

The Wrong Defendants

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For those of us who savor constitutional debate it was hard to imagine on Monday that the dispute over judges' pay in New York could get any more delicious than the point to which it has been brought by in the suit by Chief Judge Kaye and her lawyer, Bernard Nussbaum. But yesterday Judge Lehner, acting in a separate suit brought by four state judges seeking huge pay increases, actually took the first step toward ruling that the legislature and governor will have to pay our state judges more money — and lots of it, perhaps as much as \$600,000 each in back pay to compensate them for the erosion of their pay because of inflation. This could easily add up to hundreds of millions of dollars before the judges finish with the taxpayers' wallets.

To get to this order the judge had to find a way to get past the separation of powers argument, in that it's the governor who writes the budget under New York law and the legislature that approves it. It seems, however, that the judge has concluded that the Assembly won't pass a raise for the judges until a raise is put through for the Assembly members. That linkage might seem a normal part of politics to most New Yorkers, but Judge Lehner concluded that is a constitutionally impermissible entanglement of the interests of the two branches.

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One of the questions New Yorkers will want to ask was where in Sam Hill was Andrew Cuomo? He is the attorney general who was supposed to be representing the governor and the legislature. Yet he doesn't seem to have made much, if anything, in the way of response to this line of reasoning, even though it strikes us as likely, even certain, that a lack of compensation for themselves wasn't the only reason the Assembly hasn't acted on judges pay. The fact of the matter is, the kinds of payout the judges are looking for will strike many taxpayers as outrageous and there would be plenty of backlash for any legislator who supports it.

But there is one important point that is moving to the fore in this — the notion that inflation has, in effect, reduced the pay of judges as the years have gone by. Reducing a judge's pay is not allowed under the Constitution and has been a concern of constitutionalists going back to the founders of America. One can see why. But it strikes us that if it is a reduction of pay due to inflation that the judges are worried about, the defendant should not be the governor or the state legislature but the United States Federal Reserve. That is to say, Ben Bernanke is the right defendant in this case — and any former governor would say that the Fed chairman would probably be easier for the judges to push around than Sheldon Silver.