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Enough's Enough

In June of 2003, then State Bar President Reginald Turner used these pages to make an eloquent argument for an immediate and significant increase in the pay of federal judges and an end to the statutory link of their salaries to the salaries of members of Congress. Three years later, federal judicial pay at $175,000 for circuit judges and $165,200 for district judges remains substantially unchanged, and the hope of an increase continues to be held hostage to political reluctance to raise congressional compensation.[1]

Our Constitution wisely grants federal judges lifetime tenure and protects them from reductions in compensation during their tenure in office. The founding fathers debated the wisdom of permitting periodic increases in compensation and were persuaded, over James Madison's objections, that because the value of money, the "style of living," and the volume of judicial business all might change during a judge's tenure, periodic increases were appropriate and necessary.[2] Unfortunately, the "periodic increases" that Congress has seen fit to grant over the last three decades have fallen far short of covering inflation, causing federal judicial pay to decline in terms of earning power.[3] In his Year-End Report on the Federal Judiciary, Chief Justice John Roberts reported that if Congress gave judges a raise of 30 percent tomorrow, after adjusting for inflation, our federal judges would be making about what judges made in 1969.

In light of the erosion of earning power, the recent arguments for a substantial increase have tended to center around the problem of retention and recruitment. According to the 2005 Year-End Report, 21 federal judges have left the bench before retirement age, with 59 stepping down to enter the private practice of law. And the trend appears to be accelerating. Over the past five years, 37 federal judges have left the bench, nine of them in 2005. In contrast, during the 1960s, only a handful of district and appellate court judges retired or resigned.

In recent weeks, the resignation of Judge Michael Luttig has generated particular attention. A celebrated jurist on the 4th Circuit Court of Appeals who was widely described last summer as being on the short list of likely nominees for the U.S. Supreme Court, Judge Luttig resigned to become general counsel of Boeing Corporation, noting in his resignation letter that he has two children approaching college age. Commentators observed that a few years ago, Judge Luttig jokingly applied for a first year associate's position at the law firm of Hogan and Hartson because he had heard that the pay for first-year associates was higher than his own.[4]

Judge Luttig, although joking, was not exaggerating. In a world where the salary of a first-year associate at the nation's largest law firms ranges from $115,000 to $140,000, it is not uncommon for a top law-school graduate with judicial clerkship experience to command a beginning salary that, combined with bonuses, exceeds the current pay of federal judges.

Like Reginald Turner and Chief Justice Roberts, I believe that a pay raise for federal judges is long overdue. I side with the bipartisan voices who warn that the denial of a rational compensation structure for both federal and state judges threatens to undermine the stability and quality of the judicial branch.

My position, however, is not the position that was taken by a sharply divided Representative Assembly of the State Bar when it was presented with a recommendation to support an increase in federal pay in April of 2003. I understand the strong feelings that surfaced at that meeting, and I recognize the wisdom of my predecessor's observation that "when we open discussion about what one person, or one lawyer, or one class of lawyers or judges should make in comparison to others we are entering emotionally charged terrain." The position of the Representative Assembly, the final policy-making body of the State Bar, currently stands as the official position of the Bar.

For the record, then, let me acknowledge the truth of the following statements often raised to justify opposition to increases for federal judges:

- A federal judgeship is a great job, offering lifetime security, prestige, the satisfaction of public service, and interesting, meaningful intellectual challenges.
- Some lawyers with skills, aptitude, experience, temperament, and earning potential equivalent to the most accomplished federal judges earn much less than federal judicial salaries through their work in prosecution, public defense, and poverty law.
- Many qualified members of our profession (including, most probably, many readers of this column) would be delighted to serve as federal judges at the present pay scale—at least during their initial tenure on the bench. Indeed, there is no shortage of excellent candidates vying for federal judgeships, many of whom are already making more than the current pay of federal judges, and all of whom are undoubtedly aware of the stagnation of judicial pay structure.

These points are dispositive to the issue of judicial pay, however, only if is appropriate to determine judicial pay solely based on the labor market. It is not. Chief Justice Roberts offers one explanation why:

> *There will always be a substantial difference in pay between successful government and private sector lawyers. But if that difference remains too large, as it is today, the judiciary will over time cease to be made up of a diverse group of the nation's very best lawyers. Instead, it will come to be staffed by a combination of*

the independently wealthy and those following a career path before becoming a judge different from the practicing bar at large. Such a development would dramatically alter the nature of the federal judiciary.[5]

I agree with this concern, but I support a substantial increase in federal judicial pay for a broader reason: I believe that the economic health of the profession requires solidarity among lawyers for fair and adequate compensation across the board, not least for those who call the shots in our justice system—our judges, at both the federal and state level. When it comes to fair compensation for the work of any member of our very learned profession, we are not playing a zero sum game. Quite the opposite. Because federal judges hold positions of prestige and power within the justice system, federal judicial salaries are a natural benchmark for the value of other legal work. Salaries held artificially low by the linkage to congressional pay can be used as an excuse to depress compensation of lawyers throughout the profession, but especially of those in other public service work.

Erosion of public respect for public service work was the catalyst for the creation of the National Commission on the Public Service ("Volcker Commission"), whose 2003 report called for significant increases in judicial, executive, and legislative salaries, but singled out judicial compensation as especially critical: "the first priority. . . should be an immediate and substantial increase in judicial salaries."[6]

The State Bar of Michigan has long been leading the fight to reform the abysmally low compensation of Michigan's public defenders and prosecutors. Ensuring that judges everywhere are paid a salary that reflects the importance of their work is an important step toward winning that important, and even more difficult, fight. ◆

FOOTNOTES

1. Two bills pending before Congress with bipartisan sponsorship, H 5014 and S 2276, would address the situation by breaking the tie to congressional pay, raising salaries 16.5 percent and establishing cost-of-living increases. As of this writing, the bills do not appear to be moving.
2. James Madison, Notes (Aug 27, 1987), in 2 The Records of the Federal Convention of 1787, at 40, 44–45 (Max Farrand ed, 1911).
3. "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." US Const, art III, § 1.
4. John Roberts was a partner at Hogan and Hartson at the time, and reportedly informed Judge Luttig that his application had been rejected, in the same spirit in which it was submitted.
5. 2005 Year-End Report on the Federal Judiciary.
6. National Commission on Public Service.