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TIME TO END UNCONSTITUTIONAL LINKAGE OF JUDGES' & LEGISLATORS' PAY

by
The Honorable Robert F. Julian

In the beginning of February, I will resign the office of New York State Supreme Court Justice, at age 56, with seven years to go on my term. I will return to the practice of law, trying cases as I had previously for twenty-three years until my election in November 2000 to New York State's trial court of general jurisdiction. I have resigned because New York's judges have not received an increase in compensation in nine years, a situation that has placed the entire bench in extreme hardship. Our salary, \$136,700, is well below the starting salary and/or middle level attorney salaries throughout New York State. On a personal level I could no longer justify using hard earned savings to support my public service. I always had anticipated utilizing some of the interest on my savings to hold this office as the judicial pay level was substantially less than my private practice earnings. I did not expect to use the principal, which is my present dilemma.

I am appalled that both the U.S. Congress and the New York State Legislature routinely condition adopting increases in judges' compensation upon adopting concurrent increases in legislative pay. Linking judges' compensation, both on the State and Federal level, to the pay of legislators or members of the executive branch is a violation of the fundamental notion of separation of powers. In New York State linking of judges' compensation to issues such as campaign finance reform (the Governor's nuanced position) is a misuse of the third branch of government. The judiciary is neither a tool of nor in partnership with the legislative and executive branches; rather it is a separate constitutional entity charged with the important function of judicial review of the other branches. The judiciary should not be held hostage by other branches of government that are subject to judicial constitutional scrutiny. The continuous breach of this balance of power is a flagrant constitutional violation which not only demoralizes and weakens the judiciary, it creates the appearance that the judiciary is beholden to the other branches of government. Our present circumstance in New York State is rendered even more difficult by permitting those state legislators who are attorneys, and their law firms, to appear in court before the very judges being held hostage by those lawmakers. This arrangement has the appearance of unfairness and impropriety, and the flagrant linking by New York State legislators of judicial salaries to their salaries, even while they appear before those judges, makes this absurd situation ethically repugnant.

New York State's judiciary ranks at the bottom of judicial compensation nationally. Judith S. Kaye, *Free Judges' Pay*, N.Y. TIMES, June 7, 2007. It is well known that many major law firms are hiring associate attorneys just out of law school at a rate of compensation that equals or exceeds the remuneration of the New York State judiciary. It is my impression, based on anecdotal information gleaned from literally dozens of discussions, that the diminished pay is having a chilling effect on well qualified lawyers seeking elevation to the bench. On a personal level I am unwilling to further deplete my savings and reduce my lifestyle to continue in this office. I believe a number of other judges have retired prematurely

New York State Supreme Court Justice **Robert F. Julian** is leaving the bench on February 5, 2008. A board certified civil trial lawyer, he recently earned a Ph.D. in Law from the University of London. He will practice law with the Utica, New York based law firms of Brindisi, Murad, Brindisi and Pearlman, L.L.P., and Julian and Pertz, P.C.

because of this sorry situation. It is even more repugnant in my view to hold judges hostage because they have forsaken their law practice to engage in public service only to be pummeled by the ravages of inflation. In the nine years in which the judiciary has remained at a frozen level of compensation, the actual diminution of the value of the dollar has been nearly 40%, a reduction in purchasing power that the part-time legislature and no recent governor is personally required to endure. The concomitant failure of the United States Congress to properly compensate the Federal judiciary has diminished the present value of national judicial compensation on both a State and Federal level because it establishes a ceiling for state judicial pay, resulting in a decline in the real value of judicial salaries.

New York State's elected judiciary is well qualified and competent. Objective national studies have found that elected judges receive ratings from lawyers comparable to judges selected under the so-called "Missouri Plan" method of appointment which is very comparable to pending proposals to appoint judges in New York State.¹ New York's trial courts handle a tremendous volume of work. New York State's judge's percentage rate of affirmance and reversal on appeal is within a few percentage points of that of the New York State federal district court affirmance and reversal rate by the U.S. Court of Appeals for the Second Circuit.² Moreover, there has been no showing that our elected full time judiciary is more frequently disciplined than our counterparts in other states. Our ethical status appears to be quite comparable to other states' judiciaries, whether the comparator judges are elected or appointed. Of course we cannot compare disciplinary statistics with the Federal system because there is no federal apparatus which is the equivalent to our Commission on Judicial Conduct.

Several previous governors, many legislators, and private citizens have stated to complaining judges, "if you don't like the compensation, quit." I have recently discovered that this is much easier said than done, particularly for a judge who has left private practice to assume the bench. As I well know, such a judge will have discontinued private practice, severed ties with clients and withdrawn into the inevitable protective cocoon that is essential for a judge to maintain neutrality and objectivity. Re-entry to the practice of law is very difficult both logistically and practically. I have not been on the bench very long – seven years – but I can tell you that in my experience the longer a judge serves, the less he/she is able to escape due to such practical factors.

In summary, the convergence of the level of compensation and the well recognized problem that once you are a judge there is no easy way out has a chilling effect on attracting competent, well rounded judges with real courtroom experience on both the state and federal level. In my opinion these factors presently place our proud and historic New York State Supreme Court in an unfavorable circumstance. The same is true in my view of the Federal judiciary. Lawyers should not be motivated to become judges to increase their income. The bench should not be an economic enhancement, the bench should be a place where the best and brightest of the legal profession can perform public service, receive reasonable remuneration, and be accorded earned respect as they decide cases and provide input into the administration of our justice system. Given the present circumstance I believe it is less likely than ever before that the bench will, in the future, attract our best or brightest, and that we will unfortunately forfeit needed experience and expertise because of inadequate compensation.

I am saddened that I must leave a job that I truly enjoy. Because I love the courtroom, I take succor in the fact that I will be able to remain a participant on that hallowed ground as a lawyer.

There must be a delinking of judicial pay to legislative salaries and other public policy issues. State and federal judicial salaries should be based on independently established market guidelines, established by non-political citizen panels. The separation of powers established by our Constitution can only be preserved by this important reform.

¹Daniel W. Shuman and Anthony Champagne, *Removing the People From the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOLOGY PUBLIC POLICY & LAW 242, 1977; Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1977-1978).

²Bentley Kassal, *Update: Did the Appellate Odds Change in 2006? Statistics in State and Federal Courts*, 79 N.Y. BAR ASS'N J. 44, Dec. 2007.