



AMERICAN BAR ASSOCIATION

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Statement

of the

AMERICAN BAR ASSOCIATION

on

Federal Judicial Compensation

Submitted for the Hearing Record

of the

Subcommittee on the Courts, the Internet and Intellectual Property

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

April 19, 2007

The American Bar Association is grateful that the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property is undertaking an examination of the adequacy of judicial compensation. We believe that there is an urgent need for systemic reform and a growing recognition within Congress that it is time for action, particularly with respect to enacting legislation that will provide for an immediate and substantial pay increase for our federal judges. Although we realize that reform is needed across the board if we are to ensure a public service that is ready for the challenges that face our nation, this statement summarizes the compensation problems of the federal judiciary, an issue about which we can speak with some authority. We request that this statement be included in your Subcommittee's hearing record of April 19, 2007.

It is undisputed that for more than a decade the pay of most top-level federal officials has been badly 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 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.

While many excellent studies have been published documenting the problems with the inadequacy and structure of federal workforce pay, a particularly important report, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, was released in January 2003 by the National Commission on the Public Service, otherwise known as the "Volcker Commission" after its chairman, Paul Volcker¹. Composed of members of various

¹ URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY, Report of the National Commission on the Public Service (2003).

political persuasions with extensive experience as government leaders, the prestigious panel of experts examined ways to restore and renew government service. After a thorough examination of the issues, the Commission 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 Volcker Commission's report concluded that "[j]udicial salaries are the most egregious example of the failure of federal compensation policies."² Succinctly summarizing the problem, the report stated:

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....³

Following release of the Volcker commission's report, the American Bar Association (ABA) and the Federal Bar Association (FBA) released their second joint report on federal judicial pay erosion.⁴ The collaborative effort between the two organizations was prompted by our mutual and deeply held conviction that the salaries of federal judges had reached such levels of inadequacy that they threatened to impair the quality and independence of the Third Branch

The cumulative efforts of the ABA, the FBA and many other concerned organizations reinvigorated reform efforts and stimulated interest within the Administration and Congress.

² *Id.* at 31 (2003).

³ *Id.* at 23.

⁴ The report, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM (MAY 2003), is available at <http://www.abanet.org/poladv/22003judpay.html>.

During the 108th Congress, President Bush endorsed legislation that would have authorized a 16.5 per cent increase in judicial salaries. Legislation incorporating this pay raise was introduced in both chambers and received some legislative action but ultimately languished. Similar legislation was introduced in the 109th Congress as S. 2276 (Feinstein, D-CA, Leahy, D-VT; and Kerry, D- MA) and H.R. 5014 (Schiff, D-CA and Biggert, R-IL), but neither received any action.

As a result, the 110th Congress has inherited the problems identified in the ABA/FBA 2003 judicial pay report, many of which have gotten significantly worse. Over the course of the past 15 years, judges have experienced both an absolute loss in purchasing power and a relative decline in remuneration as the salaries of peer groups have increased dramatically. This same scenario existed before the last “catch-up” adjustment, which was implemented in stages in 1990 and 1991. The observation of the last impaneled salary review commission is as true today as it was in 1989: 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.”⁵ The ABA-FBA judicial pay report provided extensive documentation of the inadequacy and real decline in judicial salaries through the year 2003; updated statistics, as reported by the Chief Justice in his Year-End Report⁶ and by Justices Kennedy, Breyer and Alito in recent testimony before Congress, indicate that the pay problem has worsened. We therefore will limit the rest of our statement to an explanation of the root causes of the current inadequacy of federal judicial pay and the inadvisability of retaining the so-called “Section 140,” and will offer some recommendations that we believe will provide immediate and lasting relief.

⁵ COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES, FAIRNESS FOR OUR PUBLIC SERVANTS, at 27 (1988).

⁶ 2005 Year-End Report on the Federal Judiciary (Jan.1, 2006).

Linkage of Judicial Salaries to Salaries of Members of Congress

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 apparently stems largely from lawmakers' understandable 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. As the chart at Appendix B demonstrates, 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 new 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. The idea of linkage at the district judge level took hold in Congress and, since then, district court salaries and Congressional 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 1989.⁷ 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. As we stated in the judicial pay report, “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. The very minimum that federal judges should expect is regular cost-of-living adjustments that protect against the ravages of inflation.”⁸ The unfortunate truth, however, is that the decline in the purchasing power of their salaries has continue unabated.

While there is no doubt that Congress needs and deserves cost-of-living adjustments also, we urge Congress to delink its COLA from those of judges and other top-level government executives or, in the alternative, to pass binding legislation that would either eliminate Congressional authority to deny COLAs to top-level government officials or limit such authority to its own Members.

⁷ Pub L. No. 101-194 (1989).

⁸ FEDERAL JUDICIAL PAY EROSION, *supra* note 2, at 11.

No Mechanism Exists to Review the Adequacy of Judicial Salaries

Federal judges, Members of Congress and other top-level government officials do not get salary increases based on merit or length of service. Unlike the General Schedule, which establishes the pay system for most “white-collar” positions in the Executive Branch and certain Legislative Branch agencies, there are no “step” increases within each of the five Executive Schedule levels and there is no opportunity to move up the Executive Schedule pay scale while in the same job. At present, all Executive Schedule salaries increase only if COLAs are awarded or if the entire Executive Schedule is revamped to set more equitable compensation levels for top government officials. One of the major reasons that judicial salaries have become so inequitable and no longer bear a meaningful relationship to private-sector legal salaries is because there has been no systemic review of the adequacy of top-level federal salaries since 1988.

In 1967, as part of the Federal Salary Act,⁹ Congress created the Commission on Executive, Legislative and Judicial Salaries, commonly referred to as the “Quadrennial Commission.” This independent commission was to be composed of nine private sector members appointed by the President, leaders of the Senate and House of Representatives, and the Chief Justice of the United States; convene every four years, starting in 1968; and make recommendations regarding the appropriate salaries for Members of Congress, judges, and other high-ranking officials. These recommendations were to be sent to the President as the basis for his final recommendations to Congress. His final recommendations would then be enacted into law unless specifically rejected by Congress.

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

⁹ Federal Salary Act of 1967, Pub. L. No. 90-206, § 225 (1967).

President. The process was intended both to serve the public interest and minimize political interference.

Commissions were appointed seven times from 1968 to 1988. Six commissions made salary recommendations, and one commission, which convened in 1984, focused exclusively on modifying the process by which Congress accepted or rejected the President's salary adjustment recommendations.¹⁰

Without exception, each Quadrennial Commission concluded that top federal officials were critically underpaid as a result of the corrosive effect of inflation on their modest salaries and the increasingly higher compensation accorded their peers in the private sector. Unfortunately, commission recommendations met with varying success over the years, as the following synopsis demonstrates.

1968: From the standpoint of the federal judiciary, the results of the first Quadrennial Salary Commission were perhaps the most satisfactory. The Commission recommended salary increases ranging from 65 to 70 percent for Justices of the Supreme Court and increases ranging from 52 to 58 percent for other federal judges. The increases that ultimately took effect were less generous but still substantial -- 52 to 56 percent for Supreme Court Justices and 29 to 33 percent for circuit and district judges. These salary levels have provided a benchmark of fair compensation for all subsequent Quadrennial Commissions.

1972: The second Quadrennial Commission recommended increases of 25 percent for most offices, and the President proposed phased-in increases over three years totaling 22.5 percent. The Senate disapproved the recommendations, however, so no salary increases occurred that year.

¹⁰ 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.

1976: The result of the third Quadrennial Commission in 1976 shared some of the success of the first: the Commission recommended large increases, the President pared them back slightly, and Congress allowed them to go into effect. The 1977 increase helped to recover some of the ground lost from the 1969 benchmark salary levels.

1980: Pay erosion continued through the 1970s, and the fourth Quadrennial Commission responded by recommending large increases. The President submitted reduced salary increases to Congress but they were rejected. Consequently, no increases resulted from the fourth Commission's efforts.

1986: Because the fifth Quadrennial Commission dedicated itself solely to responding to constitutional infirmities identified in INS v. Chadha, an interim commission was appointed in 1986. The recommendations of this sixth Quadrennial Commission met with the familiar pattern of scaled-back raises. The Commission urged large increases; the President pared them back substantially; and because Congress did not disapprove them in time, judicial salary increases of ten to eleven per cent went into effect in 1987.

1988: The last Quadrennial Commission recommended increases that were intended to restore lost purchasing power of salaries. President Reagan accepted the recommendations and proposed that Congress increase the salary of Members of Congress and district court judges to \$135,000. The recommended increases were greeted by a storm of public criticism nationwide. The Senate and House voted to disapprove them.

In April 1989, the first National Commission on the Public Service issued its report, which was much broader in scope than the Quadrennial Commission's report, but which nevertheless echoed the Commission's recommendations for substantial salary increases for top-level officials in all three branches of government in order "to stop the erosion and turbulence

that characterize[d] levels of federal pay.”¹¹ The report helped change public and private attitudes, and later that year, major salary reforms were enacted into law as part of the Ethics Reform Act of 1989.

Even though the recommendations of the various Quadrennial Commissions alone were not sufficient to guarantee adequate and equitable salary adjustments for senior government officials, we believed then – and we believe now—that they are a vital component of the pay-setting process. As the Judicial Conference of the United States, in its report to the 1988 Quadrennial Commission, stated, “[The recommendations]...can pave the way for other participants in this process to follow in assuring that our nation compensates fairly those from whom we expect the most.”¹²

The Problem with “Section 140”

“Section 140”¹³ is a shorthand method used to describe one part of the Congressional process involved in determining whether federal judges receive cost-of-living adjustments. It deserves special mention because it poses its own threat to judicial independence and inter-branch relations.

Enacted as part of a 1981 continuing appropriations resolution, Section 140 requires the express, affirmative approval of Congress before judges are permitted to receive the same COLA due them under the Ethics Reform Act of 1989 and scheduled to be awarded to Members of Congress and other high-level officials. It was added to the continuing appropriations resolution during 11th hour deliberations on the Senate floor in response to that Congress’s frustration and disdain for a legal ruling that resulted in federal judges recouping cost-of-living adjustments that Congress had previously denied its own Members, as well as judges and senior Executive

¹¹ Rebuilding the Public Service, TASK FORCE REPORTS TO THE NATIONAL COMMISSION ON THE PUBLIC SERVICE at 201 (1989).

¹² SIMPLE FAIRNESS: THE CASE FOR EQUITABLE COMPENSATION FOR FEDERAL JUDGES at 9 (1988).

¹³ Pub. L.No. 97-92, § 140 (1982).

Branch officials, in 1976 and 1979. In 2001, the U.S. Court of Appeals for the Federal Circuit ruled in Williams v. United States that Section 140 was not meant to be permanent law and, in any event, was superseded by the provisions of the 1989 Ethics Reform Act.¹⁴ Unfortunately, the 107th Congress subsequently reenacted it into permanent law.¹⁵

The peril of reenacting Section 140 was demonstrated when the 107th Congress failed to waive Section 140 prior to adjournment. As a consequence, at the close of 2002, judges were denied a FY 2003 COLA while Congressional members and other top government officials paid according to the Executive Schedule were slated to receive a 3.1% COLA. Even though legislation to retroactively restore the 2003 COLA to judges was enacted early in the 108th Congress, the failure of the 107th Congress to waive Section 140 noticeably strained inter-branch relations.

Section 140 has been an unnecessary and undesirable obstacle to Congress' ability to apply the automatic pay-setting mechanism of the Ethics Reform Act to the federal judiciary. It has strained inter-branch relations by evincing a disregard for a co-equal branch of government and challenging the difficult boundary between judicial independence and judicial accountability. Our system of government works best when each separate but co-equal branch of government acts with mutual respect and restraint in pursuit of a common purpose. Federal judges should not have to go through an additional hoop to receive a cost-of-living adjustment that is meant for top officials of all three branches. The ABA, therefore, believes that Section 140 should be repealed.

¹⁴ *Williams v. U.S.*, 240 F. 3d 1019, 1022 (2001), *cert.denied*, 535 U.S. 911 (2002).

¹⁵ Pub.L.No.107-77 (2001).

Recommendations for Reform

Justice Kennedy recently said, “An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law...Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee the prosperity and secure the liberties of its people.¹⁶” We need to remain ever vigilant that we foster the conditions that support these goals. Properly and adequately compensating our federal judges is an investment in the future excellence of our courts. We therefore urge Congress to take the following action to provide for immediate and lasting judicial pay relief:

- Congress should promptly pass legislation to substantially raise the base salaries of federal judges. Judicial salaries should be raised to levels that reflect the importance of the judicial function and ensure their reasonable relationship with salaries of professionals in comparable jobs. The ABA supports the recent analysis of Paul Volcker, who said that if district judge salaries had kept pace with average American worker Salaries from 1969 to 2006, they would now be paid \$261,300.00¹⁷. This sum is an appropriate reference point for considering any salary increase.
- 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.
- 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.
- Congress should pass legislation to re-establish a salary review commission, similar to past Quadrennial Commissions, to recommend pay rates for Members of Congress,

¹⁶ Written Statement of Justice Anthony Kennedy before the Senate Judiciary Committee, Feb. 14, 2007 at p. 3.

¹⁷ Paul A. Volcker, *Judgment Pay*, The Wall Street Journal, Feb. 10-11, 2007 at A.9.

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.

Thank you for the opportunity to provide these comments.

Please feel free to direct any inquiries to:

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