FEDERAL JUDICIAL PAY EROSION

A REPORT ON

THE NEED FOR REFORM

The American Bar Association

Defending Liberty
Pursuing Justice

The Federal Bar Association

February 2001

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EXECUTIVE SUMMARY

The American Bar Association (ABA) and the Federal Bar Association (FBA) have collaborated to issue this report because of their conviction that the current salaries of Federal judges have reached such levels of inadequacy that they threaten to impair the quality and independence of the Third Branch. The ABA and the FBA urge the new Administration and the 107th Congress to enact reforms to ensure that Federal judges and other high-ranking national officials are adequately and equitably compensated. Without prompt remedial action, the Federal government may jeopardize its capacity to continue to attract and retain the very best talent in public office.

The U.S. Constitution imposes upon Congress and the President the responsibility for setting the pay of the Federal judiciary. The core problem with the current procedure for setting judges' pay is the statutory linkage of judicial salaries (as well as those of high-ranking Executive Branch officials) to the salaries of Members of Congress. This linkage causes Federal judges and top officials of the Executive Branch to suffer the consequences of Congress' reluctance to award itself a pay increase or even to accept cost-of-living adjustments provided by statute.

Despite a series of attempts by Congress and the President over the last 30 years to enact legislative measures to establish workable solutions to the salary-setting dilemma, none has been fully successful, including the latest reforms, enacted as part of the 1989 Ethics Reform Act. The salary review commission envisioned by the Act never became operational, and the mechanism for automatic, annual cost-of living adjustments has not worked as intended. While senior Executive Branch officials and Federal judges alike feel the detrimental effects of this dysfunctional dynamic, this report focuses on the impact on the Federal judiciary.

Federal judges have received only three of eight possible cost-of-living adjustments since 1993. Because judicial salaries have not kept pace with inflation, judges have suffered a 13.4 percent decline in purchasing power during that period. This erosion in judicial pay has deprived judges (many of whom accepted significantly reduced compensation to become judges) of the prospect of salary stability during their tenure on the bench.

While judicial salaries have steadily declined, private-sector salaries of top attorneys have risen dramatically. Even though rendering public service and serving in a lifetime appointment are intangible benefits that help compensate for the reduced salary levels associated with the bench, the disparity between judges' salaries and those of their peers has reached unacceptable levels. Evidence is mounting that the inadequacy of judicial salaries is adversely affecting the government's ability to attract highly qualified judicial candidates and to retain highly experienced judges.

Members of the Federal judiciary increasingly are choosing not to remain on the bench. Between 1991 and 2000, 52 Article III judges resigned or retired from the bench, and many of them returned to private practice. Those 52 judges account for over 40 percent of the 126 Article III judges who have left the bench since 1965. Premature departures of

experienced and capable judges impose both real and intangible costs upon the judiciary -- especially now, when the workload has increased markedly.

The specter of a declining salary in real terms also discourages potential candidates from seeking appointment to the bench. Promising candidates who lack the independent means to meet current and future financial obligations are especially likely to be deterred by the prospect of a salary that does not even keep pace with inflation. Regrettably, the socio-economic pluralism of the Federal Bench is jeopardized by declining judicial compensation.

The Constitutional guarantees of life tenure and an undiminished salary were designed to protect the independence of the Federal judiciary. In today's environment, neither guarantee is secure. While erosion of pay may not legally constitute a diminution in salary, it undermines the purpose of the guarantee of an undiminished salary. Similarly, the commitment to lifetime tenure is undermined when inadequate judicial salaries deter candidates from seeking appointment to the bench and discourage judges from remaining on the bench.

The new Administration and the 107th Congress have a unique opportunity to work together to break the downward cycle of pay erosion that undermines the fairness and adequacy of judicial compensation and threatens the independence of the Third Branch.

A major step in correcting this compensation problem would be to enact legislation that effectively delinks Congressional salaries from those of judges and top-level Executive Branch officials, a remedy that may not be politically feasible. Even if delinkage is not addressed, the Administration and the 107th Congress should take the following steps to reform the Federal judicial compensation system:

- **Congress and the President should devote increased attention to the critical need to provide meaningful financial rewards for public service, particularly for high-level Executive Branch officials, Congress and the Judiciary.**

- **Congress and the President should make a public commitment to work together to permit the current annual pay adjustment mechanism for judges, Members of Congress and high-level Executive Branch officials to operate annually and automatically, as envisioned by the Ethics Reform Act of 1989.**

- **Congress and the President should repeal Section 140 of Pub. L. No. 97-92 (which requires explicit Congressional approval of any pay adjustment for the Federal judiciary), to allow the pay-setting mechanism for the Federal judiciary that was established by the Ethics Reform Act of 1989 to operate as intended.**

- **Congress and the President should enact legislation to restore the Employment Cost Index adjustments for fiscal years 1995-97 and 1999, by increasing judicial salaries and those with which they are linked by 9.6 percent. This will help remedy the salary erosion that judges, Members of Congress, and high-level Executive Branch officials have suffered since 1993.**

- **Congress and the President should enact legislation to re-establish a salary review commission, similar to past Quadrennial Commissions, to recommend pay rates for Members of Congress, judges and appointed officials in top Executive Branch positions on a regular basis. Any such commission should be adequately funded and its members appointed promptly, to ensure that it is operational within a few months of its authorization.**

Electronic versions of this report are available at:

www.abanet.org/poladv/2001judicialpayreport.html

www.fedbar.org/wp-judpay.html

1. INTRODUCTION

The new Administration and the new Congress have a unique opportunity to redress a fundamental problem that has been escalating over the past decade – the erosion of fair and adequate compensation for the Federal judiciary. By enacting reforms to insure that our Federal judges and other high-ranking national officials are adequately and equitably compensated, the Administration and Congress will enable the Federal government to continue to attract and retain the very best talent to meet the increasingly complex needs of the nation.

Congress implicitly acknowledged the need to substantially increase the compensation of top federal officials when it recently doubled the President's salary -- from $200,000 to $400,000, effective January 20, 2001.[1] Raising the President's salary now makes it possible to address the longstanding problem of pay compression for top officials throughout all three branches of government. The President's salary, which traditionally sets the upper limit for the salaries of top officials across all three branches, had been frozen since 1969. As a consequence, the pay gap between the President and other top government officials had narrowed to the point that, until last month, there was little or no room for salary increases for top-level officials in all three branches. Indeed, salary compression already has prevented some officials, who are at the upper limits of their salary level (imposed by the Executive Schedule), from receiving the annual pay adjustments they would have otherwise received. Now that the President's salary has been increased, the Administration and Congress should seize this opportunity to enact comprehensive salary reforms for judges, Members of Congress, and other Executive Branch officials.

It is undisputed that over the past decade the pay of most top-level Federal officials has been insidiously eroded by inflation and that the government's executive pay system has not been adjusted to reflect the rapid escalation in salaries offered to comparably placed officials in the private sector. The failure of top-level Federal salaries to keep pace with changing economic conditions has affected the government's ability to attract and retain qualified, experienced candidates in today's highly competitive job market. Problems with the current Federal compensation system have been compounded recently by the swelling number of Federal employees who will soon be eligible to retire[2] and the measurable decline in public respect for our government institutions.[3] These conditions have led to mounting concern that the inadequacy of Federal executive pay threatens to undermine the quality of our public workforce and, by extension, the excellence of governmental institutions.

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[1] Pub. L. No. 106-58, §644, 113 Stat. 430, 477 (1999).

[2] *See* U.S. GENERAL ACCOUNTING OFFICE, SENIOR EXECUTIVE SERVICE -- RETIREMENT TRENDS UNDERSCORE THE IMPORTANCE OF SUCCESSION PLANNING, at B-282485 (2000) ("Nearly 71 percent of the 6000 members of the Senior Executive Service will be eligible to retire by 2005"); *See also* Stephen Barr, Retirement Wave Creates a Vacuum, WASHINGTON POST, May 7, 2000, at A 01. ("Within 5 years, about 30 percent of the government's 1.6 million full-time employees will be eligible to retire…. And the losses will be heaviest at the top: A whopping 65 percent of the Senior Executive Service, the government's elite cadre of managers and technicians, will be eligible for retirement by 2004….") *See also* REPORT TO THE PRESIDENT: THE CRISIS IN HUMAN CAPITAL, Subcomm. on Oversight of Government Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs, 106th Cong. 25, 27-28 (2000) (General Accounting Office report; testimony of Henry Romero, Associate Director, OPM; testimony of Colleen M. Kelley, President, National Treasury Employees Union).

[3] *See, e.g.*, PANEL ON CIVIC TRUST AND CITIZEN RESPONSIBILITY, A GOVERNMENT TO TRUST AND RESPECT – REBUILDING CITIZEN-GOVERNMENT RELATIONS FOR THE 21ST CENTURY (1999).

This report focuses exclusively on the Third Branch in order to bring to the attention of leaders in the new Administration and the 107th Congress the grave need for reform of the pay system covering the Federal judiciary.[4] It fills a gap in the existing literature by supplementing several recently released reports that have established the inadequacy of executive-level pay in the other branches and examined the causal connection between pay and recruitment, morale and retention problems. While all of the reports document similar problems caused by inadequate pay, the problems take on additional significance within the Third Branch because of their potentially adverse impact on judicial independence.

Two major national bar organizations -- the American Bar Association and the Federal Bar Association -- have collaborated to prepare and issue this report because of their conviction that the current salaries of Federal judges have reached such levels of inadequacy that they threaten to impair the quality and independence of the Third Branch. Further, the two Associations believe that the failure of judicial pay to keep pace with inflation breaches faith with the Constitutional guarantee of an irreducible salary.[5]

Chief Justice William H. Rehnquist recently stated in his Year-End Report on the Federal Judiciary that he considers the need for increased judicial pay to be "the most pressing issue facing the Judiciary" today.[6] He emphasized the urgency of the problem by focusing unparalleled attention on the subject and calling for immediate Congressional action.

This report begins with a review of the history and effectiveness of the pay-setting mechanisms established by Congress over the past 30 years. It then assesses the adequacy of current judicial salaries in comparison to their real purchasing power and the salaries of judges' peers in the private sector. Next, it addresses changes that have taken place in the judicial work environment since the last Congressionally mandated review of Federal executive pay in 1988. It also analyzes the debilitating impact and consequences of salary erosion on recruitment and retention within the Federal judiciary. Finally, the report recommends a series of initiatives to the President and the Congress to rectify the current pay problems that threaten the quality and independence of the Third Branch.

The American Bar Association and the Federal Bar Association will present an expanded version of this report to Congress and the Administration later this year.

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[4] This report focuses primarily on the Article III judiciary, and references throughout to "Federal judges" and the "Federal judiciary" generally refer to Article III judges. However, the report has implications as well for magistrates and bankruptcy judges, and for Article I judges (including the judges of the U.S. Court of Federal Claims, the territorial district courts, the U.S. Court of Appeals for the Armed Forces, the U.S. Court of Appeals for Veterans Claims, and the U.S. Tax Court) whose compensation is linked to that of Article III judges.

[5] U.S. Const. art. III, §1.

[6] 2000 Year-End Report on the Federal Judiciary at 1 (Jan. 1, 2001).

2. THE FAILED HISTORY OF FEDERAL PAY-SETTING MECHANISMS

A. Pay Linkage Between the Judiciary and Congress

Congress and the President set the pay of the nearly 1,300 active and senior Federal judges constituting the Article III judiciary.[7] Section 1 of Article III of the Constitution protects judicial independence through the dual guarantees of a salary that cannot be reduced during a judge's service in office and life tenure during good behavior. While the political branches cannot constitutionally diminish Article III judges' pay, they have the authority to raise their salaries.

Under current law, the political branches can adjust judges' pay in three ways: (1) allow automatic and annual pay adjustments based on changes in the Employment Cost Index, a well-recognized index that measures changes in the compensation of private sector workers; (2) adopt pay raises recommended by the President to Congress, based on the report of a Congressionally established select commission appointed to review and consider the salaries of high-level Federal officials; or (3) pass special legislation authorizing a pay raise. History has shown that these pay-setting procedures have failed to operate to the point that, by any reasonable standard, Federal judges are inadequately and inequitably compensated.

The core problem with the current procedure for setting judges' pay is the statutory linkage of judicial salaries (as well as those of high-ranking Executive Branch officials) to the salaries of Members of Congress.[8] This linkage causes Federal judges to suffer the consequences of Congress' reluctance to award itself a pay increase or even to accept cost-of-living adjustments that have been provided for by statute. Such reluctance stems largely from lawmakers' concern over adverse public reaction to pay increases for themselves. This dynamic has suppressed the pay of judges and other Federal executives and subjected it to the ravages of inflation. Congress has chosen not to break this salary linkage for political reasons, hoping to force a consensus on the need for across-the-board salary increases.

As a result, the history of Federal judicial salaries is characterized by sporadic cost-of-living adjustments interspersed with sizable "catch-up" adjustments. Regrettably, the cumulative value of those increases has not brought judicial salaries to where they would be today had smaller, but more regular, increases keyed to inflation been enacted.

In order to fully understand the problem of Federal judicial compensation, it is useful to review the historical forces that have been at work. Therefore, a brief history of the development of the pay-setting mechanisms, from the founding of the Republic to the present day, follows.

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[7] As of January 2001, the Article III judiciary consists of 858 authorized judgeships, including the nine justices of the Supreme Court, 179 judgeships in the appellate courts, 661 at the district court level and nine Court of International Trade judgeships. In addition, there are approximately 440 senior judges who assist in the work of the courts of appeals and the district courts. *See infra* at 15 and notes 26, 44 for an explanation of senior judge status. The Article III judiciary is complemented by approximately 350 full-time bankruptcy judges and 450 full-time magistrate judges, who are judicial officers of the district courts and have statutory authority to handle certain matters within the jurisdiction of those courts.

[8] The appendices to this report include two charts. The first chart shows the manner and rate of pay linkage among Federal judges, Members of Congress and other high-level government officials who are paid according to the Executive Schedule. The second chart lists Congressional and Article III judicial salaries since 1993.

B. Early History and Constitutional Intent

The framers of the Constitution were keenly aware that it was essential to the national well-being that the judiciary operate completely independent of political influence. For this reason, the framers placed critical priority on the economic independence of Federal judges, and insulated them from the potential for pay cuts meted out by a Congress in retribution for controversial decisions. Thus, Section 1 of Article III of the Constitution guarantees Federal judges absolute protection against diminution of their pay during their "continuance in office." Moreover, realizing the importance of both the impact of inflation and the need to maintain a qualified judiciary, the framers rejected the original draft of the compensation clause of Article III, which would have prohibited upward as well as downward adjustments of judicial pay, and instead authorized Congress "to increase salaries as circumstances might require."[9] As Alexander Hamilton noted,

> It will be readily understood, that the fluctuations in the value of money and in the state of society, rendered a fixed rate of compensation [for judges] in the Constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate.[10]

The framers also conferred on Congress the responsibility for setting its own pay, as well as the pay of the President and other top-level officials in the Executive Branch.[11] Congressional efforts to discharge this responsibility have consistently met with negative public reaction, starting in 1816 with Congress' first attempt to raise its own pay from $6.00 per day to $8.00 per day. As a result, Congress tried to insulate itself from such public criticism by linking its pay to that of Federal judges and top-level executives in the Executive Branch. While this practice of linking salary structures prevailed over the years as a matter of custom, the Ethics Reform Act of 1989[12] statutorily coupled cost-of-living salary adjustments for Members of Congress with similar adjustments for judges and high-level Executive Branch officials.[13]

Over the last 30 years, Congress and the President have enacted a series of legislative measures to establish workable solutions to the salary-setting dilemma. Their objectives have been two-fold: to make fair decisions about compensation and to minimize the political battles that inevitably accompany salary decisions for Members of Congress, judges, and officials in the Executive Branch.

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[9] They did so, however, over the objection of James Madison, who was concerned that making judges beholden to Congress for periodic salary increases could create an undesirable dependence.

[10] THE FEDERALIST NO. 79 at 491-92 (Lodge ed. 1908).

[11] *Id.* U.S. CONST. art. 1, § 6; art. II, § 1.

[12] Pub L. No. 101-194 (1989). There has been considerable disagreement over the need for linkage. While some clearly believe it is a matter of parity, others find no justification for the continued automatic linkage of the salaries of top-level officials across the three branches. Compare the discussion in THE REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (1976) with the discussion in THE REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (1986).

[13] Parity between Members of the House of Representatives and United States Senators was achieved in 1991 through legislation that extended to Senators the 25 percent pay increase and the prohibition against acceptance of honoraria for speeches and writings, two provisions of the Ethics Reform Act of 1989 that had previously applied only to House members, judges and other top officials. Pub. L. No. 102-90, § 6, 105 Stat. 447, 450.

C. The Federal Salary Act

In 1967, Congress passed the Federal Salary Act.[14] Among other things, it created a Commission on Executive, Legislative and Judicial Salaries, commonly referred to as the "Quadrennial Commission." The independent commission was composed of private sector members appointed by the President, leaders of the Senate and House of Representatives, and the Chief Justice of the United States. Every four years, the Commission convened and made salary recommendations for Members of Congress, judges, and other high-ranking officials. These recommendations were sent to the President, who made final recommendations to Congress. The President's recommendations became effective, unless specifically rejected by Congress.[15]

The Quadrennial Commission system was designed to insulate Congress from the politically sensitive task of fixing the salaries of its own members. The necessary adjustments of salaries would be recommended by the Commission and adjusted to political realities by the President. The process was intended to both serve the public interest and minimize political interference.

The process worked as intended in 1969. Responding to the substantial pre-existing erosion of salaries, the process produced what was then the largest salary increase in history for top-level executives in all three branches of government. District judges' pay was adjusted from $30,000 to $40,000 and circuit judges' pay was adjusted from $33,000 to $42,500. Unfortunately, that advance was quickly followed by a retreat; judges and other high-level officials were denied salary adjustments for the next six years.

D. The Executive Salary Cost-of-Living Adjustment Act

To deal with the ensuing problem of salary erosion, Congress enacted the Executive Salary Cost-of-Living Adjustment Act in 1975.[16] That legislation was intended to grant judges, Members of Congress and high-level Executive Branch officials the same automatic cost-of-living adjustments accorded to rank-and-file Federal employees. The adjustments made under the Act were to be automatic, unless specifically rejected by Congress. They were to be in addition to any salary raise granted through the Quadrennial review process.

In practice, the Adjustment Act did not live up to its promise because Congress frequently rejected or reduced the annual cost-of-living salary adjustments available under the Act for itself, judges, and others for political reasons. However, two Congressionally-rejected pay adjustments were restored to the Federal judiciary after a group of judges successfully brought a lawsuit on

[14] Federal Salary Act of 1967, Pub. L. No. 90-206, § 225, 81 Stat. 624-645 (1967).

[15] The process by which Congress reviewed the President's salary recommendations was modified several times, the last of which responded to INS v. Chadha, 462 U.S. 919 (1983), a Supreme Court decision that declared the legislative veto invalid and held that the Congressional law-making process requires the presentation of an act or resolution to the President for his signature or veto.

[16] Pub. L. No. 94-82, 89 Stat. 419 (1975).

behalf of the entire judiciary challenging Congress' actions to block adjustments scheduled to go into effect in 1976, 1977, 1978 and 1979.[17]

In response to that lawsuit, Congress enacted "Section 140" of Public Law No. 97-92, a 1981 continuing appropriations resolution requiring specific Congressional action to give judges cost-of-living adjustments. Section 140 provides:

> Nothwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or any Justice of the Supreme Court.[18]

Even though Public Law 97-92 pertained to certain appropriations for Fiscal Year 1982 which expired on the last day of that fiscal year, the Comptroller General of the United States repeatedly has interpreted Section 140 to be permanent legislation, which requires additional statutory authorization for any increase in salary payments to judges, even cost-of-living adjustments already authorized by the Ethics Reform Act.[19] The legality of Section 140 currently is being challenged in a lawsuit.[20]

Following the enactment of Section 140, Congress repeatedly scuttled cost-of-living adjustments for itself and the judiciary. Further, it only approved a substantially scaled-back version of the salary recommendations of the 1986 Quadrennial Commission and rejected all of the recommendations of the 1988 Commission.[21] Crises in federal pay continued.

E. The Ethics Reform Act of 1989

The anticipated exodus of top officials from the Judicial and Executive Branches and mounting concern over the Federal government's ability to recruit highly qualified replacements prompted Congress to enact the Ethics Reform Act of 1989.[22] In addition to restoring two cost-of-living

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[17] U.S. v. Will, 449 U.S. 2000 (1980) (holding that the revocations of the 1976 and 1979 pay adjustments each constituted a diminution in judicial salary proscribed by the Compensation Clause in Article III of the Constitution because they vested before Congress acted to block them).

[18] Pub. L. No. 97-92, § 140, 95 Stat. 1182, 1200 (1982).

[19] 62 Comp. Gen. 54 (1982); 62 Comp. Gen. 358 (1983); 63 Comp. Gen. 141 (1983); 65 Comp. Gen. 352 (1986).

[20] Williams v. United States, 48 F.Supp.2d 52 (D.D.C. 1999), *appeal docketed*, No. 99-1572 (Fed. Cir. Sept. 10, 1999). Section 140 is being challenged on the grounds that: (1) it was meant to apply only to the 1982 fiscal year; (2) it was superseded by the Ethics Reform Act of 1989; and (3) to the extent that Section 140 would act to bar pay adjustments under the Ethics Reform Act, it is unconstitutional.

[21] Quadrennial Commissions were established in 1968, 1972, 1976, 1980, 1984, 1986, and 1988; however, the 1984 Commission addressed only the Constitutional problem presented by the Supreme Court's ruling in INS v. Chadha, *supra* note 15.

[22] Pub. L. No. 101-194 (1989).

salary adjustments and a comparability pay adjustment, the Ethics Reform Act amended the Federal Salary Act and the Adjustment Act in two respects -- it replaced the Quadrennial Commission with a Citizens' Commission on Public Service and Compensation,[23] and it revised the mechanism for fixing the annual pay adjustments for judges, Members of Congress, and other high-level officials.

Under the new law, the Employment Cost Index (ECI), a quarterly index measuring the change in wages and salaries paid to private sector employees, was adopted as the basis for determining the amount of an annual adjustment in the pay of judges, Members of Congress and Executive Branch officials.[24] Congress intended the ECI mechanism to provide top government officials with regular pay increases to alleviate the future need for major "catch-up" adjustments of the type enacted in 1989.

In addition to amending existing salary adjustment mechanisms, the Ethics Reform Act limits the amount of income that judges and Members of Congress may earn from sources such as teaching and writing, and bars receipt of honoraria.[25] It also imposes mandatory workload requirements on senior judges.[26]

F. The Effectiveness of the Current System

In practice, the new pay system instituted by the Ethics Reform Act has failed to meet the expectations of Congress and the President. It has functioned no better than the pay system it replaced. Congress has permitted its Members, top Executive Branch officials and Federal judges to receive only three COLA increases since 1993 -- a 2.3 percent adjustment in 1998, a 3.4 percent adjustment last year, and a 2.7 percent adjustment in 2001. As a result of this salary neglect, the real pay of these officials has been reduced by over 13 percent by inflation since 1993.[27] If the federal judiciary had received the ECI adjustments called for by the Ethics Reform Act of 1989, district court judges would now be paid $159,300 (compared to the current $145,100) and court of appeals judges $168,900 (compared to the current $153,900).

Not only has the new adjustment mechanism failed to function as planned, the revamped salary review commission has never become functional. In the 12 years since the enactment of the 1989 Ethics Reform Act, no money has ever been appropriated for the Citizens' Commission, and Congress and the President have never appointed its members. As a result, there has been no systemic review of the adequacy of federal judicial salaries (or those of Congressional members and top executives) since 1988, the date of the last Quadrennial Commission report.

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[23] Under the new process, six Commission members are to be appointed by leaders of the three branches and five are to be selected from the public at large; the names of these latter individuals are to be drawn by the Administrator of General Services from voter registration lists.

[24] 28 U.S.C. § 461(a)(2). Any such adjustment cannot exceed five percent, nor can it be higher than a comparable adjustment for the General Schedule.

[25] The annual limit is approximately $20,000.

[26] Senior judges are those who retire from active, full-time judicial service but elect to continue to serve by handling a reduced caseload.

[27] Pub. L. No. 106-553, enacted on December 21, 2000, enabled Federal judges to receive the same 2.7 percent cost-of-living adjustment for FY 2001 that Members of Congress and top-level Executive Branch officials received.

In December 1997, judicial discontent precipitated a class-action lawsuit in the United States District Court for the District of Columbia, filed by a group of judges seeking restoration of annual ECI adjustments that have been denied by Congress.[28] Even within some quarters of Congress, there is a heightened awareness of the inadequacy of judicial pay. Last fall, a Senator proposed repeal of the Ethics Reform Act's prohibition against receipt of honoraria by judges.[29] At the time, he explained that the proposal was an effort to provide judges with greater compensation, in light of the ineffectiveness of the existing salary adjustment mechanisms.

3. THE INADEQUACY OF AND REAL DECLINE IN JUDICIAL SALARIES

Over the course of the past decade, judges have experienced both an absolute loss in purchasing power and a relative decline in remuneration as the salaries of peer groups have risen dramatically. This same scenario existed before the last "catch-up" adjustment. As the 1989 report of the Quadrennial Commission observed, these conditions threaten "to diminish the quality of justice in this country by dissuading the best and the brightest in all sectors of society from service on the Federal bench."[30] The President and the Congress heeded that warning and later that year adjusted judicial salaries to compensate for the loss of purchasing power due to inflation.[31] The same action is urgently needed now -- in recognition of the Constitutional mandate to preserve judicial independence, the nation's need to attract and retain a judiciary of exceptional quality and diversity, and the legitimate expectations of those who have accepted lifetime appointments to the bench to be protected against salary erosion by inflation.

A. Erosion of Judicial Salaries

Inflationary patterns over the past 30 years have caused prices to rise steadily and steeply. Average prices for consumer goods have risen at a rate faster than judicial salaries. Simply put, this means that judges must now allocate a larger part of their salaries for living costs than they did in the past. Because living costs vary widely across the country (while judicial salaries are uniform), judges who live in expensive metropolitan areas, such as San Francisco, Houston and New York, experience even greater erosion in the purchasing power of their salaries. Unlike rank-and-file Federal employees in these higher-cost areas, judges are statutorily precluded from receiving locality-based comparability pay increases.

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[28] Williams v. United States, 48 F.Supp.2d 52 (D.D.C. 1999), *appeal docketed*, No. 99-1572 (Fed. Cir. Sept. 10, 1999). *See supra* note 20.

[29] Introduced by Senator Judd Gregg (R-NH), Chairman of the Senate Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, at the request of Senator Mitch McConnell (R-KY), the repeal provision -- later dropped -- was included in the Committee's version of H.R. 4690, the Fiscal Year 2001 Appropriation for the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies.

[30] COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES, FAIRNESS FOR OUR PUBLIC SERVANTS, at 27 (1988).

[31] The Commission's recommendations were submitted by the President but initially rejected by Congress in 1989. However, many of the recommendations were enacted into law later that year as part of the Ethics Reform Act of 1989, *supra* note 22.

Despite three salary adjustments since 1993, judicial salaries have not kept pace with inflation. As a result, judges have suffered a 13.4 percent decline in purchasing power during the same time period.[32] The foremost indicator of the cost of living, the Department of Labor's Consumer Price Index (CPI), is a measure of the average change over time in the prices paid by urban consumers for consumer goods and services. Since 1993, the CPI has risen by 25.5 percent,[33] while judicial salaries have risen less than half as much – 12.1 percent. Chart A clearly illustrates the financial dilemma facing judges.

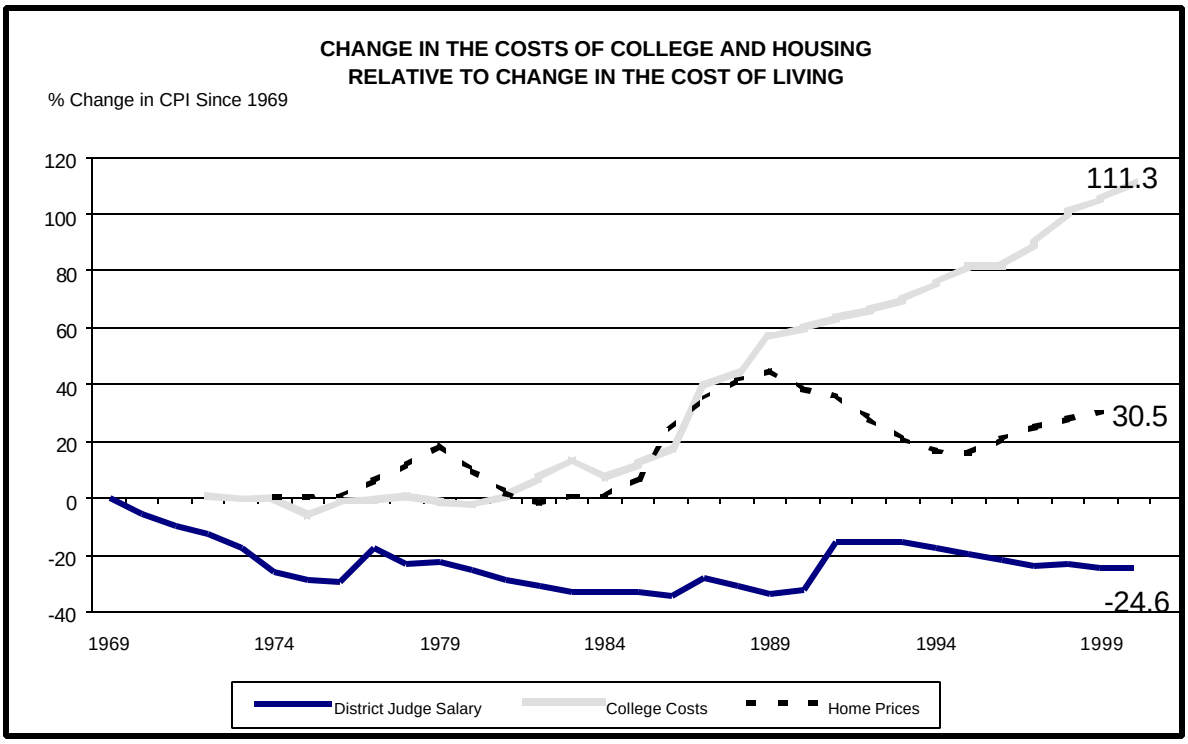

CHART A

The chart portrays the changes from 1969 to 1999 in the real cost of a college education and the cost of a home against the change in the real salary of district judges.[34] Purchasing a home and

[32] This figure, calculated by the Administrative Office of the U.S. Courts, reflects the change in the purchasing power of judges' salaries, based upon the Consumer Price Index from 1993 to present.

[33] CRS REPORT TO CONGRESS: PAY AND RETIREMENT BENEFITS FOR FEDERAL CIVIL SERVICE AND MILITARY PERSONNEL: INCREASES FROM 1969 TO 2000, updated March 20, 2000 by Patrick Purcell. The change in the CPI was computed by using the data compiled in Table 1 of that report and Year 2000 data compiled by the Bureau of Labor Statistics.

[34] The year 1969 has generally served as the baseline for Quadrennial Review Commissions, since 1969 was the year when the recommendations of the first Quadrennial Commission were enacted into law. Ironically, computations of salary loss premised on the 1969 baseline understate the full magnitude of loss, since the salary levels enacted in 1969 were approximately 20 percent less than the recommendations of the first Quadrennial Review Commission. *See also* COMPARATIVE SALARY DATA: A SUPPLEMENT TO: PROMISES MADE, PROMISES STILL UNKEPT: RESTORATION OF INFLATION-INDUCED SALARY CUTS FOR TOP GOVERNMENT OFFICIALS, A REPORT TO THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES, at 116 n.1 (1986).

paying for college for one's children represent major expenses that judges, like most Americans, want to be able to afford for their families; the cost of each has risen substantially faster than the CPI.[35]

During this same time period, Supreme Court justices experienced a 38.3 percent loss in purchasing power, while circuit and district judge salaries lost 24.6 percent (see Charts B and C). District court judges now would be earning $185,300 if their salaries had kept pace with the 1969 benchmark of $40,000. Their current salary of $145,100 would have to be raised by 27.7 percent to achieve that level. Charts B and C dramatically demonstrate that the salaries of Federal judges are effectively much lower now than they were 30 years ago.

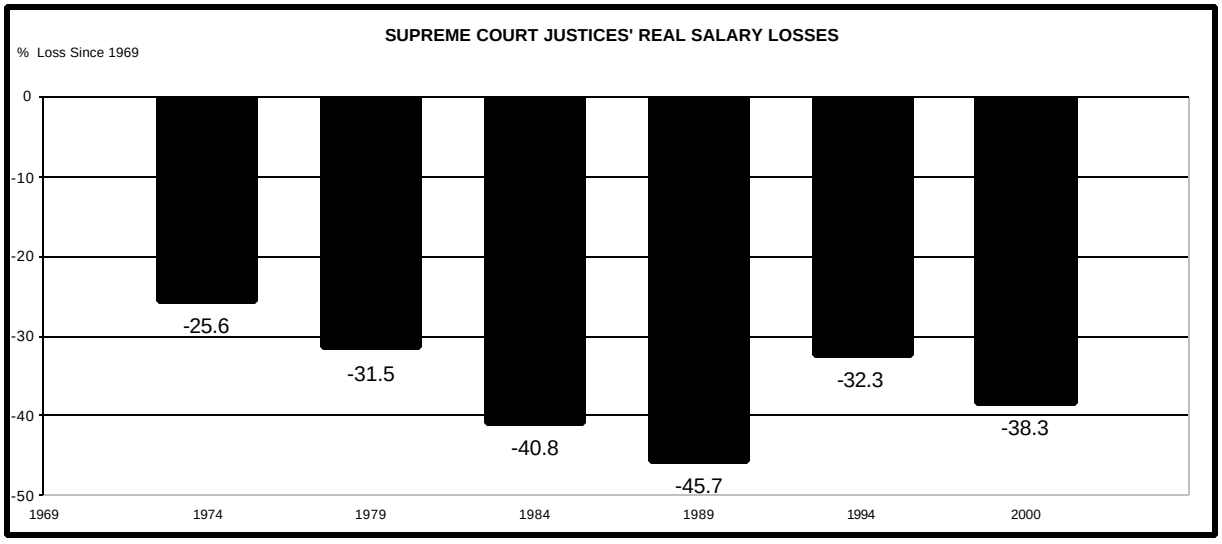

CHART B

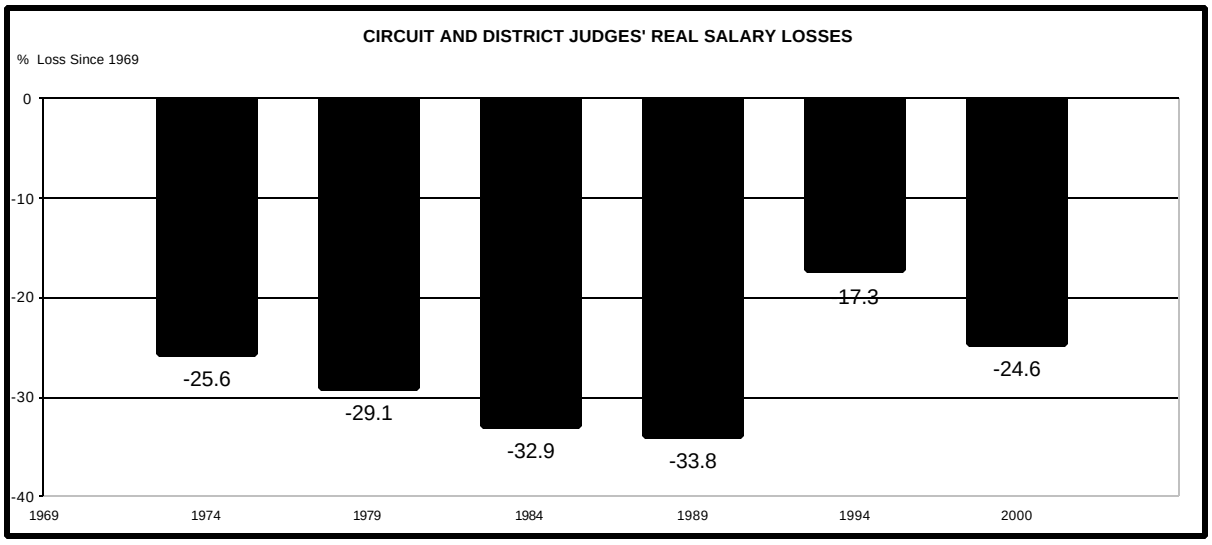

CHART C

[35] Chart A reflects data derived from reports by the College Board, the Federal Housing Finance Board and the Bureau of Labor Statistics.

Chart D depicts the disparities in salary trends between Federal judges and other workers in the United States. While the salaries of district judges increased 253.1 percent between 1969 and 1999, the salaries of civilian General Schedule federal employees averaged increases of 275.2 percent, and employees in the private workforce experienced a whopping 420.6 percent increase. During this same period, consumer prices rose by 363 percent.[36] The salaries of both judges and General Schedule employees have failed to keep up with inflation, but judges' salaries have risen the least. Thus, judges have suffered the most from the effects of inflation.

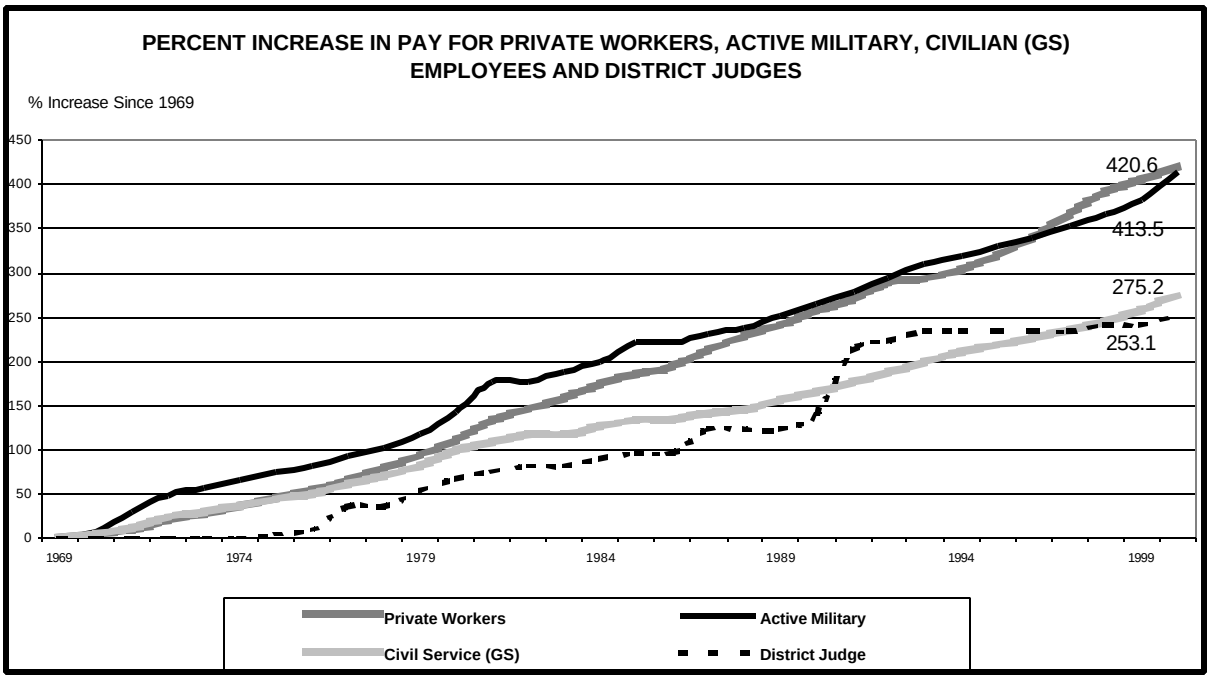

CHART D

It is one thing to ask a lawyer to accept reduced compensation to become a judge; it is quite another not to maintain at least real dollar equivalence in compensation thereafter. That judicial pay has not even kept pace with inflation has robbed judges of the prospect of salary stability during their tenure on the bench. Judges are concerned that the purchasing power of their salary will continue to decline unabated. Some judges are worried that they will not have enough money to send their children to college. Other judges have expressed concern that they will not have enough money to meet the costs of long-term care for family members in need. Is it any wonder that more judges have left the bench during the past decade than at any other time in the history of our Republic?[37]

[36] The rise in consumer prices was calculated on the basis of the Consumer Price Index for Urban Areas, as compiled by the Bureau of Labor Statistics.

[37] Section 5A of this paper includes a more detailed discussion of departures from the Federal bench.

The Constitutional guarantees of life tenure and an undiminished salary were designed to protect the independence of the judiciary. In today's environment, neither guarantee is secure. While erosion of pay may not legally constitute a diminution in salary, it "breaches faith with the Constitution."[38] The very minimum that Federal judges rightly should expect is regular cost-of-living adjustments that protect their salaries from the ravages of inflation.

B. Salary Comparisons with Legal Jobs in the Private Sector

High-level public servants understand that public service has its own intrinsic rewards and will never command the same salaries as the private sector. Public servants' more modest salaries are supplemented by the so-called "psychic income" derived from the nature of their work.[39] Not surprisingly, a recent survey of government executives reported that the rewards of a career in government service are primarily non-financial and include such qualities as the opportunity to engage in interesting, exciting and challenging work, as well as the satisfaction of serving the public and participating in important public policy decisions.[40]

For judges too, rendering public service in a highly visible and respected role and serving in a lifetime appointment are intangible benefits that help compensate for the reduced salary levels associated with the bench. Private sector compensation nonetheless is relevant to the issue of fair and adequate judicial compensation because a marked disparity between public and private salaries negatively affects the ability to attract highly qualified judicial candidates and to retain highly experienced judges. Therefore, compensation trends in the fields from which judges are selected, and to which they might reasonably be expected to return should they leave the bench, provide a legitimate point of reference. The inescapable conclusion to be drawn from such a comparison is that, even though service in the Federal judiciary has long been regarded as the pinnacle of success and prestige in the profession, the disparity between judges' salaries and those of their peers has reached an unacceptable level.[41]

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[38] COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES, QUALITY LEADERSHIP: OUR GOVERNMENT'S MOST PRECIOUS ASSET, at 189 (1986). Several other Quadrennial Commission reports also expressed grave concern that inadequate salaries threaten the core of judicial independence.

[39] REBUILDING THE PUBLIC SERVICE: TASK FORCE REPORTS TO THE NATIONAL COMMISSION ON THE PUBLIC SERVICE, at 212 (1989).

[40] MARK A. ABRAMSON ET AL., RESULTS OF THE GOVERNMENT LEADERSHIP SURVEY: A 1999 SURVEY OF FEDERAL EXECUTIVES (The Pricewaterhouse Coopers Endowment for the Business of Government, 1999).

[41] There can be no argument that retirement benefits for judges offset their significantly lower salaries, for two reasons. First, top-rate lawyers in the private sector often receive retirement benefits worth astronomical sums. Second, in contrast to the retirement plans typical in private law firms, judicial retirement benefits "vest" only when a judge reaches retirement age. Judicial retirement benefits are thus an "all or nothing" proposition. If a judge voluntarily resigns and leaves the bench before satisfying the statutorily-specified age and years-in-service requirement (the so-called "Rule of 80"), the judge forfeits all retirement benefits. See 28 U.S.C. 371 (a judge between the ages of 65 and 70, whose age and years of service total 80, may elect to either retire from judicial office or "retire in senior status"). Moreover, the Rule of 80 compels younger appointees to work longer to gain entitlement to exactly the same retirement benefits received by older colleagues who may have served as judges for a considerably shorter period of time. For example, because no judge can receive retirement benefits before age 65, a judge appointed at 40 years of age must serve 25 years to qualify for an annuity. If that judge fails to serve the full 25 years, the judge will leave office with no retirement benefits whatsoever. On the other hand, a judge appointed at age 60 must serve only 10 years to qualify for an annuity.

Salaries paid to first-year associates at major law firms across the country now top $100,000.[42] Law firms in major metropolitan areas, including Washington, D.C., are regularly paying first-year associates, on the average, $125,000 a year. In fact, many of the major national law firms last year offered associates a starting salary of $140,000 and bonuses ranging from $10,000 to $40,000. These first-year associates received more compensation in 2000 than district and appellate court judges, all of whom were highly experienced lawyers before they joined the bench.

More experienced private-sector attorneys provide a better reference point in terms of comparable knowledge and "value" to their employer. Not surprisingly, their salaries present an even starker contrast. On average, partners at major, respected law firms receive compensation well over $500,000. Law school deans surveyed by *The Chronicle of Higher Education* commanded, on average, a salary of $193,000 for the 1998-99 school year.[43]

All of this clearly demonstrates the growing disparity in salaries earned by successful attorneys in the private sector compared to the salaries earned by their counterparts on the Federal bench. It also highlights the extent of the financial sacrifice Federal judges make to serve the public and the lure of alternative private employment for those who find themselves financially strapped.

4. THE DEMANDS OF THE JUDICIARY'S INCREASED WORKLOAD

While the real value of judicial salaries has declined, the workload burden upon the judiciary has not. Judges' caseloads and the complexity of their work continue on an upward trajectory.

Despite Congress' creation of additional judgeships in the district courts and courts of appeals over the years, the average per-judge caseload in the district courts is much higher now than it was in 1969. The total number of civil and criminal cases filed in the district courts has nearly tripled over the past 30 years, from 110,778 cases in 1969 to 320,194 cases in 1999. Average caseloads increased during this same period from 339 to 526 per judge, a 55.2 percent increase (see Chart E).

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[42] *What Lawyers Earn: NLJ's Annual Report*, NATIONAL LAW JOURNAL, October 2, 2000, at A 25-31. All other salary statistics in this section come from this survey. Various law journals and legal sites on the Internet have provided regular, periodic coverage of the escalation in first-year associate pay. For example, the *New York Law Journal* runs a column called "Associate Pay Watch," and *Law.Com.* (http://www.law.com) frequently posts salary survey results from a variety of sources.

[43] *Pay and Benefits of Leaders at 479 Private Colleges and Universities: A Survey*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 24, 2000, at A29.

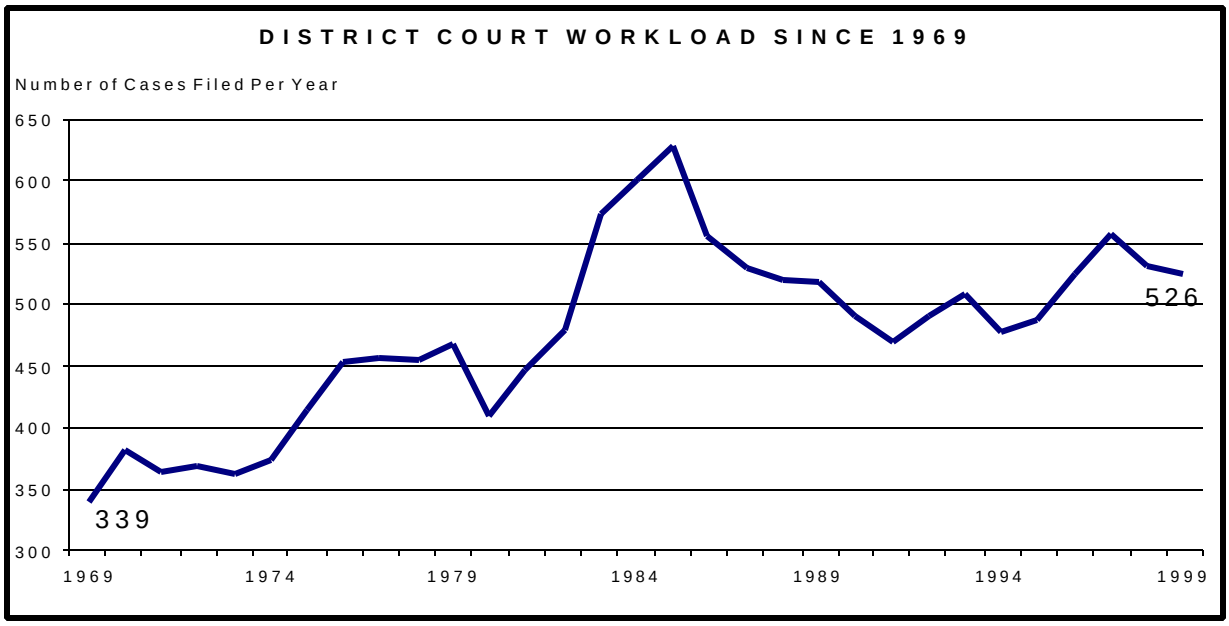

CHART E

The situation is even worse in the courts of appeals, where annual filings skyrocketed from 10,709 in 1969 to 54,693 in 1999, a five-fold increase. Average caseloads for circuit judges grew from 123 cases per judge in 1969 to 363 last year, a 195.1 percent increase (see Chart F).

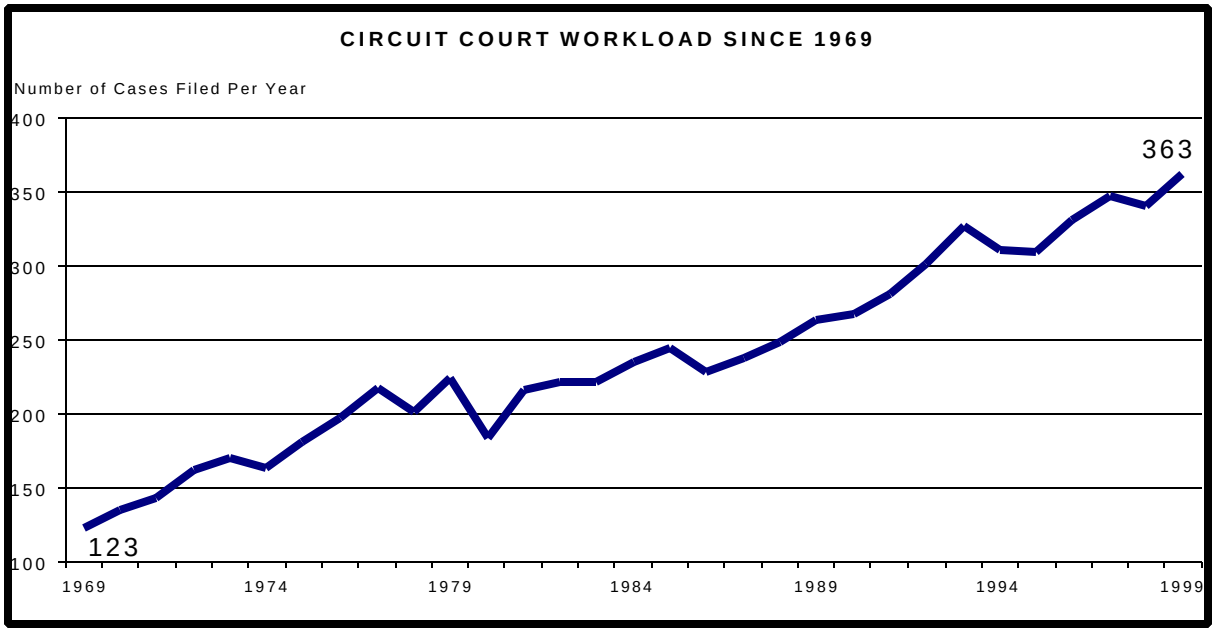

CHART F

Individual judges' caseloads would be even greater absent the significant contributions of senior judges who retire from regular active status, but retain their office and continue to carry substantial caseloads.[44] Currently, approximately 440 senior judges assist in the work of the courts of appeals and the district courts. In 1999, they participated in almost 15 percent of the appeals and presided over nearly 20 percent of the trials.

Moreover, not only has the quantity of work increased, the nature of the work has changed as well. Over the last 30 years, the work of Federal judges has become much more complex. Judges now are called upon to resolve many of the major legal, political and social disputes of our time. Rapid developments in information technology, medical science, e-commerce and globalization are spawning novel and complicated disputes requiring timely and intellectually rigorous adjudication, challenging the Federal judiciary as never before. In short, their jobs demand more and more, but judges are effectively being paid less and less.

5. THE DEBILITATING IMPACT OF THE EROSION OF JUDICIAL PAY

The Constitutional guarantee of life tenure has been the hallmark of the Federal judiciary, providing a mantle of independence and integrity for judicial decision-making, while demanding in return a lifetime commitment to public service. That commitment to public service is perilously weakened when financial pressures deter excellent candidates from seeking appointment to the Federal bench and/or motivate sitting judges to resign prematurely from office to enter private practice.

A. The Adverse Impact Upon the Retention of Judges

Life tenure is often depicted as not only protecting impartial decision-making, but also as a major "perk" of the job. It is not quite such an attractive "perk" when one considers that the longer a judge remains on the bench, the more that judge is penalized by the absence of automatic pay adjustments designed to keep pace with inflation.

It is not surprising, therefore, that members of the Federal judiciary increasingly are choosing <u>not</u> to remain on the bench. As Representative Cliff Stearns (R-FL) has observed, "The departure of experienced, seasoned judges undermines the notion of lifetime service and weakens our judicial system."[45] Chart G demonstrates that, between 1991 and 2000, 52 Article III judges resigned or retired from the Federal bench and many of them returned to private practice.[46] Those 52 Article III judges account for more than 40 percent of the 126 Article III judges who have left the Federal bench since 1965. Those who have left before reaching retirement age, calculated on the combined basis of age and years of service, have departed at great personal cost: they have lost

[44] Judges on senior status, unlike judges who retire from judicial office, are required to carry at least 25 percent of a normal workload (although most assume a much heavier load) and, in turn, receive any adjustments to their salary that are awarded to regular active Article III judges.

[45] Remarks delivered during consideration by the House of Representatives of H.R. 4690, the Fiscal Year 2001 Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act. 146 Cong. Rec. H5147 (daily ed. June 26, 2000).

[46] Based on news accounts and statements of the judges themselves, 31 of the 52 judges who resigned or retired since 1991 entered private practice. Eight of those 31 judges departed before reaching retirement age.

all retirement benefits and forfeited their right to an undiminished salary for life. For these judges, in particular, the incentive to leave the bench must have been very great indeed.

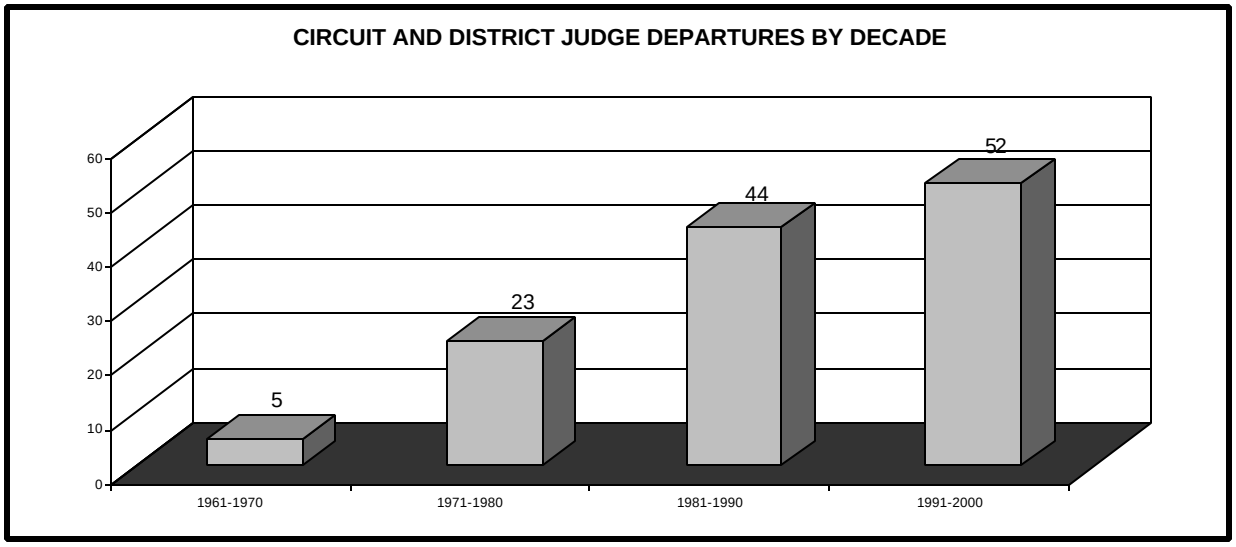

CHART G

Premature departures from the bench impose both real and intangible costs upon the Third Branch, as the Federal judiciary loses some of its most capable and experienced men and women. More alarming, the rate of departures is increasing in tandem with the decreasing rate of real salary levels for Federal judges and the escalating salaries in the private sector.

When an experienced Federal judge retires or resigns, the per-judge caseloads on that court increase until the resulting vacancy has been filled (a process that can take months, and sometimes years). In addition, the judiciary loses the valuable skills and insights of the departing jurist -- assets that are not quickly or easily replaced. Rarely do new appointees join the bench with the range of judicial capabilities and experience that years of service confer.[47] Moreover, the loss of the services of judges who elect complete retirement from judicial office rather than senior status is especially costly to the Government. Not only does the judiciary lose experienced jurists, but, in addition -- because judges who take senior status and continue to work part time receive essentially the same salary as judges who elect complete retirement -- the judiciary loses the uncompensated labor that would have been provided had the judges leaving the bench instead taken senior status.

B. The Adverse Impact Upon the Recruitment of Judges

The adequacy of judicial compensation affects more than just those who already have assumed the Federal bench. Its impact upon those who are considering a judicial appointment -- and

[47] Former Chief Justice Warren Burger noted, "It takes five years for a qualified attorney to reach peak efficiency as a Federal judge." CORPORATE COMMITTEE FOR FAIR COMPENSATION OF THE FEDERAL JUDICIARY, FEDERAL JUDICIAL SALARIES: A GAMBLE WITH THE FUTURE, at 1 (1985).

ultimately, its impact upon the quality of the Federal judiciary -- is even more disturbing. Those involved in the recruitment and vetting of Federal judicial candidates report that the insufficiency of salaries is the single most important factor discouraging potential candidates from seeking appointment.[48]

Most candidates for the bench earn considerably more than they will make if they are appointed to the Federal bench. The resulting financial sacrifice is less severe for judicial appointees whose private wealth mitigates the negative impact of an initial salary reduction and the specter of future salary erosion. Qualified attorneys who lack the independent means to meet current and anticipated future obligations are most likely to be deterred by the prospect of a reduction in salary that is likely to continue to decline in value in the years to come.

The Federal judiciary benefits from the collective wealth of experience of its jurists who have served in different capacities in the public and private sectors. It is enriched by their diverse backgrounds, including race, gender, religion and financial status. Regrettably, the socio-economic pluralism of the Federal bench is jeopardized as judicial compensation declines.

6. REFORM INITIATIVES

The new Administration and the 107th Congress have a unique opportunity to work together to break the downward cycle of pay erosion that undermines the fairness and adequacy of judicial compensation and threatens the independence of the Third Branch.

A major step in correcting this problem would be to enact legislation that effectively delinks Congressional salaries from those of judges and top-level Executive Branch officials. Even if Congress chooses not to address the delinkage issue directly, or is unable to achieve a consensus on delinkage (a remedy that may not be politically feasible), the Administration and the 107th Congress should take the following steps to reform the Federal judicial compensation system:

- Congress and the President should devote increased attention to the critical need to provide meaningful financial rewards for public service, particularly for high-level Executive Branch officials, Congress and the Judiciary.

- Congress and the President should make a public commitment to work together to permit the current annual pay adjustment mechanism for judges, Members of Congress and high-level Executive Branch officials to operate annually and automatically, as envisioned by the Ethics Reform Act of 1989.

[48] For example, during a recent Senate Governmental Affairs Subcommittee hearing, Senator Richard Durbin (D-IL) stated that the Federal government is in a "war for talent." Senator Durbin recounted the difficulties a judicial selection panel confronted in attracting a pool of highly qualified candidates for a vacancy on the United States District Court for the Northern District of Illinois. "Managing Human Capital in the Twenty-first Century," hearing before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, United States Senate, March 9, 2000.

- Congress and the President should repeal Section 140 of Pub. L. No. 97-92 (which requires explicit Congressional approval of any pay adjustment for the Federal judiciary), to allow the pay-setting mechanism for the Federal judiciary that was established by the Ethics Reform Act of 1989 to operate as intended.

- Congress and the President should enact legislation to restore the Employment Cost Index adjustments for fiscal years 1995-97 and 1999, by increasing judicial salaries and those with which they are linked by 9.6 percent. This will help remedy the salary erosion that judges, Members of Congress, and high-level Executive Branch officials have suffered since 1993.

- Congress and the President should enact legislation to re-establish a salary review commission, similar to past Quadrennial Commissions, to recommend pay rates for Members of Congress, judges and appointed officials in top Executive Branch positions on a regular basis. Any such commission should be adequately funded and its members appointed promptly, to ensure that it is operational within a few months of its authorization.

APPENDIX I

SALARIES AND LINKAGE
AMONG JUDICIAL, LEGISLATIVE AND EXECUTIVE BRANCHES

JUDICIAL	LEGISLATIVE	EXECUTIVE	FY 2001 SALARY
		President*	$400,000
Chief Justice Supreme Court	Speaker of House	Vice President	$186,300
Associate Justices Supreme Court			$178,300
	President Pro Tem of Senate Other House & Senate Leaders	Executive Level I Cabinet Secretaries Attorney General Federal Reserve Chairman**	$157,000
Court of Appeals Judges			$153,900
District Court Judges International Trade Court Judges	Senators Representatives	Executive Level II Deputy Cabinet Secretaries CIA Director	$145,100
Bankruptcy Judges*** Magistrate Judges			$133,492

* Legislation enacted in 1999 provided for the doubling of the President's salary, from $200,000 to $400,000, effective upon the inauguration of the President in 2001. This marked the first increase in the salary of the President since 1969. Pub. L. No. 106-58, §644, 113 Stat. 430, 477.

** The salary of the Chairman of the Federal Reserve Board was recently increased from Executive Schedule Level II to Level I, as part of "American Homeownership and Economic Opportunity Act of 2000." Pub. L. No. 106-569, §1002(a)(1), 114 Stat. 2944, 3028.

*** Salaries for bankruptcy and magistrate judges (who are judicial officers of the United States district courts) are set at a level equal to 92 percent of a district judge's pay.

APPENDIX II

CONGRESSIONAL AND JUDICIAL SALARIES SINCE 1993

FISCAL YEAR	COLA*	CIRCUIT JUDGES	DISTRICT JUDGES	MEMBERS OF CONGRESS
2001	2.7 %	$153,900	$145,100	$145,100
2000	3.4 %	$149,900	$141,300	$141,300
1999	0	$145,000	$136,700	$136,700
1998	2.3 %	$145,000	$136,700	$136,700
1997	0	$141,700	$133,600	$133,600
1996	0	$141,700	$133,600	$133,600
1995	0	$141,700	$133,600	$133,600
1994	0	$141,700	$133,600	$133,600
1993	3.2 %	$141,700	$133,600	$133,600

* Cost-of-Living Adjustment

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