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American Bar Association

In Support of a Fair and Impartial Federal Judiciary

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AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

IN SUPPORT OF
A FAIR AND IMPARTIAL FEDERAL JUDICIARY

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A judiciary whose independence is secured by guaranteeing its judges life tenure during good behavior and an undiminished salary while in office makes a system of impartial justice possible by enabling judges, without fear of reprisal, to make decisions based on our Constitution and laws, even if those decisions are unpopular or contrary to the political expediencies of the day.

In addition to making the judiciary an independent, co-equal branch of government, our Founders also made the judiciary accountable to, and dependent on, the executive and legislative branches. The Constitution gives those branches broad powers over the judiciary, including the power to nominate and confirm federal judges (as well as to impeach and remove them), constitute the lower federal courts, regulate court jurisdiction, and make laws necessary and proper for the exercise of these powers, including setting the salaries of judges and providing funding for court operations.

This system of checks and balances creates a purposeful tension between judicial independence and accountability that makes some inter-branch friction inevitable. If maintained within manageable limits, this tension is not so much a cause for concern as a sign that the Constitution is functioning as intended. However, even though the Constitution empowers the branches to keep each other in check by extreme means if necessary, intemperate use of checking powers is symptomatic of a government in a state of crisis.

The key to managing interbranch tension and advancing the purpose of government has always been for each branch to refrain from pressing its powers to the utmost, and for the spirit of mutual respect and restraint to dominate interbranch relations so that there is productive and cooperative interaction.

The American Bar Association has a history of taking actions to protect and preserve the independence of the judiciary as fundamental to a free society. We have supported efforts to improve the administration of justice, spoken out against intemperate and misleading criticism of judges, and opposed politically motivated bills such as those that seek to strip the federal courts of power to hear certain categories of cases involving controversial issues with constitutional implications. We likewise have urged restraint on the part of the judiciary and encouraged it to engage in rigorous self-evaluation and be receptive to congressional efforts to streamline and improve the administration of justice.

In that spirit, the ABA offers the following recommendations to the new Administration and the 1l1th Congress to strengthen respect for the vital function of the federal judiciary in our government of separated powers and to improve the administration of justice. Because of this limited focus, we have not included recommendations directed to the federal judiciary.

STRENGTHENING PUBLIC CONFIDENCE IN THE FEDERAL JUDICIARY

The new Administration and Congress should use existing opportunities to strengthen public respect for and confidence in the federal judiciary.

The actions of government officials have the potential to adversely affect the way the public perceives the role of the judiciary, especially if the public is not knowledgeable about the basic design of government and appreciative of the fundamental importance of the principle of judicial independence in a system of separated powers.

Robust criticism of the judiciary is fully protected by the First Amendment and is indispensable to the well-being of a democracy. However, in recent years, much criticism has turned into vitriolic, *ad hominem* attacks and has led to a decline in civility and respect toward our judiciary. Individual judges have increasingly been held up as scapegoats or caught in the crosscurrents of debates over some of the controversial social issues of our time. Judges who have made unpopular decisions based on the law have been characterized by some government leaders as imperial activists who dare to thwart the majority will.

Disdain for judges has resulted in myriad legislative proposals that seek to strip the courts of jurisdiction to hear controversial cases or in efforts to impose term limits on federal judges or give Congress the power to invalidate Supreme Court decisions that interpret the Constitution. In recent years, some members of Congress and candidates for public office have even called for the impeachment of particular judges because of disagreement with their decisions.

While these proposals are troubling and strongly opposed by the ABA, the real battleground may not be within government, which is known to move cyclically on these issues, but in the public's view of the judiciary. These actions have the capacity to erode and degrade the public's perception of judges and the justice system until the judiciary is neither understood nor respected.

A public that does not understand that judicial independence exists for the protection of the people and not for the benefit of the judges cannot be expected to support life tenure. A public that does not understand that judges are given independence to enable them to resist pressure and make impartial decisions based on the Constitution rather than on passing popular will of the political branches will not be able to comprehend how a system that permits judges to invalidate popular laws or release criminals on "legal technicalities" ultimately protects their rights and freedoms.

The ABA urges the Administration and members of Congress to set a tone of restraint and respect and to take advantage of opportunities to increase public respect for and understanding of the critical role of the federal judiciary in a government of separated powers.

The nation as a whole will benefit by these actions not only because our system of government requires three -- not two-- co-equal branches of government, but also because a public that does not understand the importance of an independent judiciary will not understand the importance of the rule of law.

BIPARTISAN ADVISORY JUDICIAL NOMINATING COMMISSIONS

To restore a sense of common purpose and bipartisanship to the judicial nomination and confirmation process, the new President should:

(1) pledge to consult in good faith with the home state senators and with Senate leaders of both parties prior to nominating individuals for life-time appointments to the federal bench;

(2) support the establishment of bipartisan appellate judge commissions to assist in identifying qualified candidates for potential nomination to the courts of appeals; and

(3) urge senators in each state to establish bipartisan district judge commissions to identify qualified candidates whom the senators might consider recommending to the President for potential nomination.

Likewise, senators in each state should jointly appoint bipartisan commissions of lawyers and nonlawyers that reflect the diversity of the profession and the community to develop lists of potential district judge nominees for the consideration of the senators and the White House.

The judicial nomination and confirmation process is a critical constitutional responsibility shared by the President and the Senate. Although the process is political by design, it ceases to function effectively when it becomes overly partisan or contentious. Healthy disagreement can turn into polarized combat that fosters the view that judges are in office simply to carry out ideological agendas of those involved in putting them there. A partisan and prolonged process also deters some individuals with outstanding credentials from seeking a position on the bench because they are unwilling to subject themselves and their families to acrimony and their professional lives to a state of extended suspension. While there are differences of opinion over how to repair the situation that now exists, all agree that a fair and impartial judiciary is critical to our success as a nation and to the good of our society.

The ABA supports prenomination consultation between the President and the Senate and the use of bipartisan advisory nominating commissions. These tools will benefit all parties while preserving constitutional prerogatives by bringing together people from varying backgrounds to assist in recommending top candidates for the President to consider. The best commissions will be diverse in every sense of the word, encouraging consideration of different perspectives as candidates for nomination are identified and evaluated.

Advisory judicial nominating commissions are not new; they have been, and continue to be, used at the federal and state level to identify candidates for judgeships. Currently, U.S. senators in eight states use commissions of lawyers and others to solicit and screen potential federal judicial nominees. The purpose of these commissions is not to shift power away from those constitutionally designated to have that role. It is to provide a vehicle for civic engagement and to organize and bring greater transparency to the process of identifying and vetting candidates. Commissions do not diminish in any way the existing prominent role of senators in the nomination process and the ultimate authority of the President to make the final decision with regard to each judicial nomination.

The nomination of judges needs to be a thoughtful, deliberative and civil process, not a political tug-of-war. This proposal is modest in reach, but, if adopted and implemented in good faith, will cultivate a public expectation that judicial nominees will be treated decently and fairly during their confirmation hearings and will help restore a commitment to bipartisan and interbranch cooperation to the nomination and confirmation process.

COURT RESOURCES

The new Administration and Congress should ensure that the federal courts have the resources sufficient to enable them to properly discharge their constitutional and statutory mandates.

Discharge of the judicial function as an independent branch of government requires resources sufficient for the judiciary to carry out its administrative functions and dispense justice in a timely manner. The judiciary is dependent

on Congress and the President to set the salaries of judges and for its yearly appropriation.

During the early part of this decade, the judiciary's repeated admonitions that its budget was insufficient to permit it to execute its responsibilities and maintain full services were ignored due to several factors, including congressional distrust of the judiciary's fiscal management practices and shifting national priorities. Faced with consecutive years of budgetary shortfalls, in large part brought on by spiraling cost of rent for courthouses and other administrative office space in federal buildings, federal courts around the country had no recourse other than to reduce staffing and limit access to essential services. The unintended consequences were substantial. Staffing reductions required some courts to cut back on hours of operations; other courts located in areas hit hardest by the explosive growth in criminal filings temporarily suspended their civil dockets. In other jurisdictions case backlogs grew because defender and pretrial services had to be scaled back.

The courts and the political branches learned from those years. The judiciary engaged in a top-to-bottom review of court operations and instituted far-ranging, effective cost-containment measures, reviewed and strengthened each year, which have restored fiscal credibility in the courts. Consequently, Congress recently has been sensitive to the courts' funding needs and has even provided supplemental appropriations in recognition of the impact of enhanced border enforcement on judicial workload.

The judiciary, like most government agencies, currently is being funded at FY 2008 levels through March 6, 2009, by a Continuing Resolution, and the Administrative Office of the U.S. Courts (AO) has stated that the courts have sufficient funds available to maintain the current level of services for its duration. We are guardedly optimistic for FY 2009, based on the levels of funding approved by the House and Senate Appropriations Committees ($6.5 billion and $6.3 billion, respectively). Both represent an increase over FY 2008 funds, but neither match the federal judiciary's request of $6.7 billion for FY 2009. We urge the new President and Congress to use the judiciary's request as guidance and to incorporate the higher level of funding provided in the House bill into the final appropriation measure for FY 2009.

The federal courts have not fared as well in obtaining much needed new judgeships. The last comprehensive judgeship bill was enacted in 1990. That legislation established 11 additional circuit court judgeships and 61 permanent and 13 temporary district court judgeships.

Since 1990, case filings in the federal appellate courts have increased by 36 percent and in district courts by 29 percent. In the intervening years, Congress has only authorized a modest number of additional district court judgeships on an *ad hoc* basis and no additional circuit court judgeships at all.

According to the AO, by 2007 the weighted number of case filings in district courts, which is computed based on a formula that takes into account an assessment of case complexity, was 464 per judgeship, and the average circuit court weighted caseload per three-judge panel was 1,049, dramatically above the Judicial Conference's standard of 500 cases per three-judge panel.

The Judicial Conference's recommendations for new judgeships start with an examination of weighted case filings, after which many other factors are taken into consideration. As a result, the district courts in which the Conference is recommending additional judgeships have seen an average growth in weighted filings from 427 in 1991 to 556 in 2007, an increase of 30 percent. Even these statistics do not reveal the seriousness of the situation in some jurisdictions. According to the AO, judicial districts along the 1,989- mile border the United States shares with Mexico -- Arizona, the Southern District of California, New Mexico, and the Southern and

Western Districts of Texas -- have experienced explosive growth in the number of criminal case filings since the mid-1990s as a result of a series of enhanced law enforcement initiatives. While criminal case filings grew by 27 percent in the 94 district courts nationwide, they grew by 172 percent in the five southwest border districts. Crimes involving drugs and immigration dominate those courts' dockets and accounted for more than 82 percent of non-misdemeanor offenses charged in 2007.

Congress's response primarily has been to provide more resources, not additional judgeships. While Congress did authorize seven permanent and four temporary judgeships for the border courts in 2002, it ignored the Judicial Conference's request for additional judgeships in 2003, 2005 and 2007.

This year, the Senate Judiciary Committee approved S. 2774, which is based on the Judicial Conference's recommendations for the federal court system. It would add 12 permanent circuit court judgeships and 38 permanent district court judgeships, and would convert five existing temporary judgeships into permanent positions. It also would add 14 temporary district court judgeships and two temporary circuit court judgeships, and would extend one existing temporary district court judgeship. Temporary judgeships recognize that sometimes caseload spikes will subside in time and enable Congress to respond with more flexibility.

Neither the Judicial Conference nor the ABA wants to encourage unnecessary growth in the size of the federal judiciary. But consideration must be given to the fact that the integrity of the federal courts requires that judges have manageable workloads. Our judicial system is predicated upon the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly and that justice delayed is justice denied. When judges are laboring under excessive workloads, we cannot fairly expect each case to receive the time and attention it needs or our judges to resolve every dispute in a timely fashion.

Congressional reluctance to authorize new judgeships is understandable in light of the substantial expense associated with each new judgeship and competing government-wide demands for resources. Nevertheless, the explosive growth of cases and concomitant need for more "judge-hours" is real, and constructive solutions require diligent, cooperative effort. If members of Congress question the method by which the judiciary calculates need or thinks that there are additional cost-saving steps or structural changes that the judiciary should undertake, it is incumbent upon them to engage in constructive dialogue to develop a mutually acceptable solution, lest the quality of justice suffer from inaction.

SCOPE OF FEDERAL COURT JURISDICTION

New federal causes of action should be pursued with restraint and enacted only after careful examination of need.

The size of the federal judiciary – including judges, judicial staff, courthouses and administrative infrastructure – and the amount of funding required for it to exercise its constitutional and statutory duties are a direct function of the jurisdiction that Congress assigns to the lower courts. Even though there are other factors such as demographics that contribute to growth, expansion in the scope of federal court jurisdiction is a major factor and within the control of the President and Congress.

Unlike state courts, which are designed to handle the vast majority of disputes within a geographic area, federal courts are national courts designed to adjudicate a much smaller number of cases involving important national interests. Premised on the Constitution's organizing principle of a national government of enumerated powers, the federal courts are meant to complement state

courts and provide a distinct judicial forum with limited jurisdiction. Congress and the President have sole authority to establish the jurisdiction of the lower federal courts. How they exercise their constitutional duty has lasting legal and financial ramifications for both interbranch and federal-state relations.

The late Chief Justice Rehnquist's remarks on the perils of uncontrolled expansion of court jurisdiction, delivered during the celebration of the Bicentennial of the Delaware Court of Chancery in 1992, continue to offer sound advice:

> Obviously, Hamilton…understood that the state and federal systems ultimately serve the same end -- the prompt and fair resolution of disputes. Two hundred years later, we need to reaffirm the view that our state and federal judicial systems are one resource, and an increasingly scarce one at that. The nation can no longer afford the luxury of state and federal systems that work at cross purposes or irrationally duplicate each other's efforts. Nor can it afford a view that the state courts are second-class tribunals in our system of justice.

To conserve the federal courts as a distinctive judicial forum in our system of federalism and in consideration of concerns over the growth in the size and budget of the federal judiciary, the ABA urges the new President and Congress to assign civil and criminal jurisdiction to the federal courts only to further clearly defined and justified national interests.

Every year, some members of Congress respond to constituent concerns by introducing bills to expand federal jurisdiction. This is particularly true with respect to perceived concerns over criminal activity. The ABA believes that creation of new federal crimes is appropriate only where a federal interest is implicated and the state, local or territorial remedy is inadequate to address that interest. Furthermore, we believe that Congress should respond effectively to constituent concerns about public safety by taking constructive steps to aid law enforcement, including the allocation of funds to state, local, or territorial systems for the administration of justice.

With regard to civil matters, the ABA supports the Judicial Conference's recommendation, published in its 1995 Long Range Plan for the Federal Courts, regarding the appropriate subjects of federal civil jurisdiction: cases arising under the Constitution; matters involving foreign relations of the United States; actions involving the federal government; disputes between or among the states; substantial interstate or international disputes; and matters deserving of federal adjudication that involve either a strong need for uniformity or a paramount federal interest.

New federal causes of action increase federal workload and costs and have the potential to disrupt the important constitutional balance of the federal and state systems. New federal causes of action should be pursued with restraint and enacted only after careful examination of need, including the scope of the problem, need for a national forum and the impact of the proposed solution.

JUDICIAL PAY

To attract and maintain a highly qualified and diverse federal judiciary, the new Administration and Congress should work together to provide immediate and lasting pay relief for federal judges.

Inadequate judicial salaries and "broken" pay-setting mechanisms for judges have been a serious problem for years, and lawyers and judges have jointly advocated for solutions on multiple occasions. During the 110th Congress, remedial legislation stalled short of enactment, even though it had the bipartisan support of

congressional leaders in both chambers. Both the House and Senate Judiciary Committees approved separate bipartisan bills, H.R. 3753 and S. 1638, to raise federal judicial salaries by 30 percent. The legislation also included an ABA-supported repeal of "Section 140," which requires affirmative congressional approval before judges receive a cost-of-living adjustment (COLA), and would de-link judicial and congressional salaries.

By custom, the base salaries of judges and members of Congress have been linked since 1969 and cost-of-living adjustments have been linked by statute since 1989. The statutory linkage of COLAs means that judges are not entitled to a COLA when members of Congress deny themselves a COLA. However, because of the operation of "Section 140," the converse is not true: judges are not automatically entitled to a COLA whenever congressional members receive one. Congress has the authority to accept a COLA for its members but deny the same COLA to judges.

Despite a series of attempts by Congress and the President over the last 30 years to legislate 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 new mechanism for automatic, annual COLAs has not worked as intended. These failed reforms have adversely affected salaries for top-level federal officials in all three branches of government.

For political reasons Congress has been reluctant to award itself a pay increase or even to accept COLAs to which it is entitled. When Congress denies itself a COLA or a raise, it also denies judges a COLA or raise because of the linkage. Because of congressional inaction, judges have not received a raise in base pay since 1990. On top of that, judges suffered a 12 percent decline in the value of their salaries from 1993 through 2007 as a consequence of not receiving six cost-of-living adjustments since 1993. This erosion in judicial pay due to inflation has deprived judges (many of whom accepted significantly reduced compensation to become judges) of even the prospect of salary stability during their tenure on the bench.

The phenomenal growth in salaries of attorneys in other fields over the last decade has accentuated the inadequacy and inequity of current judicial salaries. Even though market conditions alone are not the measure of the adequacy of judicial salaries, they do demonstrate the extent of the financial sacrifice many federal judges make to serve the public, and the lure of alternative private employment for those who find themselves financially strapped.

Members of the federal judiciary increasingly are choosing not to remain on the bench. The AO reports that from 1990 – October 2008, 115 Article III judges resigned or retired from the bench. Those departures account for over two-thirds of the Article III judges who have left the bench since 1970. Even more alarming is the rate of departures during the last eight years. Since January 1, 2000, 60 Article III judges have resigned or retired from the federal bench.

Of these 60 judges, 18 resigned before reaching retirement age, depriving them of any right to an annuity. Approximately two-thirds of the 60 judges entered the private practice of law; six judges accepted appointments to other government or quasi-government offices; two judges accepted appointments in academia; and one judge accepted an appointment as chief legal officer of a not-for-profit institution. 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. Judicial pay

may not be a deterrent to individuals who are already in public service, but it is a disincentive for experienced lawyers in private practice who are earning substantial salaries. The federal judiciary benefits from the collective wealth of experience and expertise of its jurists who have served in different capacities in the public and private sectors. As we continue to strive for a highly qualified federal judiciary composed of racially, ethnically and religiously diverse men and women, we cannot afford to lose the diversity of the bench that comes from the appointment of individuals of varying financial means who have served in different capacities in both the public and private sectors.

Paying judges what they deserve is an investment in America's court system. Judicial pay needs to be raised to fair and adequate levels immediately, and the current pay-setting mechanisms need to be reformed to address the root problems.

The ABA urges the President and Congress to take the following steps to provide for immediate and lasting judicial pay relief:

- Enact legislation as soon as possible to substantially raise the base salaries of federal judges. The salary increase needs to be large enough not only to restore denied Employment Cost Index adjustments, but 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. The ABA has supported the 30 percent pay increase proposed in S. 1638 and H.R. 3753 during the 110th Congress and urges enactment of a similar pay increase during the 111th Congress.

- 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.

- Repeal Section 140 of Pub. L. No. 107-77, which requires explicit congressional approval of any cost-of-living adjustment for federal judges.

- 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 soon after its authorization.

The recommendations discussed above are among a wide range of issues endorsed by the ABA and are by no means exhaustive. We emphasize these issues because of their timeliness and importance to our nation.

For more information, please contact Thomas M. Susman, Director of the ABA's Governmental Affairs Office, at susmant@staff.abanet.org or (202) 662-1765.

For more information on ABA Legislative Priorities, visit www.abanet.org/poladv.

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With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

ABA Governmental Affairs Office

The ABA Governmental Affairs Office (GAO) serves as the focal point for the Association's advocacy efforts before Congress, the Executive Branch and other governmental entities on diverse issues of importance to the legal profession on which the ABA House of Delegates has adopted policy. The GAO concentrates its advocacy efforts on the Association's Legislative and Governmental Priorities that are selected annually by the ABA Board of Governors from a list of over 1,000 policy positions adopted by the ABA House of Delegates. When appropriate, the GAO calls upon the Grassroots Action Team for grassroots advocacy assistance. The GAO also works closely with ABA member entities to communicate the views of the Association to numerous governmental entities on a broad range of issues of concern to policy makers and the legal profession. In total, each Congress, the GAO lobbies on approximately 100 different legislative issues.


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