



## American Bar Association

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# Background Information on the Need for Federal Judicial Pay Reform

### 1. Why is There Concern Over the Adequacy of Federal Judicial Pay?

Congress and the President have the constitutionally imposed responsibility for setting the pay of the Federal judiciary, top-level Executive officials and its own Members. It is a difficult and politically vexing task that has most often been characterized by inaction: to wit, the last major pay adjustment for judges and other top-level federal workers was enacted into law in 1989 and took full effect in 1991. Nowhere are the consequences of inaction more detrimental than with respect to federal judicial salaries. Over the past 16 years, judicial salaries have not only stagnated, they have actually declined in purchasing power. Since 1993, judicial pay has fallen 10.8% behind inflation while the pay of most other federal workers has increased by 18.5%. Judicial pay has reached such levels of inadequacy that it threatens the quality of justice in our nation.

### 2. Who Else is Concerned Besides the ABA?

- In January 2003, the prestigious National Commission on the Public Service, otherwise known as the “Volcker Commission” after its chairman, Paul Volcker, added its important voice to the growing number of organizations that have sounded the alarm over the serious consequences of the government’s repeated failure to properly compensate our federal judges. The Commission’ concluded that “[j]udicial salaries are the most egregious example of the failure of federal compensation policies, and recommended that Congress should grant an immediate and significant increase in Judicial, executive and legislative salaries to ensure a reasonable relationship to other professional opportunities” Succinctly summarizing the problem, the report states:

*The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America’s best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment -- and compensation -- rather than making the important contributions we have long received from judges in senior status. Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice....*

- Members of Congress are concerned. During the 108<sup>th</sup> and 109<sup>th</sup> Congresses, several bills with bipartisan cosponsorship were introduced in both chambers calling for a substantial pay raise and reform of the pay setting system. In fact, during the 108<sup>th</sup> Congress, the Senate Appropriations Committee approved a 16.5 % pay raise as part of an appropriations bill. Unfortunately, it was acted upon by the full House or

Senate because Congress passed an omnibus appropriations measure that year rather than individual appropriations bills.

Current Congressional leaders and Members of the House and Senate Judiciary Committees continue to express concern over state of judicial pay, and we fully expect that legislation soon will be introduced to remediate this serious problem.

- President Bush acknowledged the need for a judicial pay raise in 2003 by issuing a statement expressing his support for legislation that had just been introduced that would have provided Article III judges with a \$25,000 pay raise.
- Many diverse legal and non-legal organizations over the years have publicly expressed their concern and actively worked in concert to persuade Congress and the President to take immediate steps to enact legislation to remedy this problem. During February 2007, the deans of 130 law schools signed a joint letter urging congressional action. Similarly, the general counsels of 60 major U.S. corporations sent a joint letter expressing their concerns over the inadequacy of judicial pay.

### **3. How Does Inadequate Judicial Compensation Threaten the Quality of Justice?**

Judicial salaries are so inadequate, so out of synch with the responsibilities our judges bear, the knowledge and experience they bring to their job, and the salaries they could command in the private sector that they compromise our ability to preserve our fair and impartial judiciary by undermining the core principle of life tenure for judges and by deterring candidates with diverse legal backgrounds from seeking judgeships. These are not hypothetical concerns: these are the verifiable consequences of Congressional inaction over more than a decade.

**Life Tenure:** According to the Administrative Office of the United States Courts, more than 100 Article III judges left the bench between 1990 and 2006, as did additional numbers of bankruptcy and magistrate judges. During the 1960s, only a handful of Article III judges retired or resigned. Many of the judges that have retired or resigned recently have told us that financial considerations were a big factor – an assertion that is substantiated by the fact that most of the judges who have left the bench in the last ten years have entered private practice.

We do not want experienced judges to leave because they cannot afford to put their children through college or because their salaries are eaten away by inflation. Every time an experienced judge leaves the bench, the nation suffers a temporary loss in judicial productivity as a new judge gains the experience necessary to judge well. Our system cannot long tolerate the regular loss of experienced, seasoned judges now occurring.

**Recruitment:** Diminishing judicial salaries affects not only those who have become judges, but also the pool of those willing to be considered for a position on the federal bench. It is not that there is a shortage of lawyers lined up to apply for vacant judgeships. The problem is that many talented lawyers in private practice—seasoned lawyers with

diverse backgrounds -- are not willing to accept a position, knowing that their salary will not even keep pace with inflation.

Over the years, more and more judges have risen from the ranks of state judiciaries or from within the federal judiciary, where federal judicial salaries may be equivalent or even an improvement. While there is nothing wrong with that per se, extended and successful experience in the private sector brings a perspective and an independence that is vital to the Judiciary. We stand to lose that perspective because judicial salaries now are so low that they have become a deterrent.

#### **4. How Can Judicial Salaries be Insufficient When District Court Judges receive \$165,200 and Circuit Court Judges \$175,100?**

**The late Chief Justice Rehnquist succinctly answered this question in his 2002 Year-End Report:**

I recognize that the salaries of federal judges are higher than those in many occupations, and that some may be skeptical of the need to raise the salaries of judges who already earn at least \$150,000 per year. But it is not fair to compare judges' salaries to salaries in other occupations. Those lawyers who are most qualified to serve as federal judges have opportunities to earn far more in private law practice or business than as judges. I am not suggesting that we match the pay of the private sector -- but the large and growing disparity must be decreased if we hope to continue to provide our nation a capable and effective federal judicial system. Providing adequate compensation for judges is basic to attracting and retaining experienced, well-qualified and diverse men and women to perform a demanding position in the public service. We need judges from different backgrounds and we want them to stay for life.

**Chief Justice Roberts echoed these concerns in his recent 2006 Year-End Report:**

Federal judges, who have historically been leaders of the bar before joining the bench, do not expect to receive salaries commensurate with what they could easily earn in private practice. They can rightfully expect, however, to be treated more fairly than they have been....The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept lifetime appointments as a federal judge.

#### **5. Why Are Judicial Salaries So Low?**

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, known as the Citizens' **Commission on Public Service and Compensation**, never became operational, and the mechanism for automatic, annual cost-of living adjustments has not worked as intended, resulting in judges not receiving cost-of-living adjustments (COLAs) in 1994, 1995, 1996, 1997, 1999 and 2007.

Consequently, there have been no upward adjustments in judicial salaries since 1991, and judges have not received cost-of-living adjustments in six of the past 14 years.

## **6. How Can Congress Deny Judges their COLAs?**

Two pay-setting mechanisms are responsible for this – linkage of the salaries of Members of Congress with those of Federal Judges and the now notorious “Section 140.”

## **7. What is Linkage?**

The core problem with the current procedure for setting judges’ pay is the 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 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. Although seldom distinguished in discussions, there in fact are two distinct forms of pay linkage and both have contributed to deteriorating salaries -- the linkage of base salaries and the linkage of cost-of-living adjustments.

Since 1964, the year that Congress established the Executive Schedule to cover top officials in the Executive Branch, a stable pay relationship, pegged at Level II of the Executive Schedule, has existed between Members of Congress and top-level federal officials. In 1969, upon the recommendation of the first Quadrennial Commission, the salaries of circuit court judges also were pegged to Level II of the Executive Schedule. Congressional and circuit court salaries stayed in step for the next ten years. From 1979 until 1987, however, the linkage between judicial and Congressional salaries all but disappeared and the salaries of both circuit court and district court judges generally exceeded those of Members of Congress.

In 1987, a variant form of linkage reappeared when the President’s salary recommendations, which included identical salaries for Members of Congress and district court judges, were enacted into law. Since then, Congressional and district court salaries have stayed in tandem. This form of linkage -- linkage of the base salaries of top-level officials in each branch -- is predicated on the desire for inter-branch pay parity for work of comparable complexity and importance.

When most people recount the deleterious effect of linkage on judicial pay, they are referring to a different kind of linkage, i.e., the statutory linkage of cost-of-living adjustments created by enactment of the Ethics Reform Act of 1989. The Act coupled cost-of-living salary adjustments for Members of Congress with similar adjustments for all Article III judges and high-level Executive Branch officials. (It also cemented a general acceptance of the concept of pay parity for top-level officials from all three branches of government.) The resulting linkage of COLAs is most directly responsible for the erosion of judicial pay due to inflation. When Congress, for political reasons, enacts legislation to deny itself an earned cost-of-living adjustment, all top-level employees paid according to Level II of the Executive Schedule suffer their folly.

## **8. What is “Section 140”?**

Section 140 requires judges to get the express approval of Congress before they are awarded the COLA that to which they and every other employee paid according to the Executive Schedule are entitled. It is an extra hurdle that Congress has erected in their path. And we think it is an affront to the principle of judicial independence and evinces disrespect for a coequal branch of government. Since its enactment in 1981, Congress almost routinely passed legislation to comply with Section 140 -- until recently: it failed to waive Section 140 before adjourning in 2002 and 2006. The resulting tension in Congressional- judicial relations, in addition to the waste of judicial and legislative time fixing the situation, amply demonstrates the foolhardiness of this provision.

## **9. What Happened in *Williams v. United States*? Did it Affect Section 140?**

In 1997, a group of federal judges filed a lawsuit --Williams v. United States -- challenging Congress’ authority to deny judicial COLAs under the Ethics Reform Act.

The Ethics Reform Act of 1989 specifies that judges (as well as Members of Congress and top Executive Branch officials) are entitled to a COLA when General Schedule employees receive one under the Comparability Act. Even though the Act appeared to conflict with Sec. 140, which was originally adopted as part of a 1981 continuing resolution, Congress continued to comply with it.

The Court of Appeals for the Federal Circuit issued its opinion in the Williams case in February 2001 and held that even though Congress enacted into law a mechanism for annually adjusting the salaries of judges, the COLAs permitted under the 1989 Ethics Reform Act do not vest until the first day of the fiscal year in question. Consistent with this view, the Court held that it is constitutionally permissible for Congress to deny judges a COLA prior to the time it takes effect. The Federal Circuit also held that Sec. 140 was not meant to be permanent legislation and therefore was no longer viable. A petition for certiorari, supported by the ABA, was filed by plaintiffs, but the Supreme Court declined to hear the case on March 5, 2002. Justices Breyer, Scalia and Kennedy signed a vigorous dissent.

Congress, meanwhile, reenacted Section 140 to make it clear that it was meant to be permanent law.

## **10. What Happened During the 108<sup>th</sup> and 109<sup>th</sup> Congresses?**

108<sup>th</sup> Congress: During the 1<sup>st</sup> Session, the ABA and the Federal Bar Association collaborated on and issued a report on the causes and consequences of more than three decades of judicial salary erosion. The presidents of both organizations presented the report, ***Federal Judicial Pay: an Update on the Urgent Need for Action***, to Chief Justice of the United States William H. Rehnquist and other associate justices on May 28, 2003. As discussed earlier, the Volcker Commission issued a separate report on revitalizing the Federal Government in the 21<sup>st</sup> Century that urged Congress to enact an immediate and substantial pay raise.

The ABA/FBA report and the urgency of the Volcker Commission's call for action renewed media attention and galvanized support among Members of Congress. For the first time in years, Congress seriously considered remedial legislation.

**Congress took action on bipartisan legislation.** Bipartisan legislation (S. 1023 and H.R. 2115) was introduced in the House and Senate to provide a 16.5% salary increase for federal judges. Even though the President announced his strong support for the pay increase, the legislation stalled because of the addition of a controversial provision authorizing electronic media coverage prior to approval by the Senate Judiciary Committee.

As a result, the pay provisions were incorporated into the Senate's CJS appropriations bill and approved by the Senate Appropriations Committee. Unfortunately, the Senate never had an opportunity to vote on its CJS bill because congressional leaders decided to fold the House-passed version, which did not contain the pay provisions, into an omnibus appropriations bill that was enacted into law. Despite the concerted and collective efforts of many concerted organizations, meaningful pay reform legislation failed to be enacted.

**Judges did get COLAs in 2003 and 2004.** However, in 2003, judges started the year without a COLA because the previous Congress passed a continuing resolution to fund the government through January 27, 2003 but neglected to also enact a waiver of Sec. 140. As a consequence, judges were temporarily denied a COLA for FY 2003, while Congressional members and other top government officials paid according to the Executive Schedule received a 3.1% COLA for FY 2003. Even though legislation was passed early in the 108th Congress to rectify the situation, it had a corrosive effect on congressional-judicial relations. The 108<sup>th</sup> Congress avoided a repeat performance in 2004 by enacting separate legislation to waive Section 140 before it adjourned sine die.

109<sup>th</sup> Congress: Because of the war on terror, government-wide fiscal restraints, and the looming 2004 Presidential elections, the coalition of organizations (including the ABA) advocating for judicial pay reform called for a moratorium on lobbying activities during the 109<sup>th</sup> Congress. All groups, nevertheless, continued to inform Members of Congress and the Public about the importance of maintaining a fair and impartial judiciary and the inadequacy of current judicial salaries

## **11. What is the Prognosis for the 110<sup>th</sup> Congress?**

We are optimistic that the 110<sup>th</sup> Congress will take remedial action. Educational campaigns over the last several years have resulted in and more and more congressional members becoming aware of the scope of the problem and the need for decisive legislative action. Further, leaders in both chambers have expressed support for enactment of judicial pay legislation this session. We expect bills to be introduced in both chambers shortly.

The Chief Justice of the United States has made this one of his top priorities, and the ABA and many other concerned organizations are willing to commit time and energy to advocating zealously for a substantial judicial pay increase and other necessary pay reforms. The ABA

president has pledged to use every opportunity of her presidency to speak out on this issue and make the public and Members of Congress aware of how much is at stake

## **12. What are the ABA's Policy Positions on Federal Judicial Pay Reform?**

**The ABA urges the 110<sup>th</sup> Congress to take the following legislative actions:**

- 1. First and foremost, Congress should immediately provide for a substantial salary increase for Federal judges. The salary increase needs to be large enough not only to restore denied Employment Cost Index adjustments for fiscal years 1995-97 and 1999, but also to raise judicial salaries to levels that reflect the importance of the judicial function and ensure their reasonable relationship with salaries of professionals in comparable jobs.**
- 2. Congress should amend the Ethics Reform Act of 1989 to break the statutory link that couples cost-of-living adjustments for Federal judges with those of Members of Congress.**
- 3. Congress should repeal Section 140 of Pub. L. No. 107-77, which requires explicit Congressional approval of any cost-of-living adjustment for Federal judges.**
- 4. Congress should 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 soon after its authorization.**

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