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The Threat to Judicial Independence

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The Threat to Judicial Independence

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The crucial problem of inadequate judicial compensation has become a crisis.

In the first place, any complaint about salary is likely to fall upon deaf ears at any time, particularly when the listener is fighting his own battle against the grinding vise of inflation and recession and when the complainant is already being paid something like $42,500 a year.

Secondly, the listener, if he had ever been listening, most certainly stopped doing so when he heard that Congress had "sneaked through" a cost-of-living raise for judges as well as for congressmen and others on July 30, 1975.

Having ceased paying any attention, he probably doesn't realize that the increase was 5 percent when 50 percent would not have been compensatory from a strictly cost-of-living standpoint. Therefore he cannot be blamed for not understanding that what is at stake is not simply a bad personal economic situation for some individual judges, but rather the very independence and competence of the judicial system. If he understands this, does the average citizen want this to happen or can he afford to let such circumstances persist?

THE FAILURE OF CONGRESS TO IMPLEMENT THE SALARY COMMISSION'S RECOMMENDATIONS

The salaries of the executive, legislative, and judicial branches were separately considered and fixed by Congress until 1967,[1] when Congress established the Commission on Executive, Legislative and Judicial Salaries[2] to be composed of nine members, three, including the chairman, to be appointed by the President, two to be appointed by the Presi-

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[1] At no time prior to 1969 were congressional and judicial salaries tied together:

	Judicial Salary	Congressional Salary
1911	$ 7,000	$ 7,500
1919	8,500	7,500
1926	12,500	10,000
1946–47	17,500	12,500
1955	25,500	22,500
1964–65	33,000	30,000

(Courts of appeals judges' salaries; district court judges' salaries are slightly lower.)

[2] 2 U.S.C. § 351 (1970).

dent of the Senate, two by the Speaker of the House, and two by the Chief Justice of the United States.[3]

The Commission, authorized to appoint an executive director and additional personnel,[4] and to be provided by the Administrator of General Services with administrative support services,[5] was authorized to recommend to the President changes in salaries for some 2,800 officials in the three branches of government.[6]

The first commission was to be appointed for the 1969 fiscal year (July 1968–June 1969), was scheduled to report to the President before January 1, 1969,[7] and actually made its report in December 1968. In regard to the judiciary, the recommendations were as follows:

	1968 Salary	*Recommendation*
Chief Justice	$40,000	$67,500
Associate Justice	39,500	65,000
Courts of Appeal Judges	33,000	50,000
District Courts Judges	30,000	47,500

Under the act the President was to submit his recommendation to the Congress with his submission of the budget,[8] to become effective in March. President Johnson reduced the commission-recommended salaries respectively to $62,500; $60,000; $42,500; and $40,000; and Congress readily accepted these recommendations, as well as comparable executive increases and congressional salary increases from $30,000 to $42,500, all of which became effective in March 1969.

The commission was to be reactivated by new appointments every fourth fiscal year following the 1969 fiscal year. This was designed to permit the President to act upon the commission's recommendations, and to allow Congress to act upon the President's recommendations, shortly after each presidential election and well in advance of the next election (and in fact a year prior to the between-term congressional elections). However, President Nixon delayed naming his appointees to the fiscal 1973 salary commission until it was too late for recommendations to be submitted to Congress in the non-election calendar year of 1973.

The second (or 1973) commission made its recommendations on June 30, 1973. A majority of the commission recommended an across-

[3] 2 U.S.C. § 352(1) (1970).
[4] 2 U.S.C. § 353(a) (1970).
[5] 2 U.S.C. § 355 (1970).
[6] 2 U.S.C. § 357 (1970).
[7] *Id.*
[8] 2 U.S.C. § 358 (1970).

the-board increase of 25 percent on all executive, legislative, and judicial salaries, except for smaller increases for Cabinet Secretaries, and the Chief Justice and Associate Justices of the Supreme Court. The recommendations for the judiciary were respectively $72,500; $70,000; $53,000; and $50,000.[9] Two members of the commission concluded that "the greatest need is some relief for Federal judges"[10] but declined to recommend increases for any federal official. Three other members concurred in the 25 percent increase but dissented from the failure to recommend increases of at least 30 percent. These three commission members made a telling argument for the plight of the judiciary.[11]

The majority of the commission also recommended the establishment of a biennial commission so that all executive, legislative, and judicial salaries could be kept under current consideration.[12]

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[9] REPORT OF SECOND COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 14 (June 30, 1973).

[10] *Id.* at 16.

[11] It is essential that among the appointees to the Judiciary, there be a substantial number of the most able and talented young men and women. Yet, these are the very persons who are least able to make the financial sacrifice which leaving the Bar and ascending to the Bench involves today. Anyone who has been connected with judicial selection knows how many times recruitment of the most qualified lawyers among those available for judicial appointment is frustrated by their inability to accept the financial sacrifice that is entailed. We are sure we need not emphasize that compensation is not the primary attraction for those who aspire to judicial service. There is the prestige of the judge, the opportunity for enriching and rewarding service in pursuit of the highest aspiration of a people—justice under law. But judges have family obligations, too; children who go to college, all the economic pressures of a mounting economy. A differential, even a substantial differential, between earnings of the lawyer of ability and the judge of ability is to be expected, and judges do not complain of this. But the differential should not be allowed to become so great that it becomes intolerable.

A Federal judgeship is a lifetime appointment. Under prevailing standards of judicial conduct, the judge gives up virtually all opportunity for outside income. Yet, he must maintain a standard of living consistent with his position. Under these circumstances, he is especially hard hit if, when his salary is finally reviewed, the disproportion he already suffers as compared with his counterpart in private practice, is aggravated by failure to afford him even the percentage increases enjoyed by everyone else except his fellow sufferers in the Congress and the Executive branch.

We are faced with grave consequences growing out of the current situation. In the first place, recruitment of the kind of judges all of us want to see on the Bench is becoming more difficult; and now again, as in 1953 when the first Commission met, we are faced by the spectre of resignations of judges who simply cannot subject their families any longer to the financial pressures of the situation. We do not mean to indicate that if the increase were to be 25 percent rather than 30 percent, there would be a general exodus from the Bench. But there would be a lowering of morale; and there would be an increasing realization on the part of the kind of lawyers we want to attract to the Bench that challenging and inspiring as judicial service is and great as might be the financial sacrifice they would be willing to make, the future is simply too bleak to permit the sacrifice entailed for them and their families.

Id. at 20–21.

[12] *Id.* at 14–15.

President Nixon, instead of accepting the immediate 25 percent increase recommended by the second commission, recommended to Congress a 7.5 percent annual increase for each of the following three years. This would have represented for courts of appeals judges, for example, a salary of $45,700 for 1974, $49,100 for 1975, and $52,800 for 1976. Unfortunately, the recommendations came one year later than was originally anticipated when the statute creating the commission system was enacted. Instead of coming shortly after the 1972 presidential election in early 1973, the recommendations were made in early 1974, an election year. The Senate defeated the recommendations on March 6, 1974, and barred all salary raises by a 72 to 26 vote.[13] The reason was simple: Congress was fearful of increasing its own salary in an election year.

THE WAVE OF FEDERAL JUDICIAL RESIGNATIONS

For almost a year after the debacle of the second commission's efforts Congress did nothing. As a result an alarming and record number of federal judges resigned and newspapers throughout the country became concerned, evidencing their concern by editorial comment. It is now widely-known that seven federal judges resigned within a 12-month period in 1973-74[14] for economic reasons[15] and that this number represented more federal judges than had resigned for economic reasons in all of the previous 34 years.[16]

In March 1975, Mr. Chief Justice Burger met with the President and congressional leaders and told them that there were 14 to 20 additional federal judges who had indicated that they were considering re-

[13] N.Y. Times, March 7, 1974, at 1.

[14] Three more federal judges have since resigned, making the total ten:

Judge	Sworn	Resigned	Age at Resignation
Thomas A. Masterson (E.D. Pa.)	1967	1973	45
Hiram R. Cancio (D.P.R.)	1965	1974	53
Sidney O. Smith, Jr. (N.D. Ga.)	1965	1974	50
David L. Middlebrooks, Jr. (N.D. Fla.)	1970	1974	48
Arnold Bauman (S.D.N.Y.)	1972	1974	60
Anthony T. Augelli (D.N.J.)	1961	1974	72
Anthony J. Travia (E.D.N.Y.)	1968	1974	63
Harold R. Tyler, Jr. (S.D.N.Y.)	1962	1975	52
James A. Comiskey (E.D. La.)	1967	1975	48
Griffin B. Bell (5th Cir.)	1961	1976	57

[15] For evidence that the resignations were based primarily on economic reasons, *see* Chapin, *The Judicial Vanishing Act*, 58 JUDICATURE 161 (Nov. 1974); N.Y. Times, June 7, 1974, at 40; TIME, February 10, 1975, at 74; Chicago Tribune, April 17, 1975, § 2, at 9; Chicago Tribune, May 18, 1975, § 1, at 7.

[16] *Interview with Chief Justice Burger*, U.S. NEWS & WORLD REPORT, March 31, 1975, at 28.

signing for economic reasons.[17] Equally portentous was the fact that in one section of the country 15 lawyers declined judicial appointment,[18] and in another area 13 lawyers declined before the fourteenth accepted an appointment.[19]

Senator Hruska's plea for mediocrity in the judiciary[20] had been re-echoed during the heated March 6, 1974 debate by Senator Mike Mansfield, who as Senate majority leader led the fight to defeat the 1974 proposed raise. Mansfield said on the floor of the Senate that "there are hundreds of lawyers waiting to take the places of the members of the judiciary who are complaining so much" and that "in every state, lawyers are lined up to take a position in the Federal judiciary."[21] Incidentally, the Senate majority leader at that time was paid a salary of $49,500 instead of the $42,500 paid other congressmen, and received $3,000 expense funds over and above the amounts received by other senators.[22]

A judicial resignation has several severe repercussions. First, there is often a long lag in filling a vacancy. In the last five fiscal years,

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[17] *Id.* at 28. The Chief Justice added, in regard to the 14 potential resigners:

> I had a meeting with the chief judges of the 11 circuits last week to find out which judges are most likely to be lost by resignation, and a very interesting profile emerged. There are at least 14 of them. The average age is 52. They have an average of 4.6 children. They are in the upper levels in terms of disposing of cases. At age 52 they can still go back into the practice of law. There is value in the prestige of having been a federal judge.
>
> Another factor in the profile is that they are all located in the centers where the heaviest amount of work exists—in one or other of the 25 metropolitan courts in which, in the aggregate, 69 percent of all the litigation in federal courts is pending.
>
> By another coincidence, 22 of these 25 large cities are located in one or the other of 20 States which have raised the compensation of State judges up to or substantially higher than the compensation of federal judges. That means they are in communities where we need the ability of these high performers and where the temptation and opportunities to go back into private practice are maximum. Those 20 States found it necessary to increase salaries in order to keep a strong judicial system.

Id. at 29–30.

[18] Matthews, *U.S. Judges Hard to Get, Pay Cited,* Los Angeles Times, March 10, 1974, § 1, at 10.

[19] *Interview with Chief Justice Burger,* U.S. NEWS & WORLD REPORT, March 31, 1975, at 28, 30.

[20] On March 16, 1970, the first full day of debate in the Senate upon President Nixon's nominee, G. Harrold Carswell, to the Supreme Court, Senator Roman Hruska told the communications media:

> Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there.

R. HARRIS, DECISION 110 (1971). Senator Hruska has since labored hard and well as the Chairman of the Commission on Revision of the Federal Court Appellate System in efforts to upgrade that system.

[21] N.Y. Times, March 7, 1974, at 1, at 17. Mansfield added that "my heart bleeds" for federal judges.

[22] 2 U.S.C. § 31 (1970).

vacancies in the courts of appeals alone, where there are only 97 active judgeships, have caused a combined loss of 28 years of judicial service.[23] Secondly, it may then take from three to six years before a new judge reaches the peak of his performance.[24] Most of the judges who have resigned or have threatened to do so had already reached a high level of performance.

Finally, if the top choices for replacement decline to accept the appointment, the caliber of the replacement is bound to be increasingly below that of the judge who resigned. Undoubtedly there are, as Senator Mansfield said, hundreds of persons of varying competence "waiting in line" to be appointed. However, the top quality lawyer has neither the desire nor the economic ability to take on the difficult job at a great sacrifice in compensation. Nor should the federal courts be manned primarily by those so affluent that the salary is a matter of indifference to them. There are undoubtedly dilettante lawyers who would be willing to become dilettante judges. A Boston lawyer wrote in the New York Times: "As we go to court with everything that ails us, so we seem to neglect what will happen if we restrict the actual field of judicial aspirants to people who are ailing themselves."[25]

But beyond the resignations lurks an even greater possibility for concern. Not only is the power over a man's subsistence a power over his will, but constant concern over subsistence tends to erode the competence and then the independence of those who do not resign. Among those who remain are some who devoutly wish to remain but are tempted by offers from the private sector.[26] There are others who gave up private practices to accept the judgeship and whose decision to do so necessarily became irreversible. The practice is now long gone and so are the clients. It is simple to tell such a judge that "if you're not satisfied, quit" but to what future does he resign himself? Does not the possi-

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23 COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 63 (1975).

24 *Interview with Chief Justice Burger,* U.S. NEWS & WORLD REPORT, March 31, 1975, at 28, 30.

25 Higgins, *So You Want To Be A Judge?,* N.Y. Times, Jan. 5, 1975, § 4, at 17.

> [I]t's a hell of a lot easier to inform a smart, overworked judge about a case than it is to tell a dumb, overworked judge, and the result is usually fairer and a lot quicker, too.

Id.

> The Chicago Tribune editorialized:
> Every federal judge is a man of vast influence and power. Potentially, each one is a person of distinction. Let's lift the judges out of the crowd and keep their positions attractive to people no less distinguished in the future than federal judges have been in the past.

Chicago Tribune, April 28, 1975, § 2, at 2.

26 Letter from an eminent anonymous Federal judge to Senator Percy (R. Ill.), Dec. 24, 1974, in 121 CONG. REC. 1673 (daily ed. Feb. 7, 1975).

bility exist that given a desperate enough situation, subconsciously such a judge might be tempted to attract the attention and the pleasure of possible future employers? In any event, job-seekers are not good present employees.

Beyond that, judging is, in important part, a meditative occupation and best performance is induced by a complacent and even-tempered composure, unruffled by mundane concerns. Economic pressure causes depression, which affects performance. The hard-worked federal judiciary needs peak performance from unharrassed judges working under ideal conditions.[27]

The Five Percent Increase in Executive, Legislative, and Judicial Salaries

Following Chief Justice Burger's March 1975 plea to the President and congressional leaders, Representative Railsback (R. Ill.) introduced a bill on April 17, 1975, which would have increased judicial salaries by only 20 percent.[28] Senator Abourezk (D. S.D.) introduced a similar bill in the Senate on June 26, 1975.[29] About that time, Senator Percy (R. Ill.) wrote:

> I believe that Congress should act immediately to provide a 20 percent pay increase for federal judges, and also provide for cost of living increases as appropriate. Furthermore, Congress should provide long-range salary adjustments so that federal judicial salaries are comparable to those of other federal government career personnel.[30]

In addition, virtually every newspaper in the United States during 1975 editorially supported, in strong language, substantial increases in judicial salaries.

Instead of acting upon judicial salaries in any meaningful way, Congress on July 30, 1975, passed the Executive Salary Cost-of-Living Adjustment Act of 1975,[31] which had the effect of taking the 2,800 Executive Schedule employees with an annual payroll of about $100 million, who are subject to the Executive, Legislative and Judicial Salaries Act of 1967 (establishing the commission system),[32] and making

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[27] Higgins, *So You Want To Be A Judge?*, N.Y. Times, Jan. 5, 1975, § 4, at 17, states: "Those of us who appear before Federal and state judges, and who have a tendency to talk back, would prefer that they come onto the bench in the morning in the best possible spirits."

[28] H.R. 6150, 94th Cong., 1st Sess. (1975).

[29] S.2040, 94th Cong., 1st Sess. (1975).

[30] Percy, *Excellence and Efficiency on the Federal Bench*, 56 Chi. B. Rec. 313, 315 (1975).

[31] Pub. L. No. 94-82 (Aug. 9, 1975).

[32] 2 U.S.C. §§ 351-61 (1970).

them subject also to the annual cost-of-living salary adjustments previously applied to the 1.3 million white-collar civilian government employees with an annual payroll of $17 billion on the General Schedule under the Federal Salary Reform Act of 1962.[33] The 1975 Act passed the Senate 58 to 29 and the House 214 to 213. This action required that under the Pay Comparability Act of 1970,[34] an adjustment in federal white collar pay was due on October 1, 1975.

On August 29, 1975, President Ford advised Congress that his "pay agent" and the Advisory Committee on Federal Pay had recommended to him that an 8.66 percent increase was required to achieve comparability with the private sector, but that since this would add $3.5 billion to federal expenditures, he recommended a 5 percent increase only, which would reduce this increased expenditure by $1.6 billion.[35] Within 30 legislative days of its submission, either House of Congress could adopt a resolution disagreeing with the President's 5 percent plan, which would result in the 8.66 percent increase becoming effective.[36]

The Senate upheld the President 53 to 39, and the House upheld him 278 to 123. On October 1, 1975, a 5 percent increase became effective for the 1.3 million white collar workers and for the judiciary, congressmen, and top executive officials.

So instead of increasing judicial salaries by 50 percent or even by 20 percent, which public opinion strongly supported, Congress elected to increase all executive and judicial salaries, as well as congressional salaries, by 5 percent. By tying its own salary into the cost-of-living increase Congress provoked a storm of editorial rage.

Adequacy of Compensation Related to Independence and Competence

Among the grievances against George III detailed in the Declaration of Independence were that "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[37] The remedy for this grievance appears in Article

[33] 5 U.S.C. §§ 5301–08 (1970).

[34] 5 U.S.C § 5305(c)(2) (1970), *as amended* (Supp. III, 1974).

[35] Message from the President of the United States, H.R. *Doc. No.* 94–233, 94th Cong., 1st Sess. 2 (1975).

[36] 5 U.S.C. § 5305(c)(2) (1970), *as amended* (Supp. III, 1974).

[37] Much earlier, in 1689, the Convention Parliament deposed James II, declared the throne vacant, and offered the crown to William and Mary on the condition that they recognize the Declaration of Rights, the principal document stating the Revolution Settlement. The Act of Settlement of 1701, 12 & 13 Will. 3, c. 2, completed the Revolution Settlement and provided that judges should hold office during good behavior, that they should receive ascertained and established salaries, and that they could be dismissed only upon the address of both houses of Parliament.

III, § 1 of the Constitution: "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."

Hamilton wrote in the Federalist Papers that "the complete independence of the courts of justice is peculiarly essential"[38] and that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."[39] He added that "in the general course of human conduct, a power over a man's subsistence amounts to a power over his will."[40]

These ideas were much in mind two hundred years ago. The Constitutions of Massachusetts (1780) and New Hampshire (1784) each provided:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.[41]

As so often occurs when looking back at Hamilton's summaries of what the founding fathers considered when drafting the Constitution, it seems that every contingency was foreseen and in some way provided for. Hamilton wrote in the Federalist Papers:

> The plan of the convention accordingly has provided that the judges of the United States "shall at *stated times* receive for their services a compensation which shall not be *diminished* during their continuance in office."
>
> This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the

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[38] THE FEDERALIST No. 78, at 521 (C. Van Doren ed. 1945) (A. Hamilton) [hereinafter cited as FEDERALIST].

[39] *Id.* No. 79, at 528.

[40] *Id.*

[41] Similarly, the Constitution of Maryland (1776) provided:
[T]he independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and Judges ought to hold commissions during good behaviour; . . . salaries, liberal, but not profuse, ought to be secured to the Chancellor and the Judges, during the continuance of their commissions, in such manner, and at such times, as the Legislature shall hereafter direct, upon consideration of the circumstances of this State. No Chancellor or Judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.

> 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 to-day, 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 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. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him.
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> [W]ith 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.[42]

Thus, the drafters avoided fixing a permanent salary and prohibited its diminution during continuance in office. Yet there seemed to be no feasible way to provide a guarantee that a "penurious and inadequate" and "too small" a salary be increased with certainty, unless, as has been suggested,[43] Article III, § 1 of the Constitution prohibits diminution of compensation as measured by purchasing power.

It was recognized that legislative control over needed increases in judicial salaries was a threat to judicial independence. Madison wrote:

> It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.[44]

Hamilton added:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . .
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> It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally

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42 THE FEDERALIST No. 79, at 529.

43 TIME, February 10, 1975, at 74.

44 THE FEDERALIST No. 51, at 347.

> proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . . And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches . . . .[45]

The creation of the Commission on Executive, Legislative and Judicial Salaries[46] was a sound step in the direction of maintaining the separation of powers even though the legislature retains the ultimate control over the purse. An independent commission appointed by all three branches would recommend salary adjustments in the top positions in all three branches to the President, and the President would recommend adjustments to the Congress for legislative action. The device broke down in 1973–74 when the President delayed the entire process for a year and then ignored the commission's recommendations; and when Congress ignored the President's recommendations for fear of political reprisals at the polls. Senator Hugh Scott, the Senate minority leader, said on March 6, 1974:

> We fail to do justice to others because we fear to do justice to ourselves. The Senate has screwed up the system, avoided the just and postponed the inevitable.[47]

And Hamilton foresaw it all nearly two hundred years ago:

> 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 for pecuniary resources on the occasional grants of the latter.[48]

The system contemplated by the commission procedure might yet be salvaged if salaries of the judicial (and possibly the executive) branch were to be considered by a separate commission from that which would recommend legislative salary adjustments. So long as one commission packages its recommendations for all three branches in one report to the President, and so long as the President sends his recommendations in one package to the Congress, Congress obviously will not open the package and act upon the recommendations for each branch individually.

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[45] THE FEDERALIST No. 78, at 520–21.

[46] 2 U.S.C. §§ 351–61 (1970). *See* text accompanying notes 2–13 *supra*.

[47] N.Y. Times, March 7, 1974, at 1, at 17.

[48] FEDERALIST No. 79, at 528.

CONGRESSIONAL SALARIES ARE NOT COMPARABLE TO JUDICIAL SALARIES

There is no possible way in which to equate judicial salaries with congressional salaries.

In the first place, there is a sizeable disparity in age between members of the judiciary and members of the legislature. Representative Jerome R. Waldie (D. Cal.) said at the time the Nixon salary plan was voted down: "I wasn't making this much money when I came to Congress and I suspect I won't make as much when I leave."[49] Although Representative Waldie was 49 years old when he made that statement, a great number of his colleagues are much younger. A survey of the House of Representatives of the 94th Congress showed that the average House member is 49 years old. Twenty percent of the representatives have not yet celebrated their 40th birthday.[50]

We took our own survey of the 93rd Congress, 2nd Session, and compared the average age of all members with all federal judges then sitting. The results were tabulated as follows:

Representatives	—	52
Senators	—	57
District Court	—	61
Court of Appeals	—	65
Supreme Court	—	67

The average age of congressmen was 53 years and the average age of judges was 63 years, a 10-year difference at the peak of financial productivity.

Of the 435 members of the 94th Congress, 225, or 52 percent, have law degrees or are admitted to practice law. One hundred eighty-four, or 42 percent, were actively practicing law when first elected. Most of the remainder were in the communications industry, banking, manufacturing, marketing, retailing, or agriculture. Although being a congressman is a full-time pursuit, there is no requirement that a member give up his prior occupation. A lawyer-congressman can continue his practice, taking care only that he does not participate in fees from cases involving the federal goverenment. Income from his law practice is limited only by the amount of time he can devote to it. The same is true of any businessman-congressman who is in a position to

[49] N.Y. Times, March 1, 1974, at 27.
[50] Chicago Sun-Times, Jan. 16, 1975, at 42.

A judge, on the other hand, can not practice law.[51] He can not serve as an officer, director, manager, advisor, or employee of any business;[52] he can not serve as an executor, administrator, trustee, guardian, or other fiduciary, except for a member of his family;[53] he can not act as an arbitrator or mediator.[54]

He can only "write, lecture, teach and speak."[55] Because of the ethical limitations on what he is able to write or speak about, as a practical matter he is constrained rather tightly to the language of Canon 4A of the Code of Judicial Conduct: "He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."

Since he cannot, with propriety, speak or write upon very many controversial issues, the judge is not much in demand on the remunerative college-campus speaking-circuit or elsewhere. Law reviews do not pay for articles and legal treatises are seldom best-sellers.

On the other hand, in 1974 all senators earned $927,371 for making speeches, or an average of $9,273 per senator for speaking fees or honorariums. In 1973, 63 senators received a total of $1,087,413, and 189 House members reported receiving $210,619 in honorariums.[56]

As part of the Federal Election Campaign Act Amendments of 1974,[57] the following section was added to the elections and political activities chapter of the criminal code:[58]

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[51] ABA Code of Judicial Conduct, No. 5F.

[52] *Id.* No. 5C(2).

[53] *Id.* No. 5D.

[54] *Id.* No. 5E.

[55] *Id.* Nos. 4A & 5A.

[56] The ten highest recipients of honorariums in the Senate for 1974 and 1973 were:

	1974	1973
Baker (R. Tenn.)	$49,150	$34,350
Proxmire (D. Wis.)	46,278	38,625
Hatfield (R. Ore.)	45,677	33,250
Humphrey (D. Minn.)	40,750	65,650
Hughes (D. Iowa)	35,450	
Jackson (D. Wash.)	34,350	39,575
Talmadge (D. Ga.)	32,165	
Inouye (D. Haw.)	29,550	
Muskie (D. Me.)	28,880	34,976
Brooke (R. Mass.)	28,700	
Abourezk (D. S.D.)		49,425
Goldwater (R. Ariz.)		44,733
Dole (R. Kan.)		38,150
Eagleton (D. Mo.)		36,950

Sources: 1974 information: N.Y. Times, May 18, 1975, at 117; 1974 information: PARADE, November 3, 1974, at 25.

[57] Pub. L. No. 93-443, 93d Cong., 2d Sess., Title I, § 101(f)(1).

[58] 18 U.S.C. § 616 (1970).

determine how much time he can devote, and when it can be devoted, to his business or agricultural interests.

> Whoever, while an elected or appointed officer or employee of any branch of the Federal Government—
>
> (1) accepts any honorarium of more than $1,000 (excluding amounts accepted for actual travel and subsistence expenses) for any appearance, speech, or article; or
>
> (2) accepts honorariums (not prohibited by paragraph (1) of this section) aggregating more than $15,000 in any calendar year;
>
> shall be fined not less than $1,000 nor more than $5,000.

This provision *will* prevent the top honorarium recipients in Congress from receiving more than $15,000 per year, but it permits receipt of substantially more than the *average* honorariums previously received by congressmen.

It is almost impossible to determine from the Legislative Branch Appropriation Act of 1975 what each congressman is entitled to in the way of expenses, inasmuch as lump-sum appropriation figures are used,[59] but one investigative reporter has calculated the amounts as follows:[60]

> In addition to an annual salary of $42,500, each House member receives $227,220 to hire staff assistants, $6500 for stationery, reimbursement for 26 round trips back home, two free newsletters mailed to constituents and the "franking" privilege for virtually unlimited first-class mail plus $1140 for air-mail and special postage.
>
> Other perquisites include more than 500 free hours of long-distance telephone calls from Washington plus unlimited long-distance calls in district offices, $5500 for office equipment, $3400 for the maintenance of each district office—and a generous retirement plan. Senators receive comparable allowances, although they vary with the population of the state the Senator represents.[61]

Similarly, Americans for Democratic Action have reported after a study that the benefits and special privileges for each member of the House total $488,505 per year.[62]

The $6,500 stationery fund of each representative, for example, can be put to personal use without accounting, or may be accumulated

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[59] Pub. L. No. 93-371, 93d Cong., 2d Sess. (Aug. 13, 1974).

[60] Walters, *How Some Congressmen Tap Extra Funds,* PARADE, August 24, 1975, at 8. The article relates to the practice, more prevalent in the House than Senate, to maintain funds "secretly given and secretly handled," known as office funds or newsletter funds similar to the 1952 Nixon fund.

[61] The top allowance for staff assistants for a Senator was $586,160 in 1973. U.S. NEWS & WORLD REPORT, July 16, 1973, at 24.

[62] Chicago Sun-Times, August 25, 1975, at 11.

from year to year.[63] In the first six months of 1975, 76 former members of the House took their accumulated allowance in cash with them into retirement. Representative H. R. Gross (R. Iowa), for example, took $23,611.55 in stationery funds with him into retirement.[64]

Congressional fringe benefits less readily measurable include free emergency medical services and free drugs prescribed by Capitol physicians; access to a cut-rate barber shop; government supplied recreational services including steam room with masseurs and physiotherapy and swimming pool; reduced-rate meals;[65] loan of art works by the National Gallery of Art; furnishing of a selection of live plants (three small plants per month and one large plant bimonthly) and the loan of others for special occasions by the United States Botanic Garden; atlases and other reference materials as gifts or long-term loans, and free speech writing services by the Library of Congress; a mounted wall map of a congressman's home state provided by the Postal Service; up to 2,000 wall calendars per congressman provided by the Capital Historical Society; scenic photographs from the National Park Service; a free shipping trunk once a year; and (for some congressmen) free newspapers and magazines through committee payment.[66]

There are also tax benefits enjoyed by congressmen. A $3,000 a year tax deduction is allowed by statute for living expenses in Washington.[67] In October 1975, the House Ways and Means Committee voted to amend its tax equity legislation to more than double the maximum possible deduction ($6,600 or more) that congressmen may claim for living expenses in Washington.[68]

It may very well be that all congressmen, and certainly a great many of them, are worth more than they are paid. The point is that because of the many differences in their situations, their salaries cannot be equated in any way with judicial salaries. In order to avoid the continuing tying together of these oranges and apples, a separate commission should recommend judicial salaries.

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[63] This is not true of senators. Their stationery allowance is part of a package of expenses which must be accounted for by voucher, and accumulated but unused money goes back into the Senate funds.

[64] Chicago Tribune, September 29, 1975, at 6.

[65] Chicago Sun-Times, August 25, 1975, at 11; U.S. NEWS & WORLD REPORT, July 16, 1973, at 24.

[66] Chicago Sun-Times, March 8, 1975, at 57.

[67] 2 U.S.C. § 31c (1970); 26 U.S.C. § 162(a) (1970).

[68] N.Y. Times, Oct. 10, 1975, at 25.

WHAT LIES AHEAD?

Since March 1969, when judicial salaries were established at $42,500 for courts of appeals judges and at $40,000 for district judges—

—The Consumer Price Index has increased over 50 percent.

—General Schedule white-collar federal employees have received 38.1 percent comparability pay increases as well as 14.2 percent step increases for an aggregate pay increase of 52.3 percent.

—Salaries of state chief judges have increased 44.2 percent.

—Attorneys' salaries have increased 43.9 percent.

—Top officials in the private sector have received salary increases of 59.8 percent.[69]

Even if judicial salaries were adjusted for completely compensatory cost-of-living increases or for comparability, courts of appeals judges will have sustained a non-recoverable loss of $56,830 and district judges of $53,480.[70]

Based upon this data, the Committee on Judicial Compensation of the Judicial Conference of the United States concluded that "economic considerations, fairness and concern for the quality of the judiciary warrant a federal judicial salary increase of not less than 50 percent."[71]

Expenditures for the United States Courts in 1900 represented one-half of one percent of the support of the government as a whole. In 1975, the courts' share of the whole had declined to about one-thirteenth of one percent. Thus, although the cost of the support of the courts has increased absolutely, relative to the cost of the support of the government as a whole it has greatly decreased.[72]

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[69] A privately printed study prepared for the Judicial Conference Committee on Judicial Compensation, A Case For an Immediate Salary Increase For Federal Judges 1–2 [on file with the INDIANA LAW JOURNAL].

[70] *Id.* at 1.

[71] *Id.* at 3. Compensation of courts of appeals judges from 1911 to the present has been as follows:

Date Established	Salary	Years Since Last Increase	Percentage Increase
Mar. 3, 1911	$ 7,000		
Feb. 25, 1919	8,500	8	21.4
Dec. 13, 1926	12,500	7	47.0
July 31, 1946	17,500	20	40.0
Mar. 2, 1955	25,500	9	45.7
Aug. 14, 1964	33,000	9	27.8
Feb. 14, 1969	42,500	5	28.7
Oct. 1, 1975	44,600	6	5.0

[72]

Year	U.S. Courts	U.S. as Whole	Courts as %
1900	$ 2,392,574	$ 520,860,847	0.5
1975	235,092,000	304,400,000,000	0.08

Id. at Appendix H .

The cost of a 50 percent increase in federal judicial salaries for an entire year would be about $16 million, or less than the cost of one military aircraft.[73] On one day in October 1975, the President and Secretary of State met with Portuguese Foreign Minister Antunes and, with no debate or sounding of public opinion or discussions with Congress, authorized $85 million in emergency economic aid as "a first step" in significant assistance for Portugal.[74]

During the period in which there have been no salary increases (1969-1975), federal court filings have increased by 50 percent and difficult cases (those taking at least twice as much time as the average case) have increased by more than 300 percent. Yet case terminations per judge have increased by one-third and the processing time has decreased substantially. Even with the greater workload, federal judges are performing at a level of high quality and doing more work and doing it more efficiently than in 1969.[75]

The Commission on Revision of the Federal Court Appellate System, established by Congress[76] and consisting of 16 members, four appointed from the Senate, four from the House, four by the President, and four by the Chief Justice, in its report dated June 20, 1975, wrote:

> Considerations of fairness also compel us to add our voice to those who are calling for an increase in judicial salaries. More, however, is at stake: It is imperative that the opportunity for service on the federal courts attract lawyers of the highest quality. Despite rampant inflation, the salaries of federal judges have not been adjusted since 1969. We recommend that federal judicial salaries be raised to a level that will not deter outstanding individuals from accepting appointment to the bench and that will adequately compensate those now serving.[77]

It is difficult to attack such reasoning. In the determination of compensation levels for members of the federal judiciary it is imperative that all concerned remember that what is fundamentally in issue is the quality and independence of the federal courts.

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[73] TIME, October 6, 1975, at 38, interview with Israeli Defense Minister Shimon Peres: "A military aircraft that cost $1 million ten years ago costs $20 million today."

[74] N.Y. Times, Oct. 11, 1975, at 11.

[75] Study, *supra* note 69, at 2–3.

[76] Pub. L. No. 92–489, 92d Cong., 2d Sess. (Oct. 13, 1972).

[77] COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 65 (1975).