Testimony of

Stephen Breyer
Associate Justice, Supreme Court of the United States

Before the
House Committee on the Judiciary
Subcommittee on the Courts, the Internet and Intellectual Property

Oversight Hearing on "Federal Judicial Compensation"

April 19, 2007

Judicial Compensation and Judicial Independence
Statement of Justice Stephen Breyer
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Mr. Chairman, Members of the Committee,

I appreciate your invitation to testify today about judicial compensation. While it is certainly an honor to be invited, I am not happy to be here. That is because I must discuss judicial pay, the severe erosion of real compensation levels, and the connection between that erosion and the institution's health. Since I am a judge, there is an obvious degree of self-interest. And I fear that this self-interest may lead the public to discount what I say when I attempt to demonstrate that the compensation problem ultimately threatens harm to the American public, whom our independent federal judiciary seeks to serve.

Moreover, I am testifying about real compensation levels that are higher than those of the average American. It is not easy to explain to any man or woman why my pay should be higher than his or hers. Finally, I am making an exception to an important practice. Separation of powers concerns, which both Legislative and Judicial Branches share, have limited the occasions on which members of the Supreme Court have testified before Congress.

I do so today because I believe that something has gone seriously wrong with the judicial compensation system. Compared to the average American, real judicial compensation levels over time have fallen by nearly 50%; and that decline threatens to weaken the institution. Perhaps by appearing on behalf of the judicial institution and speaking directly to you in the Legislative Branch, who are facing a similar problem, I can help to explain the problem, and why something must be done.

I

I begin with the Constitution's Framers. The Framers emphasized the importance of judicial independence and the connection of compensation with that independence. Alexander Hamilton sought constitutional guarantees that would help to assure that the Judicial Branch, though the "weakest Branch" of the federal government, would remain strong and independent. He said that the "independence of the judges, once destroyed, the constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate."

What did Hamilton mean by the term "independence"? My colleague Justice Ginsburg has written that independent judges are judges who do not act on behalf of particular persons, parties, or communities. They serve no faction or constituency. And they strive to do what is right in each individual case, even if the case in question should pit the least popular person in America against the most powerful government in the world. Justice Kennedy recently captured the point when he noted: "Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must."

How did the Framers seek to assure that independence? They were aware, as the Declaration of Independence states, that the English King had "made Judges [in the colonies] dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." They wrote into the Constitution guarantees that federal judges would serve "during good behaviour" and that the judges' compensation "shall not be diminished during their continuance in office." And they expected that around these guarantees would arise traditions of independence, supported by customs and understandings, which together would assure a truly independent judicial branch. Hamilton pointed out the obvious: "If the laws are not suffered to control the passions of individuals, through the organs of an extended, firm and independent judiciary, the bayonet must."

In a word, the Framers saw the need for an "extended, firm and independent" judicial branch. And they saw a connection between that goal and judicial compensation. My testimony will focus upon that connection.

II

To state the problem in a nutshell: The real pay of federal judges has diminished substantially over nearly four decades. The gap between judicial compensation levels and compensation levels, not just in the private sector, but also in the non-profit sector and in academia, has widened substantially. The result is a threat of serious harm to the federal judicial institution and ultimately to the public that it serves.

A few facts will help to show what I mean. First, in real terms (which measures pay in constant dollars to take account of inflation), the pay of federal judges has dramatically declined over the past several decades. Between 1969 and 2007, real pay for federal district court judges will have declined nearly 27%. During the same period the real pay of the average American worker is projected to have increased by more than 23%. To restore the relationship between judges' real pay and the real pay of the average American, a federal judge's paycheck would have to make up for that nearly 50% decline. I add that the same is true with respect to Members of Congress.

Second, I shall for the moment put to the side any comparison with the private sector. Government does not and should not offer the monetary awards available in the private sector. But consider a comparison between judicial salaries and compensation offered in certain *non*-profit sectors of the legal profession. There too we find a widening gap. In 1969 when I began teaching law, a top professorial salary (for teaching and writing) was $28,000; the Dean received $33,000; and a federal judge received $40,000, about 40% more than the professor. Today, salaries alone (without compensation for consulting) of top professors at leading law schools can exceed $300,000; a Dean's

salary at several important schools exceeds $400,000; but a federal district judge receives $165,200, approximately half of what the top professors are paid. Indeed, the January 2003 Report of the National Commission in the Public Service, which was chaired by Paul Volcker, pointed out that salaries paid to CEOs of average *non*-profit organizations were far higher than those paid to federal judges. Today, CEOs of large non-profits on average make nearly double the salary of a federal district court judge.

Third, breaking my promise to put the private sector to the side, I want to offer a glimpse of the temptations that lurk there. If the figures show a gap in judicial pay and certain non-profit sector jobs, here they show a chasm the size of the Grand Canyon. Partners' salaries at large firms are on average more than $1 million per year. But from temptation's point of view what is important is not the sheer size of the salary but the significant widening of the chasm. Twenty years ago, a federal judge's salary was about 1/3 what that judge would have made as a partner at a large firm; today it is about 1/7 as much. Indeed, you probably have heard about the young law school graduate who, after he leaves his first job as the federal judge's law clerk, makes more money in his first year of practice than the judge. While that story was once hyperbole, today it is an everyday reality.

Fourth, many positions in the Executive Branch of the Federal Government now offer salaries far higher than the salaries of district court judges (or Members of Congress). The Office of Thrift Supervision, for example, recently recruited for five high-level positions, offering annual salaries of up to $305,166. The Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and quite a few other agencies offer salaries to lawyers, as well as to administrators and medical personnel, of $200,000 or more. The Administrative Office compiled a list of offers for vacant Executive Branch positions (including many medical and similarly technical positions) paying more than a federal judge's salary. The list, with each position placed on one page, is more than an inch thick.

Finally, for purposes of completeness, I include a few international comparisons. Those who join the federal judiciary used to believe, and still believe, they are becoming members of the world's finest judiciary. They also found that their pay was higher than that of judges elsewhere. Today, they often find that it is considerably lower. Indeed, federal district court judges in the United States now receive only 2/3 of the salaries of their judicial counterparts in Australia and approximately 1/2 of their judicial counterparts in England.

The upshot is that however one looks at real judicial compensation, across time, with an eye toward "profit," "non-profit," or "foreign" salaries, or through a comparison with change in the real compensation level of the average American, one consistently finds declines and gaps that are serious in nature and that have worsened significantly over time.

III

These figures and the underlying reality reveal a problem. That problem is not about what judges as individuals might in some metaphysical sense "deserve" to be paid. Many Americans are paid less than what morality suggests they "merit." In this world, there is no pay scale that accurately measures an individual's "just deserts." But if the problem has little to do with a scale of merit, it has everything to do with institutional strength.

How does the compensation problem adversely affect the health of the judicial institution? For one thing, declining pay means financial insecurity. And unlike many Americans who do not have a choice, judges who worry about how to educate their children do have a choice. They can leave the bench. They may return to law practice. Or, they can enjoy the non-pecuniary benefits of a job in the non-profit world while also finding the money needed to pay for college tuitions by becoming law school deans or highly paid arbitrators or mediators. (One prominent dispute resolution firm offers the services of twenty former federal judges.) When I became a federal judge in 1980, it was extremely

unusual to hear of a judge leaving the Bench to take a job elsewhere. But since just last year, ten Article III judges have departed from the bench. Seven of those ten judges sought employment in other sectors of the legal community. This is not a one-year blip. Indeed, in 2005, nine Article III judges departed from the bench. Four of the nine joined a private firm that provides arbitration and mediation services. Of course, one cannot be certain of the role financial insecurity played in any individual's decision to leave the bench. Such decisions always reflect a mix of motives, some unknown even to the departing judge. But I suspect that declining real compensation played a significant role.

The departures themselves mean that the judiciary has lost fine judges. But far worse is the message that the departures send to others. They suggest that the financial problem is real. And if that is so, and if departure is the remedy, some applicants or the public at large may come to think of a judicial appointment, not as the "capstone," of a legal career but as a way station. Indeed, any perception that a judicial appointment is a "stepping stone" towards a more lucrative undertaking would seriously harm the judicial system, for it is directly at war with judicial independence.

For another thing, the decline in real pay levels can make a difference with respect to the pool of applicants. I do not mean that there is a shortage of applicants. I do mean, however, that a federal judgeship should not be reserved primarily for lawyers who have become wealthy as a result of private practice, or for those whose background is that of a judicial "professional," *i.e.*, a state court judgeship or a magistrate position followed by an Article III appointment. I do not mean that those who come from those backgrounds make lesser judicial contributions. To the contrary, some of our finest judges have previously been state court judges or magistrates or successful private practitioners. I do mean that a federal judicial opening should not be beyond the reach of any lawyer whose qualifications of intellect and character indicate that he or she is well suited to the job. The federal bench should reflect diversity not simply in terms of race or gender, but in respect to professional background as well. A federal district court is a

community institution. The federal judiciary will best serve that community when its members come from all parts of the profession, large firms, small firms, firms of different kinds of practice, all varieties of government practice, other courts, and academia.

That diversity, important as it is to the institution, is gradually disappearing. If one examines the federal district court judges at the time of President Eisenhower, one finds that only about 1/5 previously had been state court judges or magistrates. If we examine appointees in the last fifteen years, however, the percentage of those whose career has followed a judicial "professional" path has increased, from about 20% to more than 50% of district court judicial appointments, and the percentage coming from other sectors has correspondingly declined.

These figures mean that those who followed the judicial "professional" path accounted for roughly one in five district court judges fifty years ago, but they now account for more than one out of every two appointments. I repeat that those who have previously served as state court judges or magistrates are typically fine judges. But the growth in the number of such appointments indicates a judiciary that has become increasingly professionalized. Many other nations, France and Belgium for example, have professionalized their judiciaries. But that is not our tradition. Nor, given the need for federal judges to interpret the Constitution and apply that document to protect the basic rights of 300 million Americans, do I believe it is desirable for our Nation to go the way of continental Europe. Would a continental style, highly professionalized judiciary have written *Brown* v. *Board of Education*? Could it have survived that decision's aftermath? Of the adverse tendencies of a real salary decline that I have mentioned thus far, it is the loss of diversity of background and the increased administrative "professionalizing" of the judiciary that I most fear.

Finally, there are what I think of as "intangible" harms, including harms that snowball, each harm building upon the others in ways that, at first subtly, and then radically, change the nature of

an institution. Based upon my own experience in government, I believe that over time salary differences do matter. Continuous cuts in the salaries at the top in any sector (public or private), cuts in the salaries of those who lead an organization, may sap the institution's strength. They will lower morale, harm the institution's reputation, and diminish its power to attract and to retain well-qualified employees. These consequences in turn bring about diminished institutional performance, which then results in public disenchantment. In the case of the judiciary, intangible harms of this kind threaten the Framers' constitutional objective, a strong, independent judicial institution.

IV

In discussing potential harm to the judicial institution, I deliberately hedge, using words such as "threaten" that indicate what could conceivably transpire, not what will inevitably occur. That is because the strength of an institution, and certainly a judicial institution, depends upon many different factors, of which monetary compensation is only one (and not necessarily the most important). Because we are discussing a risk posed to the "firm and independent judiciary" of which Hamilton spoke, I shall turn to the related subject of this hearing, judicial independence, and describe from my own experience a few of the reasons why this risk is not worth running.

First, I learned what the words "independent judiciary" do *not* mean at a meeting of judges I attended fifteen years ago in a newly independent Russia. I heard the judges talking about something called "telephone justice." That, they said, occurred when the party boss would call to tell the judge how to decide a particular case. Why did we do it, they asked each other. We all know why, they answered: Because we needed the apartment for our families, the education for our children, the economic necessities that the Communist Party controlled. In turn, the judges asked me whether we had telephone justice in the United States. I could answer honestly, no. Our judges were independent.

I believe I convinced them that was so. And how proud I was to belong to a judicial system where I could simply and truthfully give that answer.

Second, I remember listening to Alan Greenspan tell an audience that, if he could create a single institution necessary to promote economic development and thereby create the conditions necessary for economic prosperity, it would be an independent judiciary. That institution would assure the honest enforcement of contracts, produce investment, and lead to prosperity. I think about Chairman Greenspan's statement when I am at the local supermarket or mall and consider the vast display of high quality goods.

Third, when I speak to high school students, I often contrast three Supreme Court cases that illustrate this Nation's journey toward judicial independence and the rule of law. The Court decided the first case, *Worcester* v. *Georgia*, about one-hundred-eighty years ago. In *Worcester,* the Court determined that land in northern Georgia belonged to the Cherokee Indians and not to the Georgians who had seized it. The President of the United States, Andrew Jackson, then supposedly said, "John Marshall," the Chief Justice, "has made his decision. Now let him enforce it." President Jackson then sent troops to Georgia, not to enforce the Court's decision, but to evict the Indians, who traveled the Trail of Tears to Oklahoma where the descendants of the few who survived live to this day.

The Court decided the second case about one-hundred-thirty years later. The Court held in *Cooper* v. *Aaron* that *Brown* v. *Board of Education* meant what it said: Little Rock, Arkansas must integrate its schools. But Arkansas' Governor, Orval Faubus, stood with his state troopers in the schoolhouse door and defied the Court's ruling. This time, a different President, Dwight Eisenhower, dispatched troops but with a mission to enforce, rather than to reject, the law. And those federal paratroopers took the black children by the hand and walked with them into what had been an all-white school.

Now consider any recent controversial case: eminent domain? prayer in public schools? even *Bush* v. *Gore*? The most remarkable feature of those cases, I tell the students, is a feature that rarely receives comment. After the Court issued decisions in those cases, cases that elicited very strong feelings, no President needed to dispatch paratroopers to enforce the decree. There were no riots, no fighting in the streets. Americans who strongly disagreed with the Court's decision in some of those cases (and I disagreed with the Court's decision in some of those cases) have nonetheless agreed to follow the law. That is progress. That is what we mean by a "rule of law." And it is a hard-earned lesson about the rule of law that this Nation has taken to heart over the course of a history that includes a Civil War and 80 years of legal segregation.

Finally, when I take my seat on the bench for oral argument, I have the privilege of looking out over a courtroom where many of this Nation's most important cases have been decided. In this very room, I sometimes think, *Brown* v. *Board of Education* was handed down. I see before me people of every race, every religion, and every point of view imaginable. And I am confident that, even though those individuals may not always agree with one another, they will resolve their differences, not in the street, but in the courtroom. This fundamental trust in the law, this habit of following the law, this respect for the rule of law, helps to bind together our three hundred million people as a Nation. As you well know, not all peoples in all nations resolve their disputes according to the rule of law. We do. And that is a national treasure.

An independent federal judiciary plays an important role in maintaining that rule of law. But the judges cannot act alone. Trust and confidence in the institution on the public's part; integrity, competence, and sometimes courage, on the judges' part; respect and understanding on the part of others in public life — all have important roles to play. The importance of the end result, an effort by the Nation to realize the promises of its Constitution, justifies the institution. And, in my view, the importance of that

end helps to explain why it is unwise to run a significant risk of harming or weakening the judicial institution.

That is the connection I see between the present compensation problem and judicial independence; and that connection helps to explain where I believe the claim for restoration of judicial compensation truly lies.

V

I conclude by making clear that much of what I have said in respect to the relation between real compensation levels and institutional strength has general applicability. A strong judicial branch is no more important to the American public than a strong Legislative Branch or a strong Executive Branch. The roles those other Branches play are, or course, no less crucial than our own. And the continuous cutting of the real salaries paid top officials in the other Branches threatens the strength of those institutions just as it threatens the judiciary.

To harm these institutions is to harm the public whom the institutions serve. That is so whether the institution in question is the Foreign Service, the Forest Service, the Congress of the United States, or the federal judiciary. I have spoken of harm in respect to the judiciary because I have served as a judge for twenty-six years; and that is the institution I know best. But I also know that if Foreign Service officers are not paid properly, we will suffer in the long run from an inability to work with other nations; if the Forest Service is not paid properly, the wilderness will surely suffer. And similarly, without adequate compensation — if Congress permits the judges' real pay to erode without redress — we cannot expect the federal judicial system to function independently and effectively, as the Constitution's Framers intended.

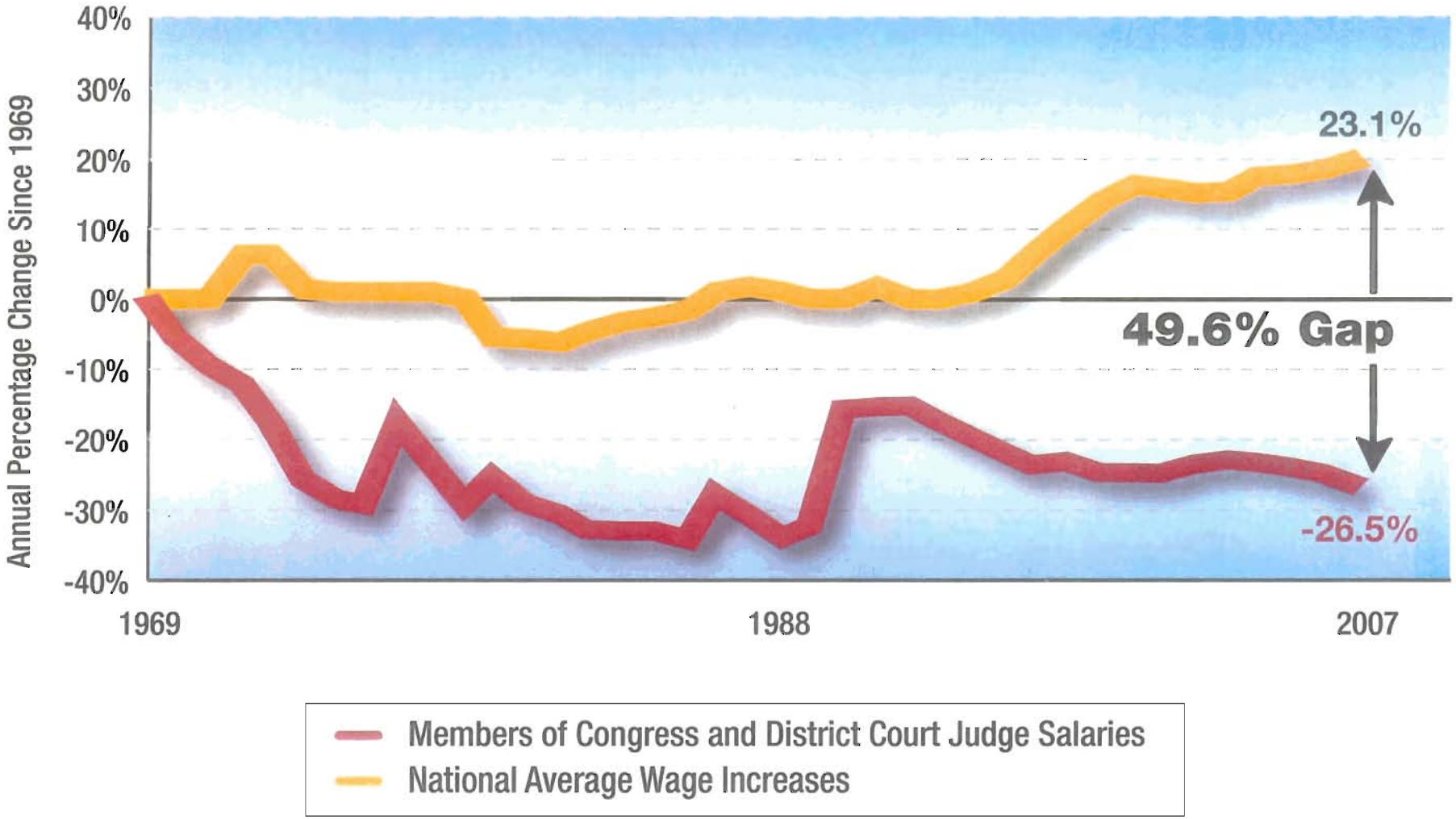
I appreciate the opportunity to appear before you and to address the compensation issue. I am happy to answer questions.

Thank you.

Appendix 1

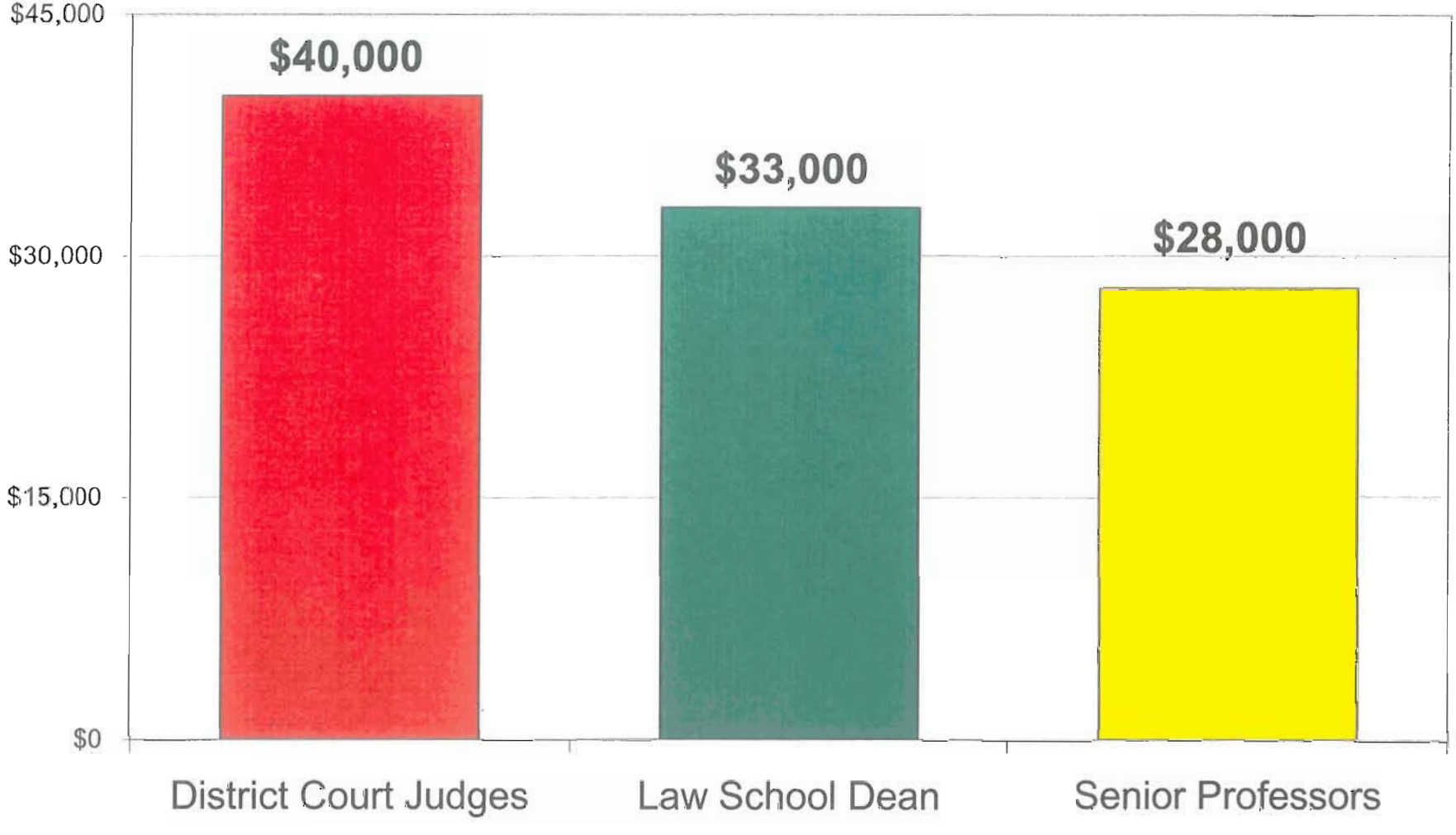
Charts Demonstrating the Decline in Judicial Compensation

Decline in Salaries of Members of Congress and District Court Judges Compared to Average U.S. Worker Wage Gains, Adjusted for Inflation From 1969 Through 2007 (projected)



Data from BLS CPI-U Index/Inflation Calculator (inc. forecasted 2.25% inflation for 2007), and Social Security Administration National Average Wage Indexing Series (inc. forecasted 5.1% for 2006 and 4.94% for 2007). Federal judges have not received a pay adjustment for 2007.

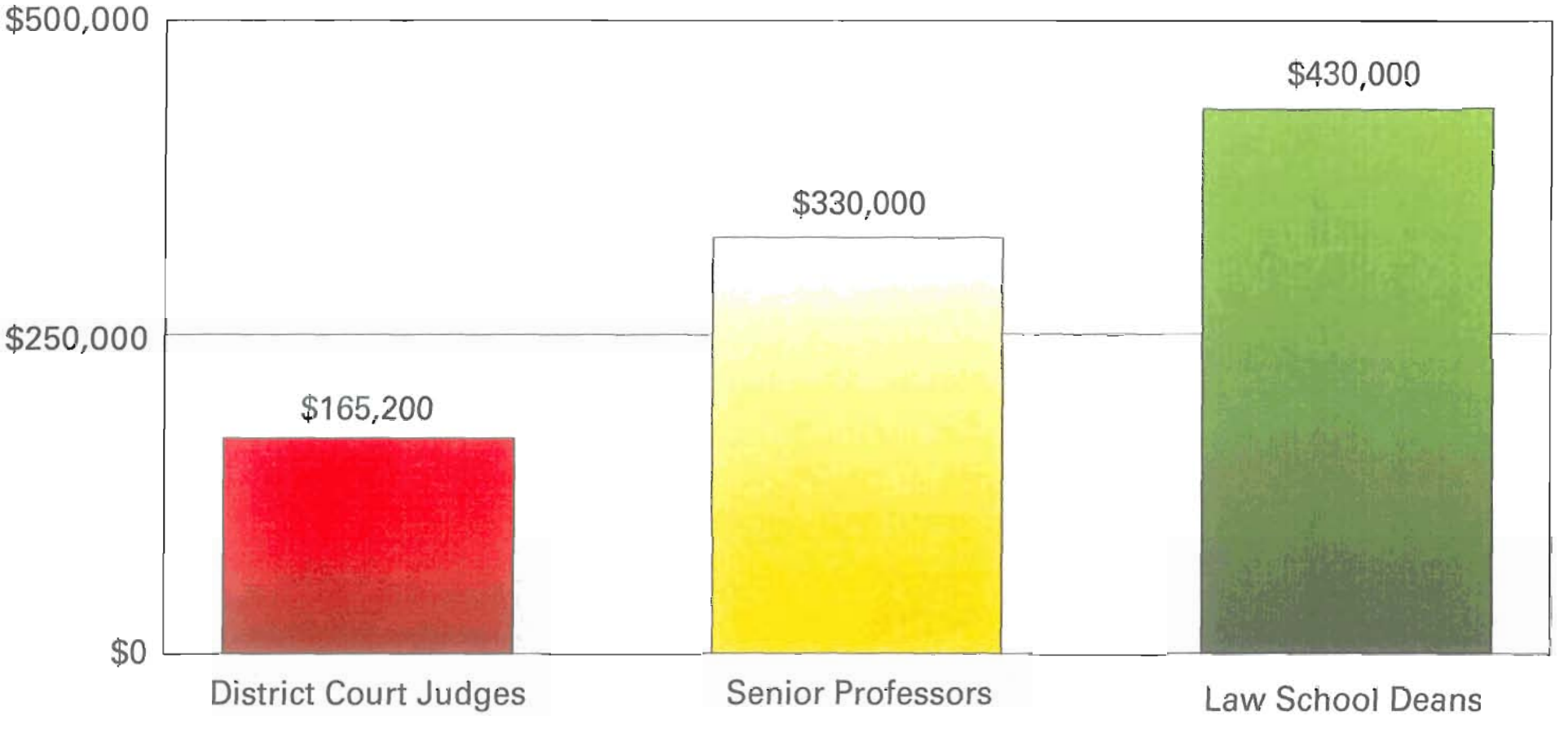
Comparison of Salaries of Dean and Senior Professors at Harvard Law School with U.S. District Court Judges in 1969



Data based on information received from Harvard Law School. Professors' salaries based on a 9-month teaching schedule.

Prepared by: Administrative Office of the U.S. Courts

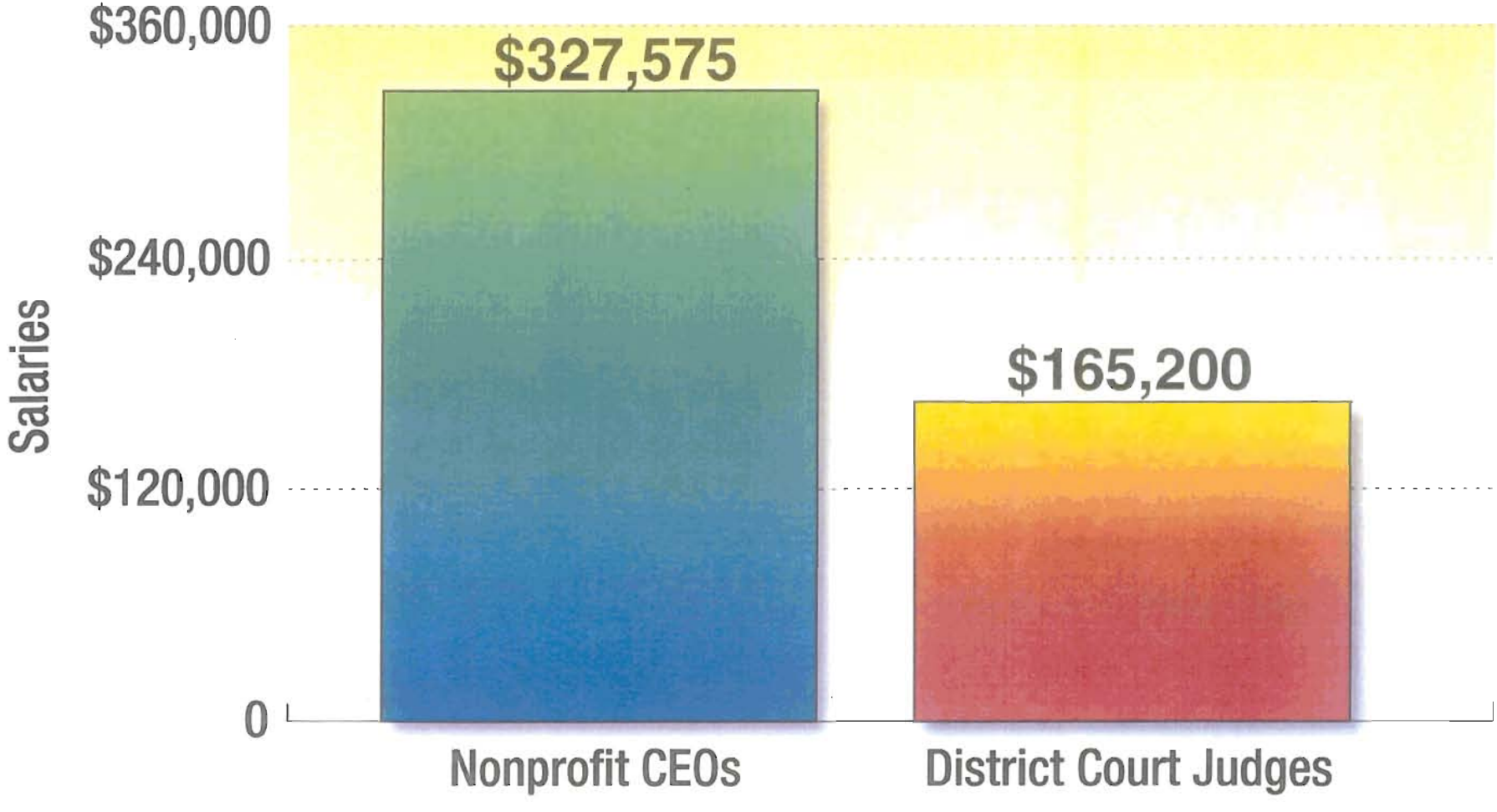
Comparison of 2006 Salaries of Deans and Senior Professors of Top Law Schools with U.S. District Court Judges



Based on informal and confidential survey of law school administrators and most recent available data. Professors' salaries based on 11-month long teaching/research schedule.

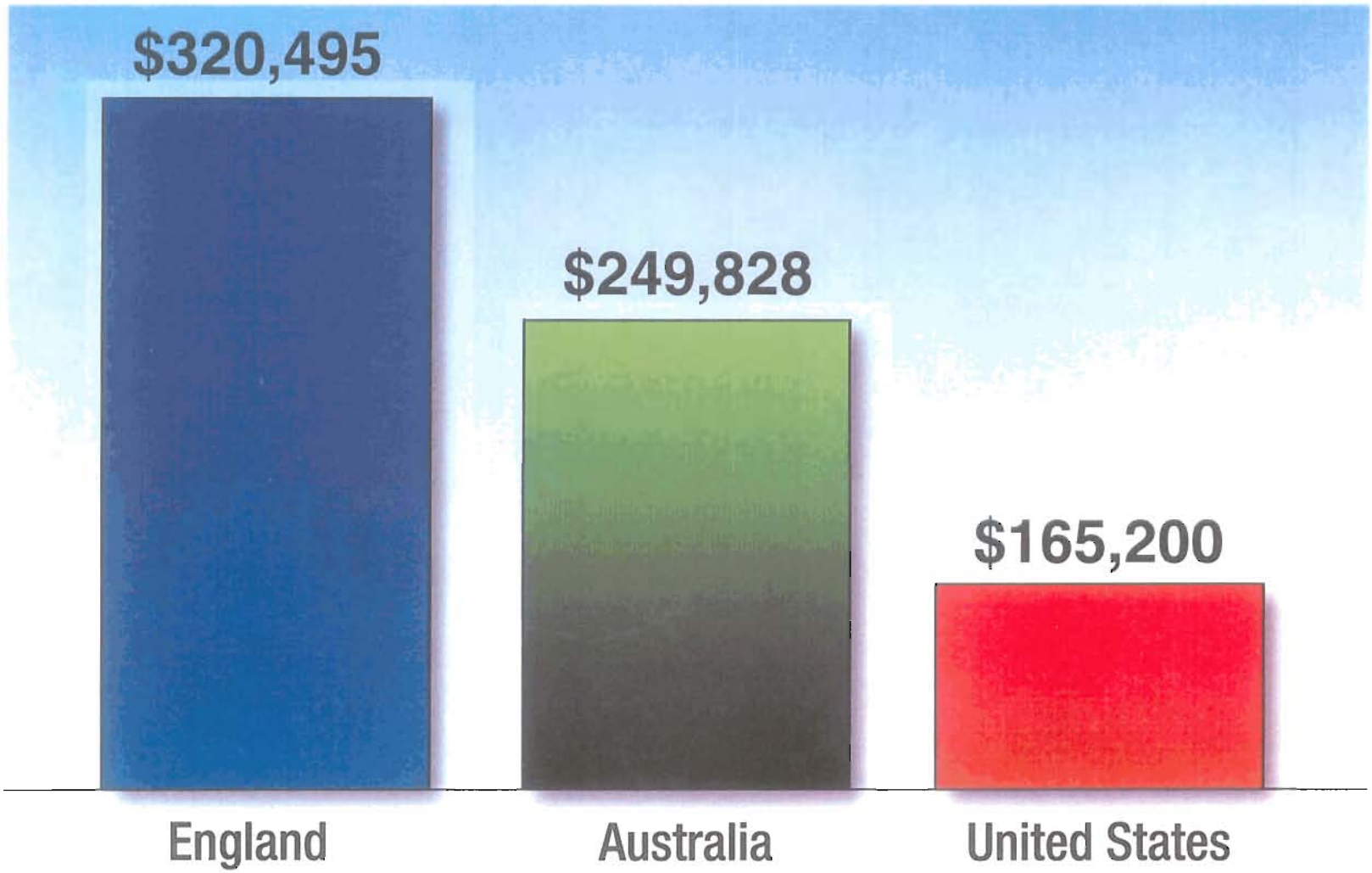
Prepared by: Administrative Office of the U.S. Courts

Comparison of Salaries of Federal District Judges and Chief Executive Officers of Large Nonprofit Organizations



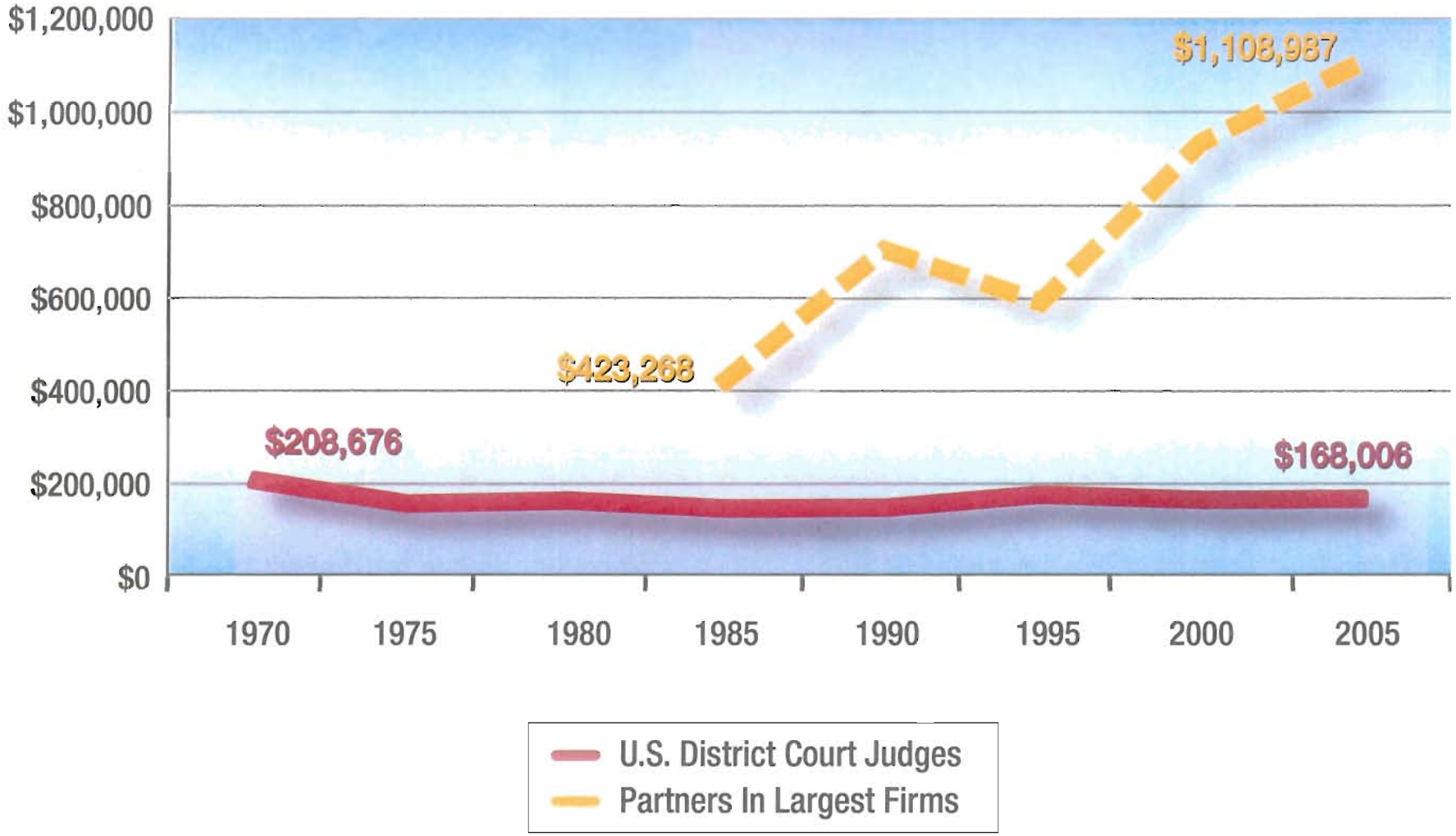
CEO salaries are for 2005 (most recent available) from survey conducted by *The Chronicle of Philanthropy* (9/28/06 issue).
District court judge salaries are current 2007 levels.

Comparison of Adjusted 2007 Salaries of District Court Judge Equivalents in Australia, England and the United States



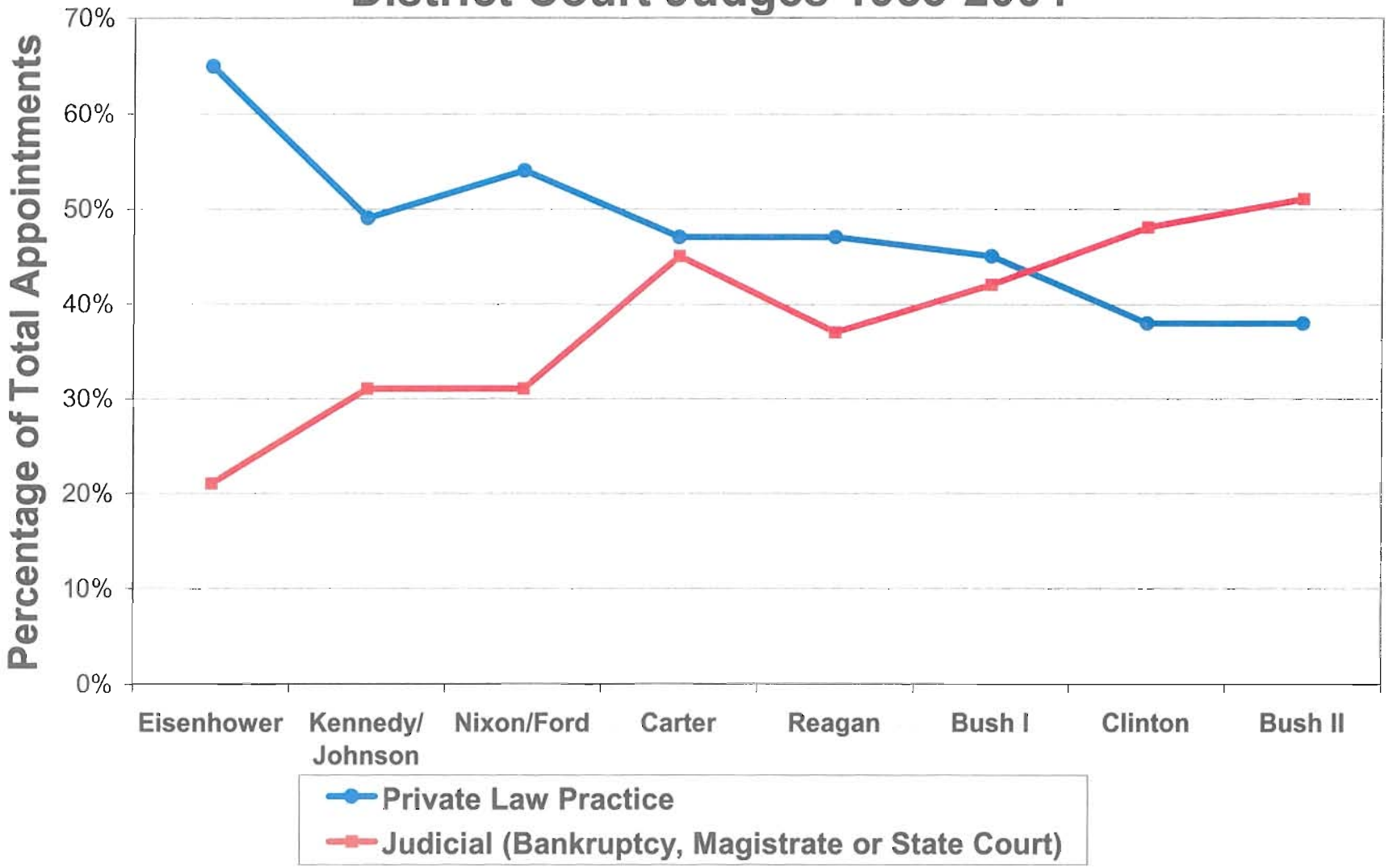
Foreign salaries converted to U.S. Dollars (using 4/3/07 currency exchange rates).

Salaries of Judges and Law Firm Partners Adjusted to 2007 Dollars



Data based on annual "Profits Per Partner" data compiled by American Lawyer magazine for referenced years (first compiled in 1985). Salaries and profits adjusted to current year using BLS Inflation Calculator.

Professional Background
District Court Judges 1953-2004



Prepared by: Administrative Office of the U.S. Courts

Appendix 2

Excerpt from the Report of the National Commission on the Public Service (Volcker Commission), January 2003

American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must be Fairly Paid, March 2007

URGENT BUSINESS FOR AMERICA

REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY

REPORT OF
THE NATIONAL COMMISSION
ON THE PUBLIC SERVICE

JANUARY 2003

As noted above, every presidential appointee must navigate through endless forms and questionnaires probing into every detail of his or her life before entering public service. Thousands of federal employees spend their days investigating the behavior of other federal employees. Requirements that employees divest themselves of financial holdings sometimes go beyond what is rational and can result in unjustified financial loss to the employee.

"Our study found that in the years from 1995 through 2000, 99.5% of all the public financial disclosure forms filed in those years were never viewed by anybody in the public."

C. Calvin Mackenzie, Visiting Fellow, The Brookings Institution

The "ethics" barriers create a climate of distrust that limits lateral entry of talent into government, which in turn creates a gulf of misunderstanding and suspicion that undermines government performance. Mission-related personnel interchanges would benefit those in government who work with the private sector and those in the private sector who work with government. At critical junctures in our past — during the two world wars, for example — such interchanges contributed vitally to the accomplishment of important government missions. But current ethics laws now prohibit virtually all such personnel movement.

We urge Congress to make federal ethics rules cleaner, simpler, and more directly linked to the goals they are intended to achieve. Specifically, we recommend that legislation be enacted to reduce the number of federal employees required annually to disclose their personal finances and that Congress enact legislation recommended by the Office of Government Ethics and currently pending in the U.S. Senate to simplify the personnel disclosure forms and other questionnaires for presidential appointees.

We urge Congress to seek a better balance between the legitimate need of the public for certain limited personal information about public servants, and the inherent rights of all Americans — even public servants — to protection from unjustified invasions of their privacy. Such a restriking of the balance, we firmly believe, will make public service much more attractive to the kinds of talented people government must recruit and retain in the years ahead.

RECOMMENDATION 9

Congress should grant an immediate and significant increase in judicial, executive, and legislative salaries to ensure a reasonable relationship to other professional opportunities.

Judicial salaries are the most egregious example of the failure of federal compensation policies. Federal judicial salaries have lost 24 percent of their purchasing power since 1969, which is arguably inconsistent with the Constitutional provision that judicial salaries may not be reduced by Congress. The United States currently pays its judges substantially less than England or Canada. Supreme Court Justice Stephen Breyer pointed out in testimony before the Commission that, in 1969, the salaries of district court judges had just been raised to $40,000 while the salary of the dean of Harvard Law School was $33,000 and that of an average senior professor at the school was $28,000.

That relationship has now been erased. A recent study by the Administrative Office of the U.S.

"Inadequate compensation seriously compromises the judicial independence fostered by life tenure. The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance."

William H. Rehnquist, Chief Justice, U.S. Supreme Court

Courts of salaries of professors and deans at the twenty-five law schools ranked highest in the annual *U.S. News and World Report* survey found that the *average* salary for deans of those schools was $301,639. The average base salary for full professors at those law schools was $209,571, with summer research and teaching supplements typically ranging between $33,000 and $80,000. Federal district judges currently earn $150,000.[10]

Also in testimony before the Commission, Chief Justice William Rehnquist noted that "according to the Administrative Office of the United States Courts, more than 70 Article III judges left the bench between 1990 and May 2002, either under the retirement statute, if eligible, or simply resigning if not, as did an additional number of bankruptcy and magistrate judges. During the 1960s on the other hand, only a handful of Article III judges retired or resigned."

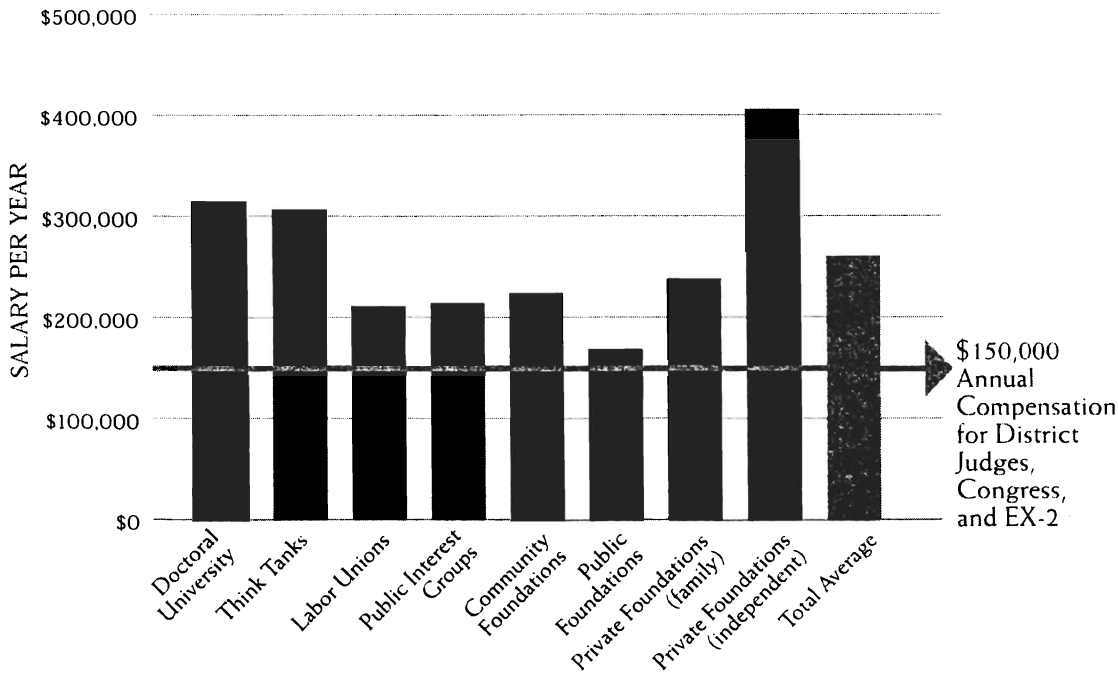
The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America's best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment — and compensation — rather than 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. We are not suggesting that we should pay judges at levels comparable to those of the partners at our nation's most prestigious law firms. Most judges take special satisfaction in their work and in public service. The more reasonable comparisons are with the leading academic centers and not-for-profit institutions. But even those comparisons now indicate a significant shortfall in real judicial compensation that requires immediate correction.

Executive compensation has reached a similar crisis. Today, in some departments and agencies, senior staff are paid at a higher level than their politically appointed superiors. We recognize that some appointees enter office with enough personal wealth to render salaries irrelevant, while others see great value in the prestige and future earning potential associated with high public office. Increasingly, more are dependent on the salary of an employed spouse. But the good fortune — or tolerance for sacrifice — of a few cannot justify the financial burdens that fall on the many.

Cabinet secretary pay rose 169 percent between 1969 and 2001. But in that same period, according to the Bureau of Labor Statistics, the Consumer Price Index for urban consumers increased 391 percent. Measured in constant 2001 dollars, the salaries of cabinet secretaries have actually declined 44 percent since 1969. During this thirty-two year period, the salaries of cabinet officers have lost more than 50 percent of their value with respect to the median family income.[11]

EXECUTIVE PAY COMPARISON



Doctoral university salaries taken from "The Chronicle of Higher Education." Think tank salaries represent those with ≥ $10M in assets, labor union salaries represent those with ≥ $100M in assets, public interest groups represent those with ≥ $10M in assets, community foundations represent those with ≥ $250M, public foundations represent those with ≥ $100M in assets, private foundations (family) represent those with ≥ $250M in assets, private foundations (independent) represent those with ≥ $1B in assets, and total average equals the average salary of an executive level officer from the above groups.

These declines in real compensation have real effects. Too many talented people shy away from public service because they have large mortgages to pay, children in college, or other financial obligations that cannot be met on current federal salaries. Too many others enter public service but stay too briefly for those same financial reasons.

It is difficult to generate public concern about the salaries of senior federal officials because those salaries are higher than the average compensation of workers nationwide. But the comparison is not apt. The talent and experience needed to run large and complex federal enterprises are not average. Eighty-seven percent of the people appointed by President George W. Bush in his first year in office had advanced degrees. Most had extensive experience in the management of large organizations. Excellence in government performance requires excellent leadership. We must be willing to pay enough to bring such leaders into public service and to keep them there.

To restore fairness and improve the appeal of public service, we believe appointees' salaries must be raised. They need not equal the salaries of senior corporate executives or even approach those. But they should be on a par with the compensation of leaders in educational and not-for-profit organizations, or even with counterpart positions in state or local government. It is not unreasonable in our view that a secretary of state should be paid a salary that compares with

a university president or that a secretary of education should earn what a superintendent of a large urban school district earns.

Legislative salaries have shown the same general decay as executive salaries. Few democracies in the world expect so much from their national legislators for so little in compensation. Indeed, salaries of members of Congress fall well below the compensation of the nation's top college and university presidents and the executive directors of its largest philanthropic foundations and charitable organizations. We believe that members of Congress merit a salary that is commensurate with comparable salaries in the educational and not-for-profit sectors.

"Salaries do matter.
If you keep cutting and cutting,
you will find the institutional strength
sapped. You will find it harder
to attract and keep people.
The reputation of the agency will fall.
The public will become disenchanted.
It will begin to distrust
the organization. It will lose interest.
As a result, morale within
the organization falls."

Stephen G. Breyer, Associate Justice,
U.S. Supreme Court

RECOMMENDATION 10

Congress should break the statutory link between the salaries of members of Congress and those of judges and senior political appointees.

Congress has traditionally tied the salaries of senior executive branch employees and federal judges to its own. In 1989 the linkage was set in statute. Given the reluctance of members of Congress to risk the disapproval of their constituents, a phenomenon first seen in 1816, Congress has regularly permitted salaries to fall substantially behind cost-of-living increases and trends in private, educational, and not-for-profit compensation.

We are aware that recent research suggests that pay disparities at the middle and lower levels of the federal workforce may be less significant than previously believed. However, the "pay gap" at the top of the salary structure is indisputable, as are its consequences in lost morale and uncertain accountability. Its consequences are also clear in the presidential appointments process, which must increasingly focus on the relatively affluent or those for whom an appointment represents a dramatic increase in compensation, neither of which is appropriate in itself for public service.

We believe that members of Congress are entitled to reasonable and regular salary adjustments, but we fully understand the difficulty they face in justifying their own salary increases. They must answer to the voters when they make such choices, and most of the voters have annual incomes significantly lower than members of Congress. Whatever political difficulties they face in setting their own salaries, however, members of Congress must make the quality of the public service their paramount concern when they consider salary adjustments for top officials of the other branches of government. We believe that executive and judicial salaries must be determined by procedures that tie them to the needs of the government, not the career-related political exigencies of members of Congress.

Although members of Congress have the power to adjust their own salaries, judges and senior executives do not have such power. Under current law, they are at the mercy of Congress when it comes to salary adjustments. That mercy should not be strained by the inherent difficulty of congressional salary decisions. Salaries for leaders of the other branches should be based on the compelling need to recruit and retain the best people possible. Unlinking congressional salaries from theirs is an important first step in accomplishing that.

OPERATIONAL EFFECTIVENESS IN GOVERNMENT

The federal workforce must be reshaped, and the systems that support it must be rooted in new personnel management principles that ensure much higher levels of government performance.

As noted earlier, much of Title 5, the section of the U.S. Code that regulates the public service, was written at a time when government was composed largely of lower-level employees with relatively routine tasks that required few specialized or advanced skills. The principal purpose of much of the substance of Title 5 is to protect federal workers from political influence, from arbitrary personnel actions, and from unfair and inequitable treatment compared to other federal workers. Those are important protections to preserve. But they must coexist with a much broader recognition of the needs of modern agencies to perform missions that are more complex and much more specialized than those of the government for which much of Title 5 was written.

In recent years, Congress has begun to permit some exceptions to Title 5 constraints for agencies facing critical mission challenges or personnel needs.[12] We believe these experiments have demonstrated beyond a doubt that, in the performance of mission-related functions, agencies often benefit when they are liberated from Title 5 constraints. And we believe the results of those experiments should now be extended much more broadly across the government.

The simple fact is that many agencies would perform better if they had greater freedom to design personnel recruitment strategies and define conditions of service, more latitude to assemble competitive compensation packages and align compensation policies with performance criteria, expanded freedom to reorganize to meet emerging needs, and greater authority to use contracted outsourcing when that is the most efficient way to meet mission objectives.

We clearly recognize the risks in some of these new approaches, especially when they are deployed unevenly. In the development of the new Transportation Security Agency, for example, we have seen how greater management and compensation flexibility in one agency can cannibalize others that lack that flexibility. Federal employees act rationally; the best are drawn to environments where their opportunities to advance in their careers and their compensation are affected by their performance. When one agency follows that principle and another does not, employees will naturally be drawn away from the latter and toward the former. That is one reason why we believe it is time to treat these matters as government-wide issues, not

JUDICIAL COMPENSATION:
OUR FEDERAL JUDGES MUST BE FAIRLY PAID

Approved by the Board of Regents
March 2007

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Executive Summary

No one can seriously dispute that an independent judiciary is critical to our system of government and to our way of life.[1] The Founding Fathers gave us a system of government with three distinct and independent branches, designed to serve as checks and balances against one another, to ensure our life, liberty, and pursuit of happiness. If our judiciary is to maintain its independence and serve its critical constitutional function, judges must be fairly compensated in order to attract and retain the very best candidates.

Sadly, we do not now compensate our judges adequately. Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%.[2] Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less than many law school professors and a fraction of what most could make in private practice. As a result, good judges are leaving the bench at an alarming rate. Judicial vacancies are increasingly being filled from a demographic that is not conducive to a diverse and impartial judiciary.

Chief Justice Roberts describes this state of affairs as nothing less than "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." The American College of Trial Lawyers joins Chief Justice Roberts – and countless others – in calling for a substantial increase in judicial compensation commensurate with the importance and stature the federal judiciary should and must have. And the College has a specific suggestion for the amount of the increase. We assume – we know – that our federal judiciary is no less important to our society than the judges of the country from which we adopted our legal system are to their native land. Judges in England are paid twice as much as their counterparts in the U.S. We believe that our federal judges ought to paid at least as much as English judges; so we propose a 100% raise from current compensation. At that, our judges will arguably still be underpaid for the service they provide our society, but it is a start.

We recognize that the increase we propose is a substantial sum of money But the cost is a mere 5% of the $6.5 billion federal court budget, and it is a rounding error – one hundredth of 1% – of the overall $2.9 trillion federal budget. It should be seen as a modest, sound investment in an independent judiciary; it is an investment necessary to preserve our constitutional framework.

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1 "Judicial independence" is an oft misunderstood phrase. Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, explained that the term should not be interpreted to mean that a judge is free to do as he or she sees fit but rather that courts need to be fair and impartial, free from outside influence or political intimidation. Chief Justice Randall Shepard of the Indiana Supreme Court puts it thus: "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."

2 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

An independent judiciary is critical to our society; and fair compensation is essential to maintaining that independence.

Of all the grievances detailed in the Declaration of Independence, none was more galling than the lack of independence imposed by King George on Colonial judges:

> He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

Declaration of Independence, July 4, 1776. English judges were assured life tenure during their "good behavior" by the Act of Settlement of 1700, but their Colonial counterparts served at the pleasure of the King. Their salaries were subject to his whims. Judges beholden to the King, not surprisingly, often ruled as he pleased, no matter how unfairly. The framers of our post-Revolution government needed to ensure an independent judiciary.

In 1780, nearly a decade before the U.S. Constitution was ratified, John Adams drafted a Declaration of Rights for the Massachusetts State Constitution, which declared:

> It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The concept of judicial independence – that judges should decide cases, faithful to the law, without "fear or favor" and free from political or external pressures – remains one of the fundamental cornerstones of our political and legal system. As Alexander Hamilton explained, once the independence of judges is destroyed, "the Constitution is gone, it is a dead letter; it is a paper which the breath of faction in a moment may dissipate."[3]

Fair compensation is critical to maintain that independence. In the *Federalist Papers,* Hamilton explained the importance of fair compensation: "[I]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Federalist Papers* No. 79. Thus, the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) life tenure and (2) a prohibition against diminution of compensation.

Inflation is not unique to modern times. The drafters of the Constitution were aware of the problem, and they took steps to solve it. Explaining that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support," Hamilton, in *Federalist Paper No. 79*, observed:

> It would readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations

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3 *Commercial Advertiser* (Feb. 26, 1802) (quoted by Chief Justice Roberts in his 2006 Year-End Report on the Federal Judiciary).

> in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

A case can be made that the Constitution *requires* a raise in judicial compensation to ameliorate the diminution which has occurred over time as the result of inflation.[4] When the Constitution was adopted, the Founding Fathers provided that the President was entitled to compensation which can be neither increased nor decreased during the term of office, while judges were guaranteed there would be no diminution of compensation; there was no ban on increases in judicial compensation, because it was contemplated that there might have to be increases. Hamilton explained:

> It will be observed that a difference has been made by the Convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

Id.

The prohibition against diminution of judicial salaries was not simply to protect judges; it was designed to protect the institution of an independent judiciary and thereby to protect all of us. Society at large is the primary beneficiary of a fairly compensated bench:

> [T]he primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

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4 To be sure, in *Atkins v. United States*, 214 Ct. Cl. 186 (Ct. Cl. 1977), a group of federal judges were unsuccessful in arguing that their rights had been violated because Congress had raised other government salaries to adjust for inflation at a different rate than for judges. The court held that the Constitution vests in Congress discretion in making compensation decisions, so long as they are not intended as an attack on judicial independence. On the facts in *Atkins*, the court found no such attack. But the effect of inflation on judicial salaries over the past 30 years has eroded judicial compensation as effectively as an all-out assault. A court might well reach a different decision on today's facts.

Evans v. Gore, 253 U.S. 245, 253 (U.S. 1920).

The current levels of judicial compensation are not fair; and the inadequacy of those levels is having an adverse impact on the administration of justice in the federal courts.

In the period from 1969 through 2006, the average U.S. worker enjoyed an 18.5% increase in compensation adjusted for inflation; at the same time, the salaries of district court judges have decreased by 24.8%. Over the past 40 years, federal judges have lost 43.3% of their compensation as compared to the average U.S. worker.[5] In 1969, although federal judges earned less than they might in private practice, their salaries were consistent with and generally higher than those of law school deans and senior professors. But by 2007, law school deans and senior professors are, in general, earning twice what we pay our district court judges.[6]

Starting salaries for brand new law school graduates at top law firms now equal or exceed the salary of a federal judge. A judge's law clerks can out-earn their judge the day after leaving the clerkship.

No one can seriously argue that federal judges have not lost ground. At the same time, it must be conceded that a federal district judge's current salary – $165,200 – is a substantial sum to average Americans, the vast majority of whom earn substantially less. But the point is that judges are not supposed to be average. They should be the best of us, the brightest of us, the most fair and compassionate of us. The Founding Fathers knew and contemplated that good judges would be a rare commodity, entitled to the special emoluments of their stature:

> There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that ***there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.*** And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government

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5 *Bureau of Labor Statistics CPI-U Index/Inflation Calculator; Social Security Administration National Average Wage Indexing Series.*

6 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary.*

> can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

Federalist Papers, No. 78 (emphasis added).

The fact is that persons qualified to be federal judges can generally command far greater sums in the private sector and even in academia. So the issue is not whether current judicial salaries might seem adequate measured against the wages of a typical American; the issue is whether those salaries continue to attract and retain those relatively few, talented persons we need as judges. Our society cannot afford to have a federal judiciary overpopulated by persons who can afford to serve at vastly below-market rates only because their personal wealth makes them immune to salary concerns or because their personal abilities and qualifications do not command greater compensation.

During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the percentages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.[7] There is nothing wrong with having former prosecutors populate the bench. But too much of a good thing ceases to be a good thing. A bench heavily weighted with former prosecutors is one which may lose its appearance of impartiality and objectivity; and appearances aside, it may actually suffer that loss. It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench.

At the same time that current compensation levels place unacceptable barriers to attracting the best possible candidates for the bench, those levels are forcing sitting judges to rethink their commitments. Over the past several years, dozens of competent, able federal judges have left the bench, many of them making no secret of the financial pressures which led them to do so. In the past few years, at least 10 federal judges left the bench well before normal retirement age; combined, these 10 judges had 116 years left before they reached the age of 65.[8] The cost of losing these able jurists cannot be measured. Put aside the cost of finding their replacements – the cost of locating, screening, and vetting qualified applicants, the cost of training the new judges, the cost to the system as the remaining judges must shoulder the extra workload until a replacement is sworn in – all of these things have a cost to society, some measured in money, some measured in the time it takes for the wheels of justice to turn – but put all of that aside. The real cost is that those 10 judges we identify

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7 Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary*, p. 3-4.

8 Judge David Levi has announced he will retire in July 2007; Judge Levi, who has served on the bench for 16 years, is 55. Judge Nora Manella resigned in March 2006 at age 55 after 8 years of service. Judge Michael Luttig retired in May 2006 at age 51 with 14 years of service. Judge Roderick McKelvie resigned in June 2002 at age 56 with 10 years of service. Judge Sven Erik Holmes resigned in March 2005 at age 54 with 10 years of service. Judge Carlos Moreno resigned in October 2001 at age 53 with 3 years of service. Judge Stephen Orlofsky resigned in 2001 at age 59 after 7 years of service. Judge Michael Burrage resigned in March 2001 at age 50 with 6 years of service. Judge Barbara Caufield resigned in September 1994 at age 46 with 3 years of service. Judge Kenneth Conboy resigned in December 1993 at age 55 with 6 years of service. Over the past two decades, scores of other judges have left the bench while still in their prime to pursue more financially rewarding careers.

above, (and scores of others like them) had more than 100 years of prospective judicial experience now forever lost to our society; years they chose to expend in private rather than public pursuits.[9] The loss is incalculable.

A federal judgeship was once seen as the capstone of a long and successful career; seasoned practitioners with years of experience and accomplishment accepted appointments to the bench, knowing that they would make some financial sacrifice to do so, but counting on the sacrifice not being prohibitive. Now, sadly, the federal bench is more and more seen, not as a capstone, but as a stepping stone, a short-term commitment, following which the judge can reenter private life and more attractive compensation. As a long-term career, the federal bench is less attractive today for a successful lawyer in private practice than it is for a monkish scholar or an ideologue. Ann Althouse, *An Awkward Plea, N.Y.Times* Feb. 17, 2007 at A15, col. 1

Chief Justice Roberts is not alone in decrying the current situation. Former Federal Reserve Board Chairman Paul Volcker, as Chair of the National Commission on the Public Service, reported in January 2003 that "lagging judicial salaries have gone on too long, and the potential for the diminished quality in American jurisprudence is now much too large." The Volcker Commission pointed to judicial pay as "the most egregious example of the failure of federal compensation policies" and recommended that Congress should make it a "first priority" to enact an immediate and substantial increase in judicial salaries. Congress, of course, has yet to do so. In February 2007, Mr. Volcker published an opinion piece in the *Wall Street Journal* in which he noted that sad fact. Mr. Volcker, observing that federal judges must possess rare qualities of intellect and integrity, stated that "the authors of the Constitution took care to protect those qualities by providing a reasonable assurance of financial security for our federal judges. Plainly, the time has come to . . . honor the constitutional intent."

The current system of linking judicial salaries to Congressional salaries makes little sense. If federal judicial salaries are to be linked to a benchmark, it should be to the salaries of their counterparts in other countries.

Since the adoption of the *Ethics Reform Act of 1989,* judicial salaries have been linked to Congressional and Executive Branch salaries. Whatever the reasoning that led to that linkage, it is a tie which must now be broken. Certainly, there is no constitutional basis for such a linkage. Judges and members of Congress are equally important to our system of government, but it was never contemplated that judges and Congressmen be equated. The Constitution contemplated that Congress would be composed of citizen-statesmen, who would lend their insights and talents to government for limited periods of time and return to the private sector. Judges in contrast, were and still are expected to serve for life.

But even if it were entirely fair to equate the roles of members of Congress and members of the bench, the linkage would still be unfair to the judiciary. Members of Congress are also underpaid. But members of Congress are limited in their ability to vote themselves a salary increase for the very

9 We use 65 as the normal retirement age, but, of course, federal judges seldom retire at that age, most remain active far longer and take senior status to remain on the bench and contribute for many additional years.

reason that they are the ones who make the decisions. Congress must be appropriately concerned about awarding itself a raise no matter how well deserved because of the appearance of self-interest and the political impact of that appearance. But there is no appearance of impropriety in awarding a well-deserved increase to judges who have no say in the matter.[10]

Because of linkage, political considerations, which necessarily impact decisions about congressional compensation, adversely and unfairly affect judicial compensation. Political considerations should not dictate how we pay our judges. Indeed, we believe that the Constitution was designed to immunize that issue from political pressure.

The federal government already pays myriad individuals far more than current congressional salaries, in recognition that market forces require greater compensation. An SEC trial attorney or FDIC regional counsel can make $175,000 per year.[11] An SEC supervisory attorney can make over $185,000 per year. A CFTC deputy general counsel can make nearly $210,000 per year. The chief hearing officer at the FDIC can make in excess of $250,000 per year; the managing director of the OTS can make in excess of $300,000 per year.[12] The OCC compensates its employees in nine pay bands, a full third of which include salaries with possible maximums in excess of $183,000.[13]

A February 2007 search of the government website posting open positions as of that date returned 343 available jobs with possible salaries in excess of a federal judge's salary; 208 of those postings have salaries in excess of $200,000, 48 in excess of $250,000.

Interestingly, the two countries with legal and constitutional systems most closely analogous to ours, Canada and England, have no links between judicial and legislative salaries; both countries pay their judges at different (higher) rates than other government officials – and both countries pay their judges significantly more than we do. The Canadian counterparts to our Supreme Court justices and federal judges receive salaries approximately 20% greater than U.S. judges:

U.S.	Salary	Canada[14]	Can $	Rate	U.S. $
Chief Justice	$ 212,100.00	Chief Justice	297,100.00	0.863	256,397.30
Appellate Judges	$ 175,100.00	Puisne Judges	275,000.00	0.863	237,325.00
District Judges	$ 165,200.00	Federal Judges	231,100.00	0.863	199,439.30

10 The Constitution left Congress free to vote itself a raise or a salary cut. Almost immediately, at least one of the Founding Fathers thought better of that, and the "Madison Amendment" was proposed in 1789, along with other amendments which became the Bill of Rights. The Madison Amendment would have allowed Congress to increase congressional salaries, but no increase could take effect until an intervening election – which would allow the voters an opportunity to express their displeasure with such a move. But while the Bill of Rights amendments sailed through the original 13 states, it took more than 200 years to obtain the necessary percentage of states to ratify the Madison amendment; it finally became the 27th Amendment in 1992 when Alabama became the 38th state to ratify.

11 For those not conversant with government acronyms: SEC is the Securities & Exchange Commission; FDIC is the Federal Deposit Insurance Corporation; CFTC is the Commodities Futures Trading Commission; OTS is the Office of Thrift Supervision; OCC is the Office of the Comptroller of the Currency.

12 Facts assembled by the Administrative Office of the Courts, February 8, 2007.

13 OCC Pay band VII has salaries ranging from $98,300-$183,000; pay band VIII ranges from $125,600-$229,700; pay band IX ranges from $163,100-$252,700. See www.occ.treas.gov/jobs/salaries.htm.

14 Data provided by Raynold Langois, FACTL, Langlois Kronström Desjardins, Avocats, Montréal (Québec).

In England, a Member of Parliament earns 60,277 Pounds – approximately $120,000. A High Court judge, the equivalent of a federal district court judge, is paid 162,000 Pounds, approximately $318,000. English judges make nearly twice what their American counterparts earn:

U.S.	Salary	England[15]	£	Rate	U.S. $
Chief Justice	$212,100.00	Lord Chief Justice	225,000.00	1.964	$ 441,900.00
Appellate Judges	$175,100.00	Lords of Appeal	194,000.00	1.964	$ 381,016.00
District Judges	$165,200.00	High Court	162,000.00	1.964	$ 318,168.00

It is ironic – our forebears split from England and formed our great, constitutional democracy in no small part because of the manner in which King George exerted influence over colonial judges by controlling their compensation; Now, two centuries later, England has provided sufficient judicial compensation to assure the recruitment, retention, and independence of good judges, while we pay our judges less than we do numerous mid-level government employees and recent law school graduates. Our Founding Fathers would find this state of affairs unacceptable. Our judges are at least as valuable to our society as English judges are to theirs. And our judges should be paid accordingly.

A 100% salary increase will still leave our federal judges significantly short of what they could earn in the private sector or even in academia. But such an increase will at least pay them the respect they deserve and help to isolate them from the financial pressures that threaten their independence.

The College is not the first and undoubtedly will not be the last to advocate for a substantial raise for our judiciary. In addition to Chief Justice Roberts and former Fed Chairman Volcker, we join the American Bar Association, which has adopted a resolution in support of increased compensation. We join countless other state and local bar associations who have done likewise. We join the General Counsels of more than 50 of the nation's largest corporations who wrote to members of Congress on February 15, 2007 urging a substantial increase. We join the deans of more than 125 of the nation's top law schools who made a similar appeal to congressional leadership in letters dated February 14, 2007. We join the editorial staffs of numerous publications, including the *New York Times*, the *Detroit Free Press*, the *Albany Times Union*, the *Chattanooga Times Free Press*, the *Seattle Post-Intelligencer*, the *Orlando Sentinel*, the *Pasadena Star-News*, the St. *Petersburg Times*, the *Anchorage Daily News*, the *Akron Beacon Journal*, the *New Jersey Star Ledger*, the *Raleigh-Durham News*, the *Boston Herald* and the *Scripps Howard News Service*, all of which have advocated for salary increases. And we join the signers of our Declaration of Independence in recognizing the need to unlink judicial pay from political considerations. We are not sure we can say it any better than the editors of the *Chattanooga Times*:

> All Americans, of course, should want our judges to be among the most stable of our nation's lawyers, to be well-trained men and women of integrity, dedicated to absolute impartiality in upholding the Constitution and the law – with no political or philosophical agenda for "judicial activism."
>
> And we should pay enough to justify the best.

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15 Data obtained from Department for Constitutional Affairs; see www.dca.gov.uk.

Appendix 3

Testimony of Justice Anthony M. Kennedy before the United States Senate Judiciary Committee February 14, 2007

Testimony of Associate Justice Anthony M. Kennedy
before the
United States Senate Committee on the Judiciary
Judicial Security and Independence
February 14, 2007

Mr. Chairman and Members of the Senate Committee on the Judiciary.

Thank you for the opportunity to testify today.

The subject of your hearing is "Judicial Security and Independence," matters of interest to all of us who are committed to preserving the Constitution and advancing the Rule of Law. With me today are Judge Brock Hornby of the United States District Court for the District of Maine, and also Chairman of the Judicial Branch Committee of the Judicial Conference of the United States; James Duff, Director of the Administrative Office of the United States Courts; and Jeffrey Minear, Administrative Assistant to the Chief Justice of the United States.

Judge Hornby has submitted a statement on the subject of personal judicial security and financial disclosure. Its conclusions appear to me to be correct, but he is more familiar with the details of your proposed legislation. I am sure he can answer any detailed questions you have.

The subject of judicial independence, and in fact the meaning of that phrase, ought to be addressed from time to time so that we remain conversant with the general principles upon which it rests and to ensure that those principles are implemented in practice.

Introduction

These principles invoke two basic phrases in our civics vocabulary, "Separation of Powers" and "Checks and Balances." We sometimes use these terms as if they were

synonymous and interchangeable. This is accurate in some contexts. In both theory and practice, however, the two principles can operate in different directions, with somewhat different thrusts. The principle of Separation of Powers instructs that each branch of our national government must have prerogatives that permit it to exercise its primary duties in a confident, forthright way, without over-reliance on the other branches. This creates lines of accountability and allows each branch to fulfill its constitutional duties in the most effective and efficient manner. So it is that Congress has the sole power to initiate all legislation, which includes, of course, the power of the purse. The President takes care that the laws are faithfully executed and is vested with the power to pardon. The judiciary has the power and duty to issue judgments that are final. The judiciary, of course, also has life tenure and protection against diminution in salary. These are the dynamics of separation.

Checks and balances, to some extent, have an opposing purpose and work in a different direction. While separation implies independence, checks and balances imply interaction. So it is that both the executive and the judicial branches must ask Congress for the resources necessary to conduct their offices and perform their constitutional duties.

Members of our Court should be guarded and restrained both in the number of our appearances before you and in the matters discussed, in order to ensure that Article III judicial officers do not reach beyond their proper, limited role. When Congress holds hearings to assist in the preparation of its appropriations bills, members of our Court appear with some frequency before the Appropriation Subcommittees of both Houses. Our experience has been that in the hearings of the Appropriation Subcommittees the testimony by members of the judiciary, including members of our Court, has been

a useful part of the interactive dynamic. The questions from Committee members tend to go beyond the limited subject of financial resources. We try not to range too far afield, but we find that our discussions have been instructive for us and, we trust, for the Members of the Committees.

Both here and abroad, students and scholars of constitutional systems inquire about the appearance before Congress by judicial officers on appropriations requests. They are fascinated by it. It is an excellent illustration of the checks-and-balances dynamic. Our request for funds to fulfill our constitutional duty is no formality. The requests and the legal dynamic are real. The process illustrates the tradition arrived at through centuries of mutual respect and cooperation. This tradition requires that the Judiciary be most cautious and circumspect in its appropriations requests. Congress, in turn, shows considerable deference when it assesses our needs. This is a felicitous constitutional tradition.

Mr. Chairman, the request to appear before your Committee gave us initial pause, for our recent custom has been to limit our appearances to those before the Appropriation Subcommittees. We should not put you in an awkward position by frequent appearances, and we think for the most part judicial administration matters should be left to the judges who are members of the Judicial Conference of the United States. Yet because of our respect for you and your Committee, and because of the importance of judicial independence in our own time and in our constitutional history, we decided, after discussion with the Chief Justice and other members of our Court, to accept your invitation. It is an honor to appear before you today.

I

The provision of judicial resources by Congress over the

years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world.

Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects.

Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement.

Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: 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; and the Rule of Law is a building block no less important to the advance of

freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people.

The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

II

As I have tried to convey, separation of powers and checks and balances are not automatic mechanisms. They depend upon a commitment to civility, open communication, and good faith on all sides. Congress has certain functions that cannot be directed or initiated by the other branches; yet those prerogatives must be exercised in good faith if Congress is to preserve the best of our constitutional traditions. You must be diligent to protect the Constitution and to follow its letter and spirit, and, on most matters, no one, save the voters, can call you to account for the manner in which you discharge these serious responsibilities. This reflects, no doubt, the deep and abiding faith our Founders placed in you and in the citizens who send you here.

Please accept my respectful submission that, to keep good faith with our basic charter, you have the unilateral constitutional obligation to act when another branch of government needs your assistance for the proper performance of its duties. It is both necessary and proper,

furthermore, that we as judges should, and indeed must, advise you if we find that a threat to the judiciary as an institution has become so serious and debilitating that urgent relief is necessary. In my view, the present Congressional compensation policy for judicial officers is one of these matters.

Judges in our federal system are committed to the idea and the reality of judicial independence. Some may think the phrase "judicial independence" a bit timeworn. Perhaps there has been some tendency to overuse the term; there may be a temptation to invoke it each time judges disagree with some commonplace legislative proposal affecting the judiciary. If true, that is unfortunate, for judicial independence is a foundation for sustaining the Rule of Law.

Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must. A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to resist improper influence is essential to the Rule of Law as we have come to understand that term.

Judicial independence presumes judicial excellence, and judicial excellence is in danger of erosion. So at this juncture in the history of the relationship between our two branches my conclusion is that we have no choice but to make clear to you the extent of the problem as we see it, with the hope your Committee will help put the problem into proper perspective for your own colleagues and for the nation at large.

It is my duty, then, to tell you, Mr. Chairman, that in more than three decades as a judge, I have not seen my colleagues in the judiciary so dispirited as at the present time. The blunt fact is that the past Congressional policy with respect to judicial salaries has been one of neglect. As a consequence, the nation is in danger of having a

judiciary that is no longer considered one of the leading judiciaries of the world. This is particularly discordant and disheartening, in light of the care and consideration Congress has generally given in respect to other matters of judicial resources and administration.

The current situation, in my submission, is a matter of grave systemic concern. Let me respectfully suggest that it is a matter Congress in the exercise of its own independent authority should address, in order to ensure that the essential role of the judiciary not be weakened or diminished. You are well aware of threats to the judiciary that history has deemed constitutional crises, such as the Court's self-inflicted wound in *Dred Scott* or the ill-conceived 1937 Court-packing proposal. These were constitutional crises in the usual sense of the term. So too, however, there can be systemic injury over time, caused by slow erosion from neglect. My concern, shared by many of my colleagues, is that we are in real danger of losing, through a gradual but steady decline, the highly qualified judiciary on which our Nation relies. Your judiciary, the Nation's judiciary, will be diminished in its stature and its capacity if there is a continued neglect of compensation needs.

The commitment and dedication of our judges have allowed us to maintain a well-functioning system despite a marked increase in workload. In 1975, when I began service on the Court of Appeals for the Ninth Circuit, there were approximately 17,000 appellate cases filed. By 2005, that number had quadrupled to nearly 70,000 cases. The increase in the number of judges has not kept up. In 1975 each three-judge panel heard approximately 500 cases per year; by 2001, the number had risen to over 1,200. Without the dedicated service of our senior judges, who are not obligated to share a full workload but do so anyway, our court dockets could be dangerously congested. It is essential to the integrity of the Article III system that

our senior judges remain committed to serving after active duty and that those now beginning their judicial tenure do so with the expectation that it will be a lifelong commitment.

Despite the increase in workload, the real compensation of federal judges has diminished substantially over the years. Between 1969 and 2006, the real pay of district judges declined by about 25 percent. In the same period, the real pay of the average American worker increased by eighteen percent. The resulting disparity is a forty-three percent disadvantage to the district judges. If judges' salaries had kept pace with the increase in the wages of the average American worker during this time period, the district judge salary would be $261,000. That salary is large compared to the average wages of citizens, but it is still far less than the salary a highly qualified individual in private practice or academia would give up to become a judge.

Since 1993, when the Ethics Reform Act's Employment Cost Index pay adjustment provision ceased operating as Congress intended, the real pay of judges has fallen even faster. Inflation caused a loss of real pay of over twelve percentage points, while the real pay of most federal employees has outpaced inflation by twenty-five percentage points.

Former Federal Reserve Chairman Paul Volcker has advocated raising the salary of federal district judges to remedy this decades-long period of neglect. His proposal would at least restore the judiciary to the position it once had. My concern is that any lesser increase would be counterproductive because it would indicate a Congressional policy to discount the role the federal court system has as an equal and coordinate branch of a constitutional system that must always be committed to excellence.

It is disquieting to hear from judges whose real

compensation has fallen behind. Judges do not expect to become wealthy when they are appointed to the federal bench; they do expect, however, that Congress will protect the integrity of their position and provide a salary commensurate with the duties the office requires. For the judiciary to maintain its high level of expertise and qualifications, Congress needs to restore judicial pay to its historic position vis-à-vis average wages and the wages of the professional and academic community.

A failure to do so would mean that we will be unable to attract district judges who come from the most respected and prestigious segments of the practicing bar. One of the distinguishing marks of the Anglo-American legal tradition is that many of our judges are drawn from the highest ranks of the private bar. This is not the case in many other countries, where young law school graduates join the judicial civil service immediately after they complete their legal educations. Our tradition has been to rely upon a judiciary with substantial experience and demonstrated excellence. Private litigants depend on our judges to process complex legal matters with the skill, insight, and efficiency that come only with years of experience at the highest levels of the profession.

There are two present dangers to our maintaining a judiciary of the highest quality and competence: First, some of the most talented attorneys can no longer be persuaded to come to the bench; second, some of our most talented and experienced judges are electing to leave it. In just the past year, two of the finest federal district judges in California have left for higher-paying jobs elsewhere, one in academia and the other in the state judiciary. The loss of these fine jurists is not an isolated phenomenon. Since January 1, 2006, ten Article III judges have resigned or retired from the federal bench. It is our understanding that seven of these judges sought other employment. In 2005, nine Article III judges resigned or

retired from the bench, which was the largest departure from the federal bench in any one year. Four of those nine judges joined JAMS, a California-based arbitration/mediation service, where they have the potential to earn the equivalent of a district judge's salary in a matter of months. My sense is that this may be just the beginning of a large-scale departure of the finest judges in the federal judiciary. It would be troubling if the best judges were available only to those who could afford private arbitration.

The income of private-sector lawyers has risen to levels that make it unlikely Congress could use earnings of a senior member of the bar as a benchmark for judicial salaries in anything approaching a one-to-one ratio. It has not been our tradition, furthermore, that highly accomplished, private attorneys go to the bench with the expectation of equivalent earnings. Still, outside earning figures are relevant, particularly if we look at earnings for entry-level attorneys, senior associates, and junior and mid-level partners. These persisting differentials create an atmosphere in which it is difficult to attract eminent attorneys to the bench and to convince experienced judges to remain. Something is wrong when a judge's law clerk, just one or two years out of law school, has a salary greater than that of the judge or justice he or she served the year before. These continuing gross disparities are of undoubted relevance. They are a material factor for the attorney who declines a judicial career or the judge who feels forced to leave it behind. The disparities pose a threat to the strength and integrity of the judicial branch.

The intangible rewards of civic service are a valid consideration in fixing salary levels, but here, too, we are at a disadvantage in recruiting and retaining our best judges. As my colleague Justice Breyer says to me, it is one thing to lose a judge to a partnership in a New York law firm but quite another to lose him or her to a non-

profit position with rich intangible rewards plus superior financial incentives. The relevant benchmark here is law school compensation. At major law schools salaries not just of the deans but also of the senior professors are substantially above the salaries of federal district judges. So if a highly qualified attorney wants to serve by teaching young people, the salary differential is itself an incentive to leave. The intangible rewards of judicial service, while of undoubted relevance, do not overcome the present earnings disparity.

For judges to use federal judicial service as a mere stepping-stone to re-entry into the private sector and law firm practice is inconsistent with our judicial tradition. It could undermine faith in the impartiality of our judiciary if the public believes judges are using the federal bench as an opportunity to embellish their resumes for more lucrative opportunities later in their professional careers.

Conclusion

It is both necessary and proper for Americans to repose trust in the dedication and commitment of the judiciary. And Congress should be confident in assuming that federal judges will continue to distinguish themselves and their offices through all their productive years of senior status. History teaches us that federal judges will strive as best they can to keep their dockets current, to stay abreast of the law, and to preserve and transmit our whole legal tradition. Judges, in turn, should have a justified confidence that Congress will maintain adequate compensation. By these same standards it would be quite wrong, in my respectful submission, to presume upon judicial qualities of dedication and commitment to secure passage of other legislation. Our dedicated judges do not expect to receive the same compensation as private-sector lawyers at the top of the profession. They do, however, have the expectation that Congress will treat them fairly,

and on their own merits, so that the judicial office and our absolute commitment to the law are not demeaned by indifference or neglect, whether calculated or benign.

By your asking us to appear here, Mr. Chairman, and by the example of courtesy and respect you and your Committee have always shown to us, we find cause for much re-assurance. Thank you for considering these remarks.