

**Testimony of**  
**Samuel Alito**  
**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**

Mr. Chairman and Distinguished Members of the House Judiciary subcommittee on Courts, the Internet, and Intellectual Property: Thank you for the opportunity to testify at this important hearing. I am pleased to appear on behalf of the federal judiciary.

### Introduction

The Constitution's Framers intended that Article III's provision on judicial compensation would help secure judicial independence. They wrote the Compensation Clause in order to help ensure "complete independence of the courts of justice." One of the grievances against King George III listed in the Declaration of Independence was: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton, in *The Federalist*, No. 79, stated:

In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the Judicial from the Legislative power, in any system, which leaves the former dependent of pecuniary resource on the occasional grants of the latter.

The delegates to the Constitutional Convention of 1787 understood that the judiciary would require persons "of the first talents" and that judicial pay would have to be sufficient to attract such persons.

The Framers' vision was that judicial pay should make judges independent of influence but not independently wealthy. As I will discuss later on in this written statement, I am afraid that today's eroding federal judicial salaries will lead, sooner or later, to less capable judges and ultimately to inferior adjudication. If this comes to pass, the function of our courts as the guardians of the rule of law will be undermined.

### A Retrospective

I want to offer a brief snapshot of the federal judiciary. Since I began my judicial service in 1990 on the United States Court of Appeals for the Third Circuit, the workload for appellate judges has spiraled upwards. In 1990, there were 40,982 appellate cases filed. In 2006, 66,618 were filed. As a result, the workload per authorized three-judge panel increased from 787 cases in 1990 to 1,197 in 2006. This represents an increase of over 52 percent. The workload for district judges has increased as well. These caseload statistics become even more startling when one considers not just the number of cases, but their character.

Many civil cases filed in federal courts are complex and protracted, and the very best legal minds are necessary for their adjudication. Similarly, today's criminal cases are also often far more complex than those that dominated the federal docket in the past.

In 1979, Judge Irving Kaufman of the Second Circuit, the first chair of the Judicial Conference Committee on the Judicial Branch, wrote:

The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation, school admissions and affirmative action, busing, free speech and political protest, internal and foreign security, the rights of criminal defendants, church-state relations from prayers in public schools to public funding for parochial schools, legislative reapportionment, obscenity, the draft, abortion, the death penalty, women's rights, and ecology. Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality have propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role. Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern judge should be, in the phrase describing Justice Brandeis, a master of both microscope and telescope.

The point is simple, but important: Our system of government requires that federal judges be highly qualified lawyers and that they operate free from extraneous influences. Judges are the central figures in our judicial system. It is in the public interest to ensure that these judges are of the highest caliber, free from the distractions of personal economic pressure, and independent of outside influence.

Yet, we increasingly hear from judges across the country that the discharge of the judicial office is becoming increasingly difficult for them. These judges are being

squeezed by ever higher caseloads and other pressures on the one hand and by increasingly inadequate compensation on the other. Both factors underscore the urgency of responsible curative action this year. Without serious salary reform, the country faces a very real threat to its judiciary.

### Real Decline in Judicial Salaries

The real compensation of federal judges has diminished substantially over the years. I want to assure you that I am not overstating the case. Consider the following: Between 1969 and 2006, the real pay of district judges declined by about 25 percent.<sup>1</sup> During this same period of time, the real pay of the average American worker increased by well over 18 percent. In 1969 dollars, the district judge salary would be worth \$219,700 today, an increase of \$54,500. If judges' salaries had kept pace with the increase in the average wages of American workers during this time period, the district judge salary would be \$261,300, an increase of \$96,100.

Since 1993, when the Ethics Reform Act's Employment Cost Index pay adjustment provision ceased operating as Congress originally intended, the real pay of judges has fallen behind inflation by over 12 percentage points, while the real pay of rank-and-file federal employees has outpaced inflation by 25 percentage points.<sup>2</sup> Unless this trend is reversed, its damage will be more severe, and more immediate, than anything

---

<sup>1</sup> See Exhibit 1.

<sup>2</sup> See Exhibit 2.

I have seen in all my years on the federal bench. Unlike other federal employees, judges do not know, from year-to-year, whether they will receive annual cost-of-living adjustments.

It is disquieting to hear from judges whose real compensation has failed to keep pace with inflation and who are concerned about the financial well-being of their families. Judges do not expect to become wealthy when they are appointed to the federal bench; however, they do expect to receive, in real terms, what the job paid when they took it. This situation threatens irreparable harm both to the institution and to the public that it serves.

Judges' salaries have been eroded by escalating living costs and have severely lagged behind the salaries of other federal employees, as well as their peers in the nonprofit sector, in academia, and in the private sector.

#### Salary Comparisons with Other Federal Employees

There is another problem. Since the enactment of the Ethics Reform Act of 1989, the salaries of numerous federal employees have been delinked from the salaries of Members of Congress and federal judges. As a result the federal salary structure has become inverted, so that rank-and-file employees may now be paid salaries well above those of constitutional officers.

In recent years, federal departments and agencies with increasing frequency have convinced friendly congressional oversight committees to exempt them from all or part

of the pay and personnel restrictions of title 5, United States Code. Stated differently, Congress has already determined to break the link in compensation between employees in the executive branch and officers and employees in the legislative and judicial branches, whose annual pay is now capped at \$165,200. As a result, it is not uncommon now to find federal employees in the executive branch, as well as in the banking and financial agencies, who are paid significantly more than Justices and judges of the federal courts, as well as Members of Congress.

The Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004<sup>3</sup> established a three-component system of compensation for federally employed physicians and dentists, consisting of basic pay, market pay, and performance pay. The aggregate compensation of these employees is capped only by the Presidential salary, which is currently \$400,000.<sup>4</sup> *See*, 38 U. S. C. § 7431(e). Following this written statement, you will find a sampling of current job vacancy announcements (from the Department of Veterans Affairs) for physicians. *See* Exhibits 3 – 17. As you will

---

<sup>3</sup> Pub. L. No. 108-445.

<sup>4</sup> The term "aggregate compensation" means the combination of basic pay plus "special pay" for factors such as length of service, scarce specialties, board certification, executive responsibilities, etc.

observe, the Veterans Health Administration is currently exercising its authority under title 38, United States Code, to pay physicians up to \$275,000 annually.

Other federal departments that employ physicians have also been delinked from the salaries of Members of Congress and judges. According to the Office of Personnel Management, the extraordinary pay authorities (for physicians and dentists) that Congress enacted for the Department of Veterans Affairs have been extended (administratively) to the Departments of Defense, Health and Human Services, and Justice.<sup>5</sup> The aggregate compensation of physicians and dentists employed by the Department of Defense apparently now ranges up to \$225,000 annually. *See* Exhibit 18. At the Department of Health and Human Services (DHHS), the aggregate compensation of physicians and dentists (exclusive of the Public Health Service) appears to be capped (as a matter of policy) at a more modest \$200,000 annually.<sup>6</sup>

*See* [http://ohrm.cc.nih.gov/info\\_center/Physicians/paypsp.htm](http://ohrm.cc.nih.gov/info_center/Physicians/paypsp.htm); *see also* Exhibit 19 (which shows that a federally-employed pharmacist or scientist at DHHS may be paid up to \$200,000 annually). Even the compensation of federally employed nurses and speech

---

<sup>5</sup> *See* Office of Personnel Management Benefits Administration Letter (Subject: Change in Crediting Physicians' Pay under Title 38, United States Code), June 12, 2006.

<sup>6</sup> It appears that physicians employed by the Department of Health and Human Services could be paid up to the Presidential salary (currently \$400,000).



pathologists has been delinked from the compensation of Members of Congress and federal judges. Nurses and speech pathologists who are employed by the Department of the Navy can now be paid salaries up to \$200,000 annually. *See* Exhibits 19 to 20.

The salary structure at the Securities and Exchange Commission (SEC) was delinked from Members' and judges' salaries pursuant to the "Investor and Capital Markets Fee Relief Act," Pub. L. No. 107-123. This legislation authorized the SEC to develop a system of pay and benefits similar to that developed by the banking agencies (i.e., the Comptroller of the Currency, the National Credit Union Administration Board, the Federal Housing Finance Board, the Farm Credit Administration, and the Office of Thrift Supervision) under section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (codified at 12 U.S.C. § 1833b).<sup>7</sup>

I have attached, for your information, five job vacancy announcements for SEC positions for which the maximum payable salaries are in excess of federal judicial salaries (currently \$165,200). *See* Exhibits 22-26. As you will observe, the SEC recently recruited for two Supervisory Attorney-Adviser, a Trial Attorney, and an Attorney-Adviser. The job vacancy announcements show that the maximum salary payable to the Supervisory Attorney-Adviser is \$191,134 and to the Trial Attorney is \$175,384. These salaries exceed the salaries of circuit and district judges (currently \$175,100 and

---

<sup>7</sup> Under section 1833b, each banking agency has the discretion to establish and adjust "schedules of compensation and benefits." The only condition is that agency heads are required to keep Congress (as well as their counterparts) informed of their respective pay and benefits

\$165,200, respectively). While these positions are undoubtedly important, it is questionable whether the functions performed by their incumbents are more important than those performed by Article III judges, who are constitutional officers and are regularly required to make extremely difficult and important decisions. Indeed, based upon the above discussion, it would be reasonable to conclude that a district judge who presides over an SEC case may be the lowest paid attorney in the courtroom.

In 2002, the FIRREA was amended to authorize the Commodity Futures Trading Commission to maintain pay comparability with the banking agencies referenced above. *See* Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, tit. X, § 10702. I have attached, as exhibits, four job vacancy announcements for positions at the Commodity Futures Trading Commission (including one for a Deputy General Counsel for Litigation) that show that the maximum salaries payable to candidates are well in excess of the salaries of Members of Congress and district judges (currently \$165,200), as well as circuit judges (currently \$175,100). *See* Exhibits 27-30.

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 authorizes the Office of Federal Housing Enterprise Oversight (of the Department of Housing and Urban Development) to “fix the compensation of . . . officers and employees . . . without regard to the provisions of chapter 51 and subchapter 53 of title 5, United

---

packages.

States Code, relating to classification and General Schedule pay rates.” See Pub. L. No. 102-550, § 1315, 106 Stat. 3941, 3947, codified at 12 U.S.C. 4515. The compensation system at this agency too is linked to the so-called FIRREA (i.e., banking agencies).

I have attached as exhibits two job vacancy announcements for positions at the Office of Federal Housing Enterprise Oversight, which show that the maximum salaries payable to candidates are in excess of the salaries of Members of Congress and judges. See Exhibits 31-32. Among other things, this agency is currently recruiting a “Senior Financial Engineer” (i.e., an economist), who may be paid up to \$186,251 annually.

The Federal Deposit Insurance Corporation’s (FDIC) organic statute provides that the Board of Directors of the FDIC “shall have the power . . . [t]o appoint officers and employees . . . , to define their duties, [and] *fix their compensation*” (emphasis added). Consistent with this independent pay-setting authority, government-wide pay caps do not apply to the FDIC. Congress in enacting FIRREA gave the other financial regulatory agencies pay authority similar to the FDIC’s and required those agencies (including the FDIC) to seek to maintain “pay comparability” with one another to avoid competition for employees. See 12 U.S.C. § 1819(a). The FDIC currently employs about 5,000 people. About ninety of those positions fall within the FDIC’s Executive Management classification band, which is currently capped at the Vice Presidential salary level of \$215,700. Another 500 positions are considered managerial and supervisory in nature, and the maximum salary at this level appears to be \$169,272. See Exhibit 33. I have

attached, as exhibits, three job vacancy announcements for positions at the FDIC (including one for a Regional Counsel) that show that the maximum salaries payable to candidates are well in excess of the salaries of Members of Congress and district judges (currently \$165,200), as well as circuit judges (currently \$175,100). *See* Exhibits 34-37.

Under 12 U.S.C. § 248(l), the Board of Governors of the Federal Reserve System is authorized to appoint employees without regard to the provisions of title 5, United States Code. According to the Federal Reserve Board's website, its employees may be paid an annual salary of up to \$178,470.

*See* <http://www.federalreserve.gov/careers/salary.htm> (Exhibit 38).

Attached is a chart listing the salaries of the presidents of the 12 Federal Reserve Banks, which range from \$249,000 (in Cleveland) to \$355,000 (in Boston, Atlanta, Chicago, and Minneapolis). *See* Board of Governors of the Federal Reserve System, 92<sup>nd</sup> Annual Report to Congress 2005, p. 291. (Exhibit 39)

As discussed above, the FIRREA agencies have long been delinked from the salaries of Members of Congress and judges. For example, the compensation of employees at the Office of the Comptroller of the Currency (OCC) is currently capped at \$225,000. *See* <http://www.occ.treas.gov/jobs/DEU-HQ-07-030.htm> (Exhibit 29).

A random search of job vacancy announcements posted on those agencies' websites (as well as <http://www.usajobs.gov/>) is revealing. *See* Exhibits 41-42.

The Office of Thrift Supervision is currently recruiting for five high-level positions, and in at least one instance an eligible candidates may be paid an annual salary of up to \$305,166. *See* Exhibits 43-47.

In 1998, Congress enacted legislation allowing the Internal Revenue Service to fix the salaries of up to 40 key officials at the Vice Presidential salary (which is currently \$215,700). Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206. Similar authority has been granted to the Federal Aviation Administration.

In the 108<sup>th</sup> Congress, legislation was enacted that restructured the system for compensating members of the executive branch's Senior Executive Service (SES). National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136. Under this legislation, the six levels in the former SES pay scale were abolished and replaced with an open pay range that currently stretches from \$111,676 to \$168,000.<sup>8</sup> *See* Exhibits 48-49. Members of the SES may be paid anywhere in the above pay range, based on performance, at the discretion of their agency head. This statutory change gives executive branch agency heads unprecedented discretion to set, raise and lower salaries for individual members of the SES based on their relative performance (e.g., their individual performance, their contribution to their agency's performance, or both). This

---

<sup>8</sup> In order for executive branch agencies to implement the new Executive Schedule level II rate of pay for their SES members, the Office of Personnel Management must certify the agency has developed a performance management system that ties executive compensation more closely to job performance.

means that any member of the SES may now be paid a salary in excess of the salary (currently \$165,200) of a district judge and a Member of Congress.

The 2004 Defense Authorization Act also authorizes the Secretary of Defense to appoint up to 2,500 “highly qualified experts” (e.g., scientists, engineers, and medical personnel) for terms of up to six years. These experts may be compensated at rates of pay as high as 150 percent of the maximum Senior Executive Service salary. Pub. L. No. 108-136, § 1101, codified at 5 U.S.C. § 9903. Under this authority, one of these “highly qualified experts” could be paid an annual salary of up to \$252,000. *See* Exhibits 50-51.

In 2005, Congress authorized the Environmental Protection Agency (EPA) to make up to five appointments annually from 2006 to 2011 (for its Office of Research and Development) “under the authority provided in 42 U.S.C. 209,” which generally provides for the hiring of consultants “without regard to the civil service laws.” *See* Pub. L. No. 109-54, tit. II. Under this authority, at least two of these appointees could be paid an annual salary of up to \$200,000. *See* Exhibits 52-53.

I should note that this salary inversion negatively affects other judicial officers as well. In many geographic locations within the continental United States, the locality-adjusted pay of nearly two hundred court unit executives (e.g., clerks of court) and their deputies now exceeds the salaries of bankruptcy and magistrate judges (currently \$151,984, as set by statutory formula). Nonforeign cost-of-living adjustments (COLAs)

and differentials for court unit executives and comparable executive branch officials who are located outside of the continental United States have also pushed their adjusted salaries above the district judge salary.<sup>9</sup>

### Second National Commission on the Public Service

My testimony would be incomplete if I failed to mention the landmark report, *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century*, in which the Second National Commission on the Public Service (hereinafter referred to as the Volcker Commission) concluded in 2003 that “[j]udicial salaries are the most egregious example of the failure of federal compensation policies,” and recommended that “Congress . . . grant an immediate and significant increase in judicial, executive and legislative salaries to ensure a reasonable relationship with other professional opportunities.” See <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>.

The Commission reached this conclusion after considering the following:

(1) the erosion in judges’ purchasing power; (2) the unfavorable comparison between federal judicial salaries and the salaries of their peers in other common law countries, (3) the substantial increase in the salaries of professors and deans at the top 25 law schools;<sup>10</sup>

---

<sup>9</sup> At present, federal employees in Alaska, Hawaii, and the territories (Guam, the Northern Mariana Islands, the Virgin Islands, and Puerto Rico) receive non-foreign cost-of-living allowances equal to 25 percent of their basic pay. Section 461 of title 28, United States Code, does not presently authorize the payment to judges of nonforeign COLAs. In the absence of specific statutory authority, judges may not receive this additional form of compensation.

<sup>10</sup> The Commission, in 2003, understood that the average salary for deans of those schools was \$310,639. The average base salary of full professors for a nine-month academic

and (4) the increase in the rates of judicial resignations and retirements for what appears to be financial reasons.

### Private Sector Salaries

As most judges know all too well from their conversations with current and former law clerks, federal judicial salaries are commonly eclipsed by the compensation of relatively inexperienced associates in large law firms. In February 2006, Senator Dianne Feinstein observed that “[t]oday, partners at major law firms routinely make three, four or five times what federal judges make. Furthermore, first year law school graduates at these law firms make more than experienced Federal judges.” 152 Cong. Rec. S1073 (daily ed. Feb. 10, 2006). The compensation of first-year associates is again spiraling upward. See Stephanie Francis Ward, “Who Will Pay for Associate Raises: Partners or Clients?,” *ABA Journal e-Report*, <http://www.abanet.org/journal/ereport/f2raise.html>.

### Negative Consequences of Eroding Salaries

In his 2006 Year-End Report on the Federal Judiciary, the Chief Justice stated that the problem of judicial compensation “threatens to undermine the strength and independence of the federal judiciary.” As discussed below, the federal judiciary is losing some of its best and brightest judges:

---

year was \$209,571, with summer research and teaching supplements ranging between \$33,000 and \$80,000.



**Judge David Levi** (E.D. Cal.) – Judge Levi, a brilliant trial judge and widely regarded national leader in civil procedure, has announced that he will resign, without any right to a judicial annuity, from the federal bench in July 2007 (at age 55 with 16 years of service) to accept appointment as Dean of the Duke University School of Law.

**Judge Michael Mukasey** (S.D.N.Y.) – Judge Mukasey was a highly regarded trial judge who presided over the terrorist bombing conspiracy trial. He retired in September 2006 (at age 65 with 18 years service) and returned to his former law firm, Patterson Belknap Webb & Tyler LLP. *See New York Sun*, July 26, 2006, <http://www.nysn.com/article/36714>.

**Judge Michael Luttig** (4<sup>th</sup> Cir.) – Judge Luttig, who was a former clerk to Chief Justice Burger and then-Judge Scalia and a leading constitutional expert, resigned without any right to a judicial annuity in May 2006 (at age 51 with 14 years of service) to become Vice President and General Counsel of Boeing Co.

**Judge Fern M. Smith** (N.D. Cal.) – In June 2005, Judge Smith retired (at age 71 with 16 years of service) to join JAMS (a private firm, comprised of former federal and state judges, that provides dispute resolution services). Judge Smith is a former Director of the Federal Judicial Center, the primary training and educational institute for federal judges, where she was one of the primary editors of the Manual of Complex Litigation.

According to its website, JAMS currently counts 21 former federal judges (including Judge Smith) among its mediator/arbitrators. *See* Attachment 1. A similar organization, called FedNet, counts 15 former federal judges among its mediators/arbitrators. *See* Attachment 2.

**Judge Paul Matia** (N.D. Ohio) – Judge Matia retired from the bench in May 2005 (at age 67 with 13 years of service) to join Porter Wright Morris & Arthur LLP (Cleveland). During his tenure on the federal bench, the judge presided over the highly publicized case of John Demjanjuk, who was ordered to leave the U.S. for helping the Nazis persecute Jews during World War II. As discussed below, Judge Matia is the third former chief judge in the Northern District of Ohio to step down from the bench to enter private practice.

**Judge Robert Cindrich** (W.D. Pa.) – Judge Cindrich was a highly respected trial judge, former U.S. Attorney, Public Defender, and judicial law clerk. He resigned, without any right to a judicial annuity, in January 2004 (at age 60 with 9 years of service) to become chief legal counsel to the University of Pittsburgh Medical Center. At the time of his resignation, it was noted that his judicial salary, which was adjusted for the cost of living in only five of his nine years on the bench, was worth about \$11,000 less in real dollars than at the time of his appointment to the bench. In stepping down from the bench, Judge Cindrich stated, “[j]udges are

supposed to be relatively smart people, so it doesn't take us long to figure out, I'm going backwards." See *Grand Rapids Press*, February 19, 2004, p. A30.

**Judge John Martin** (S.D.N.Y.) – A well-regarded trial judge and former U.S. Attorney, Judge Martin retired in September 2003 (at age 68 with 13 years service) to become of counsel to Debevoise & Plimpton, LLP. During his tenure on the bench he presided over a large number of high-profile and complex legal disputes, including several major insurance cases relating to the September 11, 2001, attack on the World Trade Center and a 1999 trial involving Con Edison in connection with environmental violations.

**Judge Roderick McKelvie** (D. Del.) – Judge McKelvie, who was considered an expert in intellectual property law, resigned from the bench, without any right to a judicial annuity, in June 2002 (at age 56 with 10 years service) to join Covington & Burling LLP. During his 10 years on the bench, Judge McKelvie presided over more than 200 patent infringement cases, including more than 30 patent infringement trials. Judge McKelvie also worked to improve the procedures for presenting complex cases to juries, developing model jury instructions for patent infringement cases and the Federal Judicial Center's video for jurors, *An Introduction to the Patent System*.

**Judge Sven Erik Holmes** (N.D. Okla.) – Judge Holmes was a highly regarded trial judge with significant judicial and congressional staff experience. He

resigned from the bench, without any right to a judicial annuity, in March 2005 (at age 54 with 10 years of service) to become Vice Chair, Legal Affairs at KPMG LLP. In reporting on Judge Holmes' hiring by KPMG, the *New York Times* stated that KPMG is hauling in "a big gun." See *New York Times*, Jan. 23, 2005.

**Judge Sam Pointer** (N.D. Ala.) – Judge Pointer retired from the bench in April 2002 (at age 65 with 29 years of service) to join Lightfoot, Franklin & White, L.L.C. (Birmingham). See "Court Set for Life or Death Argument," *Legal Times*, Apr. 15, 2002; see also <http://www.privatejudge.com/judges.asp>. At the time he stepped down from the bench, Judge Pointer was considered to be "among the 10 most knowledgeable people in the United States on class actions." *Id.* Judge Pointer returned to private practice because his judicial salary failed to keep pace with changes in the cost of living. *Id.* During his almost thirty years on the bench, Judge Pointer presided over the trial or settlement of a wide variety of major class actions, multidistrict, multiparty, and other complex cases including the Cast Iron Pipe Antitrust Litigation, the Plywood Antitrust Litigation, the National Steel Industry Employment Litigation and the Silicone Gel Breast Implant Litigation. He was one of the principal authors of the Federal Judicial Center's *Manual for Complex Litigation*, Second Edition, and he served for seven years as a member of the Judicial Panel on Multidistrict Litigation.

These are just a handful of the judges who have resigned or retired from the bench in recent years. The institutional knowledge and experience these judges take with them is not easily replaceable.

Twenty Article III judges have resigned or retired from the federal bench since January 1, 2005. It is our understanding that seventeen of these judges sought other employment. Six of these judges retired to join JAMS, a California-based arbitration/mediation, where they have the potential to earn the equivalent of the district judge salary in a matter of months. Five judges entered the private practice of law (presumably at much higher salaries). Two judges resigned to become corporate in-house counsels. One judge resigned to accept a state judicial appointment (at a higher salary). Another judge retired to accept an appointment to a quasi-governmental position. One judge recently announced his resignation to accept an appointment in higher education. One judge resigned to accept an appointment in the executive branch of government.

The table below shows the number of departures that has grown in tandem with the financial pressure of being an Article III judge:

Time Period	Number of Departures
1958 to 1969	3
1970 to 1979	22
1980 to 1989	41
1990 to 1999	55
2000 to March 2007	48 <sup>11</sup>

Of the 103 judges who have left the federal bench since 1990, 79 retired from the judicial office, and 24 departed before reaching retirement age (without any right to an annuity). To our knowledge, 63 of the aforementioned 103 judges (61 percent) stepped down from the bench to enter the private practice of law (including private dispute

---

<sup>11</sup> Of the 48 judges who have left the federal bench since January 1, 2000, 34 retired from the judicial office and 13 resigned before reaching retirement age (without any right to annuity). Thirty-one (or 65 percent) of these judges entered the private practice of law (including mediation/arbitration). Four judges accepted appointments to other government or quasi-government offices (one in the federal executive branch, two in state government, and one in a quasi-government agency). One judge accepted an appointment as chief legal officer of a not-for-profit institution and another judge accepted an appointment in academia.

resolution firms). Twenty judges sought other employment (e.g., government and quasi-government agencies, academia, and the non-profit sector). This means that 80 percent of judges who left the federal bench did so for other employment and, in most cases, for significantly higher compensation.

It is significant that a substantial proportion of these separations were related to compensation, and that the numbers are on the rise. For judges to emulate the pattern of executive branch federal service as a mere stepping-stone to reentry into the private sector and law firm practice is inconsistent with the traditional lifetime calling of federal judicial service.

#### A Potential Solution

Paul Volcker, the former Chairman of the Federal Reserve Board and chairman of the Second National Commission on the Public Service, recently advocated raising the salary of federal district judges to \$261,000. *See* Exhibit 52. I believe this is a good starting point for discussion.

I believe my earlier testimony (on the potential value of judicial salaries in 1969 dollars as well as my testimony on the compensation of other federal officers and employees) provides ample justification for raising the district judge salary to this level. The entire budget of the Third Branch is two-tenths of one percent of the total federal budget. If judicial salaries were increased by even one-third, the Third Branch budget would still be about two-tenths of one percent of the federal budget.

Some might argue that the nation cannot afford to pay improved judicial salaries at a time when it is facing a budget deficit; however, the real cost of not granting adequate salaries to our federal judges must be calculated, not in today's dollars, but by the drain on our judiciary that will be caused by the loss of qualified, seasoned judges. Judges are not fungible. A new judge cannot be expected to be as efficient as an experienced judge. The early departure of a single judge, therefore, creates a gap in the system that cannot be closed for years.

I hope my testimony to this Committee has been helpful. I come here not as one primarily telling you to recommend more money, but as one suggesting to you that the judges we have are worth keeping. In closing, I hope you will consider the following:

(1) Is the current judicial salary fair?; (2) Does it aid in maintaining judicial independence?; and (3) Does the current judicial salary-fixing process improve and not diminish the Third Branch of government? I hope you will agree that our nation must remain committed to recruiting and retaining the highest quality lawyers for its judicial system. Our nation's judiciary enjoys a proud tradition, distinguished by intellectual ability and dedication to public service.

Mr. Chairman, thank you for the opportunity to appear before your Subcommittee today. I would be happy to expand on any of these points now or in the future. Again, the judiciary is grateful to the Subcommittee for examining the problem of the compensation of judges.