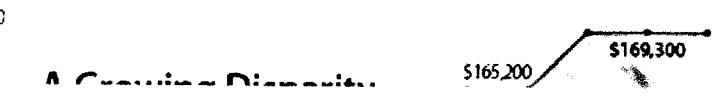
In remarks webcast to state judges yesterday, Chief Judge Jonathan Lippman said the ruling advances the judiciary's quest for a raise by dictating that "the Legislature, in its present and future deliberations, must consider the judicial salary issue independently of any unrelated issue."

He said the judiciary expects the Legislature to remedy the constitutional violation in "good faith and expeditiously."

But he acknowledged that "while the decision has great force, it does not set a precise time frame for the Legislature to act, and leaves to the Legislature the ultimate decision of whether and to what extent it must increase judicial salaries."

A statement from Assembly Speaker Sheldon Silver, D-Manhattan, reflected no particular urgency for the Assembly to consider judicial raises.

"Today's decision by the Court of Appeals regarding judicial pay recognizes that the Legislature retains the constitutional and statutory power to determine judicial compensation," Mr. Silver said. "Further, the



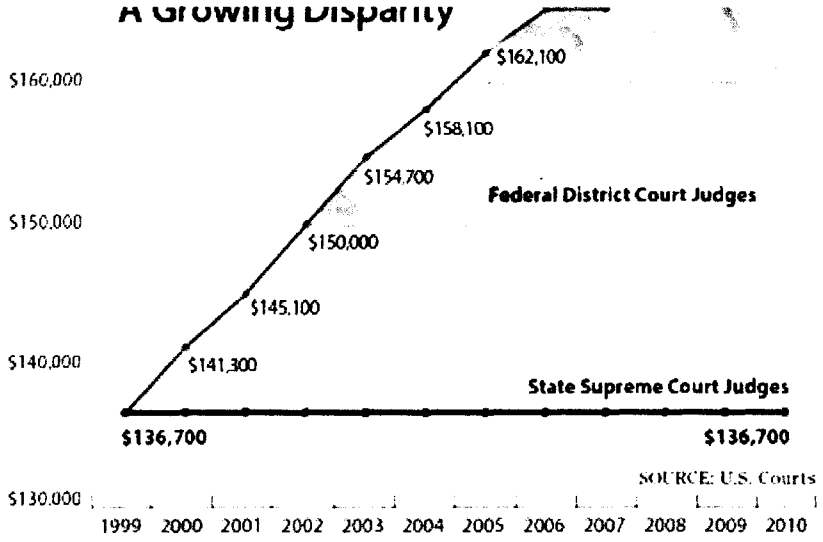
decision does not mandate any action by the Legislature at this time. I have said in the past and I continue to believe that judicial salaries in New York state should be increased. The Assembly will consider this matter when economic conditions improve."

Another prominent lawmaker, Assembly Codes Committee Chairman Joseph Lentol, D-Brooklyn, said yesterday that the Legislature will consider a judicial raise at an "appropriate time...just as there will be [consideration] for others who have worked for a long time without one, including legislators."

"In these fiscal times," Mr. Lentol said, giving judges a raise "is not necessarily the intelligent thing to do when people are out there suffering. That doesn't foreclose the possibility that we would consider them in the future."

Similarly, Senate Democratic Conference Leader John Sampson, D-Brooklyn, said the time is not right for the Legislature to be considering raises.

"During the worst fiscal crisis in decades, it is difficult to justify pay raises for anyone in public service," he said in a statement. "Controlling spending among all sectors of government is not an easy decision, but it is the right decision at this time for the people of New York."



State court officials argue that the salaries of Supreme Court justices should be comparable to those of U.S. District judges. But the salaries have diverged since the state judges got their last raise in 1999.

Governor David A. Paterson's office did not respond to a request for comment.

Chief Administrative Judge Ann Pfau noted that judges did not get raises when the state budget was flush and the bad fiscal times should not be used now to deny them increases.

"We don't see that as necessarily negating moving forward with judicial salary increases," she said yesterday.

The ruling yesterday encompassed three cases before the Court: *Maron v. Silver*, 16, *Larabee v. Governor*, 17, and *Chief Judge v. Governor*, 18.

The litigation had been seen by some advocates for judges as the judiciary's best chance of achieving its long pursuit of a pay increase. Each year since 2005, the Legislature has considered, but ultimately failed to pass, pay bills for the state's 1,300 judges.

The plaintiffs had urged the Court to set a specific increase for judges, generally tying state Supreme Court justices' salary levels to those of U.S. district judges, with other judges receiving proportional hikes.

Impaired Independence

While claims varied in the three cases, they all contended that separation of powers was violated when consideration of non-judicial issues—such as a raise for state legislators—has served to block a salary increase for judges.

"Because the Separation of Powers doctrine is aimed at preventing one branch of government from dominating or interfering with the functioning of another co-equal branch, we conclude that the independence of the judiciary is improperly jeopardized by the current judicial pay crisis, and this constitutes a violation of the Separation of Power doctrine," Judge Pigott wrote.

The majority also noted that "[a]ll parties agree that a salary increase is justified and, yet, those who have the constitutional duty to act have done nothing to further that objective due to disputes unrelated to the merits of any proposed increase. This inaction not only impairs the structural independence of the Judiciary, but also deleteriously affects the public at large, which is entitled to a well-qualified, functioning Judiciary."

Pay Raise Rulings Before The Court of Appeals

***Maron v. Silver*, 58 AD3d 102 (3rd Dept. 2008)**: Nothing in the Constitution forbids legislators from "engaging in politics" by linking judges' pay to unrelated issues. Moreover, the Compensation Clause, which bars diminishment of judges' wages, does not protect against the erosion of judicial salaries due to inflation.

***Larabee v. Governor*, 65 AD3d 74 (1st Dept. 2009)**: Accepts the Third Department view that there has been no Compensation Clause violation. However, making judges' salary increases contingent on a legislative pay increase relegates the courts to an "inferior government entity" and violates the doctrine of separation of powers.

***Chief Judge v. Governor*, 25 Misc.3d 268 (St. Sup. Ct. 2009)**: Follows *Larabee*, holding that the governor and legislative leaders have unconstitutionally abused their power through the practice of linkage. Judges' Compensation Clause argument rejected.

A fourth suit, ***Silverman v. Silver*, 117058/2008**, has been filed but no decision has been reached, and it was not before the Court.

Judge Robert S. Smith dissented, saying that while it is "depressing" that pay considerations have driven many judges from the bench, "it is also true that there are still plenty of able judges, and plenty of able people who would willingly become judges, even at today's pay levels."

Judge Smith argued that a separation of powers' violation could not be present unless it could be demonstrated that it was becoming impossible to recruit competent judges or that an underpaid judiciary was becoming subservient to the other branches of government.

"Bad as the present situation is, neither of the disastrous conditions I have mentioned...exists or is close to existing," Judge Smith wrote.

If a problem exists between the Legislature and the judiciary, he added, it is "to restrain judges' understandable displeasure with that branch of our government." That was an apparent reference to warnings by court administrators that judges not recuse themselves or delay cases in which

lawmakers' firms are involved in an attempt to show displeasure over the long-delayed raise.

Rejected Claims

While accepting the separation-of-powers arguments, the Court rejected a series of other constitutional claims included in at least one of the three plaintiffs' cases.

They included a claim that judges' equal protection rights were violated because they had been denied raises in a period when 195,000 other state employees had gotten increases. The Court held that judges were not a "suspect class" within the meaning of the law.

Current Annual Pay

Chief judge	$156,000
Associate judges, Court of Appeals	$151,200
Presiding justices, Appellate Division	$147,600
Associate justices, Appellate Division	$144,000
Presiding justices, Appellate Term	$142,700
Justices, Appellate Term	$139,700
Supreme Court justices	$136,700
Court of Claims judges	$136,700
County, Family and Surrogate's Court judges	$119,800 to $136,700
New York City Civil and Criminal Court judges	$125,600
District Court judges	$122,700
New York City Housing Court judges	$115,400
City Court judges	$108,800 to $119,500

SOURCE: Unified Court System

The Court rejected a claim that dilution of the value of judges' pay due to inflation since 1999 violated the compensation clause of the state Constitution, which prohibits judges' pay from being reduced during their terms. The Court ruled that the compensation clause framers left it to the Legislature to adjust judicial pay for the effects of inflation.

It also rejected the claim that the Legislature actually appropriated a raise in 2006-07 and that all the judges had to do was direct the state comptroller to release the funds. The judges concluded that the proper provision authorizing the spending had not been approved by the Legislature.

Despite the absence of a specific remedy, attorneys for the plaintiffs said they preferred to remain optimistic that the Legislature and governor would now give a judicial pay increase a review independent of the horse-trading that accompanies most high-level negotiations in Albany.

Thomas E. Bezanson of Cohen & Gresser, who argued for the *Larabee* plaintiffs, said the Court has made it "crystal clear" how the Legislature and the governor are to proceed when considering a judicial raise.

"It is disappointing that the Court didn't seize the opportunity to provide monetary relief, which they certainly could have done and instead left it to the good offices of the Legislature and the governor to do that," Mr. Bezanson said. "I trust that they will now do that."

Bernard Nussbaum of Wachtell, Lipton, Rosen & Katz, who argued on behalf of Judge Lippman in *Chief Judge v. Governor*, said he was "extremely pleased."

"It is a correct decision," Mr. Nussbaum said. "We fully expect the Legislature to act appropriately so that further court proceedings will not be necessary."

Judge Lippman recused himself because the court system he heads was a party in *Chief Judge v. Governor*.

The rest of the Court decided the cases under the rule of necessity. It dictates that judges are obligated to decide cases—even those involving an apparent conflict of interest such as a raise for the state judiciary—if their disqualification would leave litigants no qualified court to take their case to.

Other plaintiffs in the cases ruled on yesterday were Manhattan Family Court Judge Susan R. Larabee, Cattaraugus County Family Court Judge Michael Nenno, Manhattan Civil Court Judge Geoffrey Wright and Manhattan Criminal Court Judge Patricia Nunez in *Larabee*.

The plaintiffs in *Maron* were Supreme Court Justice Edward A. Maron of Nassau County, Supreme Court Justice Arthur Schack of Brooklyn and former Supreme Court Justice Joseph A. DeMaro of Brooklyn.

Richard H. Dolan of Schlam Stone & Dolan represented the Legislature and governor. He referred a call for comment yesterday to Mr. Paterson's office.

Steven Cohn of Carle Place argued on behalf of the *Maron* plaintiffs.

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