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Rules that Congress violated compensation clause

Federal Circuit Court decides in favor of judges in judicial pay case

The U.S. Court of Appeals for the Federal Circuit ruled this month that Congress violated the Constitution’s compensation clause when it blocked cost-of-living adjustments (COLAs) for federal judges in 1995, 1996, 1997 and 1999, and that Congress improperly withheld COLAs in 2007 and 2010 based on erroneous interpretation of a statute.

In its 10-2 decision in Beer v. United States, the court decided in favor of the six current and former judges who first brought action in 2009. The court held that Congress, when it passed the Ethics Reform Act of 1989, committed to “providing sitting and prospective Article III judges with annual COLAs in exchange for limiting the ability to seek outside income and to offset the effects of inflation.” The court concluded that “Congress broke this commitment and effected a diminution in judicial compensation.”

The 1989 act established automatic annual COLAs for judges and other senior government officials that were to take effect whenever a COLA was conferred on federal workers paid according to the General Schedule. In 1995, 1996, 1997 and 1999, however, Congress passed blocking legislation that denied judges, members of Congress and certain executive branch officials their scheduled COLAs. In 2007 and 2010, COLAs were denied because Congress failed to enact authorizing legislation to allow federal judges to receive salary adjustments as it believed was required under Section 140 of P.L. 97-92. Section 140, originally enacted in 1981 as part of an appropriations bill and made permanent in 2001, bars funds each year from being expended to increase federal judicial salaries “except as may be specifically authorized by Act of Congress hereafter enacted.”

In reaching its decision, the Federal Circuit overruled its 2001 decision in Williams v. U.S., 240 F. 3d. 1019 (Fed. Cir. 2001), which found that Congress did not violate the compensation clause when it withheld judicial salary increases in question because the clause protected only pay that had already taken effect. That decision was based on a 1980 Supreme Court decision in U.S. v. Will, 449 U.S. 200 (1980), which held that Congress could revoke a COLA any time before it vested, defined as the time it was due to be paid.

The Oct. 5 ruling maintained that Williams incorrectly relied on the vesting rules in Will, which applied to an uncertain, discretionary process under the 1975 Adjustment Act that differed substantially from the 1989 act.

Examining whether the blocked COLAs violated the compensation clause, the court concluded that the “precise and definite promise of COLAs in the 1989 act triggered the expectation-related protection of the compensation

see “Judicial pay,” page 3
### Independence of the Legal Profession

S. 1483 would subject many lawyers to anti-money laundering and suspicious activity reporting requirements under the Bank Secrecy Act when they help clients establish companies. S. 3394 and H.R. 4014 would amend the Federal Deposit Insurance Act to clarify that when banks or other supervised entities submit privileged information to the Consumer Financial Protection Bureau during examination or other regulatory processes, the privilege would not be waived as to third parties.

**ABA Position:** Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. See page 4.

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| S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11. S. 3394 was referred to the Banking, Housing and Urban Affairs Committee on 7/17/12. | H.R. 4014 on 3/26/12. | S. 348 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11. | Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See front page. |}

### Judicial Independence


**ABA Position:** Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See front page.

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| S. 348 was referred to the Judiciary Cmte. on 2/15/11. H.R. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on S. 1945 on 12/6/11 and approved the bill on 2/9/11. | H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11. | S. 348 was referred to the Judiciary Cmte. on 2/15/11. H.R. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on S. 1945 on 12/6/11 and approved the bill on 2/9/11. | Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See front page. |}

### Legal Services Corporation

P.L. 112-175 (H.J. Res. 117) a fiscal year 2013 continuing resolution funding the government through 3/27/13, maintains LSC funding at its fiscal year 2012 level of $348 million. H.R. 5326, fiscal year 2013 appropriations legislation, includes $328 million the LSC. The Senate Appropriations Committee included $402 million in its FY 2013 bill.

**ABA Position:** Supports an independent, well-funded LSC. See page 6.

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### Rule of Law


**ABA Position:** Supports.
Restrictions continue in China for U.S. lawyers

A number of important barriers restricting U.S. and other foreign law firms from operating in China still remain, the ABA told the Office of the U.S. Trade Representative (USTR) in comments submitted Sept. 24 on China's compliance with its commitments in connection with its accession in 2001 to the World Trade Organization (WTO).

In the comments, ABA Governmental Affairs Director Thomas M. Susman recognized that China has made some progress in liberalizing its legal services market. He highlighted, however, remaining market barriers identified by the USTR's 2012 National Trade Estimate Report on Foreign Trade Barriers that include: prohibiting foreign law firms from practicing Chinese law; barring cooperation with Chinese law firms; and barring foreign law firms from directly representing clients in, or even from attending along with local Chinese counsel, regulatory proceedings by Chinese government agencies.

An issue of primary importance to the ABA, Susman said, is the inability of U.S. law firms to hire qualified Chinese lawyers able to practice Chinese law. Under current rules, Chinese lawyers employed by a U.S. or other foreign law firm must surrender their licenses to the Ministry of Justice and are prohibited from practicing Chinese law during their period of employment.

These restrictions prevent U.S. firms from “being able to offer the comprehensive and integrated services expected by clients operating in our increasingly globalized economic environment,” Susman wrote. In contrast, Chinese law firms are able to hire U.S.-licensed lawyers to work for them in their offices located both in the United States and in China. The U.S. lawyers are free to provide the full range of advice and services on the law of the U.S. jurisdiction in which they are licensed to practice.

“The end result is that U.S. firms in China are disadvantaged in comparison to their Chinese counterparts by not being able to offer comprehensive services on transactions involving both Chinese and U.S. law,” Susman said.

The American Chamber of Commerce in the People's Republic of China has identified additional market access constraints on U.S. lawyers and law firms that prohibit them from participating with clients in meetings with certain government departments, impose burdensome requirements for establishing representative offices, subject them to discriminatory tax burdens, make it difficult to hire foreign non-legal professionals, and limit work visas to one year.

The ABA maintains that, while not all of the restrictions constitute technical noncompliance with China's WTO commitments on legal services, the restrictions may be contrary to the WTO's guiding principles of progressive liberalization and counter to the increasing trend toward legal services market liberalization by other countries in the region such as South Korea, Singapore and Malaysia.

The ABA has long supported a liberalized rules-based system of international trade both as a mechanism to advance the rule of law and as a means to enhance the ability of U.S. lawyers and law firms to effectively serve their clients through cross-border practice. In 2002, the association adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers in the ABA Model Rule for the Licensing and Practicing of Foreign Legal Consultants.

The USTR will be compiling the ABA comments and other statements and testimony delivered during an Oct. 5 hearing as it prepares its annual report on China's WTO compliance.

Judicial pay

continued from front page clause. As such, Congress could not block these adjustments once promised.”

The court also examined Section 140 and ruled that the 2001 amendment making Section 140 permanent did not set a new benchmark for its “hereafter enacted” requirements. Therefore, the 1989 act's precise, automatic COLAs satisfy the requirements of Section 140, according to the court.

The ruling explained that the government withheld COLAs from judges in 2007 and 2010 because the government misinterpreted Section 140 as requiring a separate and additional authorizing enactment to put those adjustments into effect.

The court also noted that Congress is not precluded from amending the 1989 act to set up a scheme promising a certain pay scale of yearly COLAs, but warned that any changes would be limited by the Constitution to prospective Article III judges and would not affect currently sitting judges.

The case was remanded to the Court of Federal Claims, which will calculate monetary damages owed to the appellants as “the additional compensation to which appellants were entitled since Jan. 13, 2003 – the maximum period for which they can seek relief under the applicable statute of limitations.”

The federal government is expected to appeal the ruling to the Supreme Court.
ABA recommends ethical code for ALJs

The ABA recommended to Congress last month that federal administrative law judges (ALJs) be subject to, and accountable under, appropriate standards for ethical conduct adapted from the ABA Model Code of Judicial Conduct.

Such a step would be “an excellent way to promote fairness and public trust in administrative adjudication proceedings,” ABA Governmental Affairs Director Thomas M. Susman wrote in a Sept. 28 letter to the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations. The Model Code, he said, establishes standards for the ethical conduct of judges that promote the independence, integrity and impartiality of the judiciary.

The ABA letter, submitted for the record of a Sept. 13 hearing on the quality of decisionmaking in cases involving the Social Security Administration’s (SSA) disability programs, emphasized that the association has worked extensively for more than two decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the system.

Susman explained that the adjudicative function performed by ALJs and the relationship they must maintain with their employing agencies distinguish them from the rest of the federal workforce. Congress recognized this unique function in 1946 when it passed the Administrative Procedure Act (APA), which established the adjudicative independence of ALJs.

The SSA has been working for years to reduce the backlog of claims under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs as the number of claims has risen at an unprecedented rate over the past few years. The Senate panel called the Sept. 13 hearing to discuss the findings of a subcommittee investigation that revealed, among other things, that more than a quarter of 300 Social Security disability cases reviewed by the staff “failed to properly address insufficient, contradictory or incomplete evidence.”

During the hearing, Debra Bice, chief ALJ for the SSA Office of Disability Adjudication and Review, emphasized that SSA has taken affirmative steps to address egregiously underperforming ALJs, but she explained that the agency’s authority to discipline ALJs is restricted by statute.

Other chief ALJs testifying at the hearing stressed that the APA grants all ALJs “qualified decisional independence,” which means that ALJs make their decisions free from agency pressure or pressure by the parties in particular cases.

They emphasized that while they can exercise appropriate management oversight over ALJs in their offices and take a number of actions to help ALJs improve their performance, they “cannot and do not interfere with or influence the ultimate decisions in any case.”

ABA urges single, consistent standard for federal treatment of privileged information

ABA President Laurel G. Bellows urged Senate leaders last month to promptly enact S. 3394, a bill that would create a single, consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks, including the new Consumer Financial Protection Bureau (CFPB).

Current law, 12 USC §1828(x), provides that privileged materials shared with federal banking agencies remain privileged as to all other parties, but the definition of “federal banking agency” in the Federal Deposit Insurance Act does not explicitly include the CFPB.

Although the CFPB, established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, recently issued guidance and a new rule asserting that §1828(x) applies to its receipt of privileged materials, the ABA has raised serious questions regarding the CFPB’s authority to protect the privileged status of such materials without a statutory fix.

“By explicitly applying the same privilege standards to information submitted to the CFPB that currently apply to any submissions to a ‘federal banking agency,’ S. 3394 would help ensure a more integrated, consistent and coordinated approach to the regulation of financial services providers,” Bellows wrote Sept. 20 to Sen. Tim Johnson (D-S.D.), chairman of the Senate Committee on Banking, Housing and Urban Affairs, and the committee’s ranking member, Sen. Richard Shelby (R-Ala.).

She pointed out that S. 3394 also takes the important step of adding the CFPB to the list of “covered agencies” under 12 USC §1821(t) that may share privileged information with other agencies without causing a waiver of the privilege. This would place the CFPB on the same footing with regard to privilege as the other federal bank regulators when it shares privileged information with any other federal government agency, she said.

The proposed change, Bellows said, makes particular sense in light of the existing statutory requirement that the CFPB and prudential regulators share draft reports of examination with each other.

see “Privileged,” page 5
New website launched on collateral consequences

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) officially launched a new free web-site Sept. 19 on Capitol Hill that was developed and is being updated and maintained by the ABA Criminal Justice Section in conjunction with the National Institute of Justice.

The “National Inventory of the Collateral Consequences of Conviction” website allows users to search for state and federal laws and rules that result in collateral consequences, which are additional state actions that hinder people with criminal records from successfully integrating back into society. These collateral consequences may affect an individual’s ability to find a job or housing, secure licenses, obtain an education or keep his or her family together.

“The website you demonstrate today will take us still further toward helping our criminal justice systems work better, providing second chances to convicted individuals, and making our communities safer,” said Leahy, who sponsored the Court Security Act of 2007, which authorized funding for establishing the collateral consequences resource.

The website is designed to help practicing lawyers, lawmakers and policy advocates recognize the scope and impact of such laws and disqualifications and also help affected individuals understand their rights and responsibilities. The database, which will be expanded over the next 18 months, initially includes information on federal statutes and regulations and state statutes and regulations from Vermont, Minnesota, Iowa, Colorado, Nevada, Texas, Wisconsin, South Carolina and New York.

“By gathering in one place information that is now scattered through the codebooks, the Inventory gives prosecutors, defense attorneys and judges the tools they need to make the best possible decisions,” according to Project Director Margaret Love, who demonstrated the website during the event.

“It also brings legislatures and executive officials face to face with the web of laws that limit opportunities for individuals with criminal records so they can decide which ones make sense and which ones do not,” she added.

The ABA Criminal Justice Section has become the leading national source for data on the collateral consequences of criminal convictions and juvenile delinquency adjudications.

Privileged information

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Urging prompt enactment of S. 3394, Bellows said the ABA’s support for including the CFPB in the coverage of 12 USC §1828(x) and 12 USC §1821(t) “reflects the critical role that those two statutes play in limiting the potential adverse consequences of the review of privileged materials by federal banking agencies.”

In addition to protecting the privilege, both S. 3394 and H.R. 4014, similar legislation passed by the House in March, also advance key financial regulatory reform principles adopted by the ABA in 2009 that were developed by the association’s Task Force on Financial Markets Regulatory Reform.
LSC task force seeks to enhance pro bono services

A task force report released this month by the Legal Services Corporation (LSC) identifies and recommends innovative ways to enhance pro bono services throughout the country.

The Pro Bono Task Force, convened by the LSC Board of Directors, included more than 60 leaders and experts from the judiciary, major corporations, private practice, law schools, the federal government and the legal aid community. The group was divided into five working groups: Best Practices—Urban; Best Practices—Rural; Obstacles; Technology; and Big Ideas.

The report considers how the LSC, its grantees and other stakeholders can narrow the justice gap through the regulation and effective engagement of pro bono lawyers.

The report makes recommendations to the LSC and urges bar leaders and the judiciary to take steps to recruit pro bono lawyers, and to support and applaud their pro bono efforts.

Bar associations, according to the report, can do the following to support and celebrate pro bono involvement by their members:

- provide training;
- offer funding for legal services;
- develop and maintain pro bono programs;
- provide a platform to educate others about legal services and the importance of pro bono work; and
- recognize pro bono contributions of their members through awards.

One of the current efforts commended in the report is the annual ABA National Celebration of Pro Bono, sponsored by the ABA Standing Committee on Pro Bono and Public Service and scheduled for Oct. 21-27 this year. During that week, lawyers will be volunteering legal services to thousands of low-income Americans at more than 700 events that include free legal clinics.

“The National Pro Bono Celebration focuses the nation’s attention on the increased need for pro bono services during these challenging economic times and celebrates the outstanding work of lawyers who volunteer their services throughout the year,” ABA President Laurel G. Bellows said in announcing the celebration Oct. 16. “It is essential that the entire legal community engage in conversation and action that results in equal access to justice for all,” she added. “The energy generated by the National Pro Bono Celebration is a powerful force that helps us build a just legal system.”

In addition to bar association actions, the courts have a unique ability to recruit and inspire lawyers to give back through pro bono, according to the report.

The task force recommends that state judicial codes of conduct reflect Rule 3.7 of the Model Code of Judicial Conduct, which expressly allows judges to encourage lawyers to provide pro bono services. Another recommendation is to allow lawyers to take on pro bono matters in jurisdictions other than those in which they are licensed to practice.

see “Pro bono,” page 8
CHILD WELFARE PROCEEDINGS: Last month, the ABA filed an amicus brief urging the Supreme Court of Georgia to allow a minor who is the subject of a child-welfare proceeding to appeal, through his attorney, a trial court’s decision. The brief in the case, In the Interest of W.L.H., a Child, states that “the ABA asserts that the child, in consultation with his attorney, must have a meaningful voice in deprivation proceedings, including standing to bring an appeal of a trial court’s ruling.” According to the brief, “to allow another party, including a guardian ad litem to overrule a child’s expressed desire to appeal would, in the ABA’s view, allow that party improperly to assume the child’s place within the attorney-client relationship.” The brief further recognizes that this position is consistent with how the Supreme Court of Georgia has previously recognized the attorney-client relationship. The brief takes no position on the merits of an appeal, stating that the “ABA asserts only that the child, through counsel, should have his or her day in court.”

A WORK IN PROGRESS: As the voice of the legal profession, the ABA insists on fair and transparent government, she concluded.

JUVENILE COURT RULES: The ABA urged the Juvenile Court Procedural Rules Committee of the Supreme Court of Pennsylvania last month to adopt proposed juvenile court rules that would establish and clarify the role and duties of lawyers in juvenile court proceedings. The proposed rules are patterned after the ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings (ABA Model Act), which was adopted with widespread support by the ABA in August 2011 after a three-year drafting process. ABA Governmental Affairs Director Thomas M. Susman explained in a Sept. 24 comment letter to the committee that the model of client-directed representation within the ABA Model Act represents the best practices for the representation of children. A lawyer-client relationship established under the ABA Model Act includes the lawyer-client privilege that is essential to build a trusting relationship that enables the child client to participate and have a voice in proceedings that fundamentally affect his or her life and safety. Susman pointed out that the ABA Model Act, the ABA Models Rules of Professional Conduct and the proposed Pennsylvania juvenile court rules also contain sufficient safeguards for clients with diminished capacity who cannot be counseled out of an unsafe decision, and they outline how a lawyer can take protective action for a child client if necessary. “Thus,” according to Susman, “under the proposed model, a lawyer would never be bound to advocate for something he or she felt would put the child client at risk of harm.”
The fight against human trafficking intensified recently as President Obama announced initiatives Sept. 25 to expand resources and legal assistance to human trafficking victims and to strengthen government contractor compliance with anti-human trafficking efforts.

“The president’s action is a meaningful victory for human rights that should rally policymakers and the public to fight the practice of modern day slavery where hundreds of thousands of victims are forced into labor or exploited for sex in the United States alone,” according to ABA President Laurel G. Bellows, who has made efforts to combat human trafficking a priority for her year in office.

President Obama’s initiatives build on his earlier announcement in March 2012 directing Cabinet officials to redouble efforts to eliminate human trafficking, which is believed to impact more than 20 million individuals worldwide. The initiatives do the following:

- prohibit federal contractors and subcontractors from engaging in specific trafficking-related activities, which include using misleading or fraudulent recruitment practices, charging employees recruitment fees, and destroying or confiscating an employee’s identity documents;
- provide tools and training to federal prosecutors, law enforcement officials and a wide range of other professionals so they will be better equipped to identify and assist victims of human trafficking;
- expand services and legal assistance to victims of trafficking; and
- develop a federal strategic action plan and a tool for tracking trafficking trends within the United States.

At the ABA, Bellows has appointed a Task Force on Human Trafficking, which is working with businesses and lawyers to develop model business-conduct standards, expand pro bono legal assistance, and conduct training for those who are helping to free victims and prosecute perpetrators. The task force also is working with the Uniform Law Commission to develop a uniform anti-trafficking law for the states.

The 17-member task force is co-chaired by Jimmy Goodman of Oklahoma City and Linda Hayman of New York City.

In addition, the association continues to urge Congress to pass legislation to promptly reauthorize the Trafficking Victims Protection Act, first enacted in 2000, to continue the domestic and international efforts against human trafficking. The pending reauthorization legislation, S. 1301 and H.R. 3589, would extend and expand anti-trafficking programs and ensure that they receive adequate funding.

Pro bono recommendations

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Recommendations for the LSC include:

- forming a professional association of pro bono coordinators at LSC-funded organizations;
- asking Congress to create a new Pro Bono Innovation/Incubation Fund modeled on LSC’s Technology Initiative Grant program; and
- developing a fellowship program for new graduates and emeritus lawyers to build support for civil legal services and pro bono with law firms, law schools and the legal profession as a whole.