

# PLU ÇA CHANGE: INDIANA JUDGES AND SALARIES

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Despite the recent crisis in the state budget, we have been able to persuade the Indiana General Assembly to appropriate new money for a host of important improvements to the court system. The legislature has agreed to help us build a twenty-first century case management system for the trial courts, expand our family courts initiative, finance interpreter services for litigants who do not speak English, improve public defender representation, and support development of drug courts. All of this has represented a strong statement about the General Assembly's commitment to improving the system of justice.

Happy as these demonstrations of commitment have been, especially in light of how little money Indiana has for new projects, the state's judiciary has been down-hearted about our inability to obtain any adjustment in the compensation of judges. The last general pay increase passed the legislature in 1995, for implementation in 1995 and 1997.<sup>1</sup> The General Assembly passed a subsequent increase in 2001, but Governor Frank O'Bannon vetoed it.<sup>2</sup> There was a ray of hope in the 2004 session of the legislature, which gave judges and prosecutors an adjustment to account for skyrocketing health insurance premiums and also created an advisory commission to recommend salary changes for all public officers.<sup>3</sup> Still, the net result has been a stretch of eight years during which judicial salaries have stood still, being eaten away in real terms by the effects of inflation.

While such stretches have occurred during my time on the bench, I recently discovered that the problem of lagging judicial salaries has a more ancient heritage than any of us might have imagined.

Perhaps the most depressing text I have encountered in the last year was an account of a debate about salaries for judges and other state officers during the legislative session of 1842-43.

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1. 1995 Ind. Acts 280. Section 7.1 of the Act established a state-wide base salary of \$90,000 for full-time circuit, superior, municipal, county, and probate judges. Section 7 increased the salaries of Court of Appeals judges from \$76,500 to \$110,000 and increased the salaries of Supreme Court justices from \$81,000 to \$115,000.

2. Governor's Veto Message for House Enrolled Act 1856, STATE OF INDIANA JOURNAL OF THE HOUSE OF REPRESENTATIVES, 112th General Assembly, 1st Reg. Sess., at 1328 (2001); STATE OF INDIANA JOURNAL OF THE SENATE, 112th General Assembly, 1st Reg. Sess., at 1176 (2001).

3. 2004 Ind. Acts 95. The Public Officers Compensation Advisory Commission is comprised of two members appointed by the Speaker of the House of Representatives, two members appointed by the president pro tempore of the Senate, two members appointed by the Governor, two members appointed by the Chief Justice of the Indiana Supreme Court, and one member appointed by the Chief Judge of the Indiana Court of Appeals. The Commission is charged with reviewing the current salaries of public officers and considering recommendations and information regarding suitable salaries. On a biennial basis, the commission must recommend to the Legislative Counsel and Budget Committee suitable salaries for those public officers identified by the act.

It seems that Democratic Senator Nathaniel West of Indianapolis proposed *lowering* the salaries of the governor, other executive branch officials, and legislators. The senate finance committee, dominated by Whigs, opposed these reductions. "Illiberal and incompetent allowances will not secure the services of competent and vigilant officers," the committee said, but ample compensation will "enable the poor man as well as the rich" to hold offices rather than to secure "to the wealthy a monopoly of all offices."<sup>4</sup>

The committee was especially emphatic about the need to increase judicial salaries. The committee declared that as the culture and economy of the state advanced, "judicial questions multiply, not only in number, but in contemplation and interest; and the benign influence of the judiciary is the more felt and the more needed."<sup>5</sup> It was an eloquent plea issued in a bleak environment. Indiana's trial judges were the twenty-fifth highest paid in the nation, but of course there were only twenty-six states at the time. Pay for members of the Indiana Supreme Court was twenty-five percent below the average of other states.<sup>6</sup> The committee's plea did not produce any pay raises for judges.

The senate committee's call of alarm was hardly the first official declaration that low salaries were bad policy. When Stephen C. Stevens resigned from the Indiana Supreme Court in March 1836 before his term was complete, Governor James Noble had considerable trouble recruiting a replacement. He acknowledged publicly that low salary made the chore difficult and said that unless there was an increase in compensation, "those of the highest attainments will be driven from the Bench, and seats there will only be accepted by those who have not talents to live by the practice."<sup>7</sup>

Other nineteenth century governors observed that low salaries had an adverse effect on Indiana's courts. As Governor George Wright gave his last message to the general assembly in 1857, he noted that the salary of the Supreme Court was so low that its members could only afford to be at work in Indianapolis the minimum of sixty days required by law and that this had produced a substantial backlog of undecided cases.<sup>8</sup> His successor Ashbel P. Willard made a similar

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4. DONALD F. CARMONY, *INDIANA, 1816-1850: THE PIONEER ERA* 247-48 (1998).

5. *Id.* at 248.

6. *Id.*

7. *Id.* at 276.

8. In his address to the General Assembly, Governor Wright stated:

The salaries paid to the Judges of our Courts are not sufficient to answer the demands of justice and sound policy. If we desire to have the full service of our Judges, and expect them to secure the confidence of the people, by a laborious and faithful discharge of their duties, it is absolutely necessary to increase their compensation. This is emphatically true in relation to the Judges of our Supreme and Circuit Courts. The compensation for the services of the Judiciary, above all other departments, should be such that the State could command, at all times, the services of our most worthy and competent men.

The increase of business in our Supreme Court, and the frequent equal division of the

observation in his annual address two years later.<sup>9</sup>

And the 1836 resignation was but the first in a string of resignations due to money. Samuel B. Gookins, one of the better known among my court's nineteenth century justices, resigned in December 1857 over money.<sup>10</sup> He had barely departed when William Z. Stuart left the Supreme Court in January 1858, over money.<sup>11</sup>

Of course, departures over money were hardly just a nineteenth century phenomenon (or just an appellate court phenomenon). Low salaries played a prominent role in a series of episodes some fifty years ago that probably represent the lowest point in the modern history of the Indiana Supreme Court: Governor George Craig's treatment of the Court to a parade of justices-du-jour. When Justice Floyd Draper resigned in January 1955, he set off a flurry of "temporary appointees." Governor Craig named four people to the court between January and May.<sup>12</sup> One of these, former house majority leader George W. Henley of Bloomington had the bad manners to tell the press that the "last thing

Judges, upon important questions, presents to you the propriety of providing, by law, for an additional Judge.

JOURNAL OF THE INDIANA STATE SENATE, 39th Sess., at 69 (1857).

9. Governor Willard subsequently stated,

Section 12 of Article 1 of our Constitution declares that "justice shall be administered freely and without purchase, completely and without denial, speedily and without delay." Upon examination I find there are more than nine hundred undecided cases in the Supreme Court.

The law requires the Judges of the Supreme Court to be present at the Capitol but sixty days in each year. That is as much time as they can spend here upon their present salary. If they receive a compensation sufficient to enable them to devote more of their time at the Capitol to the consideration of the judgments they are required to revise, the number of undecided causes would be much diminished....

While I have thus urged the necessity of the increase of the salaries of the Judges of the Supreme Court, I do not regard it as less your duty to provide for the Judges of the Circuit courts. Many able and accomplished lawyers have accepted positions as Circuit Judges, entertaining the hope that the Legislature would be willing to pay them a reasonable compensation for their services. It would be difficult to select many among them who would not receive in the practice of their profession more than twice that which they receive for their official services. The State has no right to require of one of her citizens that he should toil to see that crime is punished and justice administered, without giving that citizen a reasonable compensation.

JOURNAL OF THE INDIANA STATE SENATE, 40th Sess., at 17-18 (1859).

10. Minde C. Browning et al., *Biographical Sketches of the Indiana Supreme Court Justices*, 30 IND. L. REV. 328, 350 (1997).

11. JEROME L. WITHERED, *HOOSIER JUSTICE: A HISTORY OF THE SUPREME COURT OF INDIANA* 121 (1998).

12. *Id.* at 93.

in my life I would do” was to stay on the Supreme Court, but that serving for a few months “would allow my grandchildren to say that grand-daddy served on the Supreme Court.”<sup>13</sup> Governor Craig defended his series of revolving door appointments by pointing out that the low salary level made it difficult to convince attorneys to give up their law practice for service on the bench.<sup>14</sup>

Later in the twentieth century, pay for Indiana trial judges once again sat at the spot identified by the senate finance committee in 1842. When the Indiana Judges Association went to the legislature in 1978, asking for a pay raise after three years without so much as a cost-of-living adjustment, there was only one state that paid its trial judges less than Indiana.<sup>15</sup> They were back the following year, per custom, by which point Indiana had slid to fiftieth.<sup>16</sup> Fiftieth proved not to be the bottom, for by 1989, Indiana trial judges had fallen below most of the American-flag territories and ranked fifty-fourth.<sup>17</sup>

Distressing as all this history is, the most interesting question is, “Why?” What is it about Indiana that has so long led it to restrain the salaries of its officeholders. Demographically speaking, Indiana is a rather typical state. Why does it take an approach to public salaries that is so much more conservative than scores of other states with similar size and wealth?

Professor James H. Madison of Indiana University, the leading Indiana history scholar of our day, has postulated that the state’s conservative approach represents afterglow from the spectacular failure of the biggest venture ever launched by Indiana government: the internal improvements plan launched in 1836, most famously the Wabash-Erie Canal. Madison has argued that the magnitude of the ensuing fiscal calamity, leading as it did to a constitutional convention and constitutional provisions to prohibit state debt and state investment in private ventures, has influenced Indiana ever since. “[I]n a curious irony of history this venturesome pioneer generation contributed to the reluctance of succeeding generations to take similar risks, to use state government, as they had, to pursue the general welfare.”<sup>18</sup> Describing the long-term impact more particularly, Madison has said:

[T]his revulsion contributed generally to shaping a more conservative outlook in Indiana, a reluctance to venture actively into the public arena, a tendency of Hoosiers to prefer limited state government. Whether this is the proper lesson to be learned from the system of 1836 is open to debate, but it is the lesson generation so Indianans have chosen to

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13. *Id.* at 94.

14. Browning et al., *supra* note 10, at 353.

15. Jack Averitt, *Judges Pay Bills Other Goodies*, INDIANAPOLIS NEWS, Dec. 15, 1978, at C15.

16. *House Oks Judges Salary Increases*, INDIANAPOLIS NEWS, Mar. 9, 1979, at C8.

17. CHIEF JUSTICE RANDALL T. SHEPARD, JUSTICE SHALL BE ADMINISTERED FREELY: STATE OF THE INDIANA JUDICIARY 1988-2004, at 39-40 (2004).

18. JAMES H. MADISON, THE INDIANA WAY 85 (1986).

learn.<sup>19</sup>

In such a vision of government, one need not be so concerned if low salaries tend to dampen interest in serving in positions of leadership.

Indiana's recent experience of lagging behind other states in economic terms has put the wisdom of this approach in doubt. Whether Indiana's future place in the world economy requires a new approach has been a topic of productive debate during the 2004 race for governor. That the future of justice in our state requires a new approach to attracting and keeping bright and energetic people to Indiana's bench seems obvious. As Governor Conrad Baker declared in 1869: "A cheap judiciary will in the long run prove to be more expensive to the public than one that is adequately paid."<sup>20</sup>

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19. *Id.* at 86.

20. JOURNAL OF THE INDIANA GENERAL ASSEMBLY, 46th Sess., at 61 (1869).

