Judges' Pay: The Federal Experience

One of the toughest nuts to crack for a democracy infused with durable populist sentiments is how to assure that its judges, both state and federal, are paid in a manner and at a level so as to attract and retain a judiciary of independence and quality.

We tend to forget that our Founding Fathers, with fresh memories of what George III did with judges removable at his pleasure, decreed in the Constitution that the federal judiciary should enjoy tenure during good behavior and that their compensation could not be reduced by an avenging legislature. This was substantially the pattern of the early states, until Kentucky's neighbor, Andrew Jackson, gave currency to the idea that any citizen could do any public job if he had a mind to. Then the practice of electing judges waxed for the rest of the 19th century, as it now seems to be waning.

Today state judiciaries dispense 98% of the justice administered in this country. They, like their much smaller federal sibling, are in peril because John Q. Citizen has a hard time seeing why he cannot have top quality judges for journeymen's wages. Perhaps the ordeal that we federal judges experienced in our years of effort to restore some of the real wages lost through two decades of inflation will provide some useful background for Kentuckians as they seek to resolve their own problems.

I write as the federal judge who, as then Chair of the U.S. Judicial Conference Committee on the Judicial Branch, had the responsibility of presenting the judges' case to several national Commissions on Executive, Legislative, and Judicial Salaries, from 1984 to 1990. In the early 1980's federal judges' pay was roughly at levels comparable to the present pay of Kentucky justices and judges of courts of general jurisdiction - in the neighborhood of $70,000. While this appears as an enormous amount to many citizens, the hard fact is that judges come from the legal profession -- a fact that determines their prior and expected standard of living and sets limits on the financial sacrifices a prospect for judicial office will be willing to undergo . . . that is, if a state's bench is to be broadly representative and not consist, as one judge put it, of the independent wealthy, the personally ascetic, the ideologically driven, or the insufficiently competent.

In 1988 we conducted a survey of all federal judges and found growing dissatisfaction among 85% of our judges, 73% of whom had accepted a halving of their income upon appointment. Over 40% reported a decline in their standard of living, and nearly two thirds, a decline in savings, with a third reporting increased debt and over half a felt necessity to sell assets. Expectations of lengthy service were down, resignations had multiplied, and quality recruitment was increasingly difficult. By 1988, federal judges' salaries in real terms had shrunk by 30% since 1969. I suspect that much of the case we then made is relevant to Kentucky's situation today. In 1988 the starting salaries of first year associates at leading New York firms was $71,700, close to the salary of a Kentucky circuit court judge; the median law firm partner of 25 years' experience earned roughly twice the present compensation of Kentucky's trial and high court judges.

Aiming to introduce some objectivity and sanity into the process of compensating the nation's top officials in the three branches, Congress, in 1967, established the Commission on Executive, Legislative, and Judicial Pay (the "Quadrennial Commission") to hold hearings, deliberate, and recommend figures to the President, who in turn recommends to Congress, which then may approve or disapprove. Only the First Commission, in 1968, met with substantial success (a 29-33% increase for circuit and district judges). Although Commissions unfailingly

recommended substantial increases over the years, as judges' real income fell, Congress on two occasions (covering an eight year period) vetoed any increase. In 1985 the Fifth Commission opted not to recommend a figure but to seek a change in Congressional approval methods to conform to a recent Supreme Court decision. Two years later, a special commission urged a large increase to help offset the pay erosion of two decades, but President Reagan pared the figures by from 80 to 90 percent; Congress allowed an 8 to 15 percent increase to go into effect.

Finally, a tumultuous last act took place after the Seventh Quadrennial Commission made its recommendation in 1988 at substantially the levels of the previous Commission – a recommendation which President Reagan this time accepted. The measure foundered because of violent public dissatisfaction with House leadership plans to delay voting action beyond the time when Congressional disapproval would have any effect. Members' desks were piled high with tea bags redolent of the Boston Tea Party; local disk jockeys fulminated from their powerful pulpits. Only months later did a more modest proposal, conjoined with ethical reforms in the Ethics Reform Act of 1989 barring receipt of honoraria, gain acceptance, largely through the courageous stance of House leaders on both sides of the aisle.

In sum, a six year effort had succeeded, after great travail, in restoring only part of the purchasing power lost by the federal judiciary in the previous two decades. What are the lessons? The first is a very simple one. Congress has always insisted on "linkage," tying its own pay increases to those given the other two branches. It has felt it would be vulnerable if it stood alone. But any safe haven provided by "linkage" is destroyed by denying periodic cost-of-living pay increases for top officials in the three branches. Back in 1981 Congress tacked on to an appropriations bill a provision that judges may not receive the same cost-of-living increases as are automatically given other federal employees unless Congress affirmatively votes. This is the legislative equivalent of shooting oneself in the foot, for the inevitable demagogic debate and negative vote, year after year, simply builds up an awesome backlog of unhonored inflation offsets. The result is that when Quadrennial Commissions try to rectify this, their recommendations look gigantic, inflated, and "unrealistic." My conviction is that if Congress (or a state legislature) were to discipline itself to a hands-off-judges attitude in the administration of cost-of-living increases, the time, the decibels, the agony, and the frustration of quadrennial pay exercises would greatly diminish.

The second lesson, applicable to the states as well as the federal government, is that the compensation of judges is not a matter affecting only judges. It bears directly on the quality of justice. I therefore see, in these times of the most strenuous competition for the budgetary dollar, a standing need for bar associations to take on the responsibility of serving as a catalyst for citizens' groups in a continuing campaign to work for the strengthening of the court systems in each state. The time is past when we can take for granted that the quality of justice can long be preserved without continual citizen concern for the preservation of an independent judiciary of high competence.