Judicial Salaries: An Urgent Need Unmet

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"Seasoned judges are choosing not to remain on the bench; potential candidates are discouraged from seeking appointment to the bench; and the federal bench is losing the diversity that comes from the appointment of individuals of varying financial means who have served in different capacities in both the public and private sectors." The Federal Bar Association and the American Bar Association penned these troubling words in a 2003 White Paper entitled "Federal Judicial Pay: An Update on the Urgent Need for Action," and the presidents of both associations, Kent Hofmeister and Alfred Carlton Jr., respectively, presented the White Paper to Chief Justice William Rehnquist.

The document urged "Congress and the President to take remedial action, in recognition of the nation's need to attract and retain a [j]udiciary of exceptional quality and diversity, as well as the legitimate expectations of those who have accepted lifetime appointments to the bench to be equitably compensated and protected against salary erosion by inflation." Today, more than six years later, the "urgent need for action" that the White Paper chronicled remains, despite repeated assertions by Chief Justice Rehnquist and his successor, Chief Justice John Roberts, that lagging judicial compensation is the most pressing issue facing the federal judiciary.

In 2009, it is difficult to talk about the "immediate and substantial increase in judicial salaries" that the Judicial Conference of the United States has requested from Congress. Our nation's economy is ailing, and federal judges already earn salaries that most Americans covet. But we have learned from the physical world, through tragic events such as a bridge that collapsed, that infrastructure investment is critical. However, we cannot afford to ignore the country's intangible infrastructure and a threat to the quality of one of its most valuable institutions: the federal judiciary. Our federal courts historically have upheld the rule of law in a manner that has garnered domestic and international respect. If that respect once dissipates, it will not easily or quickly be restored.

Paul Volcker, a longtime presidential adviser, chaired the bipartisan National Commission on the Public Service that reported in 2003 that federal judges' compensation traditionally was comparable to that of law school deans, senior professors, and leaders of other educational and not-for-profit organizations. Regrettably, the data indicate that judges' current pay lags significantly behind salaries earned in those positions. In 1969, district judge salaries were about 20 percent higher than the salaries of top law school deans and about 30 percent higher than senior law professors in those schools. Fast-forward about 20 years. The median salary for deans of public and private U.S. law schools was about $267,000 in 2008—about 58 percent higher than district judges' salaries were that year.

Federal judges understand that public service requires financial sacrifice, but for decades judges steadily have been losing ground to inflation—far worse than the average American worker and most federal employees. Since 1969, the average American's wages, when adjusted for inflation, have risen 21 percent. During that same time, federal judges' real pay has *declined* 28 percent.

What happened, or didn't happen, to put federal judges in the current situation? To start with, Congress denied federal judges annual employment cost index (ECI) pay adjustments in 1994, 1995, 1996, 1997, 1999, and 2007. Judges who were appointed to the bench after 1989 were not supposed to have to worry about annual and automatic salary adjustments. The Ethics Reform Act of 1989 authorized a real salary increase for judges in 1991 and also provided for an indexed cost-of-living salary increase every year thereafter. Annual pay adjustments took effect in the ordinary course in 1992 and 1993, but beginning in 1994 the system broke down.

In addition to denying judges annual ECI pay adjustments, Congress and the President amended the Ethics Reform Act to provide that ECI pay adjustments for judges could be no higher than similar increases for "General Schedule" federal employees. The amendment ignored the fact that General Schedule employees additionally receive locality-based comparability pay adjustments.

The broken pay adjustment system has led to the twin problems of salary compression and salary inversion that are currently damaging the morale of judges. In the judiciary, salary compression describes the narrowing of the pay differentials between judges and court unit executives (as well as between executives and their subordinates). Salary inversion generally describes the case of bankruptcy and magistrate judges, who, in some locations, now are paid less than the clerk of court who works for them. We also have heard anecdotally that some potential judicial candidates have expressed concern that the history of failed ECI adjustments suggests that federal judges cannot be confident that their new (and usually lower) judicial salary will keep pace with the cost of living.

The Volcker Commission declared that "judicial salaries are the most egregious example of the failure of federal compensation policies," and that "the lag in judicial salaries has gone on too long, and the potential for the diminished quality of American jurisprudence in now too large." Like the findings in the White Paper issued by the FBA and ABA, the commission's conclusions were reached more than six years ago, yet nothing has resulted.

In 2008, Congress again declined to enact a judicial

salary restoration bill, notwithstanding the support of the President, bipartisan support in both houses of Congress, the efforts of a broad-based coalition of private groups, favorable media coverage, and unstinting work by an Administrative Office of the United States Courts team led by Director James Duff.

The cumulative effects of lagging compensation for the judiciary may account for a dismaying trend: the growing number of federal judges who choose to leave the bench through resignation and retirement. As ABA President H. Thomas Wells put it last November, "Serving as a judge in the U.S. federal court system is an increasingly less attractive option for America's best and brightest in the legal field."

Of the 64 judges who have relinquished their commissions since January 1, 2000, 19 resigned before reaching retirement age. More than 50 former federal judges currently are affiliated with mediation/arbitration services such as FedArb and JAMS. Two former federal judges resigned to become California state judges. (Eighteen of California's 58 counties pay superior court judges $179,000 annually. In Los Angeles County, superior court judges are paid $46,000 a year from the county on top of their state salaries, giving them a total annual compensation of $225,000—$1,500 a year more than Chief Justice Roberts receives in salary.)

In his 2006 year-end report on the federal judiciary, the Chief Justice said that inadequate compensation "threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded." He added: "If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy."

President John F. Kennedy recognized this danger back in 1961, when, in reaction to a federal judge's resignation to become general counsel to a private company, the President reportedly remarked, "The reason that [judges] are appointed for life is so that there can … be no actual improprieties and no appearance of impropriety. … I don't think that anyone can accept a [f]ederal judgeship unless prepared to fill it for life because I think the maintenance of the integrity of the [j]udiciary is so important."

More recently, on Feb. 14, 2007, Supreme Court Justice Anthony Kennedy sounded a warning when he testified before a Senate subcommittee: "Judicial independence presumes judicial excellence, and judicial excellence is in danger of erosion. … It is my duty … to tell you … that in more than three decades as a judge, I have not seen my colleagues in the [j]udiciary so dispirited as at the present time. The blunt fact is that past [c]ongressional policy with respect to judicial salaries has been one of neglect. As a result, the nation is in danger of having a judiciary that is no longer considered one of the leading judiciaries of the world."

Morale among federal judges today has not improved since those remarks were made. However, their dedication to our system of justice and the rule of law has not waned. They understand, as Justice Kennedy put it, that judicial independence is not conferred so that judges can do as they please. Rather, judicial independence is conferred so that judges can do as they *must*. I urge the Federal Bar Association to continue its efforts to ensure that federal judges, from whom the public has a right to expect impartiality and fairness, will themselves be treated fairly. **TFL**

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