



The Association of the Bar of the City of New York

OFFICE OF THE PRESIDENT

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The Honorable George W. Bush
The White House
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The Honorable Richard B. Cheney
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The Honorable J. Dennis Hastert
House of Representatives
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The Honorable Orrin G. Hatch
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
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The Honorable F. James Sensenbrenner, Jr.
House of Representatives
2449 Rayburn House Office Building
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The Honorable John Conyers, Jr.
House of Representatives
2426 Rayburn House Office Building
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The Honorable Charles E. Schumer
United States Senate
313 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Hillary R. Clinton
United States Senate
476 Russell Senate Office Building
Washington, D.C. 20510

Dear President Bush, Vice President Cheney, Speaker Hastert, Senators Hatch and Leahy, Representatives Sensenbrenner and Conyers, and Senators Schumer and Clinton:

On January 7, 2003, the National Commission on the Public Service (“the Volcker Commission”), chaired by former Federal Reserve Chairman Paul Volcker, issued its report, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*.¹ I am writing to you on behalf of the Association of the Bar of the City of New York to express the Association’s strong support of Recommendations 9 and 10 of the Volcker Commission’s Report. These Recommendations are of vital concern to the national interest in the maintaining a strong, independent federal judiciary.

Recommendation 9 provides:

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

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The National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, at 22, available at <http://www.uscourts.gov/newsroom/VolckerRpt.pdf>.

Recommendation 10 provides:

Congress should break the statutory link between the salaries of members of Congress and those of judges and senior political appointees.²

The Association of the Bar of the City of New York is one of the country's oldest bar associations, having been founded in 1870. Its current membership exceeds 20,000. This letter was drafted by our Committee on Federal Courts, which studies the workings of the federal courts and issues reports and recommendations for improving the administration of justice in those courts. The Committee's membership is comprised of a broad cross-section of the Bar, including lawyers who represent plaintiffs, defendants and government agencies, as well as two federal Magistrate Judges and two law professors.

Adequate compensation, pay erosion, and pay comparability are among the most important issues that affect our nation's ability to attract and maintain a strong federal judiciary. Federal judges have tremendous responsibilities, yet are seriously underpaid and have been denied salary increases for many years. The Association of the Bar of the City of New York, therefore, believes that Recommendation 9 of the Volcker Commission for increasing federal judicial salaries is vitally necessary and should be adopted immediately.

A number of factors support the Volcker Commission's suggested increase in federal judicial salaries. The purchasing power of federal judges has declined rapidly; salaries in other areas of the legal profession have risen dramatically; and the salary review mechanisms created by the Ethics Reform Act of 1989 have failed to operate as designed.

As noted in the Volcker Commission's Report, federal judges' pay has been eroded over the past decade by a steady rise in inflation coupled with the federal government's failure to provide meaningful, regular salary increases. Since January 1993, high-level government officials, including judges, have received only five cost-of-living salary adjustments. Therefore, since 1993, the annual cost-of-living salary adjustment for these officials has averaged only about 1.5 percent.³

These meager adjustments are far below the average pay raise for federal employees over the same period and even less than federal retirees' cost-of-living adjustments. Since 1993, the Consumer Price Index has increased by 25.5 percent⁴ and federal judges' purchasing power has declined by over 12.5 percent.⁵ In 1992 dollars (because the January 1993 pay adjustment was based upon 1992 data), the value of a federal circuit judge's salary has declined from \$164,000 to

² *Id.* at 22-27.

³ See The American Bar Association & The Federal Bar Association, *Federal Judicial Pay Erosion: A Report On the Need for Reform*, Feb. 2001, at 7.

⁴ See *Federal Judicial Pay Erosion*, at 9.

⁵ See *id.*

\$143,418; the value of a district judge's salary has fallen from \$154,700 to \$135,285; and the value of a bankruptcy or magistrate judge's salary has fallen from \$142,324 to \$124,462.⁶

Soaring costs have put particular financial pressure on judges. For example, over the past decade, public university tuition across the country has increased by 38 percent.⁷ Public colleges and universities raised tuitions and fees by an average of 9.6 percent in the last year alone.⁸ By contrast, federal judges' pay has increased by only a small percentage of those amounts. As a result, federal judges must allocate a far greater share of their salaries for such living costs than they did in the past.

As the Volcker Commission's Report explains, these statistics comport with a trend that has taken place over the past several decades. Between 1969 and 1999, real pay for federal trial court and appellate court judges has fallen by approximately 24 percent while the real pay for the average American worker increased by 12.4 percent.⁹

Although the real value of judicial salaries has declined during the last thirty years, the workload burden of the federal judiciary has, by contrast, increased markedly. Over the past three decades, a federal court of appeals judge's caseload has risen by nearly 200 percent. A district judge's caseload has increased by approximately 55.2 percent.¹⁰

Over this same time period, the gap between federal judicial salaries and salaries in legal academia and in private legal practice has widened dramatically. Deans at top law schools are today paid as much as \$325,000 per year, and some senior law school professors are paid in excess of \$200,000 annually.¹¹ This disparity emerged after 1969 and has increased exponentially over the past several decades. In 1969, for example, senior professors at Harvard

⁶ See Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to the Hon. Paul Volcker, Chair, The National Commission on the Public Service (June 14, 2002), at 3, *available at* www.uscourts.gov/news/html. In addition, in January 2003, the Congress approved an Employment Cost Index Adjustment of Judicial Pay. See Administrative Office of the United States Courts, *Employment Cost Index Adjustment of Judicial Pay*, January 31, 2003.

⁷ See John Wagner, "Edwards Proposing Free Year of College," THE NEWS & OBSERVER, Nov. 21, 2002, at A1.

⁸ See Michael A. Fletcher, "4-Year Public Colleges See Largest Tuition Increase in Decade," ORLANDO SENTINEL, Oct. 22, 2002, at A1 (reprinted from the WASHINGTON POST).

⁹ See National Commission on the Public Service, *Urgent Business for America*, at 22; see also Statement of the Honorable Stephen J. Breyer, Justice of the United States Supreme Court, Before the National Commission on the Public Service, July 15, 2002, *available at* www.uscourts.gov/news/html.

¹⁰ *Federal Judicial Pay Erosion*, at 13-14.

¹¹ See Dan Horn, "Federal Judges Say Pay Falls Short," CINCINNATI ENQUIRER, Sept. 16, 2002, at A1; see also *Urgent Business for America*, at 23.

Law School were paid \$28,000 per year while the Dean was paid \$33,000.¹² Federal district court judges at that time were paid \$40,000.¹³

The gap between federal judicial salaries and salaries of lawyers in private practice is even more alarming. In 1969, federal judicial salaries were comparable to those of partners in large law firms.¹⁴ Today, the mean salary for partners in the nation's largest law firms stands at about \$800,000, while first-year associates in these firms are routinely paid \$125,000 – before bonuses.¹⁵ By contrast, a federal circuit judge's salary is \$164,000, a federal district judge's salary is \$154,700, and a bankruptcy or magistrate judge's salary is \$142,324 – all only slightly in excess of what a first year associate receives before bonus.

Moreover, judges' law clerks – typically recent law school graduates – frequently join large firms after their clerkships, and often outpace their judges' salaries within a year of having entered private practice.

The large and rapidly growing disparity in salaries between the federal judiciary and successful attorneys in the private sector as well as those in legal academia has diminished the comparative attractiveness – and financial feasibility – of serving on the federal bench. As a result of these trends, our country faces the possibility of a significant departure of talent from the federal judiciary. While resignations from the federal bench were once rare, they are now increasing. The rate of departures from the federal judiciary has increased along with the financial pressure of serving as an Article III judge. In the 30-year period between 1958 and 1989, there were 93 departures from the federal bench. Between 1990 and May 2002, on the other hand, there were 73 departures.¹⁶

Although these absolute numbers are not in and of themselves large, the percent increase in resignations has grown considerably. A substantial proportion of these resignations were related to compensation. Of the 73 judges who have resigned since 1990, 61 (almost 84 percent) took other jobs, 47 of which were in the private sector.¹⁷

The erosion in judicial pay and the ever-increasing salary gap between the judicial branch and other areas of the profession affects the ability and readiness to serve on the federal bench not only of existing judges, but also lawyers willing to be considered for a position in the federal judiciary. Unlike other public service officials, such as cabinet officials or even elected representatives who are in office for a fixed period of time and then may transition to more

¹² See Statement of The Honorable Stephen J. Breyer.

¹³ See *id.*

¹⁴ See Dan Horn, "Federal Judges Say Pay Falls Short."

¹⁵ See *Federal Judicial Pay Erosion*, at 13.

¹⁶ *Id.* at 15-16.

¹⁷ See Letter from Leonidas Ralph Mecham to the Hon. Paul Volcker, at 7.

lucrative positions in the private sector, Article III federal judges are selected “for life.” Thus, potential candidates for Article III judgeships must determine whether they have the financial resources to be Article III federal judges for life. Many of the most attractive younger candidates simply cannot afford to take the dramatic pay cut they necessarily would experience on the federal bench and do not make themselves eligible for consideration. Many of the older potential nominees do not want to experience such a dramatic decline in earnings while expenses are not also decreasing.

While serving as a federal judge offers numerous rewards other than high pay, many experienced lawyers with diverse backgrounds will be deterred from public service knowing that their salary will fail even to keep pace with inflation, and that it will, in real terms, diminish over time. The federal government obviously cannot match the salaries paid to lawyers in private practice. But the immense disparity between federal judicial salaries and salaries in other areas of the profession must be decreased. As the Commission on the Public Service noted quite aptly, if the federal government fails to provide adequate pay for judges, “recruitment risks becoming limited to the wealthy or the inexperienced.”¹⁸ Such a prospect is one that our country cannot afford.

As you know, the current system for setting the federal judiciary’s compensation ties by statute judges’ salaries (and those of high-ranking executive branch officials) to the salaries of Members of Congress.¹⁹ This statutory tie prevents judges from receiving any meaningful salary increases because of Congress’ reluctance to give itself pay increases. The Ethics Reform Act of 1989 was intended to regularize cost-of-living adjustments for such high-ranking federal officials as judges. But, because of the political unpopularity of Congress awarding itself pay increases, there have been only a few cost-of-living increases, and our federal judges have suffered greatly.²⁰

In 1967, the Commission on Executive, Legislative and Judicial Salaries (referred to as the “Quadrennial Commission”) was created, as part of the Federal Salary Act, to address these issues.²¹ During the 20 years of its existence, the Quadrennial Commission convened every four years and recommended appropriate changes in high-level government officials’ salaries, which, with presidential approval, would automatically take effect.²² The Quadrennial Commission was

¹⁸ Quoted in statement of The Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court, Before the National Commission on the Public Service, July 15, 2002, *available at* www.uscourts.gov/news/html.

¹⁹ *See Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002), *reh’g denied*, 122 S. Ct. 1598 (2002) (rejecting federal judges’ legal challenge to denial of cost-of-living increases) (Association of the Bar of the City of New York participated as *amicus curiae* along with eleven other bar associations).

²⁰ *See* Linda Greenhouse, “Chief Justice Hits Familiar Themes in His Yearly Report,” N.Y. TIMES, Jan. 2, 2003, *available at* www.nytimes.com/2003/01/02/politics/02COUR.html.

²¹ Federal Salary Act of 1967, Pub. L. No. 90-206, § 225 (1967).

²² *See Federal Judicial Pay Erosion*, at 5.

abolished in 1989, however, as part of the Ethics Reform Act, which replaced the Quadrennial Commission with the Citizens' Commission on Public Service and Compensation.²³ The Citizens' Commission was also supposed to convene every four years to propose recommendations on compensation schemes for high-ranking government officials. Since the Ethics Reform Act was enacted, however, no money has been appropriated for the Commission and its members have never been appointed by Congress.²⁴ As a result, federal judges' salaries have been allowed to languish. This system clearly has not worked as intended.

The Association believes, as does the Judicial Conference, that the Quadrennial Commission should be reimplemented to recommend necessary pay increases for the federal judiciary on a regular basis. Such a system would be an effective means by which to provide federal judges with truly needed salary increases as well as regular cost-of-living adjustments.

The Association also believes that Recommendation 10 of the Volcker Commission should be adopted. It is imperative to sever the statutory tie between federal judicial salaries and congressional salaries. With such a change, federal judicial salaries will no longer be stymied by Congress' political reluctance to award itself pay increases.

To continue to retain and attract the most qualified judges with diverse backgrounds and experience – judges who are expected to serve for life – it is necessary to provide them with adequate compensation. On behalf of the Association of the Bar of the City of New York, I strongly urge you to formulate and enact a remedy for our federal judiciary's compensation problem. I greatly appreciate your considering our position.

Sincerely,

E. Leo Milonas

²³ Ethics Reform Act of 1989, Pub. L. No. 101-194 (1989).

²⁴ *See Federal Judicial Pay Erosion*, at 7.