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Appellate Division, First Department - Larabee v. Governor of the State

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SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Larabee v. Governor of the State[1]
(decided June 2, 2009)

Four New York State judges brought an action against several State officials including the Governor.[2] At issue was the New York Legislature's alleged inaction in addressing the judges' compensation packages.[3] Specifically, the judges claim that the legislature engaged

[1] 880 N.Y.S.2d 256 (App. Div. 1st Dep't 2009), *aff'd*, Maron v. Silver, 2010 WL 605279 (N.Y. 2010). This Recent Case was completed in November 2009 and the author correctly predicted that the February 2010 New York Court of Appeals decision in *Maron*, which consolidated three judicial compensation cases including *Larabee*, would be decided in favor of the judges on the basis of a violation of the Separation of Powers doctrine. *Id.* at *18. Though the court stopped short of injunctive relief, Judge Pigott opined that the judges' salaries were held "hostage to other legislative objectives" though, now, by "ensuring that judicial salary increase will premised on their merits" the judiciary will not be encroached upon by the decision-making authority of the Legislature; "[t]herefore, judicial compensation, when addressed by the Legislature in present and future budget deliberations cannot depend on unrelated policy initiatives or legislative compensation adjustments." *Id.* at *15, *16. This Recent Case argues in favor of an independent commission to review judicial salary packages, which would report to the legislature. It is important to note that Judge Pigott pragmatically reaffirmed that the legislature, while it has authority to set judicial compensation now based on merit alone, is capable of being checked by the Judiciary. *Id.* at *18. Chief Judge Lippman issued a statement the same day the case was decided ostensibly to underscore the case's legal and historical significance and stated that this case represents the "first decision by a state court of last resort to find a violation of the separation of powers doctrine based on a legislature's failure to address, on the merits, the issue of judicial compensation." Judge Jonathan Lippman, Chief Judge New York Court of Appeals, Public Statement Regarding Judicial Compensation Cases (February 23, 2010), *available at* http://www.courts. ny.us.gov. Also noteworthy is the fact that Judge Lippman explained the ramifications of his recusal due to his involvement as a named plaintiff in one of the suits and, as such, this case was decided by the remaining judges on the Court by invocation of the Rule of Necessity, which dates back to the fifteenth century and states that "where no other judge can be found who is impartial with regard to a particular case, then the court assigned to the case is compelled to hear it." *Id.* This doctrine has been used in other judicial compensation cases by both federal and state courts. *Id.*

[2] *Larabee II*, N.Y.S.2d at 259. Plaintiffs are two Family Court Judges, one Civil Court and one Criminal Court judge all of whom are presently sitting at the time of the lawsuit.

[3] *Id.* at 261, 265. Judiciary Law § 221-e and § 221-g specify the salaries for judges in New York.

in the practice of "linkage," or tying together the unrelated issue of judicial salary adjustments with legislature's own compensation, the effect of which is a disruption in the Judiciary's performance as a distinct branch of the government.[4] The Supreme Court, New York County, held that the refusal to pass such legislation was a violation of the Separation of Powers Doctrine and ordered the defendants to remedy the abuse within ninety days.[5] The Appellate Division, First Department, affirmed the trial court's holding, finding that the legislature's acts reduced the Judiciary to less than the "self-functioning" branch of government it deserves to be and that Legislative Immunity was unavailable for use as a shield against any Separation of Powers violations advanced by the plaintiffs.[6] This opinion was in direct opposition to a prior Third Department decision delivered in 2008.[7]

Judicial compensation has been a fiercely debated issue in New York over the years, despite the merits of a judicial increase being an agreed upon issue on both sides of the argument.[8] The road to rectifying the matter seems paved with puzzling details of political maneuvering.[9]

The New York State Judiciary last received a pay increase in 1999.[10] Since that time, New York's cost of living has steadily increased, devaluing overall compensation for much of the state's working population, including judges whose salary levels have remained flat.[11] Meanwhile, many young attorneys at top New York law firms have been rewarded with salaries that exceed those of the

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[4] *Id.* at 259.

[5] Larabee v. Governor of the State of New York I, 860 N.Y.S.2d 886, 878 (2008). Such activity was to be accomplished by a good faith effort to adjust the compensation levels and restore them to the equivalent of the 1998–1999 salary level taking current economic factors into consideration. It is important to note that this directive is an additional measure beyond the relief sought by the Plaintiffs.

[6] *Larabee II*, 880 N.Y.S.2d at 264, 269. At the same time, the court found that that any failure by the Legislature to increase salary was not a diminution in salary.

[7] Matter of Maron v. Silver, 871 N.Y.S.2d 404, 419 (App. Div. 3d Dep't 2008).

[8] *See* Justin S. Teff, *The Judges v. The State: Obtaining Adequate Judicial Compensation and New York's Current Constitutional Crisis*, 72 ALB. L. REV. 191, 193-94 (2009). Former Governor Mario Cuomo and Chief Justice Sol Wachtler battled this same issue with equal intensity in 1991. The Governor sued the Chief Judge in Federal Court and, though a settlement was ultimately reached, the issue sparked years of contentious debate.

[9] *Larabee II*, 880 N.Y.S.2d at 264.

[10] *Id.* at 259.

[11] *Id.* (claiming that between one-third and one-quarter of the value of judges' salaries have been lost since 1998).

judges they stand before.[12] It became apparent to both "the bench and the bar" that intervention would soon be required.[13] As a result, in 2006, the Judiciary submitted a budget to the Governor that included over $69 million for judicial compensation adjustments.[14] Moreover, there was no alteration to the budget submitted by the Governor to the Legislature and support for the pay increase seemed to be unanimous.[15] A year later, the New York Senate passed two bills which would raise state trial judges' salaries to a level equivalent with those on the federal bench.[16] The first of these two bills (S5313), designed to eliminate the linkage of judicial salary adjustments with legislative compensation through the use of an independent commission, did not pass through the Assembly since its companion bill in the Assembly (A7913) included campaign finance reform measures.[17] The Legislature's salary increase was also part of that bill and, since the Governor declined to act on it, the judicial compensation package remained frozen.[18] Ironically, the ensuing Senate bill (S6550), which did not mention Legislative pay commission, passed by a wide margin in the Senate, though the Assembly refused to act on it.[19] Despite strong political opposition, the Governor appropriated the necessary funds for the judges' pay increases, including retroactive payments, in both the 2006–2007 and 2008–2009 budgets.[20] Thereafter, the Legislature failed to introduce measures to allocate the appropriate funds and that inaction is the focal point of this appeal.[21] The net effect of this process is that the Judiciary's pay increases became part of a political power play in which the plaintiff-judges were left without recourse, save for a suit for declarative and injunctive relief.[22]

The plaintiffs' claim stated two causes of action. First, is the

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[12] *Id.* at 260.

[13] *Id.*

[14] *Larabee II*, 880 N.Y.S.2d at 260.

[15] *Id.* N.Y. CONST. art. VII, § 1. The Governor added his assent to the compensation adjustment along with the budget.

[16] *Larabee II*, 880 N.Y.S.2d at 260.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Larabee II*, 880 N.Y.S.2d at 260.

[22] *Id.*

alleged violation of article VI, section 25(a) of the New York Constitution, which states, in part, that any diminution of the compensation of judges or justices is prohibited.[23] The plaintiffs argued that while salaries remained flat, the cost of living in New York sharply rose and that dichotomy, in effect, resulted in a diminution in salary.[24] The second claim centered around the issue of linkage whereby the plaintiffs allege that the Legislature unlawfully hinged their own pay increases on unrelated matters such as judicial compensation.[25] The judges not only asked that the "impounded" $69.5 million be released and that the annual increases disbursed, but also that there be permanent enjoinment from the employment of linkage in the future.[26]

The Supreme Court, New York County, released the Governor from the case awarding him summary judgment and held that judicial salaries had neither been diminished, nor had the Governor violated any provision of the New York Constitution in question.[27] However, the court *did* find that a sufficient claim was made with regard to the issue of linkage and ruled that the Legislature's conduct resulted in a violation of the Separation of Powers doctrine.[28] The Legislature agreed that the plaintiffs' increase was in order and agreed, in principle, that linkage did contribute to the delay in such relief, but argued that the issue is one to be decided inside the walls of the Legislature and not inside a courtroom.[29]

On this point, the court found that a constitutional violation indeed occurred and the issue is to be decided by the Judiciary.[30] The defendants were ordered to remedy the constitutional violation within ninety days of the decision "by proceeding in good faith to adjust compensation payable to members of the Judiciary to reflect the increased cost of living since the last salary adjustment in 1998/1999."[31] On appeal, the Appellate Division, First Department, decided the case by analyzing the claim against the backdrop of three

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[23] *Id.* at 260-261; N.Y. CONST. art. VI, § 25(a).

[24] *Larabee II*, 880 N.Y.S.2d at 261.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 262. *See* N.Y. CONST. art. VI, § 25(a). No direct diminution had occurred so, therefore, no overall violation of the provision.

[28] *Larabee II*, 880 N.Y.S.2d at 262.

[29] *Id.*

[30] *Id.* at 263.

[31] *Id.*

concepts: the Compensation Clause, Legislative Immunity via the Speech or Debate Clause, and, most importantly, the Separation of Powers doctrine.[32]

First, in affirming the decision to dismiss the claim that there was a violation of the Compensation Clause, the First Department agreed with the Third Department's decision in *Matter of Maron v. Silver*.[33] This approach is contrasted by the plaintiffs' contention whereby compensation is broadly interpreted and read in the context of the times and the overall financial portrait of the period in which the judges must live.[34] The Compensation Clause has been interpreted to mean that there is room for the Legislature to take a position towards judicial salaries that might be adverse.[35] The United States and New York constitutional views are identical in this regard; the Legislature is granted power over judicial salary determinations.[36]

In the second cause of action, the defendants relied on the New York State Constitution which states that, "[f]or any speech or debate in either house of the Legislature, the members shall not be questioned in any other place."[37] The thrust of the defendants' argument in positing the Speech or Debate Clause was that the provision removes legislative decision-making from judicial review since such review would be mere conjecture and speculation about the intentions of the Legislature.[38] Moreover, the defendants argued that their inac-

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[32] *See generally Larabee II*, 880 N.Y.S.2d 256.

[33] *Maron*, 871 N.Y.S.2d at 409. The Compensation Clause challenge fails in this case because the salaries have not been diminished. In *Maron*, an identical dispute regarding judicial salaries was at issue. The principle of the Compensation Clause, namely, that judicial compensation shall not be diminished during the judge's time on the bench, was narrowly construed by the court in that compensation was defined as actual, tangible salary and wage.

[34] *Larabee II*, 880 N.Y.S.2d at 265.

[35] *Maron*, 871 N.Y.S.2d at 411 (*citing* United States v. Will, 449 U.S. 200, 227 (1980)). The Compensation Clause has been interpreted to mean that there is room for the Legislature to take a position towards judicial salaries that might be adverse.

[36] *Maron*, 871 N.Y.S.2d at 413-14. Such power is not absolute and policy choices must be reviewed in light of the Separation of Powers doctrine. In New York, case law on the subject leans squarely in favor of the defendants' approach. *See* Matter of Benvenega v. LaGuardia, 63 N.E.2d 88 (N.Y. 1945). In the Supreme Court, the issue was more focused on the premise that inflation was an "indirect, nondiscriminatory lowering of judicial compensation" and while there was consternation that the judiciary's power would become diluted as a result, the outcome in these cases was still similar to the New York holdings; the effect of inflation on judicial salaries is not enough to be a violation of the Compensation Clause. *See* Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977).

[37] N.Y. CONST. ART. III, § 11.

[38] *Larabee II*, 880 N.Y.S.2d at 267.

tion is policy based and, therefore, free from the any judicial challenge.[39]

The defendants assert that the plaintiffs' linkage analysis is a manifestation of speculation; therefore, it is in violation of the clause and any such review would be improper since the Legislature engages in the making or denial of laws as a matter of course and to inquire about the propriety of their activities would be to invite unwarranted scrutiny.[40] Historical insight into the development of the law bears the defendants' assertions out especially in light of the law's interpretation on the federal level.[41] The Supreme Court has interpreted the clause as a necessary protection for the Legislature both against intimidation from the executive branch and from criticism and scrutiny from a "possibly hostile judiciary."[42] However, with regard to linkage specifically, the defendants rely on the Supreme Court decision in *Bogan v. Scott-Harris*.[43] Since that case turned on resource allocation issues and budget management, which are claims not made here, the appellate division looked to New York law to attempt to find more clarity. In *Pataki v. New York State Assembly*, the New York Court of Appeals held that the courts are empowered to rule on the constitutional boundaries of the different branches of government and, here, the court utilized that holding to find that legislative immunity was not available to the defendants for use as a shield against Separation of Powers claims brought by the plaintiff judges.[44] Since

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[39] *Id.*

[40] *Id.*at 267.

[41] *See* People v. Ohrenstein, 565 N.E.2d 493, 501 (N.Y.1990). The federal Speech or Debate provision was born out of the political conflicts of the "diverse governing bodies of the American colonies" and traces back to this country's English roots. *See also* Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951).

[42] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975); *see also* Gravel v. United States, 408 U.S. 606, 617 (1972) (legislative interactions with the executive branch might further legislative interests, but would not generally be protected legislative activity).

[43] *See generally* Bogan v. Scott-Harris, 523 U.S. 44 (1998) (showing due deference to the Legislature by refusing to inquire into the motives behind its decision to eliminate an entire department from a city budget, becasue such a decision is budgetary and, as such, legislative in nature). The difference in this case is that the decision not to increase judicial salaries was not budgetary at all but political; therefore, the deference shown to the Legislature in *Bogan* was strictly based on an allocation of resource basis—a claim not made by the defendants in this case.

[44] 824 N.E.2d 898, 910-11 (N.Y. 2004). It is important to note that the plaintiffs did not name any legislators specifically so, therefore, the court in this case does not consider the legislative immunity defense to be available since no one legislator is under attack. *See La-*

judicial review is not barred by operation of the Legislative Immunity via the Speech or Debate clause, the appellate division decided the case on the defendant's claim that the Separation of Powers doctrine is not implicated.[45]

The First Department's analysis of the Separation of Powers claim represents the focal point of this decision and presents a significant departure from that of the Third Department.[46] In affirming the lower court's decision granting summary judgment to the plaintiffs, the First Department confirmed that the Separation of Powers doctrine had been violated.[47] In doing so, the court examined the *action* of the Legislature and not necessarily its inaction.[48] In order to completely examine this issue, the doctrine must first be clearly identified and then analyzed in light of both the New York and Federal regimes.

First, it is well established that three separate, co-equal branches of government, intertwine to form our American system.[49] Traditionally, the Legislature has been empowered to make decisions on the issue of resource allocation.[50] In addition,

> [t]he necessity of preserving each from every form of illegitimate intrusion or interference on the part of the other is so imperative as to require this court, when its judicial power is properly invoked, to view with a careful and discriminating eye any legislation challenged as constituting such an intrusion or interference.[51]

However, the Separation of Powers doctrine, as applied in this case, is more sharply focused on the convergence of that power with the issue of judicial compensation.[52] Not surprisingly, throughout the history of American government, judicial compensation, and disputes

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rabee II, 880 N.Y.S.2d at 269.

[45] *Larabee II*, 880 N.Y.S.2d at 270.

[46] *Id.* at 270.

[47] *Id.*

[48] *Id.* at 271.

[49] Matter of Kelch v. Town Bd. of Davenport, 829 N.Y.S.2d 250, 252 (App. Div. 3d. Dep't. 2007).

[50] Evans v. Gore, 253 U.S. 245, 249 (1920).

[51] Steward Machine Co. v. Davis, 301 U.S. 548, 611 (1937).

[52] *Larabee*, 880 N.Y.S.2d at 272.

over governmental salaries in general, have been contentious.[53] One needs only to look at the language of the Judiciary Law and the New York Constitution to understand that each branch's compensation package was intended to be determined outside the purview of the Legislature.[54] The prevailing federal view is that the ongoing debate in this realm leaves the Judiciary dependent and vulnerable to the Legislature, which was a fear of at least one court during the time of the ratification of the Constitution.[55] In *O'Donoghue v. United States,* the Supreme Court addressed the issue of compensation and reiterated that separation is not "a matter of convenience" but is vital to the maintenance of the American scheme.[56] The Supreme Court stressed the importance of Separation of Powers and especially noted the "anxiety of the framers of the Constitution to preserve the independence especially of the judicial department."[57] American jurisprudence promptly recognized that matters of judicial compensation are inextricably intertwined with judicial independence vis-a-vis the legislative branch of government, requiring "a continuing guaranty of an independent judicial administration for the benefit of the whole people."[58] Thereafter, the Supreme Court identified the Judiciary as the "weakest" of the three branches in *Evans v. Gore.*[59] In *Evans*, the plaintiff-judge challenged the validity of a tax and won based on the impingement of the Judiciary by the Legislature.[60] This case was later overruled by the decision in *United States v. Hatter;* however, the primary holding in the decision still underscores the fear with which the Legislature's power over the Judiciary was historically viewed.[61]

In *Cases of the Judges of the Court of Appeals*, the Virginia

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[53] *See generally Cases of the Judges of the Court of Appeals*, 8 Va. 135 (1788).

[54] Judiciary Law § 39 (sets forth that judicial compensation is to be increased by appropriation); N.Y. CONST. art IV § 3 (Governor's salary to be fixed by the Senate and Assembly's joint resolution). Each branches' salary determinations are specified outside art III, which signals a directive that the Legislature is not to subordinate any of the other branches in this regard.

[55] *See Cases of the Judges of the Court of Appeals*, 8 Va. 135.

[56] O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

[57] *Id.* at 531.

[58] *Id.* at 533.

[59] *Evans*, 253 U.S. at 249.

[60] *Id.* at 245.

[61] *See* United States v. Hatter, 532 U.S. 557, 560-61 (2001). Linkage, as employed in these circumstances, manifested an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations.

Court of Appeals noted that the Judiciary must be protected from "dependence upon the Legislature" if its role in protecting the people from the government's actions was going to be effectively maintained.[62] The justices specifically addressed matters of compensation in "respectful remonstrance" to the Virginia Assembly and stressed the importance of "independent judicial administration for the benefit of the whole people."[63] This holding foreshadowed the events taking place in *Larabee* and similar judicial compensation cases. Recently, the Supreme Court noted the importance of judicial compensation beyond the individual justices' monetary interests and adopted a broader approach; that adequate compensation is an effective means of attracting and retaining the most qualified battery of judges available.[64] In another albeit factually unrelated compensation case, the Court redefined the Separation of Powers doctrine by positioning it as a prophylactic device; one designed to be a general safety as opposed to a specific remedy against distinct claims.[65] Herein lies the main feature of the federal approach on the subject which establishes "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[66] The Federal position on this issue directs clear protections of the Judiciary, and other co-existing branches of government, from encroachments by any overbearing branches. The decision in *Larabee* is novel in its contrast to recent cases in New York, with regard to Separation of Powers violations.

The New York law on this issue reinforced the notion of separate and autonomous branches of government.[67] The volume of case law is sparse with regard to this issue, generally, and with regard to judicial compensation, the case law is even less populated.[68] The only Court of Appeals case, decided in 1898, on the issue held, "[a]ny legislation that hampers judicial action, or interferes with the discharge of judicial functions, is in conflict with the principles of the constitution."[69] New York law utilizes the doctrine more directly and

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[62] *Cases of the Judges of the Court of Appeals*, 8 Va. 135.

[63] *Id.*

[64] *See Evans*, 253 U.S. at 253.

[65] Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 239 (1995).

[66] *Id.*

[67] People *ex rel.* Burby v. Howland, 49 N.E. 775, 779 (N.Y.1898).

[68] *See* Teff, *supra* note 8 at 220-21.

[69] *Burby*, 49 N.E. at 779. The Legislature in this case, which was decided in 1898, re-

actually states that the point of the law is to prevent any one branch of government from seeking maximization of its powers.[70] The concept was further strengthened in a New York Court of Appeals case in 1985, which, among other concepts, holds that the doctrine of Separation of Powers in New York "inheres, by implication in the pattern of government adopted by the State."[71] In *Under 21 Catholic Home Bureau for Dependent Children v. City of New York*, the court held that the Mayor of New York could not dictate the hiring policies of those who secured contracts with the city.[72] "While the doctrine of Separation of Powers does not require maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch."[73] This holding stands for the application of the doctrine to inter-branch governmental disputes, which is the issue in the instant case and, if the language of the statute is followed, was decided correctly.[74]

"The judicial system is at its best when it stands above and apart from the political interactions that more typically characterize the other two forms of government."[75] Since the Judiciary is dependent upon the other two branches in regard to matters of compensation a delicate balancing act is required. "[I]t is not the province of the courts to direct the legislature how to do its work" just as the same might be said of the legislature as it would be inappropriate for it to act to the detriment of the Judiciary and impose impediments to the functioning of the Judiciary unabated.[76] With such clarity in the law, however, *Larabee* represents a stark detour from the path carved out by the Third Department's recent decision in *Maron*.[77]

In *Maron v. Silver*, both current and former judges brought an

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moved some duties from justices of the peace and, as a result, lowered their compensation accordingly. *Id.*

[70] Cohen v. State of New York, 94 N.Y.2d 1, 13-14 (1999) (holding that law requiring legislators pay is to be upheld if no budget is passed by the first day of a fiscal year since it was not in violation of the separation of powers doctrine).

[71] Under 21 Catholic Home Bureau for Dependent Children v. City of New York, 482 N.E.2d 1, 4 (N.Y.1985).

[72] *Id.* at 8.

[73] *Id.* at 4.

[74] *Id.* at 10.

[75] *Larabee II*, 880 N.Y.S.2d at 272.

[76] *Urban Justice Ctr. v. Pataki*, 828 N.Y.S.2d 12, 27 (App. Div. 1st. Dep't 2006).

[77] *Larabee II*, 880 N.Y.S.2d at 274.

Article 78 proceeding seeking a writ of mandamus to order New York's Comptroller to disburse appropriated funds set aside for judges and to compel the states' other branches of government to keep judicial salaries in line with inflation.[78] In addition, the suit claimed an action of declaratory relief against the legislature and the governor due to failures of each to increase judicial salaries, the same claim as in this case.[79] The decision in *Maron* holds that the Separation of Powers claim is barred since the judges have not stated a claim for relief, or put another way, the judges lacked standing.[80] The opinion cites to a case in which appointed defense counsel brought an action for pay increases and, in which, the court held that Separation of Powers principles dictate that judicial intervention may be warranted "when legislative appropriations prove insufficient and legislative inaction obstructs the Judiciary's ability to function," or there is an imminent threat that such functioning will be impaired.[81]

The *Maron* court relied on the decision in *Matter of Kelch v. Davenport* and found that a claim in this realm can only be supported by a showing that the Legislature had acted in a way that was both in violation of the constitution and acted in a manner "likely to affect or impinge upon the independence of the judiciary."[82] In *Kelch*, Britt Kelch was recently elected as one of two town justices but the Legislature set his salary at just $500 per year while it approved a raise for the incumbent town justice from $5000 to $7500 annually.[83] Kelch argued that while the legislature is within its power to set salaries for municipal employees, its actions violated both the Federal and New York Constitutions.[84] The court ordered the Legislature to set Kelch's salary appropriately.[85] More importantly, the language used set the tone for decisions thereafter by stating, "[a] real threat strikes at the heart of judicial independence if the Judiciary must cater to the ideological whims of the legislature or personally suffer the financial

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[78] *See Maron*, 871 N.Y.S. 406.

[79] *Id.* In *Maron*, there was an Equal Protection violation claimed, which changed the complexity of the case in a way not discussed in *Larabee*. *See id.*

[80] *Id.* at 416-17.

[81] New York County Lawyers Assn. v. New York, 745 N.Y.S.2d 376, 436 (App. Div. 1st Dep't 2002).

[82] *Kelch*, 829 N.Y.S.2d at 253.

[83] *Id.* at 251.

[84] *Id.* at 251.

[85] *Id.* at 253.

consequences for rendering legally correct but unpopular decisions."[86] The decision went on to cite *Atkins v. United States* and found that the judges had "to demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges qua judges, or to drive them from office."[87] Finally, the Third Department found that since the Legislature had not seen a pay increase while it held the judge's pay increase in abeyance, then there was no plan to restrict the judges' salaries exclusively, nor was there a plan to control or limit the power of the Judiciary.[88]

The two departments differ on the concept that a present impairment be a prerequisite to a claim for a violation of the Separation of Powers doctrine. The underpinning of the argument is that the Judiciary has no present loss and, therefore, a present Separation of Powers claim is unripe. *Maron* stands for the theory that a present, specific complaint is necessary. The *Larabee* court disagreed and held that the attempted erosion of the barriers, which insulate one branch from another, was enough to find a violation of the doctrine without any further specification required.[89] While a specific and present impairment is sufficient for a claim to be viable, it is not essential.[90] Justice Tom went on to state that the Legislature's inclusion of judicial compensation in the world of politics to this degree was a clear violation of the Separation of Powers doctrine.[91] "A line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the Separation of Powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated."[92] Furthermore, the court endorsed the notion of an independent commission to review, analyze, and then report to the Legislature on their recommendations regarding the issue.[93] The court has endorsed this methodology on other occasions

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[86] *Id.* at 252.

[87] *Atkins v. United States*, 556 F.2d 1028, 1054 (1977).

[88] *See generally Maron*, 871 N.Y.S. 404.

[89] *Larabee II*, 880 N.Y.S.2d at 274.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 275.

[93] *Id.*

as well, including matters relating to education.[94]

The approach utilized by the First Department is sensible, logical, and fair. It is well-known that New York courts, especially those in the five boroughs and their surrounding areas, are some of the busiest in the country.[95] Despite this fact, New York judges do not even rank in the top 10 in the nation when their salaries are considered in absolute terms.[96] The numbers are even worse when the level of compensation is measured against the actual cost of living especially in light of the fact that the cost of living in New York is among the highest in the nation.[97] The proposed plan of action in *Larabee*, which could empower an independent commission to make a determination regarding judicial compensation, works to ensure that the branches of government remain appropriately separate while each maintains an effective working relationship with the others. As a result, one might argue that the arbiters of judicial compensation are, in fact, the judges themselves.

While the outcome of such an issue seems well in hand when decided by the would-be-beneficiaries, judges are tasked with and are empowered to decide numerous issues where their impartiality is essential and where their decisions, potentially, can directly impact them both to their benefit and detriment. Although the outcome is not frequently a gain or loss to their personal paychecks, the issues in front of them are rarely, if ever, inconsequential to their functions as judges. Moreover, judges are entrusted to be fair, equitable, and inherently detached; all of which are absolute keys to our judicial system. The fact that they would approve the first compensation increase for themselves after more than a decade's wait would not be seen by most reasonable voters and citizens to be an abuse of power. In addition, the presentation of an independent commission to review and report on the issue is similarly fair and reasonable and represents a safeguard against any semblance of impropriety. The Legislature could argue that they their power in controlling salaries within municipalities is being usurped by such a commission. However, the re-

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[94] Campaign for Fiscal Equity v. State of New York, 8 N.Y.3d 14, 20 (2006) (Independent assessment made regarding the allocation of overall budgets for state run schools).

[95] *Larabee II*, 880 N.Y.S.2d at 261.

[96] *Id.*

[97] *Id.* New York judges' salaries rank 48th in the nation when viewed against the cost of living in New York. *Id.*

porting would go to the Legislature before being decided on so it would still have adequate control over the issue.

The New York courts' position on this issue is in line with the precedents set by both the New York and the United States Constitutions. In addition, judicial pay increases is one issue that is agreed on by all branches of the government. One that should be an easier push through the system than it is proving to be. Ultimately, the Legislature's inaction resulted in the inference that by using the Judiciary's salary increases, already assented to by the Governor, as leverage to resist campaign finance reform. Such an inference is a rather unfortunate outcome and an undesirable result for those seeking to shed the public's image of a recalcitrant, unfocused, and self-serving representative body; an image which continues to perpetually plague our system.

Lastly, it is important to note Judge Lehner's imposition of a 90-day deadline before which the compensation must be appropriated which is above and beyond the amended remedy sought by the plaintiffs.[98] The appellate division's decision on this case will surely lead to more intriguing subsequent results and, possibly, even more litigation. While this decision could present a welcomed shift in the direction of the judges, a shift that would receive little to no argument from either side, the concept upon which it seems to turn, that more than a present showing of a contentious relationship must fortify a claim for a violation of the Separation of Powers doctrine, is controversial. Perhaps now that the First Department has recognized the long-term ramifications of the dispute, the New York Court of Appeals will now have the necessary support to award the judges the upgrade all agree is overdue.

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[98] *Id.* at 262.