

November 20, 2008

United States Senate  
Washington, DC 20510

**RE: Section 140 and Denial of a Cost-of-Living Adjustment for Judges**

Dear Senator:

Before the 110<sup>th</sup> Congress effectively comes to a close, we urge you to take two modest but very important steps to provide an immediate and lasting remedy to halt the erosion of judicial pay caused by judicial salaries not keeping up with inflation: take affirmative action to assure that judges are permitted to receive the same COLA that congressional members will receive in 2009 and repeal “Section 140” once and for all.

While we continue to believe that it is essential that Congress enact a 30 percent pay raise for federal judges, as was approved by both the Senate and House Judiciary Committees earlier this year, we nevertheless understand that its enactment may not be politically feasible given the economic downturn and the level of priority that some members of Congress assign to it. However, we do not understand, and are deeply disturbed by, the fact that as of today all federal judges will be denied a Fiscal Year 2009 cost-of-living adjustment because Congress has not passed an explicit authorization waiving Section 140 of Public Law 97-92.

Aware that some misunderstanding exists, we want to make clear that Section 140 is not the statutory mechanism that links judicial COLAs to congressional COLAs: linkage is the result of a provision enacted as part of the Ethics Reform Act of 1989. Pub. L. No. 101-194 (1989).

Section 140 was originally enacted as an amendment to a continuing appropriations bill in 1981 because of the concern of certain influential congressional members over the decision in *U.S. v. Will*, 449 U.S. 2000 (1980), which restored to the federal judiciary two out of four congressionally rejected COLAs on the basis that they had already vested and therefore were constitutionally inviolable. After the Court of Appeals for the Federal Circuit, in *Williams v. U.S.*, 240 F.3<sup>rd</sup> 1019 (D.C. 2001), held that Section 140 would not apply because it was never meant to be permanent law, the provision (and clarifying language) was inserted into an appropriations measure that was enacted as Pub. L. No. 107-77 (2001). Congressional members did

not have the opportunity to examine or debate the merits of the provision. Its reenactment was unfortunate because Section 140 directly and needlessly injects politics into judicial salary adjustments and suggests congressional disregard for a co-equal branch of government.

Judicial salaries already are so inadequate that they threaten the vitality of the judiciary and are injurious to good government. To deny or delay a cost-of living adjustment for judges in 2009 -- or in any year in which COLAs otherwise would be permitted -- further erodes already inadequate salaries and needlessly strains interbranch relations.

Repealing Section 140 and assuring that judges are entitled to the 2009 COLA will have little impact on the FY 2009 budget but will send a very clear message that Congress recognizes the growing urgency of dealing effectively with lagging judicial salaries and is ready to start taking action to help preserve the vital role of the federal judiciary in our constitutional system of government.

We urge you to promptly pass legislation to help remediate the continuing erosion of already inadequate federal judicial salaries.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

**Thomas M. Susman**  
**Director**