



JUDICIAL COMPENSATION:
OUR FEDERAL JUDGES MUST BE FAIRLY PAID

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TABLE OF CONTENTS

Executive Summary 1

An independent judiciary is critical to our society; and fair compensation is essential to maintaining that independence. 2

The current levels of judicial compensation are not fair; and the inadequacy of those levels is having an adverse impact on the administration of justice in the federal courts. 4

The current system of linking judicial salaries to Congressional salaries makes little sense. If federal judicial salaries are to be linked to a benchmark, it should be to the salaries of their counterparts in other countries. 6

JUDICIAL COMPENSATION: OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Executive Summary

No one can seriously dispute that an independent judiciary is critical to our system of government and to our way of life.¹ The Founding Fathers gave us a system of government with three distinct and independent branches, designed to serve as checks and balances against one another, to ensure our life, liberty, and pursuit of happiness. If our judiciary is to maintain its independence and serve its critical constitutional function, judges must be fairly compensated in order to attract and retain the very best candidates.

Sadly, we do not now compensate our judges adequately. Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%.² Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less than many law school professors and a fraction of what most could make in private practice. As a result, good judges are leaving the bench at an alarming rate. Judicial vacancies are increasingly being filled from a demographic that is not conducive to a diverse and impartial judiciary.

Chief Justice Roberts describes this state of affairs as nothing less than “a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.” The American College of Trial Lawyers joins Chief Justice Roberts – and countless others – in calling for a substantial increase in judicial compensation commensurate with the importance and stature the federal judiciary should and must have. And the College has a specific suggestion for the amount of the increase. We assume – we know – that our federal judiciary is no less important to our society than the judges of the country from which we adopted our legal system are to their native land. Judges in England are paid twice as much as their counterparts in the U.S. We believe that our federal judges ought to be paid at least as much as English judges; so we propose a 100% raise from current compensation. At that, our judges will arguably still be underpaid for the service they provide our society, but it is a start.

We recognize that the increase we propose is a substantial sum of money. But the cost is a mere 5% of the \$6.5 billion federal court budget, and it is a rounding error – one hundredth of 1% – of the overall \$2.9 trillion federal budget. It should be seen as a modest, sound investment in an independent judiciary; it is an investment necessary to preserve our constitutional framework.

1 “Judicial independence” is an oft misunderstood phrase. Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, explained that the term should not be interpreted to mean that a judge is free to do as he or she sees fit but rather that courts need to be fair and impartial, free from outside influence or political intimidation. Chief Justice Randall Shepard of the Indiana Supreme Court puts it thus: “Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law.”

2 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

An independent judiciary is critical to our society; and fair compensation is essential to maintaining that independence.

Of all the grievances detailed in the Declaration of Independence, none was more galling than the lack of independence imposed by King George on Colonial judges:

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

Declaration of Independence, July 4, 1776. English judges were assured life tenure during their “good behavior” by the Act of Settlement of 1700, but their Colonial counterparts served at the pleasure of the King. Their salaries were subject to his whims. Judges beholden to the King, not surprisingly, often ruled as he pleased, no matter how unfairly. The framers of our post-Revolution government needed to ensure an independent judiciary.

In 1780, nearly a decade before the U.S. Constitution was ratified, John Adams drafted a Declaration of Rights for the Massachusetts State Constitution, which declared:

It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The concept of judicial independence – that judges should decide cases, faithful to the law, without “fear or favor” and free from political or external pressures – remains one of the fundamental cornerstones of our political and legal system. As Alexander Hamilton explained, once the independence of judges is destroyed, “the Constitution is gone, it is a dead letter; it is a paper which the breath of faction in a moment may dissipate.”³

Fair compensation is critical to maintain that independence. In the *Federalist Papers*, Hamilton explained the importance of fair compensation: “[I]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” *Federalist Papers* No. 79. Thus, the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) life tenure and (2) a prohibition against diminution of compensation.

Inflation is not unique to modern times. The drafters of the Constitution were aware of the problem, and they took steps to solve it. Explaining that “next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support,” Hamilton, in *Federalist Paper No. 79*, observed:

It would readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations

3 *Commercial Advertiser* (Feb. 26, 1802) (quoted by Chief Justice Roberts in his 2006 Year-End Report on the Federal Judiciary).

in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

A case can be made that the Constitution *requires* a raise in judicial compensation to ameliorate the diminution which has occurred over time as the result of inflation.⁴ When the Constitution was adopted, the Founding Fathers provided that the President was entitled to compensation which can be neither increased nor decreased during the term of office, while judges were guaranteed there would be no diminution of compensation; there was no ban on increases in judicial compensation, because it was contemplated that there might have to be increases. Hamilton explained:

It will be observed that a difference has been made by the Convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

Id.

The prohibition against diminution of judicial salaries was not simply to protect judges; it was designed to protect the institution of an independent judiciary and thereby to protect all of us. Society at large is the primary beneficiary of a fairly compensated bench:

[T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

⁴ To be sure, in *Atkins v. United States*, 214 Ct. Cl. 186 (Ct. Cl. 1977), a group of federal judges were unsuccessful in arguing that their rights had been violated because Congress had raised other government salaries to adjust for inflation at a different rate than for judges. The court held that the Constitution vests in Congress discretion in making compensation decisions, so long as they are not intended as an attack on judicial independence. On the facts in *Atkins*, the court found no such attack. But the effect of inflation on judicial salaries over the past 30 years has eroded judicial compensation as effectively as an all-out assault. A court might well reach a different decision on today's facts.

can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Federalist Papers, No. 78 (emphasis added).

The fact is that persons qualified to be federal judges can generally command far greater sums in the private sector and even in academia. So the issue is not whether current judicial salaries might seem adequate measured against the wages of a typical American; the issue is whether those salaries continue to attract and retain those relatively few, talented persons we need as judges. Our society cannot afford to have a federal judiciary overpopulated by persons who can afford to serve at vastly below-market rates only because their personal wealth makes them immune to salary concerns or because their personal abilities and qualifications do not command greater compensation.

During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the percentages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.⁷ There is nothing wrong with having former prosecutors populate the bench. But too much of a good thing ceases to be a good thing. A bench heavily weighted with former prosecutors is one which may lose its appearance of impartiality and objectivity; and appearances aside, it may actually suffer that loss. It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench.

At the same time that current compensation levels place unacceptable barriers to attracting the best possible candidates for the bench, those levels are forcing sitting judges to rethink their commitments. Over the past several years, dozens of competent, able federal judges have left the bench, many of them making no secret of the financial pressures which led them to do so. In the past few years, at least 10 federal judges left the bench well before normal retirement age; combined, these 10 judges had 116 years left before they reached the age of 65.⁸ The cost of losing these able jurists cannot be measured. Put aside the cost of finding their replacements – the cost of locating, screening, and vetting qualified applicants, the cost of training the new judges, the cost to the system as the remaining judges must shoulder the extra workload until a replacement is sworn in – all of these things have a cost to society, some measured in money, some measured in the time it takes for the wheels of justice to turn – but put all of that aside. The real cost is that those 10 judges we identify

7 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary*, p. 3-4.

8 Judge David Levi has announced he will retire in July 2007; Judge Levi, who has served on the bench for 16 years, is 55. Judge Nora Manella resigned in March 2006 at age 55 after 8 years of service. Judge Michael Luttig retired in May 2006 at age 51 with 14 years of service. Judge Roderick McKelvie resigned in June 2002 at age 56 with 10 years of service. Judge Sven Erik Holmes resigned in March 2005 at age 54 with 10 years of service. Judge Carlos Moreno resigned in October 2001 at age 53 with 3 years of service. Judge Stephen Orlofsky resigned in 2001 at age 59 after 7 years of service. Judge Michael Burrage resigned in March 2001 at age 50 with 6 years of service. Judge Barbara Caufield resigned in September 1994 at age 46 with 3 years of service. Judge Kenneth Conboy resigned in December 1993 at age 55 with 6 years of service. Over the past two decades, scores of other judges have left the bench while still in their prime to pursue more financially rewarding careers.

above, (and scores of others like them) had more than 100 years of prospective judicial experience now forever lost to our society; years they chose to expend in private rather than public pursuits.⁹ The loss is incalculable.

A federal judgeship was once seen as the capstone of a long and successful career; seasoned practitioners with years of experience and accomplishment accepted appointments to the bench, knowing that they would make some financial sacrifice to do so, but counting on the sacrifice not being prohibitive. Now, sadly, the federal bench is more and more seen, not as a capstone, but as a stepping stone, a short-term commitment, following which the judge can reenter private life and more attractive compensation. As a long-term career, the federal bench is less attractive today for a successful lawyer in private practice than it is for a monkish scholar or an ideologue. Ann Althouse, *An Awkward Plea*, *N.Y. Times* Feb. 17, 2007 at A15, col. 1

Chief Justice Roberts is not alone in decrying the current situation. Former Federal Reserve Board Chairman Paul Volcker, as Chair of the National Commission on the Public Service, reported in January 2003 that “lagging judicial salaries have gone on too long, and the potential for the diminished quality in American jurisprudence is now much too large.” The Volcker Commission pointed to judicial pay as “the most egregious example of the failure of federal compensation policies” and recommended that Congress should make it a “first priority” to enact an immediate and substantial increase in judicial salaries. Congress, of course, has yet to do so. In February 2007, Mr. Volcker published an opinion piece in the *Wall Street Journal* in which he noted that sad fact. Mr. Volcker, observing that federal judges must possess rare qualities of intellect and integrity, stated that “the authors of the Constitution took care to protect those qualities by providing a reasonable assurance of financial security for our federal judges. Plainly, the time has come to . . . honor the constitutional intent.”

The current system of linking judicial salaries to Congressional salaries makes little sense. If federal judicial salaries are to be linked to a benchmark, it should be to the salaries of their counterparts in other countries.

Since the adoption of the *Ethics Reform Act of 1989*, judicial salaries have been linked to Congressional and Executive Branch salaries. Whatever the reasoning that led to that linkage, it is a tie which must now be broken. Certainly, there is no constitutional basis for such a linkage. Judges and members of Congress are equally important to our system of government, but it was never contemplated that judges and Congressmen be equated. The Constitution contemplated that Congress would be composed of citizen-statesmen, who would lend their insights and talents to government for limited periods of time and return to the private sector. Judges in contrast, were and still are expected to serve for life.

But even if it were entirely fair to equate the roles of members of Congress and members of the bench, the linkage would still be unfair to the judiciary. Members of Congress are also underpaid. But members of Congress are limited in their ability to vote themselves a salary increase for the very

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We use 65 as the normal retirement age, but, of course, federal judges seldom retire at that age; most remain active far longer and take senior status to remain on the bench and contribute for many additional years.

reason that they are the ones who make the decisions. Congress must be appropriately concerned about awarding itself a raise no matter how well deserved because of the appearance of self-interest and the political impact of that appearance. But there is no appearance of impropriety in awarding a well-deserved increase to judges who have no say in the matter.¹⁰

Because of linkage, political considerations, which necessarily impact decisions about congressional compensation, adversely and unfairly affect judicial compensation. Political considerations should not dictate how we pay our judges. Indeed, we believe that the Constitution was designed to immunize that issue from political pressure.

The federal government already pays myriad individuals far more than current congressional salaries, in recognition that market forces require greater compensation. An SEC trial attorney or FDIC regional counsel can make \$175,000 per year.¹¹ An SEC supervisory attorney can make over \$185,000 per year. A CFTC deputy general counsel can make nearly \$210,000 per year. The chief hearing officer at the FDIC can make in excess of \$250,000 per year; the managing director of the OTS can make in excess of \$300,000 per year.¹² The OCC compensates its employees in nine pay bands, a full third of which include salaries with possible maximums in excess of \$183,000.¹³

A February 2007 search of the government website posting open positions as of that date returned 343 available jobs with possible salaries in excess of a federal judge’s salary; 208 of those postings have salaries in excess of \$200,000, 48 in excess of \$250,000.

Interestingly, the two countries with legal and constitutional systems most closely analogous to ours, Canada and England, have no links between judicial and legislative salaries; both countries pay their judges at different (higher) rates than other government officials – and both countries pay their judges significantly more than we do. The Canadian counterparts to our Supreme Court justices and federal judges receive salaries approximately 20% greater than U.S. judges:

U.S.	Salary	Canada ¹⁴	Can \$	Rate	U.S. \$
Chief Justice	\$ 212,100.00	Chief Justice	297,100.00	0.863	256,397.30
Appellate Judges	\$ 175,100.00	Puisne Judges	275,000.00	0.863	237,325.00
District Judges	\$ 165,200.00	Federal Judges	231,100.00	0.863	199,439.30

10 The Constitution left Congress free to vote itself a raise or a salary cut. Almost immediately, at least one of the Founding Fathers thought better of that, and the “Madison Amendment” was proposed in 1789, along with other amendments which became the Bill of Rights. The Madison Amendment would have allowed Congress to increase congressional salaries, but no increase could take effect until an intervening election – which would allow the voters an opportunity to express their displeasure with such a move. But while the Bill of Rights amendments sailed through the original 13 states, it took more than 200 years to obtain the necessary percentage of states to ratify the Madison amendment; it finally became the 27th Amendment in 1992 when Alabama became the 38th state to ratify.

11 For those not conversant with government acronyms: SEC is the Securities & Exchange Commission; FDIC is the Federal Deposit Insurance Corporation; CFTC is the Commodities Futures Trading Commission; OTS is the Office of Thrift Supervision; OCC is the Office of the Comptroller of the Currency.

12 Facts assembled by the Administrative Office of the Courts, February 8, 2007.

13 OCC Pay band VII has salaries ranging from \$98,300-\$183,000; pay band VIII ranges from \$125,600-\$229,700; pay band IX ranges from \$163,100-\$252,700. See www.occ.treas.gov/jobs/salaries.htm.

14 Data provided by Raynold Langois, FACTL, Langlois Kronström Desjardins, Avocats, Montréal (Québec).

In England, a Member of Parliament earns 60,277 Pounds – approximately \$120,000. A High Court judge, the equivalent of a federal district court judge, is paid 162,000 Pounds, approximately \$318,000. English judges make nearly twice what their American counterparts earn:

U.S.	Salary	England ¹⁵	£	Rate	U.S. \$
Chief Justice	\$212,100.00	Lord Chief Justice	225,000.00	1.964	\$ 441,900.00
Appellate Judges	\$175,100.00	Lords of Appeal	194,000.00	1.964	\$ 381,016.00
District Judges	\$165,200.00	High Court	162,000.00	1.964	\$ 318,168.00

It is ironic – our forebears split from England and formed our great, constitutional democracy in no small part because of the manner in which King George exerted influence over colonial judges by controlling their compensation; Now, two centuries later, England has provided sufficient judicial compensation to assure the recruitment, retention, and independence of good judges, while we pay our judges less than we do numerous mid-level government employees and recent law school graduates. Our Founding Fathers would find this state of affairs unacceptable. Our judges are at least as valuable to our society as English judges are to theirs. And our judges should be paid accordingly.

A 100% salary increase will still leave our federal judges significantly short of what they could earn in the private sector or even in academia. But such an increase will at least pay them the respect they deserve and help to isolate them from the financial pressures that threaten their independence.

The College is not the first and undoubtedly will not be the last to advocate for a substantial raise for our judiciary. In addition to Chief Justice Roberts and former Fed Chairman Volcker, we join the American Bar Association, which has adopted a resolution in support of increased compensation. We join countless other state and local bar associations who have done likewise. We join the General Counsels of more than 50 of the nation’s largest corporations who wrote to members of Congress on February 15, 2007 urging a substantial increase. We join the deans of more than 125 of the nation’s top law schools who made a similar appeal to congressional leadership in letters dated February 14, 2007. We join the editorial staffs of numerous publications, including the *New York Times*, the *Detroit Free Press*, the *Albany Times Union*, the *Chattanooga Times Free Press*, the *Seattle Post-Intelligencer*, the *Orlando Sentinel*, the *Pasadena Star-News*, the *St. Petersburg Times*, the *Anchorage Daily News*, the *Akron Beacon Journal*, the *New Jersey Star Ledger*, the *Raleigh-Durham News*, the *Boston Herald* and the *Scripps Howard News Service*, all of which have advocated for salary increases. And we join the signers of our Declaration of Independence in recognizing the need to unlink judicial pay from political considerations. We are not sure we can say it any better than the editors of the *Chattanooga Times*:

All Americans, of course, should want our judges to be among the most stable of our nation’s lawyers, to be well-trained men and women of integrity, dedicated to absolute impartiality in upholding the Constitution and the law – with no political or philosophical agenda for “judicial activism.”

And we should pay enough to justify the best.

15 Data obtained from Department for Constitutional Affairs; see www.dca.gov.uk.

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