

MINNESOTA CHAPTER OF THE FEDERAL BAR ASSOCIATION

Bar Talk



LUNCHEON SPEAKERS AT A GLANCE



Professor Jacobs

We are honored to welcome **Professors David Schultz** and **Larry Jacobs** as this week's luncheon speakers. Professors Schultz and Jacobs will address "The Minnesota U.S. Senate Election: What Happened, Why, and How to Get Better."

Specifically, the professors will discuss the legal strategy and issues of the two candidates since the recount, as well as provide some analysis of where the candidates are headed as the election contest proceeds. In addition, the professors will highlight what the candidates did right, what they did wrong, and what they could have done differently. In light of their deep expertise in this area, this is sure to be an entertaining and insightful discussion.

David Schultz is a professor in the School of Business at Hamline University, where he teaches doctoral and masters-level students in public administration, non-profit

administration, and business administration. His assignments include professional ethics, legislative process, non-profit law, housing and economic policy, planning, alternative service delivery, and public policy. Schultz also holds appointments in the Hamline University Department of Criminal Justice and Forensic Science, where he offers classes on policing, criminal procedure, and criminology, as well as at the University of Minnesota law school, where he is a Senior Fellow at the Institute on Law and Politics and teaches election law, state constitutional law, and professional responsibility.

Professor Schultz has a Ph.D. in political science and a J.D. from the University of Minnesota, an LL.M. from the University of London, M.A.s in political science and philosophy from Rutgers University and SUNY Binghamton respectively, a Masters of Astronomy from James Cook University, and a B.A. in political science and philosophy from SUNY Binghamton.

Professor Schultz is an attorney and member of the Minnesota and United States Supreme Court bar.

He has participated in two amicus briefs before the United States Supreme Court and he does extensive pro bono practice in the areas of family and landlord-tenant law. He also practices in the area of election and administrative law.

Professor Jacobs is Director of the Center for the Study of Politics and Governance in the Hubert H. Humphrey Institute at the University of Minnesota. He is also the Walter F. and Joan Mondale Chair for Political Studies and Professor in the Department of Political Science. The Center for the Study of Politics and Governance sponsors non-partisan independent analysis and forums that foster informed discussion of American politics and policy and contribute to designing practical solutions to the pressing problems of public life.

Professor Jacobs received a Ph.D. in political science from Columbia University with concentrations in



Professor Schultz

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American politics, political institutions, and comparative public policy. He has a B.A. in History and English from Oberlin College.

Professor Jacobs has specific expertise in the areas of presidential and legislative politics; elections and voting behavior; public opinion and polling; American political history; Midwestern swing states; third party politics; and Social Security and health care policy.

Both of our presenters are frequently involved in discussions in the mass media, either as commentators or through their published

research, and have been featured in Minnesota Public Radio, ABC, NBC, CBS News, CNN, CSPAN, MSNBC, *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *The Los Angeles Times*, and *The Chicago Tribune*, to name just a few. Each presenter has also published an extensive number of scholarly books and articles, as well as, served in prominent editorial positions. Professor Schultz is the former editor for four book series on law, politics, and the media for Peter Lang Publishing and currently edits the series *Election Law, Politics, and Theory*, for Ashgate Publishing. Professor Jacobs co-edits the pres-

tigious "Chicago Series in American Politics" for the University of Chicago Press, a premier publisher of scholarly research.

D. Scott Aberson is a member of the Communications Committee for the Minnesota Chapter of the FBA and is an attorney at Maslon Edelman Borman & Brand, LLP.



CONGRESS REFUSES TO APPROVE COST-OF-LIVING ADJUSTMENT FOR FEDERAL JUDGES

Congress recently decided to award itself a 2.8% cost-of-living adjustment, a benefit it also bestowed on every other federal employee—excluding only federal judiciary members.¹ Near the close of the 2008 Session, court officials worked closely with Congress on a cost-of-living adjustment for judges for 2009.² On November 20, 2008, the Senate unanimously passed a bill, which would have provided an increase for federal judges this year.³ But with the House unable to vote on the bill before the Thanksgiving recess, the increase had to be added as an addendum to the automobile-bailout bill that the House passed on December 10, 2008.⁴ When the bailout came up for vote again in the Senate, several senators used the opportunity to object to the cost-of-living-increase for federal judges.⁵ Many senators

opined that, with economic conditions growing more dire by the day, it simply was not the appropriate time to grant federal judges a "pay raise."⁶ The adjustment was ultimately removed from the auto bailout, which failed to pass as well.

It certainly is not unprecedented for Congress to act (or fail to act) out of fear of political backlash. What makes Congress's inaction frustrating in this instance is that the inaction stems partly from a fundamental misunderstanding of a cost-of-living adjustment. Contrary to the common assumption, an adjustment is not a *raise*; rather, it is an annual salary-adjustment designed to keep salaries on par with the ever-increasing costs of living.⁷ That is,

the adjustment keeps a salary from lowering, it does not raise it.

Congress' latest failure to act on judicial salaries is certainly not its first. Congress has failed to grant judges cost-of-living adjustments for six out of the last fifteen years.⁸ In 2007, Congress introduced The Federal Salary Restoration Act, which would have increased judicial salaries 30%, and would have allowed federal judges to automatically receive adjustments without Congress's authorization.⁹ The bill was approved by both the House and Senate Judiciary Committees, but failed when the full House and Senate voted.¹⁰ The bill made no additional headway in 2008.¹¹

The Judiciary has not received a substantial pay raise since the 1989

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Ethics Reform Act raised the federal judges' salaries by 25%.¹² And even that increase was something of a Pyrrhic victory for the judiciary, because the Act placed significant impediments on judges' ability to earn outside income.¹³

Congress' consistent refusal to keep judicial pay indexed to the real cost of living means that federal judicial salaries are eroding. Statistics compiled by the Administrative Office of the U.S. Courts show that judicial pay has declined 25% in real terms over the last 25 years.¹⁴ In contrast, the average American worker's salary has increased by 19%.¹⁵

There are arguments against granting an annual adjustment to federal judges. Some argue that present judicial salaries (\$169,300 for district judges and \$179,500 for appellate judges) are sufficient, because federal judges rank in the top 10% income bracket among Americans.¹⁶ In addition, others assert that the added benefits of lifetime tenure and a lifetime pension leave federal judges with few complaints.¹⁷ As the gravity of the current economic crisis continues to affect more Americans, these arguments gather force.

But such force is superficial. First, why should the judiciary be singled out as the only class of federal employees not to receive a cost-of-living adjustment? Moreover, as commentators have discussed extensively, the stagnation of judicial salaries significantly handicaps the judiciary in terms of

attracting and retaining top-notch legal talent. In 2008, district court judges earned \$169,300 and appeals court judges earned \$179,500.¹⁸ By contrast, earnings for lawyers at top law firms have soared in recent years. Some first-year associates at leading law firms now earn \$180,000—as a starting salary.¹⁹ Judges have come to accept that judicial pay will never compare to that of top lawyers in private practice.

But judges now say a more reliable indicator of how far judicial salaries have lagged is the disparity between judges' salaries and those of legal academics. In 1969, federal district judges earned \$40,000, slightly more than law school deans, who averaged \$33,000, and substantially more than the \$28,000 earned (on average) by senior law professors.²⁰ By 2006, however, this situation had completely inverted: judges were earning \$165,200, and at top law schools, professors were earning \$330,000, and deans were earning \$430,000.²¹

Traditionally, appointment to the federal bench has been regarded as the capstone to a legal career. But that perception is changing. The number of federal judges who have left their judicial posts for more lucrative positions in the private sector is growing. The past three years have seen the highest rate of departure of Article III judges in U.S. history.²² Most of those departing judges earned higher salaries after leaving the bench.²³

In short, it may be that more federal judges are looking at their appointment as a stepping stone rather than a capstone. If this is the

case, the consequences of their decisions are far graver for the public than many realize. Constitutional principles are at stake. Article III of the Constitution guarantees federal judges life tenure and places an unequivocal prohibition on reducing their salaries.²⁴ The Framers established these guarantees to engender an environment of judicial independence: where judges could perform their duties unfettered by political or financial pressure. But because of the unchecked erosion of judicial salaries, Article III's mandate of judicial independence continues to be imperiled. If judges increasingly contemplate returning to the private sector, the prospect of such a return may impose the very sort of pressure on their deliberations that the framers sought explicitly to nullify.

Judicial independence is core to the Constitutional vision of unbiased federal judges. Every time Congress denies another cost-of-living adjustment to the federal judiciary, that protection erodes a little further.

Oliver Nelson is a member of the Communications Committee for the Minnesota Chapter of the FBA and is an attorney at Flynn, Gaskins, and Bennett LLP.



¹ U.S. Courts Website, Statement from James C. Duff, Director Administrative Office of the U.S. Courts (December 12, 2008), <http://www.uscourts.gov/newsroom/2008/statement.cfm>; Washingtonpost.com, Chief Justice: Inflation Outpacing Pay for Judges, (December 31, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/31/AR2008123102581>.

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² U.S. Courts Website, James C. Duff Memorandum regarding 2009 COLA for Federal Judiciary (December 12, 2008), http://www.federaljudgesassoc.org/egov/docs/1229114254_494079.pdf.

³ Duff Statement, *supra* note 1.

⁴ *Id.*

⁵ Duff Memorandum, *supra* note 3.

⁶ Los Angeles Times, *Federal Judges Lose Bid for Pay Raise* (January 1, 2009), <http://www.latimes.com/printedition/asection/lana-judiciary1-2009jan01,0,595479>; Duff Memorandum *supra* note 3.

⁷ Duff Statement, *supra* note 1.

⁸ *Id.*

⁹ The Third Branch, *Bill to Adjust Salaries of Federal Judges Introduced in Senate*, Vol. 39, Number 37 (July 2007), available at <http://www.uscourts.gov/ttb2007-07/bill/index.html>; Washingtonpost.com, *supra* note 2.

¹⁰ Chief Justice John G. Roberts Jr. 2008 Year-End Report on the Federal Judiciary (December 31, 2008), available at <http://www.uscourts.gov/newsroom/2008/2008year-endreport.pdf>.

¹¹ *Id.*

¹² Congressional Record Statement of Arlen Specter, p. S4088 (March 29, 2007), available at http://www.uscourts.gov/judicialcompensation/SpecterPay_CongressionalRecord.pdf.

¹³ *Id.*

¹⁴ U.S. Courts Website, Need for Federal Judicial Pay Increase Fact Sheet (last visited January 14, 2009), <http://www.uscourts.gov/judicialcompensation/payfactsheet.html>.

¹⁵ *Id.*

¹⁶ U.S. Courts Website, Judicial Salaries Since 1968 Fact Sheet (last visited January 14, 2009), <http://www.uscourts.gov/salarychart.pdf>; USAToday.com, *Pay Gap Dismays Federal Judges*

(last visited January 14, 2009), http://www.usatoday.com/news/nation/2007-09-23-judges-pay_N.htm.

¹⁷ *Id.*

¹⁸ Pay Increase Fact Sheet, *supra* note 14.

¹⁹ The New York Times, *Chief Justice Again Calls for Pay Raise for Judges* (January 1, 2008), http://www.nytimes.com/2008/01/01/washington/01scotus.html?_r=1&scp=5&sq=%22PAY%20RAISE%22%20&%20%22JUDICIARY%22&st=cse.

²⁰ Pay Increase Fact Sheet, *supra* note 14.

²¹ *Id.*

²² U.S. Courts Website, Circuit and District Court Departures by Decade Graph (last visited on January 14, 2009), <http://www.uscourts.gov/judicialcompensation/departure.pdf>; USATODAY.COM, *supra* note 17.

²³ *Id.*

²⁴ U.S. Const. art. III, § 1.

TRAVELING JUSTICE: JUDGE DOTY TAKES TO TUCSON

Ask an average member of the federal bar to name a senior district court judge, and the odds are pretty good that he or she can come up with a few names: **Judge Alsop, Judge Magnuson, Judge Doty, or Judge Kyle.** Ask that same person to clarify exactly what one of these senior judges does, and the response may take a while. The short answer, at least in the District of Minnesota, is that the senior judges work. A lot. Although it is each senior judge's prerogative to limit his caseload, the majority of senior judges in the District of Minnesota keep a full docket and do much to alleviate the flood of cases—both civil and criminal—that district court judges face every day. By sheer numbers, the District of Minnesota is in the top five districts in the nation in caseload. Yet it is also a District with a reputation for delivering the mandate set forth in Federal Rule

of Civil Procedure 1: the just, speedy, and inexpensive determination of every action and proceeding. These competing qualities could not coexist without the contributions of senior judges.

The work of a senior judge, however, does not stop at the border of his or her district. Capitalizing on the increased freedom in schedule that comes with senior status, many senior judges engage in a modern-day version of federal circuit riding in an effort to assist other jurisdictions. Such judges sit by designation in district courts throughout the United States and handle the same variety of matters they see in their home district. Although these trips provide a welcome change of scenery for the judges, they also provide a valuable service to the districts receiving the visitors.

For Judge David Doty, the move to senior status has prompted annual trips to jurisdictions beset by illegal immigration challenges. During the past seven years, Judge Doty has spent at least two weeks of every spring in Tucson, Arizona—a city approximately sixty miles from the U.S./Mexico border. Although the timing of the trip provides a short respite from Minnesota winters, it is no vacation for Judge Doty and his staff. Last year, Judge Doty presided over nearly seventy hearings during his stay in Tucson. The vast majority of these cases involved illegal reentry to the United States coupled with another crime, from drug smuggling or distribution to gun possession to fraud. The District of Arizona's Early Disposition program under United States Sentencing Guidelines

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Section 5K3.1, a highly competent cadre of court interpreters, public defenders and Assistant United States Attorneys, and Judge Doty's own experience during twenty-plus years on the bench, all facilitate such impressive numbers.

The stay in Arizona also affords Judge Doty the opportunity to see another district court system in

action and to bring new ideas back to the District of Minnesota, particularly in the areas of sentencings and supervised release revocations. Thus, the trips add benefit to the senior judges' home districts even as the judges lend needed assistance to overstretched districts throughout the country. Such travels also serve as a reminder that while their title reads "senior," Judge Doty and his fellow

senior judges are very active indeed.

Michael D. Reif is a former law clerk to Judge Doty and an attorney at Robins, Kaplan, Miller & Ciresi L.L.P.



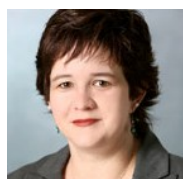
LOOKING BACK IN TIME

At its website, the Federal Judicial Center (FJC), the "education and research agency for the federal courts," offers an intriguing glimpse into a broad spectrum of federal court history.¹ Particularly worthy of note are the FJC's "Milestones of Judicial Service." For instance, **The Honorable Joseph W. Woodrough**, a senior judge of the U.S. Court of Appeals for the Eighth Circuit, was the "oldest serving federal judge" at the time he passed away in 1977—at the age of 104. Another federal "milestone": at age 34, **William Howard Taft** was the youngest judge appointed to a U.S. Court of Appeals: the Sixth Circuit. Taft was also the first and only federal judge to be elected President of the United States. (Note, however, that 26 of the 43 U.S. Presidents have been lawyers during their careers, now that **President Barack Obama** has taken office.²)

The Sixth Circuit bears another distinction: the first woman appointed to a U.S. court of appeals served there. In 1934, **Florence Ellinwood Allen** was

appointed to the Sixth Circuit by **President Franklin Delano Roosevelt**.³ Judge Allen began her legal career by enrolling at the University of Chicago Law School in 1909, where she was the only woman among a class of 100. She later transferred to New York University, and graduated second in her class. One of Judge Allen's most famous statements: "When women of intelligence recognize their share in and their responsibility for the courts, a powerful moral backing is secured for the administration of justice."⁴ She served on the Sixth Circuit for 32 years and died in 1966, at age 82.

Kerri J. Nelson is a member of the Communications Committee for the Minnesota Chapter of the FBA and is an attorney at Holstein Kremer.



³ A partial biography of Judge Allen is available at http://www.ca6.uscourts.gov/lib_hist/courts/circuit/judges/judges/feabio.html.

⁴ *Id.*, citing Florence Ellinwood Allen, *To Do Justly* (Cleveland: Western Reserve University Press, 1965), 9.



Judge Woodrough, along with his colleagues at the Eighth Circuit Court of Appeals, met at this courthouse in St. Louis, Missouri, where the Eighth Circuit presided from 1935–2000. For more information on this and other historic courthouses, please visit the Federal Judicial Center's Website at <http://www.fjc.gov/history/courthouses.nsf>.

¹ *History of the Federal Judiciary*. <http://www.fjc.gov>.

² Prior to this year, 25 of the 42 U.S. Presidents were also lawyers. <http://www.abanet.org/museum/exhibit.html>.

REFER A COLLEAGUE: HELP US INCREASE MEMBERSHIP!

The Minnesota Chapter of the FBA is already one of the most strong, vibrant, and active chapters in the country. This is clear from the crowds that fill the Minneapolis Club each month for lunch, the newer lawyers who gather in a federal judge's chambers to discuss the do's and don'ts of practice, and the national recognition that the national FBA awards our chapter for its continued collegiality and vitality.

Now we have set out to add one more badge for our chapter. We want to be the largest chapter in the FBA. With your help, we can do this. Particularly at this time when new associates have passed the bar and are eligible to join the FBA, please explain the benefits and rewards of the FBA and recommend that your new associates join.

Joining the FBA is easy to do. Non-members can join by signing up online at <http://www.fedbar.org/join.html> or by filling out the application attached at the end of the newsletter. If anyone has any questions about joining the FBA, please do not hesitate to contact me at BTJones@rkmc.com or **Patrick Arenz** at PMArenz@rkmc.com. We are both eager to answer any questions about the advantages that FBA membership has to offer. The Minnesota Chapter of the FBA is truly a unique opportunity for the bench and bar to get together outside the courtroom.

B. Todd Jones is Vice President of Membership for the Minnesota Chapter of the FBA and an attorney at Robins, Kaplan, Miller & Ciresi L.L.P.

MEMBERS ON THE MOVE

Are you a member of the FBA? Have you recently made a career change? Authored an interesting article? Received an appointment or award? Submit your news, publications, and updates to Bar Talk at PMARENZ@rkmc.com.

CALENDAR OF UPCOMING EVENTS

- January 27, 2009

Newer Lawyers please plan on attending lunch with Judge Dreyer and her law clerk to learn "What Every Lawyer Needs to Know About Bankruptcy Court." To attend, RSVP to Tammy Schemmel at tschemmel@bgs.com.

- February 18, 2009

Please join us at the Minneapolis Club for our monthly luncheon. Magistrate Judge Keyes will present.

- February 24, 2009

There will be a FBA law student reception at Dorsey and Whitney from 4 to 6 pm. Please watch your e-mail for more details.

- March 18, 2009

Please join us at the Minneapolis Club for our monthly luncheon.

- May 16, 2009

Please save the date for the annual Federal Judges' Dinner Dance.

- June 24, 2009

Please plan on attending the annual Federal Court Practice Seminar.

NEXT ISSUE

Will arrive to you in your inbox in mid-March and in hard copy at the March 18, 2009 FBA luncheon.

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