

THE FEDERAL JUDICIAL SALARY CRISIS

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The federal judiciary is revered in the legal world and stands as a testament to the virtues of our system of justice. As with any institution, its reputation is a function of the professionalism, intelligence, and hard work of its past and current members. Nominees for federal judgeships go through a rigorous vetting process,¹ which to date has yielded an exceptionally qualified judiciary. Unfortunately, Congress has not treated federal judges with the dignity that they deserve when it comes to salary considerations. Judicial pay has not increased commensurate with that of other federal employees, nor kept up with inflation.²

The Framers sought to insulate the federal judiciary from political influence by granting federal judges the constitutional guarantees of lifetime tenure “during good Behaviour” and, through the Compensation Clause, “Compensation, which shall not be diminished during their Continuance in Office.”³ Although Congress has not actually decreased the pay of federal judges, which would be an obvious violation of the Compensation Clause, it has accomplished the functional equivalent of a salary cut by failing to increase federal judges’ wages; instead, standing idly by as the quality of life one can lead on a judicial salary declines.

This Article argues that Congress, in its treatment of judicial pay, has violated the spirit and possibly even the letter of the Constitution. Admittedly, this argument may be purely aca-

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1. See John S. Cooke, *Judicial Ethics Education in the Federal Courts*, 28 JUST. SYS. J. 385, 388 (2007); Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 540 (2007).

2. JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2007) [hereinafter ROBERTS, 2006 YEAR-END REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2008) [hereinafter ANNUAL REPORTS OF THE CHIEF JUSTICE], available at <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf>.

3. U.S. CONST. art. III, § 1.

demic because the forum for such a debate would be federal court.⁴ Federal judges might be reluctant to find Congress's actions unconstitutional, due to the perceived impropriety of granting themselves a de facto pay raise. Thus, the bulk of this Article focuses on the practical and more immediate effect of the growing inadequacy of judicial salaries. I contend that the steady erosion of judges' "real salaries," i.e. their salaries once we account for changes in the cost-of-living due to inflation,⁵ will impact the composition of the federal judiciary in three ways: (1) there will be less diversity on the federal bench; (2) more judges will retire once they have attained the requisite age and service requirements; and (3) fewer top legal professionals will seek federal judgeships. Therefore, if Congress does not act quickly to improve judicial pay, the integrity of the federal judiciary is at risk.

I. THE CHIEF JUSTICE'S ANNUAL PLEA

The issue of judicial pay has been on Congress's plate for decades. Chief Justice Warren Burger raised the issue of judicial pay erosion in his 1984 Year-End Report on the Federal Judiciary, referring to Congress's refusal to modify judicial pay to keep pace with inflation as "unseemly" and "unjust."⁶ Chief Justice Burger's successors have not only continued the tradition that he established of issuing annual year-end reports,⁷ but have also continued to enunciate concerns about federal judges' salaries. By 2002, judicial compensation had been raised in thirteen of the last twenty year-end reports,⁸ but

4. See 28 U.S.C. § 1331 (2006) (federal question jurisdiction statute).

5. KEVIN M. SCOTT, CONG. RESEARCH SERV., JUDICIAL SALARY: CURRENT ISSUES AND OPTIONS FOR CONGRESS, No. RL34281, CRS-1 (Dec. 12, 2007), available at http://assets.opencrs.com/rpts/RL34281_20071212.pdf.

6. Linda Greenhouse, *Burger Urges Congress to Help Cut Court Load*, N.Y. TIMES, Dec. 31, 1984, § 1, at 7.

7. See WILLIAM H. REHNQUIST, 1995 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1996), reprinted in ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra* note 2, available at <http://www.uscourts.gov/ttb/jan96ttb/1yearend.html>.

8. In the 2000 Year-End Report, Chief Justice Rehnquist noted that "[t]he need for increased compensation for federal judges has been raised in 13 of the last 19 Year-End Reports," but he did not discuss it in the following year's report, perhaps because it would have seemed inappropriate in light of the terrorist attacks of September 11, 2001. WILLIAM H. REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2001), reprinted in ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra* note 2, available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html>; see WILLIAM H. REHNQUIST, 2001 YEAR-END

“at the risk of beating a dead horse,” Chief Justice William Rehnquist again took the opportunity to emphasize the importance of the issue and discuss the need for a judicial pay increase.⁹

In the 2006 Year-End Report, Chief Justice John Roberts limited his report to just one issue—judicial pay—arguing that it had “been ignored far too long and has now reached the level of a constitutional crisis.”¹⁰ The Chief Justice acknowledged that pursuing a career on the bench entails sacrifice, and that federal judges do not expect to receive salaries on par with lawyers in private practice, however, he emphasized the enormity of the decline in judicial salaries by comparing them with the strides in American wages over the past four decades. According to the Chief Justice, once adjusted for inflation, the average U.S. worker’s wages rose 17.8% since 1969, whereas federal judicial pay declined 23.9%, “creating a 41.7% gap.”¹¹ At a time when Americans’ quality of life has improved, federal judges have seen their spending power shrink.¹²

Chief Justice Roberts argued that deficient pay reduces the number of elite attorneys that are willing to pursue federal judicial appointments.¹³ He noted that, at the time of the Eisenhower administration, roughly 65% of federal judges came from private practice and 35% from the public sector, but by

REPORT ON THE FEDERAL JUDICIARY (2002), *reprinted in* ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra* note 2, available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>.

9. WILLIAM H. REHNQUIST, 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–5 (2003), *reprinted in* ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra* note 2, available at <http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html>.

10. ROBERTS, 2006 YEAR-END REPORT, *supra* note 2, at 1.

11. *Id.* at 3. A similar trend can be seen when comparing judges with academics. Federal district court judges used to earn twenty-one percent more pay than deans at top law schools, but by 2006 deans’ salaries doubled those of district judges. *Id.* at 2.

12. According to Judge Joseph M. Hood of the Eastern District of Kentucky, a federal judicial salary today yields sixty percent less purchasing power than the salary of a federal judge in 1969. Jeffrey C. Rager, *Judicial Profile: Hon. Joseph M. Hood, Senior Judge, Eastern District of Kentucky*, 55 FED. LAW. 18, 20 (Mar./Apr. 2008).

13. ROBERTS, 2006 YEAR-END REPORT, *supra* note 2, at 4. 2009 salary figures were: District Judges—\$174,000; Circuit Judges—\$184,500; Associate Justices—\$213,900; and Chief Justice—\$223,500. AM. BAR ASS’N, GOV’T AFFAIRS OFFICE, INDEPENDENCE OF THE JUDICIARY: JUDICIAL SALARIES, May 1, 2009, http://www.abanet.org/poladv/priorities/judicial_pay/; JUDICIAL SALARIES—SUPREME COURT JUSTICES, http://www.fjc.gov/history/home.nsf/page/salaries_scsus (last visited Dec. 1, 2009). These salaries are by no means paltry but are grossly inadequate when considering the prestige of these positions and the wages that these individuals could receive in the private sector.

2006, “the numbers [were] about reversed—roughly 60% from the public sector, less than 40% from private practice.”¹⁴ The Chief Justice found this trend problematic because “[o]ur judiciary will not properly serve its constitutional role if it is restricted to (1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase.”¹⁵

Chief Justice Roberts’s point is important because it highlights the necessity of diversity on the bench—not just in terms of race and gender—but rather wealth, legal experience, and background. Undoubtedly, a federal defender has very different interactions with the legal system than a corporate attorney. The law benefits through the appointment of judges with different backgrounds who can combine their multitude of experiences, and thereby bring varied perspectives when examining difficult legal issues. In effect, the varying backgrounds of federal judges serve as a miniature form of checks and balances within the judiciary itself, ensuring that one perspective within the legal system does not commandeer the federal judiciary’s jurisprudence. The continuous erosion of judicial salaries threatens this framework by limiting interested applicants for the federal bench to a few increasingly overdrawn pools, namely the wealthy and those already in public service.

The year-end reports of Chief Justice Roberts and his predecessors also suggest another equally problematic trend: the increased politicization of the judiciary due to salary concerns. In Federalist No. 79, Alexander Hamilton explained the rationale behind the Compensation Clause, emphasizing that “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.”¹⁶ Despite the Framers’ belief that the judiciary can only be truly independent of political influence if its compensation is not subject to congressional whim, Congress has effectively dragged judges into the political process. As discussed below, in 1989 Congress passed a law which appeared

14. ROBERTS, 2006 YEAR-END REPORT, *supra* note 2, at 3.

15. *Id.* at 7. But see Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary “Crisis,”* 87 MARQ. L. REV. 55, 57 (2003) (arguing that “the level of judicial compensation is hardly oppressive and is not seriously impairing the federal judiciary”).

16. THE FEDERALIST NO. 79, at 497 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

to end the judicial salary crisis by substantially increasing judicial salaries and guaranteeing that in the future judges would receive a salary adjustment whenever General Schedule employees received such an adjustment. Several times since 1989, however, Congress has exempted federal judges from cost-of-living increases, while granting them to virtually all other federal employees. Congress now operates without any set formula for modifying judicial pay; instead it annually determines whether to grant or deny judges a cost-of-living adjustment.

This approach raises questions about the judiciary's independence from the legislature. The federal judiciary has long stood as a defender of individual rights, often making politically unpopular rulings in areas such as civil rights.¹⁷ Now, at least in theory, members of Congress can vote whether to give judges a cost-of-living increase by examining rulings on hot-button issues and determining whether they think the federal judiciary did a "good job."¹⁸ The mere possibility that judges would be denied a salary increase because the members of Congress or their constituents do not approve of particular judicial rulings is troubling both from a constitutional and systemic stance. Such a scenario is precisely what the Framers sought to avoid by drafting the Compensation Clause and is directly at odds with the spirit of the Constitution.

II. THE ETHICS REFORM ACT

In the late 1980s, the federal judiciary was facing a compensation crisis similar to that which we see today, wherein it had suffered three decades of severe salary erosion.¹⁹ Congress took note of the staggering number of judges stepping down from the bench for salary reasons and feared that they would

17. See generally JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981) (describing politically unpopular rulings made by judges of the U.S. Court of Appeals for the Fifth Circuit in the area of civil rights).

18. James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441, 441-42 (2003) ("One such potential 'assault' on the judiciary has been said to be punitive threats to decrease judicial budgets and salaries of judges in the wake of unpopular court rulings.").

19. Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 486 (1990).

be unable to find qualified replacements.²⁰ To remedy this problem, Congress passed the Ethics Reform Act of 1989,²¹ “which provided a catch-up pay raise of approximately 33 percent over two years”²² and sought to prevent the salary erosion problem from recurring by mandating that federal judges would thereafter receive an automatic salary adjustment whenever federal civil servants received a similar adjustment.²³ These salary increases, however, came at a price—the Ethics Reform Act “forbade the receipt of honoraria, speaking or lecture fees, payments for articles, or other income earned other than by teaching or writing books. And it imposed a dollar limit [fifteen percent of his/her salary] on the income a judge could earn through classroom teaching.”²⁴

Although the Ethics Reform Act did not quite restore judges’ real salaries to the level they would have been had Congress simply provided yearly cost-of-living adjustments over the past three decades, it appeared to be a reasonable solution because it brought judicial salaries closer to where they should have been and guaranteed that judicial salary erosion would not continue. However, despite the Ethics Reform Act’s unequivocal language, Congress has denied payment to federal judges of cost-of-living increases five times since the passage of the Ethics Reform Act.²⁵ First, it did so by relying on a 1981 statute that, by its own terms, appears to be limited to “appropriations for the fiscal year 1982.”²⁶ Congress keyed in on one provision, Section 140, that mandates that judges may only receive the yearly cost-of-living adjustment if specifically authorized by Congress, and interpreted that section as surviv-

20. AM. BAR ASS’N & FED. BAR ASS’N, *FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM* 6 (2001), available at <http://www.uscourts.gov/judicialpay.pdf>.

21. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 5 and 28 U.S.C.).

22. *Judicial Branch Committee Responds to Senate Pay Freeze Plan*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), June 1995, at 7, available at <http://www.uscourts.gov/ttb/junttb/freeze.htm>.

23. 28 U.S.C. § 461(a)(1) (2006).

24. *Williams v. United States*, 535 U.S. 911, 911 (2002) (Breyer, J., dissenting from the denial of certiorari) (citing 5 U.S.C. app. §§ 501-502 (2000)).

25. Judges also did not receive an adjustment in 1994 because of a budget crisis, but other federal employees did not receive a yearly increase either. *Id.* at 913.

26. Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183.

ing beyond the passage of the Ethics Reform Act.²⁷ As such, Congress sought to render the language in the Ethics Reform Act meaningless. Congress has since chosen to be more explicit by including language in appropriations legislation that expressly denies yearly adjustments to judges, thereby circumventing the intent of the Ethics Reform Act and causing federal judges' salaries to again remain stagnant.²⁸

Congress's actions are troubling for a number of reasons. First, and most obviously, judicial salaries remain an issue. The Ethics Reform Act sought to end the judicial salary debate by putting in place a set pay adjustment model, but instead, just as in the 1980s, the necessity of a salary restoration provision is a topic of heated debate. Second, the Ethics Reform Act threatens to limit some judges' take-home pay to a level even below that which they could obtain before 1989. This is because the Ethics Reform Act places strict restrictions on judges' outside income, but does not promise that salaries will continue to grow in the future. Finally, Congress has demonstrated that it cannot be trusted to keep its word. Congress purported to put in place a framework that would adjust judicial salaries to compensate for changes in inflation and cost-of-living. It is a slap in the face to federal judges and the judicial institution, however, to then deprive them of the adjustments to which they are entitled under the Ethics Reform Act. Judges and judicial nominees would be wise to view Congress's future promises regarding judicial pay with skepticism.

III. THE FUTURE OF THE FEDERAL JUDICIARY

The composition of the federal judiciary will suffer unless Congress modifies judicial pay to account for inflation and changes in cost-of-living. This topic has thrust the federal judiciary—the branch designed to be most immune from political influence—into the thick of the political arena, where the Chief Justice must campaign annually for pay adjustments. Moreover, because judges' pleas to Congress have largely

27. *Id.* § 140, 95 Stat. at 1190. See *Williams v. United States*, 240 F.3d 1019, 1026 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002).

28. *Williams*, 240 F.3d at 1031.

fallen on deaf ears,²⁹ judges have reluctantly sought relief in their own courts for Congress's alleged violations of statutory and constitutional rights. In 1997, a group of federal judges filed suit alleging, *inter alia*, that Congress's legislation divesting judges of the salary increases promised under the Ethics Reform Act was unconstitutional under the Compensation Clause.³⁰ The judges won in district court, were reversed by a split decision at the circuit level, and sought certiorari to the Supreme Court, where they fell one vote short of that needed for the Court to take the case.³¹ Justice Breyer, joined by Justices Scalia and Kennedy, vigorously dissented from the denial of certiorari, but noted the prudential concerns that likely accompanied their colleagues' decision not to hear the case: "For one thing, we face the serious embarrassment of deciding a matter that would directly affect our own pocketbooks; and, in doing so, we may risk the public's high opinion of the Court"³²

Constitutional considerations aside, the inadequacy of judicial salaries raises serious concerns about the future of the federal judiciary. In a 2009 speech about judicial pay erosion, Judge Peter T. Fay of the U.S. Court of Appeals for the Eleventh Circuit explained that morale nationally among federal judges is incredibly low and that judges are resigning in record numbers.³³ These phenomena damage both the efficiency and integrity of the judiciary. On the efficiency side, once a

29. Some members of Congress have openly opposed judicial pay raises on the ground that it would be unfair for federal judges to earn higher pay than members of Congress. See Grant Slater, *Danforth, Gephardt: Raise Judges' Pay*, ST. LOUIS POST-DISPATCH, May 13, 2007, at A2 (according to former Rep. Richard Gephardt, the link between congressional and judicial salaries "came from Constitutional entitlement attitudes in Congress that equal pay should be afforded to equal branches of government"); Press Release, Rep. Jim Sensenbrenner, Sensenbrenner Opposes Pay Hike for Federal Judges (Dec. 14, 2007), available at <http://sensenbrenner.house.gov/News/DocumentSingle.aspx?DocumentID=80788> ("If Congress passes [a bill to increase judicial pay], then the message it would send is that one branch's responsibility and time spent is worth more than another co-equal branch.").

30. *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), *rev'd* 240 F.3d 1019 (Fed. Cir. 2001).

31. *Williams*, 535 U.S. at 911.

32. *Id.* at 919 (Breyer, J., dissenting). Another case has recently been brought by federal judges raising challenges to congressional treatment of judicial pay. Complaint, *Beer v. United States*, No. 09-00037 (Fed. Cl. filed Jan. 16, 2009).

33. John Pacenti, 'Judicial Salaries Are an Outrage,' Says 11th Circuit Judge, DAILY BUS. REV., Dec. 9, 2008, <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202426576959> (quoting Chief Judge Federico Moreno, Southern District of Florida).

judge reaches retirement age, she may retire and continue to collect full pay for the rest of her life.³⁴ Many judges, rather than retiring, take “senior status” and continue to assist the courts with their swelling dockets.³⁵ However, as deficiencies in judicial pay grow and judges are forced to reduce their quality of life in order to remain on the bench, judges are more likely to outright retire, collect their salaries for life, and pursue more lucrative careers in the private sector.³⁶ The judiciary will therefore lose a much-needed portion of its workforce. On the integrity side, the judiciary will be unable to continue to recruit a diverse pool of top talent. As judges’ real salaries continue to shrink, top lawyers are unlikely to pursue careers on the bench, and those that are willing to do so will likely be the wealthy and those coming from the public sector. If the federal judiciary loses its diversity, litigants and the public will be the ones paying the price for Congress’s refusal to grant judges adequate compensation.

The salary debate has, as stated by Chief Justice Roberts, reached the level of a “constitutional crisis.”³⁷ Not only has judicial pay not kept pace with increases in the salaries of other legal professionals or the average American worker, but it pales in comparison with the salaries of judges in peer nations, such as England, where judges earn nearly twice as much.³⁸ Congress has shown a profound disrespect for the federal judiciary by failing to consistently grant modest cost-of-living increases, instead reneging on prior promises and forcing judges to grovel for yearly adjustments. Should such a pattern continue, the structure and composition of the federal judiciary will be at risk.

34. 28 U.S.C. § 371(a) (2006).

35. *Id.* § 294(b) (a judge on senior status continues to “perform such judicial duties as he is willing and able to undertake” without being counted towards his court’s seat quota). For a more detailed discussion of the federal judiciary’s reliance upon senior judges, see Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 764–68 (2009).

36. See Kristen A. Holt, Comment, *Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform*, 55 CATH. U. L. REV. 513, 513 (2006) (“As purchasing power dwindles, judges steadily leave the bench, often to enter private practice.”).

37. ROBERTS, 2006 YEAR-END REPORT, *supra* note 2, at 1.

38. See Pacenti, *supra* note 33 (“In England . . . , a high court judge—equivalent to a U.S. district judge—makes \$318,168.”).