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COMPENSATION OF THE FEDERAL JUDICIARY: A REEXAMINATION

The compensation of the federal judiciary has been a persistent issue since the enactment of the Judiciary Act of 1789.¹ The problem has been traditionally perceived in the context of particular proposals for salary increases,² but the underlying issues are much more fundamental than the concerns of the day. The institutional arrangements by which judicial compensation is determined and the factors which shape that determination have a profound impact on the fiscal and human resources of the judiciary, on the power relationships among the three branches of the national government, and, thereby, on the independence and quality of the judicial branch.

Though many analogous problems are shared by state judges, those of the federal judiciary are of special concern. Its judges enjoy a salient prestige, its courts are distributed geographically throughout the country,³ and its relationship with Congress and the Executive Branch is unique. While the states differ widely in their approaches to judicial compensation,⁴ these differences no doubt reflect variations in local needs and priorities. The federal system itself, on the other hand, establishes a dichotomy which sets federal courts and judges apart from their state counterparts, implying separate consideration of their requirements.

¹ 1 Stat. 73 (1789).

² See, e.g., JUDICIAL AND CONGRESSIONAL SALARIES, H.R. REP. NO. 49, 84th Cong., 1st Sess. (1955); *Hearings on H.R. 113, H.R. 1494, and H.R. 3886 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 82d Cong., 1st Sess., ser. 6 (1951); *Hearings Before the Comm. on Judicial and Congressional Salaries*, 83d Cong., 2d Sess. (1954); REPORTS OF THE TASK FORCES OF THE COMMISSION ON JUDICIAL AND CONGRESSIONAL SALARIES, S. DOC. NO. 97, 83d Cong., 2d Sess. (1954); *Hearings on S. 5, S. 1163, S. 1415, and S. 1663 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. (1953); American Judicature Society, *Judicial Salaries and Retirement Plans in the United States*, 54 JUDICATURE 180 (1970); Dickerman, *The Business of the Federal Courts, and the Salaries of the Judges*, 24 AM. L. REV. 78 (1890); Issac, *The Relief of Federal Courts and the Pay of Federal Judges*, 93 CENTRAL L.J. 255 (1921); Mitchell, *The Judicial Salary Crisis*, 39 A.B.A.J. 197 (1953); Mooney, *Federal Judges Compensation—Proposed Legislation*, 27 N.Y.U.L. REV. 457 (1952).

³ In 1974, there were 667 federal judges located in the fifty states, the District of Columbia, Canal Zone, Virgin Islands, Puerto Rico, and Guam. This does not include bankruptcy judges and staff, which numbered 1056, or U.S. Magistrates and staff, which numbered 710. *Civil Filings Up, but Criminal Filings Down in Federal Courts, Administrative Office Report Shows*, 60 A.B.A.J. 1404, 1407 (1974).

⁴ There are differences in amount of annual salary; availability of local supplements to the annual salary; benefits, including medical and life insurance, holidays, and vacation time; expense reimbursement; retirement plans; procedure for salary increases; and constitutional provisions concerning minimum and maximum salaries. See American Judicature Society, *Judicial Compensation 1974*, 58 JUDICATURE 159, 168-206 (1974).

This analysis, therefore, will first examine and criticize the present system of compensation for federal judges. Next, an inquiry will be made into the purposes and goals that a compensation scheme for the federal judiciary should serve. Finally, a proposal for a new system of compensation will be offered, which, it is hoped, is responsive to presently perceived needs.

I. THE PRESENT SYSTEM OF FEDERAL JUDICIAL COMPENSATION

The patterns of increases of federal judicial salaries has been marked by long, irregular intervals in which salary levels remained constant.⁵ A span of less than six years between increases has occurred only twice.⁶ As of the beginning of 1975, the salary of federal judges had not changed in six years.⁷

⁵ The history of salaries of Supreme Court Associate Justices (with the Chief Justice receiving an additional \$500 each year until 1969, and an additional \$2500 thereafter) is \$3500, 1 Stat. 72 (1789); \$4500, 3 Stat. 484 (1819); \$6000, 10 Stat. 655 (1855); \$8000, 16 Stat. 494 (1871); \$10,000, 18 Stat. 108 (1874); \$12,500, 32 Stat. 825 (1903); \$14,500, 36 Stat. 1152 (1911); \$20,000, 44 Stat. 919 (1926); \$25,000, 60 Stat. 716 (1946); \$35,000, 69 Stat. 9 (1955); \$39,500, 78 Stat. 434 (1964); and \$60,000, 83 Stat. 864 (1969).

The history of salaries of the judges of the Courts of Appeals since 1891, the year in which the Courts of Appeals were established, is \$6,000, 16 Stat. 494 (1871), 26 Stat. 826 (1891); \$7,000, 32 Stat. 825 (1903); \$8,500, 40 Stat. 1157 (1919); \$12,500, 44 Stat. 919 (1926); \$17,500, 60 Stat. 716 (1946); \$25,500, 69 Stat. 10 (1955); \$33,000, 78 Stat. 434 (1964); and \$42,500, 83 Stat. 864 (1969).

The history of the salaries of the judges of the district courts since 1891, the year in which salaries were made uniform for all district judges, is \$5,000, 26 Stat. 783 (1891); \$6,000, 32 Stat. 825 (1903); \$7,500, 40 Stat. 1156 (1919); \$10,000, 44 Stat. 919 (1926); \$15,000, 60 Stat. 716 (1946); \$22,500, 69 Stat. 10 (1955); \$30,000, 78 Stat. 434 (1964); and \$40,000, 83 Stat. 864 (1969).

In connection with the changing salaries it is relevant to note the history of the tax status of federal judges. In *Evans v. Gore*, 253 U.S. 245 (1920), and *Miles v. Graham*, 268 U.S. 501 (1925), it was held that as a matter of constitutional law, based on U.S. Const. art. 3, § 1, salaries of federal judges were not subject to federal income taxes. This rule was reversed, however, in *O'Malley v. Woodrough*, 307 U.S. 277 (1939). In *Baker v. Commissioner*, 149 F.2d 342, 344 (4th Cir. 1945), *cert. denied*, 326 U.S. 746 (1945), it was held that "a judge who takes office under an established Congressional policy of taxing his salary becomes entitled only to the salary prescribed by statute less income taxes. . . ." Moreover, the court emphasized that the constitutional provision against diminishing judicial salaries did not apply to raising income tax rates. Consequently, since the policy of taxing federal judges' salaries was established in the Revenue Act of 1918, 40 Stat. 1057 (1919), the only judges to whom the doctrine of *Evans v. Gore* now has any application are those who entered the federal judiciary before 1918. See also B. BITTKER & L. STONE, *FEDERAL INCOME, ESTATE AND GIFT TAXATION* 180 (4th ed. 1972).

With respect to state and local taxation of federal judges' salaries, Congress consented to such taxation in the Public Salary Act, 53 Stat. 574 (1939). Congress may so consent in the area of intergovernmental taxation. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

⁶ Supreme Court justices waited only three years between 1871 and 1874. All federal judges' salaries were increased in 1964 and 1969, a five-year span.

⁷ Chief Justice of the Supreme Court, \$62,500; Associate Justices of the Supreme Court, \$60,000; Judges of the Courts of Appeals, \$42,500; Judges of the District Courts, \$40,000; Judges of the Court of Claims, Court of Customs and Patent Appeals, Court of Military Appeals, \$42,500; Judges of the Customs Court and Tax Court, \$40,000. 83 Stat. 864 (1969).

Federal judges have attractive retirement benefits. After reaching seventy years of age and having served at least ten years on the bench, a judge may resign and continue to receive the same salary as he received at his date of resignation.⁸ If a judge is age sixty-five with fifteen years of service or seventy with ten years of service, he may accept retired-judge status and have a reduced workload.⁹ He may then continue to receive the regular salary of that office.¹⁰ In case of disability while on the bench, a judge may retire and receive the full salary of the office if he has served for ten years or longer, or 50 percent of his former salary if he has served less than ten years.¹¹ Judges have the additional opportunity to elect to subscribe to an annuity plan which pays to the judge's survivors a sum upon his death,¹² varying with his average salary and length of service.¹³

The Commission on Executive, Legislative, and Judicial Salaries, which is charged with the duty of recommending the level of judicial compensation, was established in 1967.¹⁴ The Commission, composed of nine appointed members,¹⁵ is required to make its recommendations to the President at four-year intervals.¹⁶ The law requires that the President, in the budget next submitted by him after receipt of a report of the Commission, set forth his recommendations with respect to the

⁸ 28 U.S.C. § 371(a) (1970).

⁹ 28 U.S.C. § 371(b) (1970).

¹⁰ *Id.*

¹¹ 28 U.S.C. § 372(a) (1970).

¹² 28 U.S.C. §§ 375, 376 (1970), *as amended*, (Supp. II, 1972).

¹³ Length of service includes all governmental service, whether judicial or not. 28 U.S.C. § 376(c) (1970), *as amended*, (Supp. II, 1972). In addition to the annuities, other fringe benefits are available. Judges are covered by government health programs and share the cost of the premiums with the government. Vacations may extend to one month; holidays generally correspond to those observed in the place where the court sits. Judges are also reimbursed for official travel. *See* American Judicature Society, *supra* note 4, at 194.

¹⁴ 2 U.S.C. § 351 *et seq.* (1970).

¹⁵ Appointees include

- (a) three appointed by the President of the United States, one of whom shall be designated as Chairman by the President;
- (b) two appointed by the President of the Senate;
- (c) two appointed by the Speaker of the House of Representatives;
- and (d) two appointed by the Chief Justice of the United States.

2 U.S.C. § 352(1) (1970).

¹⁶ *Id.* § 352(3); 2 U.S.C. § 357 (1970).

A variety of executive, legislative, and judicial positions are subject to the Commission's scrutiny. Included are

- (A) Senators, Members of the House of Representatives, and the Resident Commissioner from Puerto Rico;
- (B) offices and positions in the legislative branch referred to in sections 136a and 136a-1 of this title, sections 42a and 51a of Title 31, sections 162a and 162b of Title 40, and section 39a of Title 44;
- (C) justices, judges, and other personnel in the judicial branch referred to in sections 402(d) and 403 of the Federal Judicial Salary Act of 1964;
- (D) offices and positions under the Executive Schedule in Subchapter II of Chapter 53 of Title 5; and
- (E) the Governors of the Board of Governors of the United States Postal Service appointed under section 202 of Title 39.

2 U.S.C. § 356 (1970).

levels of compensation.¹⁷ The President's recommendations become effective thirty days following transmittal of the budget, unless in the meantime:

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations, [or] (B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations.¹⁸

II. OBJECTIONS TO THE PRESENT SCHEME

The present scheme of compensation is objectionable from the point of view of judges,¹⁹ of the judiciary as a whole,²⁰ and of a society interested in diffusion of power within the national government.²¹ The objections chiefly put forth are that the present system results in inadequate salaries,²² that salary distribution within the federal judiciary is inequitable,²³ and that the system encroaches upon the independence of the federal judiciary.²⁴ Additionally, judicial resources are inefficiently expended in lobbying efforts.²⁵ The ultimate danger is a decline in the quality of the judiciary.

A. Inadequacy of Salaries

With increasing frequency since the end of World War II, federal judges have said that they can not live adequately on their official salaries.²⁶ The judges' complaints tend to emphasize that their salaries cause uncertainty about their ability to provide adequately for their children's education and to accumulate savings for the support of their

¹⁷ 2 U.S.C. § 358 (1970).

¹⁸ 2 U.S.C. § 359 (1970).

¹⁹ The expressions of judicial discontent with the present system are plentiful. *See, e.g.*, Chapin, *The Judicial Vanishing Act*, 58 JUDICATURE 160 (1974) (includes interviews with former federal judges).

²⁰ *Id.*; *See also* Remarks of Chief Justice Warren E. Burger, in ANNUAL REPORT ON THE STATE OF THE JUDICIARY, AMERICAN BAR ASSOCIATION MID-WINTER MEETING, CHICAGO, ILLINOIS, Feb. 23, 1975, at 8-9.

²¹ Wall Street J., Jan. 31, 1975, at 8, col. 1.

²² *See* notes 26-38 and accompanying text *infra*.

²³ *See* notes 39-44 and accompanying text *infra*.

²⁴ *See* notes 45-51 and accompanying text *infra*.

²⁵ *See* note 88 and accompanying text *infra*.

²⁶ *See Hearings Before the Comm. on Judicial and Congressional Salaries, supra* note 2, at 63 (statement of Evan Howell, former judge of the Court of Claims); *Id.* at 241-52 (statement of Harold M. Kennedy, former United States District Court Judge). *See also* Chapin, *supra* note 19, at 161-62 (statements of former district judges Anthony T. Augelli, David L. Middlebrooks, and Arnold Bauman).

families after their deaths.²⁷ In view of the fact that the median income of American families in 1972 was \$11,116,²⁸ one might question a claim that a person can not adequately live on \$40,000 per year, the present salary of a federal district court judge. There are, however, special circumstances involving compensation of a federal judge that make such a suggestion plausible. It is inconsistent with proper judicial behavior for a judge to make productive use of his official income in large scale investments.²⁹ Such a restraint is derived from the assumption, which has not always been followed by individual judges,³⁰ that judges should be impartial and independent of extraneous economic influence. Today, these restraints on extrajudicial conduct have been formalized and forcefully expressed in the Code of Judicial Conduct. The most specific canons on the subject are 5C(1):

A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

and 5C(3):

A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.³¹

²⁷ See, e.g., the statement of Harold M. Kennedy, former United States District Judge, at the 1953 Senate Hearings on judicial salaries:

[W]hen I resigned I had nothing to say about the reason for my resignation; I did not think it was appropriate. But now maybe is the time to say it. . . . I do not keep a maid; I never did, and I do not have a car and never did. My household expenses ran to about \$700 a month. By the time that I got through I had absolutely no way of getting any security for my wife; she is younger than I. I had no means of paying for an annuity for her. I had some insurance, but I had no private capital and no outside income.

Hearings on S. 5, S. 1163, S. 1415, and S. 1663, *supra* note 2, at 54-55.

See also Chapin, *supra* note 19, at 161-62.

²⁸ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1974 at 385 (1974).

²⁹ ABA CODE OF JUDICIAL CONDUCT, CANONS 5, 6.

³⁰ For a discussion of extreme examples of judges who violated their duties of independence and impartiality beyond the point of mere conflict of interest, see J. BORKIN, THE CORRUPT JUDGE (1962). Borkin's study concentrates on the judicial misconduct of three judges. Other examples include judges who have been impeached and removed from office. See Swindler, *High Court of Congress: Impeachment Trials, 1797-1936*, 60 A.B.A.J. 420, 427 (1974).

³¹ The Commentary to Canon 5C is explicit about whether financial security or objectivity should take precedence if the two conflict:

Canon 5 may cause temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income

Furthermore, the adequacy of judicial compensation may reflect the fact that most federal judges have the alternative of practicing law at a higher salary.³² This problem is not new.³³ A contemporary example is that of Arnold Bauman, a former judge in the Southern District of New York, who left the bench for a \$150,000-per-year position with a New York law firm.³⁴ From the perspective of a federal judge, a judicial salary is likely to represent a significant financial sacrifice.

In addition, a federal judge may regard his salary as inadequate in comparison to salaries of some state judges. In twenty states, some of

through commercial activities. The remedy, however, is to secure adequate judicial salaries.

Canon 6 emphasizes that public disclosure of compensation should be the rule for judges: "A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities." And though judges may hold and manage investments, subject to the previous qualifications, Canon 5C(2) states that a judge "[s]hould not serve as an officer, director, manager, advisor, or employee of any business."

³² The survey reported at 60 A.B.A.J. 123 (1974), indicates that the median total compensation of heads of corporate law departments is \$57,000. Former Judge David L. Middlebrooks of the Northern District of Florida, who resigned August 1, 1974, to enter private practice, suggests that people with sufficient competence to be federal judges could earn \$60,000 to \$100,000 a year practicing law. *Chapin, supra* note 19, at 161.

³³ John Marshall was faced with this financial consideration:

Marshall's salary as Chief Justice was \$500 more than that paid to the other Justices. He received \$4,000 a year when he was first appointed, and that was increased to \$5,000 in 1819. This, of course, was far below the potential available to him if he had remained a lawyer in private practice and indicates why he felt compelled to write the Washington biography and also why he speculated so much in land development.

L. BAKER, JOHN MARSHALL: A LIFE IN LAW 558 (1974). As to the American judiciary in general between 1776 and 1847:

A prominent lawyer usually took a cut in income if he became a judge. The salaries of judges, as of public officials in general, were not generous. Judges continually complained that they were pinched for money. By statute in 1827, New Jersey fixed the salary of the justices of the state supreme court at \$1,000. The chief justice earned \$1,200. The governor earned \$2,000. Lemuel Shaw became chief justice of Massachusetts in 1830 at a salary of \$3,000. The salary was the source of his only reluctance. For trial judges, the fee system was common. A New York law of 1786 awarded fees to the "judge of the court of probates, . . . to wit: For filing every petition, one shilling; for making and entering every order, six shillings; for every citation, under seal, to witnesses, or for any other purposes, six shillings . . . for copies of all records and proceedings, when required, for each sheet consisting of one hundred and twenty-eight words, one shilling and six pence." Under the fee system, lower-court judges sometimes got rich. But higher levels of the bench paid off in the coin of high status.

L. FRIEDMAN, A HISTORY OF AMERICAN LAW 121 (1973) (footnotes omitted).

Another well-known historical figure is Associate Supreme Court Justice Benjamin R. Curtis who resigned from the bench in 1857 because he considered his \$6,000 per year salary to be inadequate. Mr. Justice Curtis then practiced law for seventeen years until his death. During that time, he had an average annual income of slightly over \$38,000 per year. *Dickerman, supra* note 2, at 85.

³⁴ N.Y. Times, June 9, 1974, at 5, col. 1. Other examples include former Judge Middlebrooks of the Northern District of Florida, who is now making at least \$60,000 a year working for a Pensacola law firm. *Chapin, supra* note 19, at 161-62. Sidney O. Smith, former District Judge for the Northern District of Georgia, "would have turned down a \$120,000 partnership offer if even a 25 percent salary hike had come through." *Time*, Feb. 10, 1975, at 74.

the state judges are paid as much as or more than federal district judges.³⁵ In New York, the most extreme example, judges of the Family Court in New York City are paid a greater salary than federal district judges.³⁶ This appears to be somewhat anomalous and would be especially so to a federal judge³⁷ if the proposition is taken seriously that a higher status, responsibility, and popularity inhere in the federal bench³⁸ and that such factors warrant a higher salary. On the other hand, status may be part of the federal judges' compensation, albeit an intangible one.

B. Inequities

A second objection to the present federal judicial compensation scheme is directed at its inequity. Judges are paid identical salaries for assuming roughly equal responsibility and doing similar work, but they work and live in very different places subject to a wide range of living costs. One measure of these costs is the Consumer Price Index for various regions of the country. For example, the annual average of the Consumer Price Index for 1973³⁹ was 145.5 for the Philadelphia area and 127.5 for the Seattle area, a difference of 18.0.⁴⁰ Another inequitable aspect of the present uniform system is that the relative

³⁵ These states include Alaska, California, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania, New York, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. American Judicature Society, *supra* note 4, at 168-93 (1974).

³⁶ Judges of the Family Court in New York City make \$42,451 per year, as do judges of the New York City Civil Court and the New York City Criminal Court. *Id.* at 183, 184.

³⁷ See Time, Feb. 10, 1975, at 74.

³⁸ Judge Friendly has suggested that the reasons for the high status and popularity of the lower federal courts

may be due in part to their rather low visibility. . . . Yet I think the impression is rather general that, with the exceptions inevitable for an institution that has endured for so many generations. . . , they have largely fulfilled Hamilton's expectations that "[j]ustice through them may be administered with ease and dispatch" and that, owing their "official existence to the union," they "will never be likely to feel any bias inauspicious to the principles on which it is founded."

H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 2-3 (1973) (footnotes omitted).

³⁹ U.S. DEPT OF LABOR, MONTHLY LABOR REVIEW, Nov. 1974, at 108.

The Consumer Price Index is a monthly statistical measure of the average change in prices of goods and services purchased by urban wage earners and clerical workers for day-to-day living. It is based on prices of about 400 "market-basket" items selected to represent all consumption goods and services purchased by these workers.

Id. at 100.

Price indexes are given in relation to the base period of 1967=100. *Id.* at 100. It is also possible to use the "City Worker's Family Budget," published annually by the Bureau of Labor Statistics of the United States Department of Labor, which covers thirty-nine areas in the United States and compares the budgets of three groups of families according to the level of their expenditure. Cost-of-living figures compiled by the states are also available.

⁴⁰ The areas listed include not only the central city but the entire urban portion of the Standard Metropolitan Statistical Areas, as defined for the 1960 Census of Population. *Id.* at 108.

status of federal judges may vary according to their locality. This phenomenon results from the fact that in some states federal judge-ships are financially more attractive than a comparable position with the state judiciary, while in other states, the opposite is true. The extremes of the state salary differential are in the states of New York and Utah: the average salary of a New York state judge is roughly 2.63 percent greater than that of his counterpart in Utah.⁴¹ Depending on the position within this wide range, the federal judiciary is either a more or less attractive alternative to state judicial service.

Moreover, the Commission on Executive, Legislative, and Judicial Salaries works to the disadvantage of the federal judges and the federal judiciary. Of all the positions subject to the Commission's jurisdiction, the federal judges are the only group so widely distributed throughout the country.⁴² Thus, salary needs of the judges differ from the needs of Congressmen and certain executive personnel. Yet, because the Commission must always review together the salaries of the five statutory groups under its jurisdiction,⁴³ including "the relationships between and among the respective offices and positions covered by such review,"⁴⁴ salary increases for judges tend to be considered only in conjunction with those for the other groups.

C. *Encroachment on Judicial Independence*

Because the establishment of judges' salaries is a product of the interrelation of a public commission, the President, and the Congress, the judiciary is vulnerable to institutional conflict. Such conflict can threaten its independence vis-à-vis the other branches. This development is unfortunate because the concept of judicial independence, though difficult to define, goes to the very heart of the American system of government. It is a common assumption that independence is a necessary condition for an effective judiciary.⁴⁵ An illustration of the effect of the present method of salary determination will demonstrate its detrimental impact on judicial independence.

The law establishing the Commission on Executive, Legislative, and Judicial Salaries was approved on December 16, 1967.⁴⁶ The Com-

⁴¹ American Judicature Society, *supra* note 4, at 183, 190.

⁴² Except for some of the positions under level IV, 5 U.S.C.A. § 5315 (1967), as amended (Supp. 1975), and level V, 5 U.S.C.A. § 5316 (1967), as amended (Supp. 1975), most of the offices subject to the Commission's jurisdiction are centered in the Washington, D.C., area. See note 16 *supra*.

⁴³ 2 U.S.C. § 356 (1970).

⁴⁴ 2 U.S.C. § 356(i) (1970).

⁴⁵ D. MINAR, IDEAS AND POLITICS: THE AMERICAN EXPERIENCE 128 (1964).

⁴⁶ 81 Stat. 642 (1967).

mission's first report was not submitted to the President until December, 1968, and the President submitted his recommendations to the Congress on January 15, 1969.⁴⁷ Since the Commission is required to make its recommendations at four-year intervals,⁴⁸ the next Commission should have formulated its proposals in 1972 and made its recommendations to the President in December of that year.⁴⁹ However, President Nixon failed to appoint the Commission on time.⁵⁰ The recommendations were finally offered in 1974, an election year for Congress but not for the President. Accordingly, Congress rejected the proposals for a three-step pay increase.⁵¹ The losers of this political battle were the federal judges, who received little attention and no salary raise.

D. Decline in Quality of the Federal Judiciary

It has been frequently suggested that there has been and will be difficulty in attracting qualified people to the federal bench.⁵² Inadequate and inequitable salaries may induce judges to leave the Bench and discourage qualified candidates from seeking judgeships. To the extent that the Judiciary responds by becoming less independent and attempting to court either the Congress or the Executive, its status may decline.⁵³ Of more serious consequence, its objectivity in the face

⁴⁷ 83 Stat. 863 (1969).

⁴⁸ 2 U.S.C. §§ 352(3), 357 (1970).

⁴⁹ 2 U.S.C. § 352(2) (1970) seems to have contemplated that the first Commission was to be appointed in the 1969 fiscal year and was to make its recommendations in time for the January, 1969 budget. The next Commission was to have been appointed in the "fourth fiscal year following the 1969 fiscal year." *Id.* § 352(3). That would have meant the 1973 fiscal year in order for the recommendations to be available in time for the January 1973 budget. President Nixon did not appoint the Commission until the 1974 fiscal year, and his recommendations to the Congress were made in January, 1974.

⁵⁰ Senator Gale McGee, Chairman of the Senate Committee on Post Office and Civil Service, which initially receives the President's salary recommendations, has also stated,

President Nixon appointed his quadrennial commission too late for it to include a review and to formulate a report to the president so that the question could be taken up in 1973, a non-election year, as intended.

McGee, *Are Judicial Salary Increases Coming?* 60 A.B.A.J. 1259 (1974).

⁵¹ McGee, *supra* note 50, at 1259.

⁵² See Mooney, *supra* note 2, at 457. REPORTS OF THE TASK FORCE OF THE COMMISSION ON JUDICIAL AND CONGRESSIONAL SALARIES, *supra* note 2, at 56; N.Y. Times, Oct. 10, 1973, at 46, col. 4 (letter from Prof. Maurice Rosenberg). Chief Justice Burger has recently said that [the federal judiciary has] had more resignations in the past year, based on economic grounds, than at any time in the past one hundred years. I am also reliably informed that many qualified lawyers have declined appointment because the pay of a district judge is now only double the starting salary of law graduates hired by large law offices. It is surely not in the public interest to have some of the best qualified lawyers resigning or declining appointments because of inequitable and inadequate compensation.

McGee, *supra* note 50, at 1260.

⁵³ It has usually been thought that the threat to status of federal judges comes from the increasing number of federal judges and the broadening scope of their duties. H. FRIENDLY,

of issues of political import may also be impaired.⁵⁴ Some indirect evidence indicates that the first of these results is already occurring. Since the end of World War II, a number of respected federal judges have resigned; within the last year alone, seven federal judges have resigned, at least five of whom did so partly for salary reasons.⁵⁵

III. REFORM IN JUDICIAL COMPENSATION METHODS

A. *The Historical Role of Compensation*

Suggestions for reform of the present system invite an examination of historical principles. A starting point is the debate at the Constitutional Convention on the judicial compensation provision of the Constitution.⁵⁶ The debate centered on the relative merits of the provision finally adopted, "The Judges . . . shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office,"⁵⁷ and a proposal that "[n]o increase, or

supra note 38, at 2-3; Carrington, Book Review, 72 MICH. L. REV. 628, 630 (1974). A dependent and conformist judiciary would also find its status diminished.

⁵⁴ With respect to the major first amendment issues,

the courts must play a crucial part in maintaining and extending our system of freedom of expression. Their competence to do so rests upon their independence from the other branches of government, their relative immunity to immediate political and popular pressures, the training and quality of their personnel, their utilization of legal procedures, and their powers of judicial review. The need of the courts to perform this function has become more imperative as the nation has moved from nineteenth-century economic liberalism to twentieth-century mass democracy.

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 13 (1970).

⁵⁵ Between 1940 and 1954 eighteen federal judges resigned. HEARINGS BEFORE THE COMM. ON JUDICIAL AND CONGRESSIONAL SALARIES, *supra* note 2, at 451. Within the last year alone the following federal judges resigned: Judge Thomas A. Masterson of Philadelphia; Judge Sidney O. Smith of Atlanta; Judge David L. Middlebrooks of Tallahassee; Judge Arnold Bauman of New York City; Judge Anthony J. Travia of Brooklyn; Judge Hiram Cancio of San Juan; and Judge Anthony T. Augelli of Newark. Letter from Joseph F. Spaniol, Executive Assistant to the Director of the Administrative Office of the United States Courts, to the author, October 21, 1974 (on file at the *University of Michigan Journal of Law Reform*); Chapin, *supra* note 19, at 161; Time, Feb. 10, 1975, at 74.

⁵⁶ U.S. CONST. art. III, § 1.

⁵⁷ *Id.* Litigation giving meaning to art. III § 1 has been sparse. The basic questions presented by this provision have concerned which judges are protected by the provision and whether income taxes "diminish" a judge's salary. In *Charles v. United States*, 21 F. Supp. 366 (Ct. Cl. 1937), it was held that the provision only applies to judges of a constitutional court. In that case, it was decided that the income of a referee in bankruptcy arising out of fees paid to him for services in that capacity is subject to an income tax, since a referee is not a "judge" whose compensation may not be diminished. In *O'Donoghue v. United States*, 289 U.S. 516 (1933), it was held that the Supreme Court and Court of Appeals of the District of Columbia were constitutional courts, the judges of which could not have their salary constitutionally diminished.

In *Booth v. United States*, 291 U.S. 339 (1934), the Supreme Court held that this provision prohibits reduction of compensation of retired federal judges below the amount fixed at date of retirement, even if the reduced compensation exceeds the judge's salary when he first took office.

The status of the income tax under this provision has already been discussed in note 5 *supra*.

diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution."⁵⁸ James Madison, a supporter of the latter proposal, argued that the compensation provision must not undermine the basic goals of the judicial branch.⁵⁹ The proposal, he asserted, would ensure: (1) the impartiality of judges and the ability of the judges to carry out their duties objectively; (2) the independence of judges individually, and the judiciary, generally; and (3) the quality of the federal judiciary and its ability to attract qualified people.⁶⁰

The supporters⁶¹ of the provision eventually adopted did not disagree with Madison's view of the goals of the judicial branch or the role of compensation in furthering these goals. They simply felt that allowing legislative increases of judicial salary "would not create any improper dependence in the Judges."⁶²

[They] urged that, as money became more plentiful, manners and style of living altered, the country more populous, and the business of the Courts increasing, [the judges'] salaries ought to be susceptible of increase.⁶³

Similar views about the role of compensation schemes were expressed by Alexander Hamilton in the *Federalist Papers*. He emphasized the connection between compensation and the goal of independence for judges and the judiciary:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . 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.⁶⁴

Hamilton felt that because of inflation, a fixed-sum approach would

⁵⁸ C. WARREN, *THE MAKING OF THE CONSTITUTION* 533 (1937).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The supporters of what is now art. III, § 1, included Gouverneur Morris and Benjamin Franklin. *Id.*

⁶² *Id.*

⁶³ *Id.* Hart and Wechsler write:

What chiefly stirred debate was the proposal to prevent the temptation of increases. After first being accepted in the Committee of the Whole, it was rejected in the general debate in the Convention and again in the debate on the report of the Committee of Detail. But the rejection was largely on the practical ground that the cost of living might rise, and it prevailed only over the strong opposition of Madison and the votes of Virginia and North Carolina.

H. HART & H. WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 7 (2d ed. 1973) (footnotes omitted). See also 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 121 (1911) and 2 *id.* 44-45, 429-30.

⁶⁴ *THE FEDERALIST* NO. 79, at 472 (C. Rossiter ed. 1961) (A. Hamilton).

not be adequate and that the legislature would have to be relied on to authorize increases. However, to minimize the possible encroachment on the judiciary by the legislature, the constitutional provision prohibiting decreases in salary for sitting federal judges was necessary.⁶⁵

As chairman of the Massachusetts Judicial Salary Committee in 1806,⁶⁶ Joseph Story addressed himself to the role of judicial compensation schemes:

Domestic concerns, and, much more, the active pursuit of property, are, in a great degree, inconsistent with [judges'] duties; and, as they are thus shut out from the acquisition of wealth, it would seem to be the proper office of the legislature to become the guardians of their families. . . .⁶⁷

An acceptable scheme of compensation, he noted, must guarantee impartiality and the appearance of impartiality among judges, attract qualified people, further the independence of judges, and support the "permanent respectability of the judiciary."⁶⁸

Modern commentators have not added significantly to these early analyses.⁶⁹ Recent writing on the subject has come during periods of agitation for salary increases.⁷⁰ The commentators include groups such as the American Bar Association⁷¹ and the American Judicature Society,⁷² which have been involved in some organized lobbying for salary increases. These modern views echo the concern that judicial compensation can affect the independence and the quality of the judiciary.⁷³ Yet, the goals of compensation schemes and the schemes themselves must be brought up to date to reflect the realities of American society in the last quarter of the twentieth century.

⁶⁵ *Id.* at 473. U.S. CONST. art. III, § 1.

⁶⁶ Story was head of a committee created by the Massachusetts House of Representatives to determine if the salaries of the judges of the Supreme Judicial Court should be increased. The committee recommended doubling the salary of the judges. J. STORY, *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 58, 61 (W. Story ed. 1852).

⁶⁷ *Id.* at 61.

⁶⁸ *Id.* at 60.

⁶⁹ Much of the discussion on this subject may be found in the Congressional hearings and bar journals. See the references cited in note 2 *supra*.

⁷⁰ See, e.g., Dickerman, *supra* note 2; Isaac, *supra* note 2; Mooney, *supra* note 2; Mitchell, *supra* note 2; American Judicature Society, *supra* note 2.

⁷¹ The ABA has a standing Committee on Selection, Tenure, and Compensation, which has actively lobbied for judicial salary increases.

⁷² For over twenty-five years, the American Judicature Society has devoted at least part of one issue annually to the subject of judicial compensation.

⁷³ For example:

[The] most compelling reason for granting these federal judicial salaries increases . . . is the long and widely recognized need for such increases, in order to preserve the standing and capacity of this important co-ordinate branch of the federal government.

Mitchell, *supra* note 2, at 200.

B. Institutional Independence and Compensation

The basic concept that must be re-examined is judicial independence. The primary meaning attached to "judicial independence" has been the independence of judges to make decisions free of improper external pressures.⁷⁴ This meaning of judicial independence was implicit in Madison's argument for judicial salaries fixed independently of the Congress:

Whenever an increase is wished by the Judges or may be in agitation in the Legislature, an undue complaisance in the former may be felt towards the latter. If, at such a crisis, there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered if it can be prevented.⁷⁵

Perhaps the best description of this individualized sense of judicial independence was given by Chief Justice John Marshall:

The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [the Judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought . . . that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.⁷⁶

The focus, then, has historically been on the independence of individual judges to render decisions rather than on the independence of the judiciary as an entity. As long as adequate provision was made to protect the integrity of each judge from financial temptation, the judiciary seemed secure.⁷⁷ It has been suggested that this individualized concept of judicial independence is still dominant among federal judges today.⁷⁸ But the vitality of this type of judicial independence is

⁷⁴ P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 427 (1973).

⁷⁵ C. WARREN, *supra* note 58, at 533.

⁷⁶ Speech by Chief Justice John Marshall during the debates of the Virginia State Convention of 1829-1830, quoted in *O'Donoghue v. United States*, 289 U.S. 516, 532 (1932).

⁷⁷ In *O'Donoghue* the Court said:

In framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support.

289 U.S. at 531.

⁷⁸ P. FISH, *supra* note 74, at 427. See also *Hearings on the Independence of Federal Judges Before a Subcomm. of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

dependent upon the degree of institutional judicial independence.⁷⁹ The institutional sense of judicial independence is concerned with the judiciary as a national institution in its relationship with other national institutions.⁸⁰ Professor Peter G. Fish has argued that the independence of the judiciary as an institution may be secured only by the effective functioning of a centralized judicial administrative apparatus:⁸¹

Centralized judicial administration surely poses dangers, but it raises a dilemma as well. Without at least some degree of central control and clearance, the viability of the judiciary as an independent branch may be threatened by local and individual customs and behavior. . . .

Administrative institutions and politics are, after all, but means to an end; they are generally not ends in themselves. They give life to the separation of powers doctrine in that the judge-developed administrative system enables courts to adjust to changes in their legal, political, and economic environment without surrendering judicial independence.⁸²

In short, the Judiciary must be organized in such a way to be able to deal effectively with challenges thrown its way by the Executive and Legislative branches as well as local pressures. If the centralized judicial administration functions effectively, individual judges may function in an environment relatively free from external pressures.

The federal judiciary has attempted to accomplish an effective centralization of administration through organizations such as the Judicial Conference⁸³ (the national policy making organ), the Administrative Office of the Courts⁸⁴ (the judicial bureaucracy), and the Federal Judicial Center⁸⁵ (the research-and-development organ). These groups deal with congressional committees and with the federal bureaucracy in an attempt to allow the judiciary "to function as a coordinate part of the national political system."⁸⁶

But the Judiciary can not assure its independence merely by interposing an administrative institutional framework to deal with corresponding institutions in the Legislative and Executive branches. Despite administrative centralization, Madison's view that any legislative involvement in judicial compensation schemes would inevitably

⁷⁹ P. FISH, *supra* note 74, at 434; Address by Justice William J. Brennan, Jr., The Continuing Education of the Judiciary in Improved Procedures, Tenth Circuit Judicial Conference, July 5, 1960, at 8.

⁸⁰ P. FISH, *supra* note 74, at 436.

⁸¹ *Id.*

⁸² *Id.* at 436-37.

⁸³ *Id.* at 228-68.

⁸⁴ *Id.* at 166-227.

⁸⁵ *Id.* at 340-78.

⁸⁶ *Id.* at 437.

allow the legislature to encroach upon the judiciary remains relevant.⁸⁷ The judiciary, through its major administrative organizations, must expend time, money, and effort convincing the other branches of the necessity of salary increases.⁸⁸ Through these organizations, the judiciary will inevitably attempt to impress individuals, committees, or organizations in Congress or the Executive Branch. In the long run, this process may increase the dependence of these organizations on the other branches of government, thereby compromising, in turn, the independence of the judiciary.⁸⁹

IV. A PROPOSAL FOR REFORM

A reform of the present system would provide for automatic annual salary increases based on percentage increases in the cost of living⁹⁰ in the geographic area where the judge holds court.⁹¹ Before the automatic

⁸⁷ See notes 59-61 and accompanying text *supra*.

⁸⁸ Fish has described the Judicial Conference's staff work, which includes preparing memoranda in support of bills proposed by the Conference:

"We put in one eighteen-hour stretch," related Judge Stephens, "myself, Biggs, three secretaries, and a law clerk, from 9:30 in the morning until 12:30 at night, to get the statutes and memorandum drafted in time for a deadline for their presentation to Senator McCarran [chairman of the Senate Judiciary Committee] and Congressman Cellar [chairman of the House Judiciary Committee]."

Some memoranda were exhaustively detailed. One to accompany a judicial salary bill considered "the nature and importance of the work of the Federal bench, the history of Federal judicial salaries, a comparison of such salaries with those of other court systems, including the English, . . . the relation of the cost of living to salaries and of taxation on a reduction of salaries."

P. FISH, *supra* note 74, at 318. See also *id.* at 322-23, 334-37.

⁸⁹ What occurs is a commingling of elites representing separate governmental institutions. What results is a pool of interests independent of those institutions.

When the individual has become associated with a cooperative enterprise [organization] he has accepted a position of contact with others similarly associated. From this contact there must arise interactions between these persons individually, and these interactions are social. . . . They . . . cannot be avoided. . . . Such interactions are consequences of cooperation, and constitute one set of social factors involved in cooperation. These factors operate on the individuals affected; and, in conjunction with other factors, become incorporated in their mental and emotional characters.

C. BARNARD, THE FUNCTIONS OF THE EXECUTIVE 40-41 (1938), quoted in D. HAMPTON, C. SUMMER & R. WEBBER, ORGANIZATION BEHAVIOR AND THE PRACTICE OF MANAGEMENT 19 (1968). When these contacts take place between individuals who represent different organizations there is the possibility that as a result of these interactions

organizational members and groups may [become] primarily interested in the rational pursuit of their narrow interests and the consolidation and improvement of their own power position, even at the expense of wider organizational interests.

N. MOUZELIS, ORGANIZATION AND BUREAUCRACY 159 (1967). This process has also been described as "control among leaders" or "political bargaining." R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 324-65 (1953).

⁹⁰ The U.S. Consumer Price Index is one measure of the cost of living that may be used. Other possible alternatives are described in note 39 *supra*.

⁹¹ One method for determining the "area" where a judge holds court is to use the federal judicial districts as the basic area unit. Judges of all the federal courts would be deemed to live in the district which contains the court at which they sit most often.

increases could be applied, salaries should be readjusted to reflect the differences in the cost of living between judicial districts. A base salary would be selected for the district with the lowest cost of living. The initial salaries for the other districts would be greater than the base salary by the percentage that the cost of living in those districts exceeds that of the least expensive district.⁹² Then, in subsequent years, the automatic increases would be effected. If the cost of living were to decrease, there might be constitutional obstacles, derived from the prohibition against diminishing the salaries of existing federal judges,⁹³ to decreasing judicial salaries. To avoid these constitutional problems, there should be no actual decreases in salaries, but the percentage decreases in the cost of living should be set off against subsequent increases.

This proposal has been modeled after a number of contemporary examples. At least four states have recently enacted automatic cost-of-living salary provisions for their judiciary, based either on per capita income or on the Consumer Price Index—California,⁹⁴ Maryland,⁹⁵ Massachusetts,⁹⁶ and Tennessee.⁹⁷ The experiences of these states with

⁹² For example, if the Eastern District of Michigan had the lowest cost of living, the federal district judges sitting in the Eastern District would receive the base salary of, for example, \$40,000, the present salary of federal district judges. If there are any Courts of Appeals judges who sit most of the time in the Eastern District, they would receive a base salary of \$42,500, the present salary of judges of the Courts of Appeals. If the cost of living in the Southern District of New York is 10 percent higher than that of the Eastern District of Michigan, the district judges of the Southern District would receive \$40,000 plus 10 percent of \$40,000, or \$44,000.

⁹³ U.S. CONST. art. III, § 1.

⁹⁴ CAL. GOV'T. CODE ANN. § 68203 (Supp. 1974). The law provides for an annual automatic increase based on the percentage increase in the California consumer price index as compiled and reported by the California Department of Industrial Relations. The statute had originally provided for an automatic increase every fourth year, based on the percentage increase in per capita personal income in California as compiled by the U.S. Department of Commerce. Ch. 144, § 4, [1964] Cal. Stats., 1st Ex. Sess.

⁹⁵ MD. ANN. CODE art. 26, § 47(a), art. 64A, § 27 *et seq.* (1972). The Maryland system does not provide much in the way of a new model for the Federal government. The Secretary of Personnel prepares and recommends to the Governor a salary plan, which is subject to the Governor's approval and the Legislature's provision of funds. *Id.* art. 64A, § 27(a). The Secretary of Personnel has authority to make provisions for automatic increases. *Id.* art. 64A, § 30(a).

⁹⁶ MASS. GEN. LAWS ANN. ch. 30, § 46 (1973). The Massachusetts system also stops short of the automatic increase. Whenever there is a 3 percent increase in the average cost of living, the director of personnel and standardization must recommend legislation for a corresponding increase in the judge's salaries. The statute does not specify whether the average cost of living is the average for the United States or for Massachusetts; the latter would seem to make more economic sense. Apparently, the director may suggest legislation where there is an increase of less than 3 percent, though he is not required to do so. He may also recommend decreases if the average cost of living decreases, but no salary may be decreased below the level of salary in effect on December 31, 1969.

⁹⁷ 3 TENN. CODE ANN. § 8-2303 (Supp. 1974). The Tennessee statute provides for automatic annual increases based on the percent increase in the average consumer price index (all items—city average) as published by the U.S. Department of Labor, Bureau of Labor Statistics, between the two calendar years preceding July of the year in which the adjust-

the problems of accurate cost-of-living indexes and of decreases in the cost of living should be useful sources of feedback for drafters of a federal proposal. Kentucky has responded to the same economic concerns through judicial action. In a series of decisions beginning with *Matthews v. Allen*,⁹⁸ the Kentucky courts have interpreted constitutional provisions setting maximum salaries for judges⁹⁹ as incorporating changes in the purchasing power of the dollar; accordingly, they have held that the constitutional limitations on the maximum level to which judicial salaries may be increased are subject to variations in the cost of living.¹⁰⁰

The "post-adjustment" compensation system used by the United Nations and World Bank,¹⁰¹ who have staff members working in over 160 countries and territories,¹⁰² provides an even more detailed model. The purpose of designing the post-adjustment system was to establish salary scales "adequate to recruit and retain staff"¹⁰³ and "to ensure that salaries have the same purchasing power in the various areas of assignment."¹⁰⁴ The salaries are computed by taking into account: (1) the difference in cost of living between a base city (New York) at a base date and the city where the staff member works;¹⁰⁵ (2)

ment is made. Apparently, the relevant price index is the average for the entire United States, not just for Tennessee. No reduction is made if the average consumer price index should decrease. Tennessee's original statute had provided for annual increases based on the percentage increase in the per capita personal income in the state between 1970 and the year next preceding September 1 of the year for which the salaries are to be paid. Ch. 226, § 1 [1971] Tenn. Acts 631.

⁹⁸ 360 S.W.2d 135 (Ky. Ct. App. 1962).

⁹⁹ KY. CONST. § 246.

¹⁰⁰ The Court in *Matthews* was confronted with a section of the state constitution which provided a maximum salary limit for certain public officials. KY. CONST. § 246. Another section of the constitution provided that judges of the circuit courts should receive "adequate compensation." KY. CONST. § 133. Therefore, the court reasoned, to make these provisions consistent, the fixed salary limit must be interpreted to take into account the declining purchasing power of the dollar, thereby incorporating an automatic cost of living increase into the limit. *See also* Commonwealth v. Hesch, 395 S.W.2d 362 (Ky. Ct. App. 1965); Meade County v. Neafus, 395 S.W.2d 573 (Ky. Ct. App. 1965). In *Meade County* the court held that the *Matthews* decision did not mean that salaries of public officials would be automatically increased as the cost of living increased; *Matthews* merely gave the legislature authority to raise the statutory maximum salary in accordance with the cost of living. 395 S.W.2d at 574. In this connection, it has recently been suggested that, in violation of U.S. CONST. art. III, § 1, judges' salaries are being diminished by a failure to increase them as the cost of living rises. *See* Time, Feb. 10, 1975, at 74.

¹⁰¹ The World Bank uses the United Nations post-adjustment salary system. Letter from Fredrick Nossal, Information and Public Affairs of the World Bank, to the author, Oct. 18, 1974 (on file at the *University of Michigan Journal of Law Reform*).

¹⁰² Letter from Mohamed H. Gherab, Assistant Secretary-General, Personnel Services, United Nations, to the author, Nov. 8, 1974 (on file at the *University of Michigan Journal of Law Reform*).

¹⁰³ 3 REPORT OF THE SPECIAL COMMITTEE FOR THE REVIEW OF THE UNITED NATIONS SALARY SYSTEM, Supp. No. 28 at 155, U.N. DOC. A/8728 (1972).

¹⁰⁴ *Id.* at 185.

¹⁰⁵ *Id.* at 163, 178-79.

where the primary dependents of the staff member live;¹⁰⁶ and (3) devaluation, revaluation, and the floating of currencies.¹⁰⁷ Though the federal judiciary is not faced with the problems of fluctuating currencies, the practice of taking into account one's primary dependents is an aspect of the post-adjustment scheme that may be profitably applied to the federal judicial salary system.

A. *The Benefits of the Proposal*

This proposal represents a modest attempt to solve the recurrent problems of the inadequacy and inequity of judicial salaries. It more clearly tends to promote the goal of independence of the judicial branch. By combining these objectives, it seeks to maintain the quality of the federal judiciary.

Automatic increases without congressional approval or without recommendations of a public commission or of the President would make judicial salaries independent of the state of relations between Congress and the President. By making the salary issue nonnegotiable, representatives of the judiciary would be less vulnerable in their dealings with legislative and executive elites and less likely to become dependent on them.¹⁰⁸

Other aspects of the proposal might maintain or improve the quality of the federal judiciary. The fact that salary will increase commensurately with increases in cost of living should assure prospective judges that any financial sacrifice which appointment to the federal bench may entail should not become more severe with the passage of time.¹⁰⁹ Furthermore, making salary increases automatic would eliminate the necessity for substantial lobbying for higher salaries¹¹⁰ and would help assure the impartiality of judges to the extent that their political activities are thus minimized. Because the proposal would decrease the amount of time and other resources that judges and judges' organizations devote to lobbying, more resources would become available for other concerns of the judiciary.

¹⁰⁶ *Id.* at 159, 167-68.

¹⁰⁷ *Id.* at 190-95.

¹⁰⁸ See note 89 and accompanying text *supra*.

¹⁰⁹ T. John Lesinski, Chief Judge of the Michigan Court of Appeals, who is planning to resign because of inadequate salary, has recently said that if his salary had been subject to cost-of-living increases, he would not have decided to resign:

If they had kept it at \$32,000 with a normal escalator—like the auto workers have—to keep up with the rising cost of living, it would have been all right.

Detroit Free Press, Feb. 20, 1975, at 1A, col. 2, and 14A, col. 1.

¹¹⁰ See note 88 and accompanying text *supra*.

B. Precedents for the Proposal

A scheme of nonuniform salaries based in part on regional differences in the cost of living is hardly novel. From 1789 to 1891, federal district judges were paid on a nonuniform basis. In the first judicial salary scheme there were thirteen judicial districts and six levels of salary, ranging from \$800 to \$1,800.¹¹¹ Increases in the salaries of the various district judges were enacted sporadically. At any one time, some districts were included in a given enactment and others were not.¹¹² By 1890, the number of judges and judicial districts had increased to fifty-eight, while the number of levels of salary had decreased to four: \$5,000, \$4,500, \$4,000, and \$3,500.¹¹³ One reason for this salary variation was the distance that a judge had to travel.¹¹⁴ In California for example, the judicial districts were large and the population was sparse; federal district judges there had to hold court in several places as well as substitute for circuit judges who were able to travel to the district only infrequently. Consequently, in 1890, one of the California district judges was the highest paid judge in the country.¹¹⁵

In 1891, the change was made to uniform salaries.¹¹⁶ The uniform salary scheme was largely the result of a compromise in the Congress; paying all the judges a uniform salary would be less expensive than paying them on a nonuniform basis.¹¹⁷ The decision to change was *not* made on the principle that uniform payment was a fairer and more equitable system.¹¹⁸ In fact, the opposite was assumed.¹¹⁹

The debate over the Salary Bill¹²⁰ in 1891 highlights the major

¹¹¹ 1 Stat. 72 (1789) included the following salary allocation: District of Delaware, \$800; District of Connecticut, \$1,000; District of Kentucky, \$1,000; District of Maine, \$1,000; District of New Hampshire, \$1,000; District of New Jersey, \$1,000; District of Massachusetts, \$1,200; District of Georgia, \$1,500; District of Maryland, \$1,500; District of New York, \$1,500; District of Pennsylvania, \$1,600; District of South Carolina, \$1,800; District of Virginia, \$1,800.

¹¹² See, e.g., 2 Stat. 121 (1801), "An act to augment the salaries of the district judges in the districts of Massachusetts, New York, New Jersey, Delaware and Maryland." 2 Stat. 431 (1807) gave the judges of the Mississippi, Indiana, Michigan, and Louisiana Territories an additional \$1,200 each. 2 Stat. 660 (1811) increased only the salary of the judge of the Circuit Court of the District of Columbia.

¹¹³ Dickerman, *supra* note 2, at 86. One judge in California received \$5,000. One judge in New Orleans received \$4,500. Eleven judges in Chicago, Baltimore, Boston, Trenton, New York, Brooklyn, Cincinnati, Utica, Philadelphia, Pittsburgh, and Los Angeles received \$4,000. Forty-five judges received \$3,500.

¹¹⁴ 22 CONG. REC. 3004 (1891) (report of the House Judiciary Committee); Dickerman, *supra* note 2, at 86.

¹¹⁵ Dickerman, *supra* note 2, at 86 indicates that in 1890 the judge in the District of California, Judge Hoffman of San Francisco, was the only one paid \$5,000.

¹¹⁶ 26 Stat. 783 (1891).

¹¹⁷ 22 CONG. REC. 3004 (1891).

¹¹⁸ See notes 121-123 and accompanying text *infra*.

¹¹⁹ See note 124 and accompanying text *infra*.

¹²⁰ Because the House decided not to consider its own bill, it debated S. 174, 51st Cong., 1st Sess. (1889), on the House floor. 22 CONG. REC. 3002 (1891).

motivations of the Congress in changing the compensation system. The original bill called for nonuniform salaries for federal judges based *explicitly* on cost of living variations.¹²¹ This proposal was felt to be too expensive and was altered on the House floor.¹²² Representative Stewart of Vermont, the sponsor of the bill for nonuniform salaries, admitted that

it has been considered that where any class of Federal officers are performing precisely the same service and under equal responsibility, it is unwise to make a discrimination in respect to their compensation. As a matter of *expediency*, inasmuch as this has become a crying evil, and everybody recognizes the entire inadequacy of the salaries of these officials in many parts of the country, and because of the fact . . . that all legislation in a country like ours must of necessity be more or less of a compromise, or at least to some extent a compromise, it has been considered wiser for Congress, as a measure of affording relief to the judges of these courts to fix the salaries on a uniform basis of \$5,000.¹²³

But Mr. Stewart was determined to make known his position that the best long-run scheme involved nonuniformity:

While this salary [\$5,000] is ample, no doubt, in some parts of the country, in some of the rural regions where the business of the district courts is not large, in others the salary of \$5,000 is entirely inadequate. Still we believed that it was the best that could be done now to fix all on a uniform basis of \$5,000.¹²⁴

In the twentieth century, uniform salaries for federal judges have become the norm. Subsequent Congresses have ignored the political expediency leading to the 1891 change and have forgotten the long-range view of Representative Stewart. For example, a House committee in 1926, while considering proposals for judicial salary increases, included the following comment in its Report:

It is apparent to every person who has considered this subject of salaries and their inadequacy that it is impossible to make and pass a bill fixing graduated salaries and paying different compensations to judges of the same class because of geographical or

¹²¹ Representative Stewart remarked:

The report of the Judiciary Committee presents a graded bill, making some changes which were thought by the committee to be justified by the difference in the expense of living in the different districts.

22 CONG. REC. 3002 (1891).

¹²² The uniform salary bill passed the House on February 21, 1891, 22 CONG. REC. 3087 (1891).

¹²³ 22 CONG. REC. 3004 (1891) (remarks of Representative Stewart) (emphasis added).

¹²⁴ 22 CONG. REC. 3005 (1891) (remarks of Representative Stewart).

other reasons. The mind of the bar association and that of all persons interested in the present bill recognized the fact that a flat advance is all that can be accomplished. This is justified because today under the law governing the appointment and assignment of judges to different localities and districts, judges of our Federal courts are like a mobile army that can be moved here and there and assigned to work distances probably from their home district. All this requires the creation of a flat increase that shall be the same in every district throughout the United States.¹²⁵

This argument is not persuasive. If it was possible before 1891 to ascertain travel costs and differentiate salaries on that basis, it should be possible to differentiate salaries according to the overall cost of living, given the available data.¹²⁶

V. CONCLUSION

Though this proposal for automatic salary increases based on the cost of living has some attractive features, it might not be welcomed by Congress.¹²⁷ But if the proposal were to be accepted, a two-step process would be necessary to implement it. First, judicial salaries would be excluded from the jurisdiction of the Commission on Executive, Legislative, and Judicial Salaries. Second, a new statute would be enacted embodying the proposals set forth in part IV of this article. Such an enactment would represent a minor statutory effort to assure the independence and quality of the judiciary.

—*Elliot A. Spoon*

¹²⁵ H.R. REP. No. 232, 69th Cong., 1st Sess. 3 (1926).

¹²⁶ See note 39 and accompanying text *supra*.

¹²⁷ One major reason is that Congress has always considered congressional and judicial salaries together:

By some peculiar legislative alchemy, congressional and judicial salaries are linked, and when Congress lacks the will to allow itself a pay raise, federal judges are among those who must suffer.

McGee, *supra* note 50, at 1259.