

# CRS Report for Congress

## Judicial Salary: Current Issues and Options for Congress

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# Judicial Salary: Current Issues and Options for Congress

## Summary

Several federal judges, including the Chief Justice of the United States, have expressed concern over the level of judicial salary. Chief Justice Roberts has called the current levels of judicial salary a “constitutional crisis” that threatens the independence of the federal courts. The most common arguments for raising judicial salary claim that low judicial salaries (1) limit the ability of the federal judiciary to draw on a diverse pool of candidates for positions on the federal bench; (2) force federal judges concerned about their financial futures to resign from the bench before they become eligible for retirement; and (3) drive other federal judges, upon becoming eligible for retirement, to retire completely (to earn extra income outside the judiciary), rather than remain to assist the courts as judges on “senior status.” Opponents of raising judicial salary generally question whether variations in judicial salary affect recruitment and retention of federal judges.

Examination of the available evidence on the effect of judicial salary on judicial recruitment and retention suggests (1) trends away from appointing judges directly from private practice and toward appointing federal judges who are already in the judiciary (as state judges or federal bankruptcy or magistrate judges) date to before the most recent decline in judicial salaries, (2) federal judges are not resigning from the federal bench at rates much higher than historical averages, and (3) the percentage of federal judges who chose retirement in lieu of senior status has also not risen markedly in the last several years. From an examination of data on judicial departures, we are unable to identify a conclusive relationship between judicial salary and federal judges’ decisions to resign or retire.

Should Congress wish to address the issue of judicial salary, it has several options. In addition to increasing the pay of federal judges on a one-time basis by a specific amount or percentage, Congress might consider “de-linking” congressional and judicial salaries, providing that judges receive salaries based on their cost of living, revising retirement benefits, adjusting survivor benefits for the spouses and dependents of federal judges, altering outside income limits, convening the Citizens’ Commission on Public Service and Compensation, or enacting automatic adjustments for judicial salary.

Four bills concerning judicial salary have been introduced in the 110<sup>th</sup> Congress: S. 197 would adjust the salaries of federal judges upward by 1.7%; S. 2353 would increase the salaries of federal judges by 16.5%; and S. 1638, as reported by the Senate Judiciary Committee, and H.R. 3753, as ordered reported by the House Judiciary Committee, would increase the salaries of most federal judges by 28.7%, permit cost-of-living adjustments to judicial salaries to go into effect unless Congress passed legislation stopping them from doing so, change the eligibility for federal judges to retire, and change how the annuity they receive upon retirement is calculated. S. 1638 also imposes limits on reimbursable travel and honorary memberships for judges, as well as applying limits on outside earned income to U.S. Supreme Court justices. This report will be updated as events warrant.

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# Judicial Salary: Current Issues and Options for Congress

## Introduction<sup>1</sup>

Federal judges have repeatedly expressed concern about what they view as a continuing decline in their “real salary” level.<sup>2</sup> Chief Justice Roberts has characterized the current judicial pay rate as a “constitutional crisis,”<sup>3</sup> particularly noting that judicial salaries remain steady or decrease as the real salaries of lawyers, law professors, and wage earners continue to increase. The salary for district court judges is currently \$169,300; the salary for court of appeals judges is currently \$179,500.<sup>4</sup> In 2006 dollars, the median salary for district court judges between 1955 and 2006 was \$167,047; the median salary for court of appeals judges over the same time period was \$178,139. While the judges’ current salary is only slightly below the 1955-2006 median, the salary level has steadily decreased since 1991, when the real salary of district judges was \$185,170 and of court of appeals judges was \$196,419.

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<sup>1</sup> This report was written by Kevin M. Scott, formerly an Analyst on the Federal Judiciary at CRS. The listed author updated the report and is available to answer questions concerning its contents.

<sup>2</sup> Throughout this report, a distinction is made between “real” and “nominal” values of salary. “Real” values use the Consumer Price Index (CPI) to account for changes in cost of living due to inflation and allow salaries from different time periods to be compared with one another. Though the CPI includes components which vary across regions of the country (e.g., housing, food, and gasoline), the CPI represents a national average for urban consumers and may better reflect the true cost of living in some regions of the country than in others. “Nominal” values are the actual amounts paid to federal judges and other workers at a given time and cannot be compared over time. This report uses 2006 dollars as its baseline because that is the year for which the most recent comparison data to other professions is available.

<sup>3</sup> John G. Roberts Jr., “2006 Year-End Report on the Federal Judiciary,” *The Third Branch*, Jan. 2007, p. 1.

<sup>4</sup> The focus of this report is the salaries for U.S. district court judges and, to a lesser extent, U.S. court of appeals judges. Salaries of the Justices of the Supreme Court traditionally rise with the salaries of other judges. Associate Justices of the Supreme Court currently receive an annual salary of \$208,100; the Chief Justice receives an annual salary of \$217,400. Since 1987, the Judicial Conference has determined the salaries of magistrate judges (normally 92% of the salaries of district court judges). By statute, the salaries of full-time bankruptcy judges are equal to 92% of the salaries of district court judges. See 28 U.S.C. § 153 (a). Salaries of the judges of the Court of International Trade have been equal to those of district court judges since the court was established in 1980. Salaries of judges of the Court of Federal Claims have been equal to the salaries of district court judges since 1987. See [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)] for historical salary data.

Out of evident concern about the erosion of salary levels for federal judges in recent years, four bills pending in the 110<sup>th</sup> Congress would increase those levels. While one bill (S. 197) would provide for a nominal 1.7% salary adjustment, the other three — S. 2353, H.R. 3753, and S. 1638 — would provide for much more substantial increases, of 16.5%, 28.7%, and 28.7% respectively (for specific values, see **Table 3**, below). H.R. 3753 and S. 1638 would also grant federal judges annual cost-of-living adjustments (COLAs) equal to the increase in base pay for General Schedule (GS) salaries unless Congress acted to block the increase from taking effect. In addition, H.R. 3753 and S. 1638 would, while retaining the “Rule of 80” for senior status qualification, create a “Rule of 84” for retirement, where years of service and age must add to 84 (starting at 67 years old and 17 years of service). H.R. 3753 and S. 1638 would reduce the amount of annuity retired federal judges receive if they have earned income that exceeds the value of their annuity; for every \$2 in annual earned income above the level of the annuity, a federal judge’s annuity would be reduced by \$1, but no reduction to an annuity could be greater than 67%. H.R. 3753 and S. 1638 require that judges in senior status perform, each year, the equivalent work of an active judge on their district or circuit performs in four months. S. 1638 also includes a provision that restricts the reimbursable seminar-related travel for federal judges to \$2,000 per trip and \$20,000 per year, with exceptions for events approved by the State Department and those sponsored by the federal government, state governments (not including public educational institutions), bar associations, and the National Judicial College. S. 1638 also outlaws the acceptance of honorary memberships valued at more than \$50 per year and applies the regulations of the Judicial Conference on outside earned income to justices of the U.S. Supreme Court.<sup>5</sup>

#### This report

- reviews the most common arguments that have been advanced in recent years for and against raising federal judicial salaries;
- examines a large body of data relevant to the question of whether fluctuations in judicial pay levels have affected the federal judiciary’s ability to recruit and retain judges;
- considers various time periods (between 1955 and 2006)<sup>6</sup> over which the rise and fall of judicial salaries may be examined, taking into account, as well, changes that have occurred at various points in time in non-salary compensation that federal judges receive;
- identifies and analyzes options available to Congress in addressing the judicial pay issue in addition to increasing judicial salaries by a specific amount or percentage on a one-time basis — including “de-linking” congressional and judicial salaries, providing judges with

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<sup>5</sup> For more details on the nature of these restrictions see, below, “Outside Earned Income.”

<sup>6</sup> See “Recent History of Retirement Options for Federal Judges,” below, for a discussion of the use of 1955 as a starting point for salary comparisons.

salaries based on their cost of living, revising retirement benefits, and altering outside income limits; and

- provides a side-by-side comparison of the three bills noted above that would provide for a substantial judicial pay increase, showing how the levels provided for would compare with those of the benchmark year of 1969 (the year of highest real salaries for federal judges since at least 1913).

Should Congress choose to act, it can increase but not decrease judicial salaries. The Constitution prohibits Congress from diminishing the salaries of Article III federal judges.<sup>7</sup>

## Arguments For and Against Raising Judicial Salary

The degree to which federal judges' pay has changed depends on how it is measured. While real judicial salary for district court judges declined 21.5% between 1969 and 2006, such a calculation does not take into account real income growth for other classes of wage earners. According to Paul Volcker, chairman of the National Commission on Public Service, the real compensation of the average wage earner has grown 18.5% since 1991, and the real salaries of federal workers more generally have grown 15.1%.<sup>8</sup> The real growth of salaries for individuals whom federal judges regard as their professional peers, particularly partners in law firms and law professors, may have been even greater.<sup>9</sup> Using those benchmarks, the 2003 Volcker Commission study reported a more notable decline in real judicial salary:

Judicial salaries are the most egregious example of the failure of federal compensation policies. Federal judicial salaries have lost 24 percent of their purchasing power since 1969, which is arguably inconsistent with the Constitutional provision that judicial salaries may not be reduced by Congress...The lag in judicial salaries has gone on too long and the potential for diminished quality in American jurisprudence is now too large.<sup>10</sup>

Several professional organizations have expressed concerns similar to those made by Chief Justice Roberts and other current and former members of the federal judiciary. The American Bar Association, the National Bar Association, several state and local bar associations, the U.S. Chamber Institute for Legal Reform, several law

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<sup>7</sup> Article III, Section 1 of the U.S. Constitution reads, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

<sup>8</sup> Paul A. Volcker, "Judgment Pay," *Wall Street Journal*, Feb. 10, 2007, p. A9.

<sup>9</sup> "Need for Federal Judicial Pay Increase Fact Sheet." Available at [<http://www.uscourts.gov/judicialcompensation/payfactsheet.html>].

<sup>10</sup> National Commission on Public Service (Volcker Commission), *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century*, Jan. 2003, pp. 22-23.

school deans, and the American Judicature Society, among other organizations, have expressed support for increasing the salaries of federal judges.<sup>11</sup> In addition, the current administration of President George W. Bush has expressed support for raising federal judges' salaries.<sup>12</sup> On balance, the majority of expressed opinions on the topic of judicial salary appear to favor some form of increase in the pay of federal judges, though the specific amount of the pay and future prospects for judicial compensation may divide judges, policymakers, and professional organizations.

The consequences of such a decline in judicial salary are alleged to be the creation of problems of recruitment and retention in the federal judiciary. Abner Mikva, who served in Congress, as a court of appeals judge, and as White House counsel, has argued that low judicial pay has several consequences for the judiciary:

It is true that more judges, faced with the alternatives of senior status or outright retirement, are choosing the more lucrative path of retirement. But they have served their time, and a vacancy occurs whether or not the judge retires or takes senior status. I chose retirement rather than senior status so that I could become White House counsel. While I received no pay in that job, I have had the opportunity to earn substantial income since I left the White House and became a neutral with JAMS, a dispute-resolution firm. The public obviously benefits from the ongoing service of a senior judge, but it is not a flaw in the system that allows judges to have the option to make up for some lost earning opportunities after retirement.

The real problem of inadequate judicial pay is the limits it puts on attracting judges to the bench in the first place. I saw these limits both as White House counsel for President Clinton, when I was very much involved in finding candidates to fill judicial vacancies, and as a member of various selection panels since I returned to the private sector. Lawyers most appropriate for consideration as judges are at the height of their earning power in the private sector. At one time law schools were a good place to look, but even those salaries have advanced beyond the judicial levels now in existence. To ask a lawyer to go on the bench from the private sector is usually to ask that person to take a drastic reduction in earnings, as well as the other problems of living in a public fishbowl.<sup>13</sup>

Those who argue against raising judicial salary tend to make four arguments. First, they note that the salaries of federal judges are high relative to all workers in the United States. The 2006 salary of federal district court judges (\$165,200) would put judges somewhere between the 90<sup>th</sup> and 95<sup>th</sup> percentile among all American households, assuming no other members of the household had income as defined by the Census Bureau. Court of appeals judges (2006 salary of \$175,100) and Supreme

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<sup>11</sup> See, generally, [<http://www.uscourts.gov/judicialcompensation/support.html>]. See also Karen J. Mathis, president, American Bar Association, "Judicial Pay Crucial to Our Courts' Future." Jan. 5, 2007. Available at [<http://www.abanet.org/abanet/media/oped/oped.cfm?releaseid=60>].

<sup>12</sup> Letter from Rob Portman, director, Office of Management and Budget, to Rep. John Conyers, chair, House Judiciary Committee, Apr. 19, 2007. Available at [<http://www.uscourts.gov/judicialcompensation/OMBletter.pdf>].

<sup>13</sup> Abner Mikva, "Attracting the Best," *National Law Journal*, June 4, 2007.



Court justices (2006 salary of \$203,000 for associate justices and \$212,100 for the Chief Justice) would be above the 95<sup>th</sup> percentile in household income.<sup>14</sup> Second, opponents argue that federal judges and the “perks” of being a federal judge (prestige, job security, opportunity to select and work with law clerks, interesting work, retirement package that offers full salary upon qualification) more than compensate for any shortcomings in judicial salary.<sup>15</sup> Third, some have argued that raising judicial salaries may not solve some of the problems thought to be associated with low and declining judicial salary. As Judge Richard Posner, a judge on the Seventh Circuit Court of Appeals who has written extensively on judicial salary, argues:

Raising salaries would not do a great deal to attract commercial lawyers to judgeships. The lawyer who doesn't want to exchange a \$1 million income for a \$175,000 income is unlikely to exchange it for a \$225,000 income — [Chief Justice] Roberts doesn't name a figure to which he thinks judicial salaries should be raised, but he can hardly expect Congress to raise salaries by more than 30 percent, and that only intermittently, so that inflation will eat away at the salary until the next jump.<sup>16</sup>

Fourth, they contend that many of the consequences one might expect from declining salaries, including problems recruiting and retaining federal judges, have not manifested themselves in the degree to which advocates for judicial salary contend.<sup>17</sup>

## **Effect of Judicial Salary on Recruitment and Retention of Federal Judges: An Examination of the Relevant Data**

The difference of opinion on the necessity of a raise in judicial salary stems, in part, from disagreement on some of the consequences of what might be considered a low judicial salary. In particular, those who advocate and oppose increasing judicial salary disagree over the extent to which declines in judicial salary:

- make it more difficult to recruit federal judges from private practice, depriving the federal judiciary of talented candidates;

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<sup>14</sup> For 2006, the household income for the 90<sup>th</sup> percentile of American households was \$133,000; the household income for the 95<sup>th</sup> percentile was \$174,012. See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006*, Aug. 2007, p. 41. See *Ibid.*, p. 27, for a definition of income.

<sup>15</sup> See, e.g., James C. Harrington, “No Need To Boost Salaries,” *The National Law Journal*, Jan. 16, 2006, p. 26. (Hereafter, cited as Harrington, “No Need To Boost Salaries.”) See also Richard Posner, “Judicial Salaries,” *The Becker-Posner Blog*, Mar. 18, 2007. Available at [[http://www.becker-posner-blog.com/archives/2007/03/judicial\\_salari.html](http://www.becker-posner-blog.com/archives/2007/03/judicial_salari.html)]. (Hereafter, cited as Posner, “Judicial Salaries.”)

<sup>16</sup> Posner, “Judicial Salaries.”

<sup>17</sup> Harrington, “No Need To Boost Salaries.” See also Posner, “Judicial Salaries.”

- lead more federal judges, before becoming eligible for retirement, to leave the bench to work in private practice, increasing turnover in the federal judiciary; and
- lead more judges, after becoming eligible for retirement to leave the judiciary (often for jobs in the private sector or elsewhere), rather than remaining in the judiciary in semi-retired “senior status,” depriving the federal judiciary of important resources of manpower and expertise.

To date, little systematic evidence has been collected which would allow Congress to evaluate the degree to which the current patterns of recruitment and retention on the federal judiciary deviate from historical patterns and the degree to which those deviations (if they do exist) can be attributed to fluctuations in judicial salary. This report collects and analyzes evidence that can be used to evaluate how increases and decreases in judicial pay have affected the federal judiciary’s ability to draw on a diverse set of professional backgrounds and deter federal judges from leaving their positions early to earn more money.

## **Inability to Recruit Qualified Candidates**

Those who seek higher federal judicial salaries, including several current and former federal judges, contend that relatively low judicial salaries deprive the federal judiciary of the ability to recruit lawyers from private practice. As a result, federal judges are increasingly drawn from other ranks of the judiciary and government service rather than from private practice. The Ad Hoc Group on Federal Judicial Salaries, for example, has argued that the declining earning power of federal judges raises the prospect of “an alteration of the federal bench from one drawn from all elements of the legal profession to one populated only by the independently wealthy and those for whom a federal judicial appointment represents a salary enhancement.”<sup>18</sup>

Justice Stephen Breyer, in prepared remarks he delivered in April 2007 to the Subcommittee on the Courts, the Internet, and Intellectual Property of the House Judiciary Committee, outlined what he viewed as the consequences of such a shift:

A federal district court is a community institution. The federal judiciary will best serve that community when its members come from all parts of the profession, large firms, small firms, firms of different kinds of practice, all varieties of government practice, other courts, and academia. That diversity, important as it is to the institution, is gradually disappearing.<sup>19</sup>

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<sup>18</sup> Letter from John C. Danforth and Leon C. Panetta to Sen. Patrick Leahy, chair, Senate Judiciary Committee, and Sen. Arlen Specter, ranking member, Senate Judiciary Committee, May 7, 2007. The Ad Hoc Group on Federal Judicial Salaries listed as its members former Members of Congress Howard H. Baker Jr., John C. Danforth, Richard A. Gephardt, Henry J. Hyde, Susan Molinari, Sam Nunn, Leon E. Panetta, and Louis Stokes.

<sup>19</sup> Testimony of Justice Stephen Breyer, U.S. Congress, House, Committee on the Judiciary, (continued...)

Given the importance of the background of federal judges, an analysis of the data cited by Justice Breyer may illuminate the degree to which the trends they cite appear in the federal judiciary. The data cited by both Chief Justice Roberts and Justice Breyer appear in **Figure 1**.<sup>20</sup> The indicator used in **Figure 1**, and by Justice Breyer, is the occupations federal district court judges held immediately prior to their appointments to the federal bench.

Though the proportion of judges coming to the federal bench from private practice has declined since the Eisenhower Administration, current levels are roughly equal to those of the presidential administrations of Franklin D. Roosevelt and Harry S Truman. The appointment practices of Dwight D. Eisenhower's administration were exceptional in the extent to which district court judges were drawn from private practice; the Eisenhower Administration appointed 65.1% of its federal judges from private practice, while no other administration since 1933 has appointed more than 55% of its federal judges from the same population. Four Presidents since 1933 — Franklin D. Roosevelt, Harry S Truman, William J. Clinton, and George W. Bush — have appointed fewer than 40% of federal district judges directly from private practice.

Since 1933, the percentage of federal judges whose immediate prior position was another judgeship, either at the state or federal level, has increased. The percentage of district court judges appointed by President George W. Bush who were already judges — 46.8% — is 2.5 times greater than the percentage of district court judges appointed by President Franklin D. Roosevelt who were already judges (18.6%). Since 1933, only Presidents Ronald Reagan and George W. Bush have appointed a smaller percentage of district court judges from the judiciary than their immediate predecessors.

The data presented in **Figure 1** do not illustrate a relationship between judicial salary and the immediate prior positions of federal district court judges. While the percentage of federal judges whose immediate previous position was another judgeship has increased, on a fairly consistent basis, since 1933, the real salaries of federal judges have risen and fallen several times over that same time interval. The experiences of two presidential periods (Reagan and Nixon/Ford) highlight the difficulties of comparing salary and immediate prior occupation of federal district court appointees:

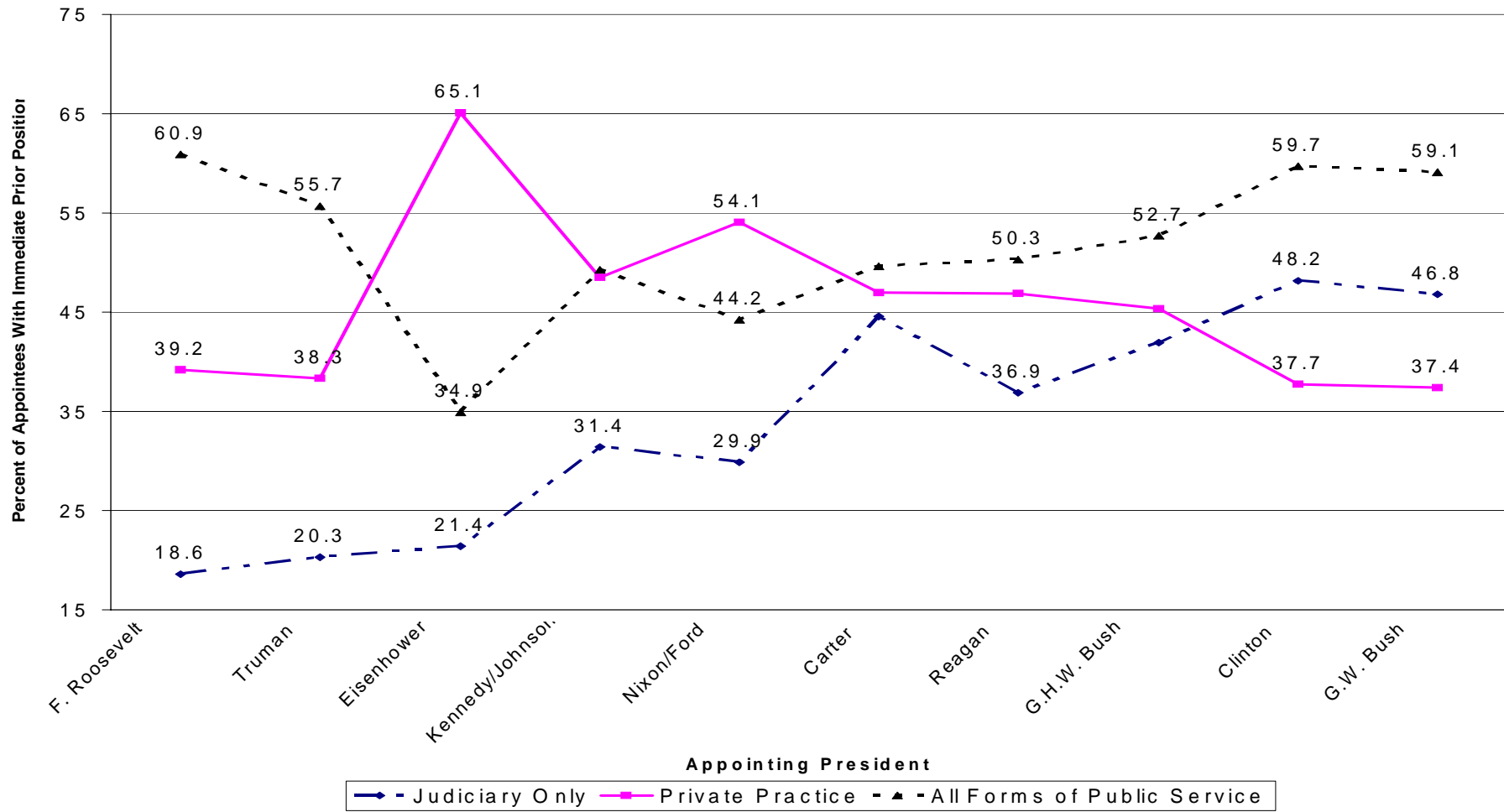
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<sup>19</sup> (...continued)

Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 19, 2007 (not yet printed). Available at [<http://www.uscourts.gov/testimony/JusticeBreyerPay041907.pdf>], pp. 6-7.

<sup>20</sup> John G. Roberts Jr., "2006 Year-End Report on the Federal Judiciary," *The Third Branch*, Jan. 2007, p. 3.

**Figure 1. U.S. District Court Judges, 1933-2006: Percent Whose Immediate Prior Positions Were in Private Practice, in the Judiciary, or in Public Service (Including the Judiciary)**



**Source:** Data for six most recent Presidents are found in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, “Picking Judges in a Time of Turmoil: George W. Bush’s Judiciary During the 109<sup>th</sup> Congress,” *Judicature*, vol. 90, no. 6 (May-June 2007), p. 277. For earlier presidencies, Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), pp. 58-59 (Roosevelt), pp. 104-105 (Truman), pp. 147-149 (Eisenhower), pp. 190-191 (Kennedy/Johnson), pp. 227-229 (Nixon/Ford). Some data labels deleted for clarity. Data are current through the end of the 109<sup>th</sup> Congress.

- Reagan Administration (1981-1988): Throughout this period, real salaries for federal judges were *below* the 1955-2006 median. This time period also saw a decline in the number of federal district judges appointed whose immediate prior position was another judgeship. The data for this period are *inconsistent* with the argument that lower judicial salaries translate into more federal judges whose immediate prior position was another judgeship.
- Nixon/Ford Administrations (1969-1976): For all but one year of this period, real salaries for federal judges were *above* the 1955-2006 median, while the percentage of appointed federal judges who were from private practice (51.4%) was the second-highest of all administrations within the 1933-2006 time frame.<sup>21</sup> These data are *consistent* with the argument that lower judicial salaries translate into more federal judges whose immediate prior position was another judgeship.

These examples suggest that any conclusions about the decrease in real salary causing changes in the composition of professions leading to federal judgeships should be made with caution.

## Early Departures of Federal Judges

Federal judges concerned about the adequacy of their salary might choose one of two methods to make more money than they do as federal judges. First, they may simply resign as federal judges and take positions that provide higher levels of compensation. Second, they may choose to retire, taking an annuity equal to their salary upon retirement that will never increase, rather than taking senior status, which entitles judges to continued cost-of-living adjustments if Congress authorizes such adjustments for active judges. Advocates of higher judicial salary argue that federal judges resign and retire at greater rates during periods of low judicial salary. In testimony before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee, Justice Samuel Alito noted the following:

Twenty Article III judges have resigned or retired from the federal bench since January 1, 2005. It is our understanding that seventeen of these judges sought other employment. Six of these judges retired to join JAMS, a California-based arbitration/mediation [company], where they have the potential to earn the equivalent of the district judge salary in a matter of months. Five judges entered the private practice of law (presumably at much higher salaries). Two judges resigned to become corporate in-house counsels. One judge resigned to accept a state judicial appointment (at a higher salary). Another judge retired to accept an appointment to a quasi-governmental position. One judge recently announced his resignation to accept an appointment in higher education. One judge resigned to accept an appointment in the executive branch of government.<sup>22</sup>

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<sup>21</sup> The source data for **Figure 1** and the accompanying text, combine the administrations of Richard Nixon and Gerald Ford, as well as those of John Kennedy and Lyndon Johnson.

<sup>22</sup> Testimony of Justice Samuel Alito, U.S. Congress, House Committee on the Judiciary, (continued...)

The degree to which these numbers represent trends or aberrations in the federal judiciary could help illustrate how the decisions federal judges make about remaining in or leaving their positions are affected by judicial salary. If there is a relationship between salary and early departure, then one way to increase the stability of the judiciary would be to increase the salary of federal judges. If, on the other hand, judicial salary and the method (and frequency) of departure from the federal judiciary are unrelated, then increasing judicial salary may not alter the decisions of federal judges to depart for other positions.

**Recent History of Retirement Options for Federal Judges.** Before evaluating the relationship between salary and patterns of departure from the federal bench, a review of the options federal judges have for departure may prove useful. In the past 53 years, there have been two significant changes to the retirement system for federal judges, one in 1954 and one in 1984. Congress also made modest changes to senior status in 1989 and 1996.

In 1954, Congress enacted legislation allowing judges to take senior status if they had reached 70 years of age with 10 years of service as an Article III judge or 65 years of age with 15 years of service. At the time, senior status allowed a federal judge to “retain his office but retire from active service,”<sup>23</sup> (thus receiving their salary) but did not specify how much work judges in senior status must do to retain their offices. Judges could also “resign with salary” if they were 70 years old and had served as Article III judges for at least 10 years.<sup>24</sup> The 1954 legislation was the first legislation that allowed judges younger than 70 to leave active service and receive their salaries (though they could only take senior status and could not resign with salary until they were 70 years old and had served for 10 years);<sup>25</sup> before that time, only judges 70 and older could choose to depart while retaining their salary, and only then by taking senior status.<sup>26</sup>

In 1984, Congress enacted legislation that eliminated the two age and service thresholds for senior status (70 years of age and 10 years of service, or 65 years of age and 15 years of service) and replaced them with the Rule of 80, allowing any judge to take senior status who was at least 65 years of age and whose age and years of service add to at least 80. The 1984 legislation also eliminated the option of judges “resigning with salary” but allowed judges to “retire” and permitted judges to

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<sup>22</sup> (...continued)

Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 19, 2007 (not yet printed). Available at [<http://www.uscourts.gov/testimony/JusticeAlitopay041907.pdf>], pp. 19-20. The figures cited by Justice Alito include federal district court and court of appeals judges on senior status who chose to retire, as well as federal judges in active service who chose to resign or retire.

<sup>23</sup> P.L. 294, 68 Stat. 12 (Feb. 10, 1954).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Act of April 10, 1869, 16 Stat. 45 (Apr. 10, 1869).

exercise this option if they met the criteria of the Rule of 80.<sup>27</sup> Practically speaking, resigning before 1984 and retiring after 1984 were the same: judges who choose this option (i.e., retire) leave office but receive the salary they were receiving upon departure for the rest of their lives.

In 1989, Congress allowed judges serving in senior status to receive the same adjustments to salary that judges in active service received. In so doing, Congress outlined the criteria for qualifying for senior status (and the pay adjustments). Each year, senior status judges must handle the equivalent of 25% of the caseload of an active judge or serve the federal judiciary in an administrative capacity.<sup>28</sup> In 1996, Congress further amended the provisions of senior status to allow judges to count work done in later years to fulfill the workload criteria for earlier years in which they did not meet the 25% threshold and to count administrative work toward the 25%.<sup>29</sup>

**Current Options to Terminate Active Service.** Under current law, federal judges may retire or take senior status when they are at least 65 years of age and their age and years of service in Article III judgeships add to at least 80 (the Rule of 80).<sup>30</sup> Federal judges who resign, rather than retire, are not eligible for judicial retirement. Unlike pension plans where individuals may acquire some level of retirement income (partial vesting) after a few years of employment, judicial retirement is all-or-nothing: federal judges who do not meet the requirements of the Rule of 80 do not earn retirement benefits. A federal judge who is appointed at 45 years of age and resigns at 60 will receive no annuity because both the age and years of service requirements must be met to qualify for judicial retirement; for the same reason, a federal judge appointed at 50 who resigns at 59 will also not receive judicial retirement.<sup>31</sup>

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<sup>27</sup> P.L. 98-353, 98 Stat. 333 (Jul. 10, 1984). Before 1984, resignation with salary was only available to judges who had reached the age of 70 and had 10 years of service. The difference between resignation, resignation with salary, and retirement is important when considering patterns of departure from the federal judiciary. Since 1984, judges who resign have done so without any pension; those who retire receive an annuity equal to the salary they were receiving when they retired.

<sup>28</sup> P.L. 101-194, 103 Stat. 1716, 1770 (Nov. 30, 1989).

<sup>29</sup> P.L. 104-317, 110 Stat. 3847, 3851 (Oct. 19, 1996).

<sup>30</sup> 28 U.S.C. § 371.

<sup>31</sup> Federal judges who take another position in the federal government, or served in the federal government before becoming a federal judge, may be eligible to receive credit for time served in the federal judiciary under the Civil Service Retirement System (CSRS) or Federal Employee Retirement System (FERS). Like other federal employees, most federal judges whose employment with the federal government (not necessarily their date of employment as a federal judge) began before Jan. 1, 1984, would be enrolled in CSRS; those whose federal employment began on or after Jan. 1, 1984, would be enrolled in FERS. Federal employees whose service started before Jan. 1, 1984 could choose to enroll in FERS. See Administrative Office of the U.S. Courts, *Senior Status and Retirement for Article III Judges*, Judges Information Series No. 4, (Washington: Administrative Office of the U.S. Courts, Apr. 1999). All federal judges may participate in the Thrift Savings Program, contributing up to 5% of their salaries, but there is no matching contribution made

(continued...)

Federal judges may depart active status on their court in a variety of ways: they may resign, be impeached and convicted, be elevated, resign, retire, take senior status, or die while in office.<sup>32</sup> If judicial salary is related to departure (that is, if judges are more likely to leave the bench when salary levels are low), then one should expect to observe two phenomena when judicial salaries decline: an increase in the number of judges who resign (and, so doing, forfeit judicial retirement) and judges who opt to retire rather than take senior status upon qualifying under the Rule of 80. Doing the latter (retiring rather than taking senior status) would allow a judge to earn income in a position (in private practice or academia) while still drawing a judicial retirement annuity that does not change as the salaries of active judges change. **Table 1** summarizes the options federal judges have to leave active service under current law, and the consequences of those choices, in comparison with active service.

**Table 1. Comparison of Active Status to Resignation, Senior Status, and Retirement for Federal Judges**

<b>Benefit</b> \ <b>Status</b>	<b>Active Service</b>	<b>Resignation</b>	<b>Senior Status</b>	<b>Retirement</b>
Lifetime Nondiminishing Compensation	Yes	No	Yes	Yes
Congress-approved Salary Increases	Yes	No	Yes	No
Exemption from Federal Taxes on Compensation	No	No	Yes	Yes
Can Earn Unlimited Nonjudicial Income	No	Yes	No	Yes
Judicial Chambers, Clerks, Administrative Support	Yes	No	Yes	No

**Source:** Adapted from Albert Yoon, “As You Like It: Federal Judges and the Political Economy of Judicial Tenure,” *Journal of Empirical Legal Studies*, vol. 2, no. 3 (Nov. 2005), p. 511.

**Federal Judges Who Resign.** To evaluate the claim that departures of federal judges are related to salary, one might start by distinguishing between judges who resign and those who retire. Judges who resign are not eligible for judicial retirement, so they may make a significant monetary sacrifice by resigning from the federal bench that they hope to offset by alternative employment. The years after

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<sup>31</sup> (...continued)  
by the federal government.

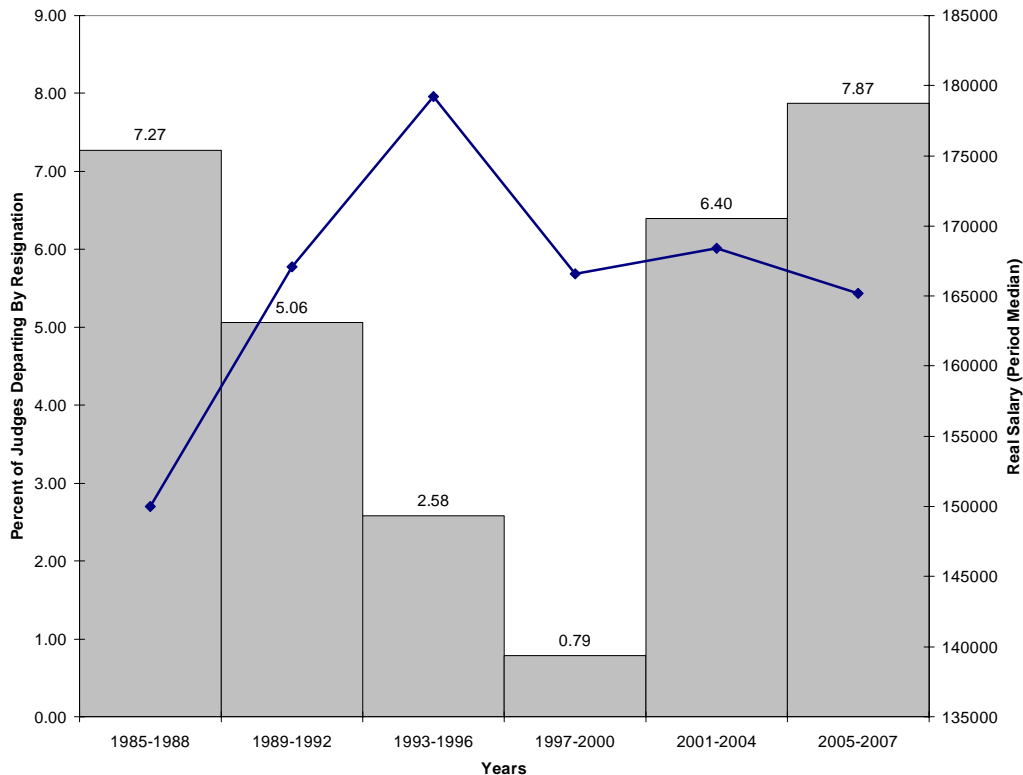
<sup>32</sup> Federal judges may also be assigned to another court if Congress reorganizes the district courts or circuit courts of appeals. Such changes are not considered in this report to end a judge’s service.



1984 provide a reasonable period for analysis of judicial departures due to the changes in judicial retirement and resignation. “Resignations” before the enactment of the 1984 legislation could come with salary if the judge met the age and years of service requirement; all resignations after enactment of the 1984 legislation meant that the resigning judges would receive no judicial retirement.

**Figure 2** plots the percentage of lower court judges who departed their position by resignation between 1985 and 2007 against the real salary of district court judges over the same time period.

**Figure 2. Percentage of Federal Judges Who Left Active Service by Resigning, and Real Salary of District Court Judges, 1985-2007**



**Source:** CRS analysis of data provided by the Federal Judicial Center (FJC). Data used are presented in **Appendix 1**. The percentage of district court judges who resigned was calculated by dividing the number of judges who resigned in a given period by the sum of the number of judges in the same period who resigned, retired, took senior status, were impeached and convicted, or whose recess appointments expired without Senate confirmation. Data are current through December 31, 2007.

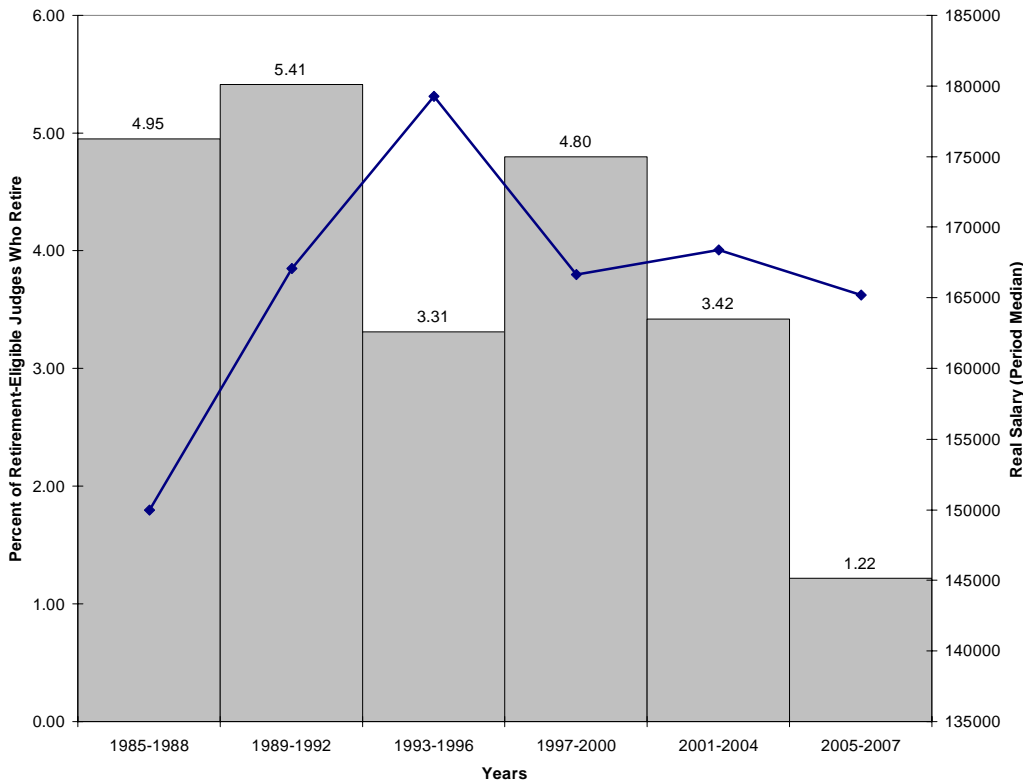
**Note:** The solid line plots the median real salary for district court judges for each interval (the salaries of Court of International Trade judges are the same as those of district court judges and the salaries of court of appeals judges follow the same pattern as those of district court judges); the columns plot the percentage of Article III district court judges who left active status by resigning in each period.

Since 1985, the percentage of judges who resign and forgo judicial retirement has fluctuated. In the first 16 years after 1985, the percentage of judges who resigned declined in every four-year period while real judicial salary increased in the first three of those same four-year periods. Between 2001 and 2004, in contrast, when real judicial salary rose slightly over the 1997-2000 period, 6.4% of federal judges who

left active status did so by resigning. In 2005 and 2006, 7.9% of federal judges who left active status did so by resigning. Generally speaking, as salaries rose, the percentage of judges who left office by resignation fell, but the 1997-2000 period, where no federal district judges resigned though real salary fell, stands as an exception to the general trend.

**Federal Judges Who Retire Rather Than Take Senior Status.** Federal judges who do not qualify to take judicial retirement, but who are concerned about their compensation, make a decision to remain a member of the federal judiciary or resign and pursue alternative employment. On the other hand, federal judges who meet the requirements for judicial retirement (the Rule of 80) face a different choice; they may choose to retire (after which they may or may not pursue additional employment) or take senior status, where they continue to hear cases and perform administrative tasks for their courts. Both retired and senior judges receive an annuity equal to the salary they were receiving when they left active status; only judges on senior status, however, continue to receive cost-of-living adjustments and any other raises Congress approves as long as they remain in senior status.

**Figure 3. Percentage of Federal Judges Who Retired Rather than Take Senior Status, and Real Salary of District Court Judges, 1985-2007**



**Source:** CRS analysis of data provided by the Federal Judicial Center (FJC). Data used are presented in **Appendix 1**. The percentage of federal judges who retired was calculated by dividing the number of judges who retired from active service in a given period by the sum of the number of judges in the same period who retired from active service or took senior status. Data are current through December 31, 2007.

**Note:** The solid line plots the median real salary for district court judges for each interval (the salaries of Court of International Trade judges are the same as those of district court judges and the salaries of court of appeals judges follow the same pattern as those of district court judges); the columns plot the percentage of Article III district court judges who chose retirement over senior status in each period.

**Figure 3** presents data on the percentage of federal district court judges who, between 1985 and 2006, opted for outright retirement rather than senior status. The data presented in **Figure 3** demonstrate that, with the exception of the 1997-2000 time period, the percentage of district court judges who retired rather than take senior status declined steadily, if not dramatically, since the 1989-1992 period. Over the 1985-2007 time period, the percentage of district judges who retired rather than take senior status fell from 4.95% in the 1985-1988 time period to 1.22% in 2005-2007. Though the raw number of federal judges choosing retirement without first taking senior status between 1985 and 2007 may not be large (29 judges, compared with 695 who took senior status in that time frame), variations over time may still help explain the effect of judicial salary on the departure decisions of federal judges. If declining judicial salary explains the choice judges make between retirement and senior status, it might be argued that judges in the 2001-2004 and 2005-2007 periods should have retired at rates comparable to the 1997-2000 period, whereas the retirement rates for those two periods are actually lower than the 1997-2000 time period, and the retirement rate for the 2005-2007 time period was the lowest of any time period since 1985.

## Evaluating the Data

The data evaluated to this point note only the degree to which judicial salary is correlated with the professional backgrounds of district judges and the departure via resignation or retirement of federal judges. Establishing correlation is a necessary, but not a sufficient, condition to establish causation. This section evaluates, first, the strength of the correlations established by the data and, second, considers what intervening variables might influence the relationship between judicial salary and the kind of candidates recruited to become federal judges and how federal judges depart the bench. Any conclusions made about causation from correlations should be made with these considerations in mind.

**Strength of Correlations.** The data presented here suggest that there are, at best, weak correlations between judicial salary levels and the pool of candidates from which judges are drawn. While the federal judiciary consists of a different mix of individuals than it did 50 or 70 years ago, concluding that these trends are caused by lower judicial salary raises several concerns. Changes in the immediate prior position of district court judges appear to arise independent of fluctuations in judicial salary; the decline in private practice as a prior occupation dates to the Eisenhower administration, and the increase in service as judge as a prior occupation dates at least to the Franklin D. Roosevelt administration, while judicial salary has risen and fallen several times over those same time periods. Establishing the correlation that is a prerequisite for causation requires more convincing data than the data presented thus far by advocates of higher judicial salary.

Similarly, determining that low judicial salaries cause judges to depart early, either by resigning or by retiring rather than taking senior status, can be difficult. The correlations between judicial salary and the number of judges who resign or retire (rather than taking senior status) again appear to be limited. The proportion of judges resigning declined in every four-year period between 1985 and 2000, and judicial salary rose in all but the last (1997-2000) four-year period in that time interval, suggesting that there may have been, at least between 1985 and 1996, an inverse relationship between judicial salary and the proportion of judges who resign. That pattern, however, does not necessarily hold for the 1997-2006 period. Over those 10 years, real judicial salaries dropped during the 1997-2000 period and then fluctuated little. Yet, the number of judges who resigned varied from 0% in 1997-2000 to 7.8% in 2001-2004, two periods in which real judicial salaries differed by less than 1.1% (the median real salary for district court judges was \$166,618 for 1997-2000 and \$168,441 for 2001-2004).

Finally, the percentage of judges who opted to retire rather than take senior status between 1985 and 2007 appeared to decline — to 1.22% between 2005 and 2007 from 4.95% between 1985 and 1988. If low judicial salary caused retirements, then the rate of retirements should have remained constant from 1997 to 2007, a period of nearly constant real salary for federal judges. Instead, the percentage of judges who retired rather than take senior status declined over that time period. Concluding that judicial salary has caused fewer judges to be drawn from private practice (or more from other ranks of the judiciary), or that judicial salary causes judges to resign or retire are claims that require the development of more conclusive evidence.<sup>33</sup>

**Possible Intervening Variables.** Even if correlations are established, they may exist due to intervening factors — some unconsidered factor which may explain the relationship between the two factors observed to correlate with one another. In the case of the relationship between judicial salary and judicial recruitment and

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<sup>33</sup> There is a small body of academic literature that evaluates the influences on judges' decisions to leave the bench. That literature has reached competing conclusions. Deborah Barrow and Gary Zuk find that salary increases reduce retirements by district court judges in a given year, but have no effect on the number of retirements by court of appeals judges. James Spriggs and Paul Wahlbeck find that increases in (inflation-adjusted) salary delay departure for court of appeals judges appointed by Democratic presidents, but have no effect on judges appointed by Republican Presidents. David Nixon and J. David Haskin find that the effect of salary on individual-level retirement decisions is mixed, but that more court of appeals judges retire in years with lower salary. Albert Yoon argues that judicial salaries do not appear to effect judicial tenure or judicial retirement. However, all of these works span several different eras of retirement policy and do not appear to distinguish between retiring and taking senior status. See Deborah J. Barrow and Gary Zuk, "An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987," *Journal of Politics*, vol. 52, no. 2 (May 1990); James F. Spriggs II and Paul J. Wahlbeck, "Calling it Quits: Strategic Retirements on the Federal Courts of Appeals, 1893-1991," *Political Research Quarterly*, vol. 48, no. 3 (Sep. 1995); David C. Nixon and J. David Haskin, "Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts," *American Politics Quarterly*, vol. 28, no. 4 (Oct. 2000); and Albert Yoon, "Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000," *California Law Review*, vol. 91, no. 4 (Jul. 2003).

judicial tenure, one might consider, as a potential intervening variable, the impact of the changing nature of the appointment process. The average confirmed district court nominee was pending before the Senate for 70 days if nominated by President Jimmy Carter; through the 109<sup>th</sup> Congress, the average time from nomination to confirmation of confirmed district court nominees by President George W. Bush was 171 days.<sup>34</sup> Independent of fluctuations in judicial salary, the longer amount of time that now passes between nomination and confirmation may deter candidates who otherwise might be interested in federal judgeships from expressing interest in those positions. President Bush suggested that the contemporary practices in the nomination and confirmation process may have affected who will serve in the federal judiciary:

Lawyers approached about being nominated will politely decline because of the ugliness, uncertainty, and delay that now characterizes the confirmation process. Some cannot risk putting their law practices — their livelihoods — on hold for long months or years while the Senate delays action on their nominations. Some worry about the impact a nomination might have on their children, who would hear dad or mom’s name unfairly dragged through the mud. So they decide to remove themselves from consideration. When people like this decline to be nominated, they miss out on a great calling. But America is deprived of something far more important: the service of fair and impartial judges.<sup>35</sup>

Establishing a causal relationship between judicial salary and *departures* may also be confounded by intervening variables. Generally speaking, departures may be driven by job satisfaction in addition to concerns about judicial salary. Judges whose caseloads are higher may be more likely to resign than judges whose caseloads are lower. Several studies have indicated that the per-judge caseload in many districts and circuits is much higher than it was 30 or 40 years ago, and may contribute to decisions judges make to depart the federal bench.<sup>36</sup> Judges may also be concerned

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<sup>34</sup> CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107<sup>th</sup>-109<sup>th</sup> Congresses*, by Denis Steven Rutkus, Kevin M. Scott, and Maureen Bearden, p. 35. President Jimmy Carter’s confirmed nominees to the courts of appeals spent an average of 69 days pending in the Senate; on average, 300 days elapsed between first nomination and confirmation of President George W. Bush’s confirmed court of appeals nominees. All data are current through the end of the 109<sup>th</sup> Congress (2005-2006).

<sup>35</sup> U.S. President (G.W. Bush), “Remarks at The Federalist Society’s 25<sup>th</sup> Annual Gala,” *Weekly Compilation of Presidential Documents*, vol. 43 (Nov. 15, 2007), p. 1510.

<sup>36</sup> As an illustration, the number of unweighted filings per authorized district court judgeship rose from 448 in 1990 to 545 in 2004, then fell to 482 in 2006. The number of weighted filings per district court judgeship reflects a similar pattern. One caveat to keep in mind is that this value does not account for senior status judges or vacant judgeships. See [<http://www.uscourts.gov/judicialfactsfigures/2006/Table602.pdf>]. “Weighted filings” use a system developed by the Federal Judicial Center to account for how much of a judge’s time each case type should take. Weighted filings is an annual measure of court workload updated every three months. According to the Administrative Office for the United States Courts, “average civil cases or criminal defendants each receive a weight of approximately 1.0; for more time-consuming cases, higher weights are assessed (e.g., a death-penalty habeas corpus case is assigned a weight of 12.89); and cases demanding relatively little time from judges receive lower weights (e.g., a defaulted student loan case is assigned a weight (continued...))

about personal security, collegiality on their courts, and a myriad of other factors when they consider remaining on the bench or departing the bench. If one adds these possible intervening variables to the weak correlations discussed above, it becomes clear that more evidence may be necessary to evaluate the degree to which judicial salary *causes* the changes that may be taking place in the federal judiciary.

**Judicial Salary Relative to Other Salaries.** Real salaries for district court judges declined 21.5% — to \$165,200 from \$210,570 — between 1969 and 2006 while the real salaries of other wage earners rose over the same time period. As discussed below, the salaries of individuals federal judges may consider as professional peers — law professors, partners in law firms — have increased at rates greater than those of the average wage earners, leaving federal judges with the perception that their salaries continue to fall further behind where they were in 1969 than the actual dollar figures illustrate. That perception, and any deleterious effects that perception may have on who becomes a judge, how long judges remain on the bench, and the quality of the work they provide as federal judges, may magnify observed effects in ways that are difficult to measure using objective criteria. That is, federal judges may not be exiting the federal judiciary at greater rates during periods of lower salary, but the perception that they are doing so may affect the morale of the judiciary.

**Magnitude of Effects.** Although statistical analysis may not reveal a strong effect for salary on the career decisions of federal judges, several former federal judges have pointed to salary as one of their reasons for departure.<sup>37</sup> Furthermore, though the effect of judicial salary on recruitment and retention in the federal judiciary may be modest, some advocates for higher judicial salary argue that the role of judicial salary in career considerations may continue to grow. As the American Bar Association and Federal Bar Association have noted of the departures of federal judges, “even though the absolute number of departures is not large, the trend is alarming because the number is increasing significantly (even after factoring in the overall growth of the federal judiciary) in a profession where there is an expectation, grounded in the Constitution, of life tenure.”<sup>38</sup>

## Patterns in Judicial Salary

### Determining a Proper Time Interval for Evaluating Changes in Judicial Salary

An informed consideration of options available to Congress, should it wish to address the issue of judicial salary, requires an understanding of the fluctuations that

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<sup>36</sup> (...continued)  
of 0.031.” See [<http://www.uscourts.gov/library/fcmstat/cmsexpl06.html>].

<sup>37</sup> A collection of selected statements from federal judges can be found in American Bar Association and the Federal Bar Association, “Federal Judicial Pay: An Update on the Urgent Need for Action,” May 2003, pp. 27-28.

<sup>38</sup> *Ibid*, p. 20.

have occurred in judicial salary over time. It also requires choosing an appropriate time frame over which to evaluate claims made in favor of and against raising judicial salary. Any choice of baseline has strengths and weaknesses. One useful way to choose baselines may be to consider changes in the non-salary compensation that federal judges receive. In monetary terms, the most significant non-salary benefit is the retirement package available to federal judges who choose to vacate their position by retirement or by taking senior status. When comparing judicial salary over time, it may prove useful to keep the changes in judicial retirement benefits in mind. Comparisons of judicial salary within, rather than across, the eras defined by retirement benefits (1955-1984, 1984-1989, and 1989-present) could be more useful. Directly comparing salary data across these time periods should be undertaken with caution, as any such comparison does not account for the non-salary compensation available to federal judges. By creating the Rule of 80, the 1984 legislation<sup>39</sup> made it easier for judges to qualify for either senior status or retirement, which may have increased the attractiveness of federal judgeships without a direct increase in the salary in that time interval. The 1989 legislation<sup>40</sup> may have made senior status a more attractive option because judges in senior status could qualify for the same salary adjustments as active judges. At the same time, the 1989 legislation may have encouraged federal judges to retire rather than taking senior status because it required, for the first time, that federal judges perform a certain level of work to qualify to remain in senior status.

The Judicial Conference, and federal judges who have testified on the issue of judicial salary, favor comparisons using 1969 as a baseline.<sup>41</sup> In that year, the salaries of federal judges rose to \$40,000 from \$30,000. In 2006 dollars, the increase was to \$219,727 from \$173,793 — a raise of \$45,934. The salaries paid federal judges in 1969 were the highest real salary for federal judges in any year since at least 1913.<sup>42</sup> While comparisons of judicial salary since 1969 span more than one era of

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<sup>39</sup> P.L. 98-353, 98 Stat. 333, 350.

<sup>40</sup> P.L. 101-194, 103 Stat. 1716, 1770-1771.

<sup>41</sup> See, e.g., John G. Roberts Jr., “2006 Year-End Report on the Federal Judiciary,” *The Third Branch*, Jan. 2007. Testimony of Justice Stephen Breyer, U.S. Congress, House, Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 19, 2007 (not yet printed); available at [<http://www.uscourts.gov/testimony/JusticeBreyerPay041907.pdf>]. Testimony of Justice Samuel Alito, U.S. Congress, House, Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 19, 2007 (not yet printed); available at [<http://www.uscourts.gov/testimony/JusticeAlitopay041907.pdf>]. Testimony of Justice Anthony M. Kennedy, U.S. Congress, Senate Committee on the Judiciary, *Hearing on Judicial Security and Independence*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., Feb. 14, 2007 (not yet printed). CQ Congressional Transcripts; available at [<http://www.cq.com/committees.do>]. Administrative Office of the U.S. Courts, “Need for Federal Judicial Pay Increase Fact Sheet”; available at [<http://www.uscourts.gov/judicialcompensation/payfactsheet.html>].

<sup>42</sup> Russell R. Wheeler and Michael S. Greve, “How to Pay the Piper: It’s Time to Call Different Tunes for Congressional and Judicial Salaries,” *Issues in Governance Studies*, (continued...)

retirement, using 1969 as a baseline may be useful because data on salaries of comparable professions from that year, collected by the Judicial Conference, may help assess the change in judicial salaries relative to other professions. It would, however, be misleading to compare patterns in departure from the bench across the different time periods, given changing meanings assigned to “retire” and “resign,” distinctions that are an important part of the judicial salary debate.

## Nominal And Real Judicial Salaries, 1955-2006

**Figure 4**, below, illustrates real (dollar values adjusted for inflation) salaries for federal district court judges. **Appendix 2** includes these nominal and real values for the salaries of district court judges, court of appeals judges, and the average for American wage earners over the 1955-2006 time interval. As the data presented in **Figure 4** and **Appendix 2** indicate, judicial salaries have varied considerably since 1955; their lowest real value (since 1955) occurred in 1986, when the real salary was \$144,762 for district court judges and \$153,039 for court of appeals judges. The highest real salaries in the last 50 years occurred in 1969, when the real salary was \$210,570 for district court judges and \$222,018 for court of appeals judges.<sup>43</sup> Within this range, the current salaries are closer to the minimum than the maximum real values, but they are also not very far from the median values for district and court of appeals judges over the 1955-2006 interval. The median real salary for district court judges between 1955 and 2006 is \$167,047. The 2006 real salary for district court judges, \$165,200, was 98.9% of the median real salary for the 1955-2006 period.<sup>44</sup>

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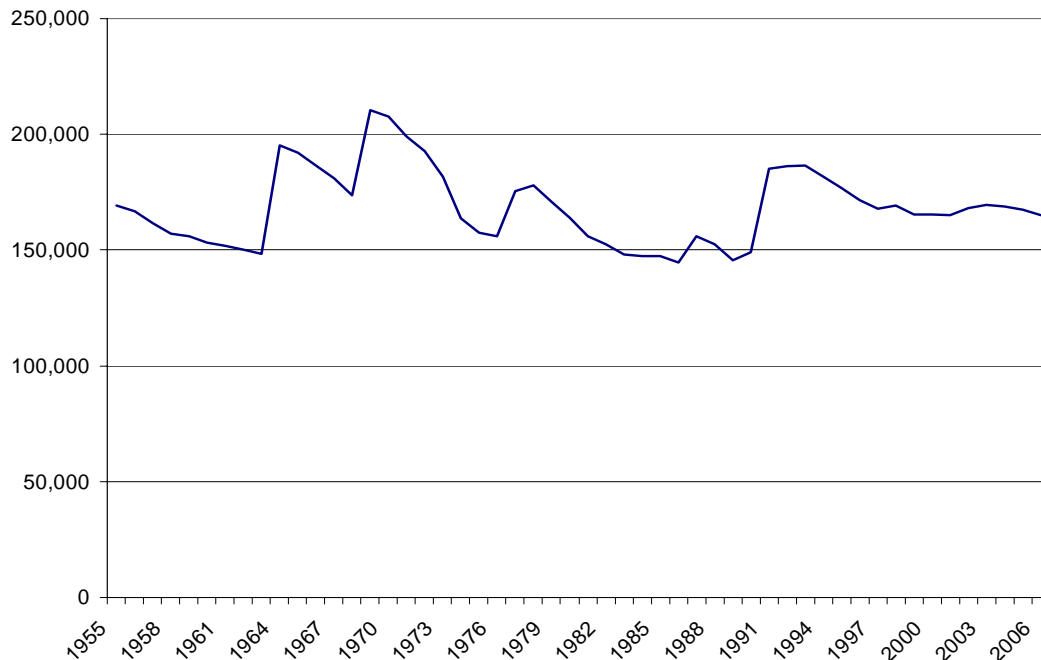
<sup>42</sup> (...continued)

Brookings Institution-American Enterprise Institute, Apr. 2007, pp. 13-15. (Hereafter, cited as Wheeler and Greve, “How to Pay the Piper.”) The Bureau of Labor Statistics does not track the Consumer Price Index (CPI) before 1913, making comparisons of pre-1913 values to post-1913 values problematic. Given adequate data on inflation, one might consider evaluating judicial salaries back as far as 1891, the date of the establishment of the current hierarchy of district courts, courts of appeals, and the U.S. Supreme Court. Most scholars of the history of the federal judiciary treat 1891 as the time of the creation of the “modern” federal judiciary. See, e.g., Howard Gillman, “How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891,” *American Political Science Review*, vol. 96, no. 3 (Sep. 2002), pp. 520-521. From 1891 to 1903, district court judges received an annual salary of \$5,000 and court of appeals judges received an annual salary of \$6,000; from 1903 to 1919, the salaries were \$6,000 and \$7,000, respectively. See [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)].

<sup>43</sup> Most other sources, including the Federal Judicial Center [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)] and the Administrative Office for the U.S. Courts [<http://www.uscourts.gov/salarychart.pdf>], report salaries for district judges in 1969 as \$40,000 (nominal) and \$219,727 (real), and \$42,500 (nominal) and \$233,460 (real) for court of appeals judges. But those salaries took effect on March 1, 1969; during the first two months, federal judges were paid at the same rate as their 1968 salaries.

<sup>44</sup> The 2006 real salary for court of appeals judges, \$175,100, was 98.3% of the 1955-2006 median real salary, \$178,139.



**Figure 4. Real Salaries of U.S. District Court Judges, 1955-2006**

**Source:** Judicial salary data provided by the Federal Judicial Center, available at [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)]. See **Appendix** for specific values. For specific dates of pay adjustments, see [<http://www.uscourts.gov/salarychart.pdf>]. Adjustments for real salary data were made using the Bureau of Labor Statistics CPI Inflation Calculator, available at [<http://data.bls.gov/cgi-bin/cpicalc.pl>]. Real salaries are in 2006 dollars. If judicial salary changed during a year, the salaries were calculated based on the salary judges received for each portion of the year. This affects calculations for 1969, 1977, and 1987. In 1987, for example, district court judges' annual salary was \$81,100 from Jan. 1-Feb. 28, and \$89,500 from March 1 forward. A district court judge who worked for the entire year would have received \$88,100 in salary that year.

## Options for Congress

Should Congress choose to act to change the compensation for federal judges, its choices are not limited to increasing the salary for federal judges, although such a choice may address the immediate concerns of those who advocate for higher judicial salary. Congress may also choose to consider several changes to the structure of salary and benefits for federal judges, including “de-linking” congressional and judicial salaries, paying judges different salaries based on the location of their chambers, revising retirement benefits for federal judges, altering survivor benefits for the spouses and dependents of federal judges, reconsidering limits on the outside income judges are permitted to earn, convening the Citizens’ Commission on Public Service and Compensation, and creating “automatic” adjustments for judicial salaries.

## Raising Judicial Salary

Foremost among the requests of Congress by the Judicial Conference is an increase in the salary paid to federal judges, though the Judicial Conference, and individual judges and justices, have generally not outlined a specific salary level they would like Congress to provide. Justice Breyer, in response to a question posed by Representative Steve Cohen of Tennessee, said “the rule [Art. III of the Constitution] is supposed to be no diminishment of compensation. Let’s keep it real, and let’s say the compensation should stay the same compared to the average American that it was when I took office. That’s what I think most judges would say.”<sup>45</sup>

**Appropriate Comparisons for Judicial Salary.** A starting point for considering the appropriate level of judicial salary may be determining the proper comparison group for federal judges. Judicial salaries have been compared with those of lawyers in private practice, heads of non-profit corporations, and judges in other countries.<sup>46</sup> No other occupation offers a perfect comparison to the work of federal judges. Accordingly, making any comparisons across professions may prove problematic. Many federal judges come from private practice, but many also come from legal academia, state judiciaries, and other positions in the government (see **Figure 1**, above). One may consider comparing salaries in those professions from which judges come to judicial salaries with the proviso that such a comparison likely does not fully account for the compensation (monetary and non-monetary) that federal judgeships offer.

Members of the judiciary also compare the salaries of federal judges with those of law school professors and deans. In 1969, the dean of Harvard Law School made \$40,000 (\$219,728 in 2006 dollars) — very close to the then-salary of \$38,333 for U.S. district court judges and almost identical to the \$40,417 salary of U.S. court of appeals judges. Today, according to the Administrative Office of the U.S. Courts, the deans of “top” law schools earn \$430,000, or 95.7% more than the \$219,728 real salary of the dean of Harvard Law School 1969.<sup>47</sup> Senior professors at Harvard Law School earned, on average, \$28,000 in 1969 (\$153,809 in 2006 dollars). Senior professors at “top” law schools now earn, on average, \$330,000, 114.6% more than

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<sup>45</sup> Testimony of Justice Stephen Breyer, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., April 19, 2007 (not yet printed). CQ Congressional Transcripts. Available at [<http://www.cq.com/committees.do>].

<sup>46</sup> National Commission on Public Service (Volcker Commission), *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century*; John G. Roberts Jr., “2006 Year-End Report on the Federal Judiciary,” *The Third Branch*, Jan. 2007, pp. 1-2.

<sup>47</sup> Comparison of these two numbers should be made with caution, as the Administrative Office of the U.S. Courts defines “top” law schools as those rated in the top 25 of the annual survey of *U.S. News and World Report*. The comparable salaries of deans of “top” law schools in 1969 may have been higher or lower than the salary of the dean of Harvard Law School at the time. Data for 1969 and 2006 available at [<http://www.uscourts.gov/judicialcompensation/factsheetcharts.html>].

the \$153,809 real salary of senior professors at Harvard Law School in 1969.<sup>48</sup> By comparison, district court judges earn \$165,200, 21.5% less than what they earned (in 2006 dollars) in 1969. Judges on the U.S. courts of appeals earn \$175,100, 21.1% less than what they earned (in 2006 dollars) in 1969.

In some respects, the working conditions for federal judges compare well to those of law professors. Like law professors once they are granted tenure, federal judges have considerable job security. Like law professors, federal judges have a diverse workload. Like law professors, federal judges enjoy a certain amount of prestige. But the monetary components of the two professions may not lend themselves to perfect comparisons. Federal judges may enjoy retirement benefits that are more generous than those of law professors, but law professors likely have much more freedom to set their own schedules and choose work that they find interesting. Law professors may also earn additional salary as consultants (though restrictions may be imposed by their universities on the consulting they may do). Federal judges may earn no more than 15% of the annual base pay rate for Level II of the Executive Schedule in outside earned income; in 2007, federal judges were limited to earning no more than \$25,200 in outside earned income.<sup>49</sup>

Comparing the two professions has other limits as well. Law schools are free to bid for the services of faculty members in a market. Such a market does not exist for federal judges, as only the federal government purchases the services of federal judges. Such a market for law professors may drive up salaries of the best law professors, whereas such competition for services does not exist within the judiciary (“better” judges are not paid more than other judges). At the same time, both legal academia and the judiciary are part of a broader market for legal services, and the federal judiciary must compete with legal academia, private practice, and other government agencies for the services of qualified individuals.

Nothing published by the federal judiciary, however, compares the salaries of federal judges with those of state judges. Judges at the state level perform functions comparable to those of federal judges, though workload, salary, and prestige vary considerably across the different states. State judges also have less job security than federal judges, as many of them must win elections to retain their positions. Despite the imperfect comparison, the data on the salaries of state judges may help illustrate the degree to which trends in federal judicial salary are trends common to all judges or unique to members of the federal judiciary. The average (mean) salary for associate justices on state courts of last resort in 2006 was \$140,150.<sup>50</sup> By comparison, the average (mean) salary for associate justices on state courts of last

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<sup>48</sup> In addition to the caveats that apply to comparing salaries of deans, the Administrative Office notes that the 1969 data were compiled based on nine-month teaching schedules; the 2006 data were based on 11-month teaching schedules. Data for 1969 and 2006 available at [<http://www.uscourts.gov/judicialcompensation/factsheetcharts.html>].

<sup>49</sup> 5 U.S.C. App. § 501(a).

<sup>50</sup> National Center for State Courts, *Survey of Judicial Salaries*, vol. 32, no. 1 (Jan. 2007). Available at [[http://www.ncsconline.org/WC/Publications/KIS\\_JudComJudSal010107Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal010107Pub.pdf)].

resort in 1976 was \$38,152 (\$135,175 in 2006 dollars).<sup>51</sup> In other words, the average annual real salary of associate justices of state supreme courts rose 3.7% between 1976 and 2006. In that time, the annual salary of federal district court judges rose 6.0% (from \$155,895 to \$165,200 in real dollars).

**Table 2**, below, outlines several possible comparisons to other professions or positions in legal services and calculates the salaries federal district court judges would receive had their salaries experienced comparable growth to these other professions or positions between 1969 and 2006. As noted above, 1969 provides a high baseline for the salaries of federal judges, as their salaries in 1969 were the highest real salaries federal judges have received since at least 1913. At the same time, the Judicial Conference provides data for other professions in 1969; those data are not available from the Judicial Conference for other years, so comparisons to 1969 are driven, in part, by data availability.

As the data in **Table 2** indicate, salaries in all other fields reported have increased, in real terms, since 1969. For some groups, particularly all lawyers and associate justices of state supreme courts, those increases, relative to inflation, have been quite modest. In other areas, particularly the legal academy and among law partners, the increase in real salary has been more pronounced. Federal district court judges represent the only group (presented here) for which real salaries declined in the 1969-2006 period.

**Table 2. Change in Salaries of U.S. District Court Judges and Selected Other Professions, 1969-2006**

Comparison Group	1969 Real Salary	2006 Real Salary	Percentage Change, 1969-2006	2006 Salary of District Court Judges If Salary Had Kept Pace with Comparison Group
District Court Judges	\$210,570	\$165,200	-21.5%	—
All Wage Earners	\$32,376	\$38,651	+19.4%	\$251,421
All Lawyers	\$101,547	\$101,695	+0.1%	\$212,676
Profits of Law Partners	\$151,714	\$264,128 <sup>a</sup>	+74.1%	\$366,602
Top 25 Law School Senior Professors	\$153,809 <sup>b</sup>	\$330,000	+114.6%	\$451,883
Top 25 Law School Deans	\$219,728 <sup>b</sup>	\$430,000	+95.7%	\$412,085
State Supreme Court Associate Justices	\$135,175 <sup>c</sup>	\$140,150	+3.7%	\$218,361

<sup>51</sup> National Center for State Courts, *Survey of Judicial Salaries*, vol. 2, no. 3 (Jan. 1976). Available at [[http://www.ncsconline.org/WC/Publications/KIS\\_JudComJudSal010176.pdf](http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal010176.pdf)].

**Source:** Data for salary of district court judges derived from Federal Judicial Center, available at [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)]. See notes to **Table 1** for additional details. Average wages are calculated by totaling the compensation (wages, tips, and the like) subject to federal income taxes, as reported by employers on Form W-2 and dividing by the number of wage earners for whom data are reported. Data are available at [<http://www.ssa.gov/OACT/COLA/AWI.html>]. For lawyers, the 1969 data are derived from Richard H. Sander and E. Douglass Williams, “Why Are There So Many Lawyers?: Perspectives on a Turbulent Market,” *Law & Social Inquiry*, vol. 14, no. 3. (Summer, 1989), p. 448. The 2006 data are from U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Occupational Wages in the United States, June 2006*, p. 7. Available at [<http://www.bls.gov/ncs/ocs/sp/ncbl0910.pdf>]. Profits of law firm partners are calculated from Department of the Treasury, Internal Revenue Service, *Statistics of Income 1969: Business Income Tax Returns*, Publication 438 (10-72), 1972, p. 106. Value calculated by dividing net profit by number of partners for legal services partnerships with and without net profit. For 2004 data, see Department of Treasury, Internal Revenue Service, *Statistics of Income 1994: Business Income Tax Returns*. Available at [<http://www.irs.gov/pub/irs-soi/04pa01.xls>]. Value calculated by dividing ordinary business income by number of partners for legal services. Data for law school professors and deans provided by Administrative Office of the U.S. Courts, available at [<http://www.uscourts.gov/judicialcompensation/factsheetcharts.html>]. “Top 25” law schools are according to the ratings provided by *U.S. News and World Report* (current rankings available at [[http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank\\_brief.php](http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php)]). Data for state supreme court associate justices derived from National Center for State Courts, *Survey of Judicial Salaries*, available at [[http://www.ncsconline.org/WC/Publications/KIS\\_JudComJudSalArchives.html](http://www.ncsconline.org/WC/Publications/KIS_JudComJudSalArchives.html)]. All figures adjusted for inflation using CPI Inflation Calculator at [<http://data.bls.gov/cgi-bin/cpicalc.pl>].

- a. Data from 2004 are adjusted to 2006 dollars using CPI Inflation Calculator. Doing so assumes no real wage growth in 2005 or 2006.
- b. Data from 1969 are for Harvard Law School only.
- c. The earliest available data for associate justices of state supreme courts are from 1976, not 1969. Data from 1976 are adjusted to 2006 dollars using CPI Inflation Calculator. Doing so assumes no real wage growth from 1969 to 1976.

## “De-linking” Congressional and Judicial Salaries

Related to the issue of judicial salary is the relationship between the salaries of federal judges and Members of Congress.<sup>52</sup> To argue that judicial and congressional salaries are “linked” might create the mistaken impression that judicial and congressional (and executive salaries, as Executive Level II salaries are also “linked” at the same level) all must move at precisely the same rate. Such an impression is only partially correct. “There is no constitutional or statutory requirement (other than the provision of law establishing the [Citizens’ Commission on Public Service and Compensation]) that the salaries of federal executive branch officials and federal justices and judges be limited by the salaries of Members of Congress, or that Member pay be limited by the salaries of these federal executive and judicial officials.”<sup>53</sup> Unlike adjustments to Executive Schedule (EX) and congressional salaries, which take effect under the Ethics Reform Act of 1989 unless Congress acts to block them, adjustments to judicial salaries require affirmative action by Congress in order to be raised. The Further Continuing Appropriations for Fiscal Year 1982

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<sup>52</sup> See, e.g., Wheeler and Greve, “How to Pay the Piper.”

<sup>53</sup> CRS Report RS20388, *Salary Linkage: Members of Congress and Certain Federal Executive and Judicial Officials*, by Barbara L. Schwemle. See also CRS Report RL33245, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, by Barbara L. Schwemle.

Act requires that any increase in the salaries of judges and justices be “specifically authorized by Act of Congress hereafter enacted.”<sup>54</sup> Congress did not enact the recommended 1.7% pay increase for federal judges for calendar year 2007; S. 197, which would provide the increase effective January 1, 2007, passed the Senate by unanimous consent on January 22, 2007. The House has thus far taken no action on the bill. The legislation is currently pending before the Courts, Internet, and Intellectual Property Subcommittee of the House Judiciary Committee.

While there is no statutory linkage between congressional and judicial salaries, the recommended annual increase is the same for members of Congress, Executive Schedule (EX) employees, and federal judges. Until 2007, Congress enacted the same increase for congressional, judicial, and EX salaries. Under the Ethics Reform Act of 1989, the annual salary adjustments of Members of Congress, the Vice President, persons employed on the Executive Schedule (EX), and federal judges are based on the Employment Cost Index (ECI) for private industry wages.<sup>55</sup> Specifically, salary adjustments reflect the December-to-December change in the ECI, reduced by 0.5%.<sup>56</sup> An additional statute restricts the rate of adjustment for judicial, congressional, and executive officials whose salaries are covered by the Ethics Reform Act of 1989 to being no greater than the rate of adjustment for the base pay of General Schedule (GS) employees.<sup>57</sup>

Those who refer to judicial and congressional salaries as “linked” correctly point to the fact that the annual recommended salary adjustment (the December-to-December change in the ECI, reduced by 0.5%) is the same for federal judges, Members of Congress, and EX employees. But the process by which the annual adjustment is enacted into law differs for the three sets of officials. For EX employees and Members of Congress, the recommended adjustment takes place unless Congress acts to block the increase. Since enactment of the Ethics Reform Act of 1989, Congress has blocked enactment of the increase for EX employees and Members of Congress in 1994, 1995, 1996, 1997, and 1999. In 2007, Congress blocked enactment of the increase for Members of Congress, but not for EX employees. The 2007 decision by Congress to not adjust congressional or judicial salaries, but to allow EX salaries to increase, represented the first time since enactment of the Ethics Reform Act of 1989 that EX Level II employees, Members of Congress, and federal district court judges have received different salaries. As a result, in 2007, EX Level II employees (deputy secretaries of departments, secretaries of military departments, and heads of major agencies) received salaries of \$168,000, while Members of Congress and district court judges received salaries of \$165,200.

In 2008, EX Level II employees, federal judges, and Members of Congress will receive a cost-of-living adjustment of 2.5% to their 2007 salaries. For EX Level II

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<sup>54</sup> P.L. 97-92, § 140.

<sup>55</sup> CRS Report RL33245, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, by Barbara L. Schwemle.

<sup>56</sup> *Ibid.* See 28 U.S.C. § 461(a)(1).

<sup>57</sup> CRS Report RL33245, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, by Barbara L. Schwemle. See 28 U.S.C. § 461(a)(2).

employees, the 2008 salary rate is \$172,200<sup>58</sup> and Members of Congress and district court judges will receive a 2008 salary of \$169,300.

Because the mechanisms by which the salary recommendations for EX employees, Members of Congress, and federal judges are enacted differ, it may not be accurate to label those salaries as “linked,” to the extent that term implies that the salaries can only move together. It may be more accurate to label the practice of providing Members of Congress, federal district judges, and EX Level II employees the same salaries as “pay parity.”

**Effect of Pay Parity on Judicial Salaries.** Advocates of abandoning parity in judicial and congressional salaries contend that the rise of judicial salaries has slowed since they were statutorily linked to the salaries of Members of Congress.<sup>59</sup> The relationship between pay parity and salary growth, however, is complex.<sup>60</sup> Between 1955 and 1986, a period when Congress, in statutorily increasing judicial salaries, did not link those salaries to its own levels, real salaries of district court judges fell by 14.5% (0.5% per year),<sup>61</sup> to \$144,762 in 1986 from \$169,254 in 1955. Between 1987 and 2006, the real value of judicial (and congressional) salaries rose 5.9% (0.3% per year), to \$165,200 in 2006 from \$156,007 in 1987.<sup>62</sup> Based on this evidence, it appears that judicial salaries to date have actually risen more under pay parity than absent a congressional practice of equal salary for Members of Congress and federal district judges.

This finding is reinforced by accounting for wage growth among all workers over the same time periods. Over the 1955-2006 time period, judicial salaries fared better relative to all wage earners, on average, when they were equal to the salaries of Members of Congress than when judicial salaries were not necessarily equal to

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<sup>58</sup> See “Salary Table 2008-EX” at [<http://www.opm.gov/oca/08tables/html/ex.asp>].

<sup>59</sup> See, e.g., Wheeler and Greve, “How to Pay the Piper.”

<sup>60</sup> Congress set the salaries of Members of Congress and district judges at the same rate (\$89,500) starting in 1987, though the current process for recommending salary adjustments was not enacted until 1989. At the time of enactment of the Ethics Reform Act of 1989, the salaries of Members and district judges were the same. The provision of the Ethics Reform Act of 1989 dictating the method for calculation of annual adjustments to be the same for Members and district judges, and Congress’s decisions since 1989 to not block increases in congressional salaries and, at the same time, allow increases in judicial salaries, has left the salaries equal in every year since 1987.

<sup>61</sup> The translation from overall to annual percentage increases and decreases relies on the formula for computing simple interest:  $S=P(1+rt)$ , where  $S$ =future value,  $P$ =present value,  $r$ =rate, and  $t$ =time. The formula was then solved for  $r$ .

<sup>62</sup> This calculation should be interpreted with caution given its starting and ending points. The choice of 1955 as a baseline was discussed above; also, as discussed above, the 1986 salaries of federal judges were the lowest real salaries over the 1955-2006 time period. Between 1955 and 1986, wage earners nationwide experienced a real increase of 28%, or 0.9% per year. Real wages for all workers rose by \$7,027 (to \$31,862 from \$24,835 in 2006 dollars). See National Average Wage Indexing Series at [<http://www.ssa.gov/OACT/COLA/AWI.html>]; nominal values were adjusted for inflation using the Bureau of Labor Statistics CPI Inflation Calculator at [<http://data.bls.gov/cgi-bin/cpicalc.pl>].

those of Members of Congress. Between 1955 and 1986, the real value of the National Average Wage Index increased by 28% (0.9% per year); the real value of the National Average Wage Index increased by 16.6% (1.0% per year) between 1987 and 2006.<sup>63</sup> Relative to all wage earners, judicial salaries fell by about 1.4% per year between 1955 and 1986 (0.5% decline per year for judges compared to 0.9% increase per year for all wage earners). After 1989, judicial salaries fell about 0.7% per year relative to all wage earners (0.3% increase per year for judges compared to 1.0% increase per year for all wage earners).

**Effect of Pay Parity on Congressional Salaries.** The growth of congressional salaries has slowed more than the growth of the salaries of federal judges since the two salaries have been equal. Between 1955 and 1986, the real salaries of Members of Congress fell from \$156,716 to \$138,140, an 11.9% (0.4% per year) decrease in real salary. Salaries of Members of Congress, like those of federal judges, have risen 0.3% per year since 1987 (as noted above, the real salaries of federal judges fell 0.5% per year between 1955 and 1986). Salary linkage, then, appears to have increased the growth of congressional salaries (to 0.3% per year increase from 0.4% per year decrease) slightly *less* than linkage has increased the growth of judicial salaries (to 0.3% per year increase from 0.5% per year decrease).

**Arguments For and Against Pay Parity.** Should Congress choose to raise the salaries of federal judges or change how the salaries of federal judges are set, it could consider ending the practice of parity of congressional and judicial salaries and allow them to increase at different rates. The primary argument against pay parity is that the practice holds back judicial salaries:

For 20 years, legislators have matched their salaries to those of United States district judges and deputy cabinet secretaries. They hoped that coupling their own compensation with that of officials less in the public eye would salvage legislative salary increases despite voter hostility. However, Congress has still been reluctant to increase its salaries (compared to, say, average worker wage gains). Thus, linkage has not produced the benefits legislators anticipated for their own salaries, and at the same time, it has held back less controversial salary increases for judges and executives.<sup>64</sup>

There are at least two arguments in favor of pay parity. First, some Members of Congress believe that their work is equal to that of federal district judges and, accordingly, that both should receive the same salary. As Representative F. James Sensenbrenner has argued,

I am one of those that believes that when you're dealing with constitutional officers of the government in all three branches — and you and we are — there should be some type of comparability in compensation since the branches are separate and co-equal....And I think the real question that has to be answered is

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<sup>63</sup> The real value (2006 dollars) of the National Average Wage Index in 1955 was \$24,835; in 1986, it was \$31,862; in 1987, it was \$32,701; in 2006, it was \$38,145. The National Wage Index provides data from 1951 to 2005; the 2006 value was calculated by adjusting the 2005 value for inflation, in effect assuming no real wage growth from 2005 to 2006.

<sup>64</sup> Wheeler and Greve, "How to Pay the Piper."



not whether you deserve more pay or you don't deserve more pay, but are the duties and responsibilities and time involved in discharging the duties of a federal district judge worth that much more than the duties, responsibilities and time involved in being a member of the House of Representatives, or a United States Senator.<sup>65</sup>

The second argument for linkage is more pragmatic; Members of Congress may favor pay parity as a mechanism to justify raising their own salaries.<sup>66</sup> Before 1987, Congress tended to increase judicial salaries first and follow those increases by raising the salaries of Members. Since 1928 (and with the exception of the period from 1969 to 1978, when salaries for Representatives and Senators exceeded those of district judges), salaries of district judges have generally risen before the salaries of Representatives and Senators. Were Congress to de-link salaries, one might expect a resumption of the pattern of judicial salaries rising first, followed by congressional salaries. This pattern would mean Members of Congress might have to consider their own salary increases as separate legislative items (rather than as part of a broader salary package for officials across all three branches of government).

Pay parity is an important component of the debate over the salaries of federal judges; should Congress decide to address the issue of judicial salary, it could choose to consider the advantages and disadvantages of the practice of paying federal district judges and Members the same salary. The three pieces of legislation introduced in the 110<sup>th</sup> Congress that offer substantial increases in the salaries of federal judges — H.R. 3753, S. 1638, and S. 2353 — would, if enacted, end the practice of parity between congressional and judicial salaries, as none currently contain language increasing congressional salaries.

## Locality Pay

Federal judges have, since 1891, been paid the same salaries regardless of the location of their chambers or residences.<sup>67</sup> In contrast, General Schedule federal employees across the country receive different salaries that depend on the location of their duty station. Those who argue for higher salaries for federal judges often, implicitly or explicitly, express concern that the same salary for all federal judges can hamper the ability to recruit candidates for federal judgeships in areas of the country where the cost of living is higher. For example, Justice Antonin Scalia reportedly noted, in a December 2006 speech, “if you become a federal judge in the Southern District of New York, you can't raise a family on what the salary is.”<sup>68</sup>

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<sup>65</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, *Oversight Hearing on Federal Judicial Compensation*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., April 19, 2007 (not yet printed) CQ Congressional Transcripts. Available at [<http://www.cq.com/committees.do>].

<sup>66</sup> Wheeler and Greve, “How to Pay the Piper.”

<sup>67</sup> Judicial salaries before 1891 were based on the amount of work that Congress anticipated federal judges in the different locations would perform. See [[http://www.fjc.gov/history/home.nsf/page/dc\\_bdy](http://www.fjc.gov/history/home.nsf/page/dc_bdy)].

<sup>68</sup> Matthew Barakat, “Scalia Argues for Better Judicial Pay,” *Associated Press*, Dec. 13, (continued...)

Congress might wish to consider taking into account the cost of living in different regions of the country when determining the salaries that federal judges and justices receive. Such action has historical precedent; before 1891, Congress regularly paid different salaries to judges serving in different districts; in Illinois, for example, judges on the Northern District of Illinois were paid an annual salary of \$4,000 from 1867 to 1890; over the same time period, judges on the Southern District of Illinois were paid an annual salary of \$3,500.<sup>69</sup>

Locality pay for General Schedule employees is based on duty station, or where the employee is assigned to work, and not residence. That may create unexpected difficulties as applied to the judiciary, as judges have some freedom to choose where to locate their chambers. Within a given judicial district or circuit, the judicial council of each circuit may assign district judges to a particular location within each district.<sup>70</sup> Circuit judges have greater latitude on where to locate their chambers and typically travel to the same location (usually the location of the courthouse for the circuit court, though panels occasionally hear cases at other courthouses in the circuit and at other locations, including law schools) to hear oral arguments for one or two weeks each month. Granting locality pay to judges may concentrate judges' chambers in different areas of each district or circuit. For example, the Northern District of Illinois has an Eastern Division (with a courthouse in Chicago) and a Western Division (with a courthouse in Rockford). If Congress were to adopt the same locality pay areas used by the Office of Personnel Management,<sup>71</sup> judges with chambers in Chicago would be paid more than judges with chambers in Rockford, and judges whose chambers are in Rockford might seek to move their chambers to Chicago, a higher-paying locality within the same judicial district.

Congress might choose to address this matter in several ways. First, it could choose to do nothing. Second, it might choose to allocate judgeships within the divisions of each district. Current federal law establishing the boundaries of the U.S.

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<sup>68</sup> (...continued)

2006. As of Oct. 23, 2007, 40 of the 44 active and senior judges in the Southern District of New York had chambers in Manhattan; the remaining four had chambers in White Plains.

<sup>69</sup> Federal Judicial Center, "Federal Judicial History: Salaries U.S. District Court by State." Available at [[http://www.fjc.gov/history/home.nsf/page/salaries\\_USDC\\_states](http://www.fjc.gov/history/home.nsf/page/salaries_USDC_states)]. Illinois added an Eastern District in 1905 (33 Stat. 992) and Congress reorganized the federal judicial districts into their current configuration of Northern, Central, and Southern Districts in 1978 (92 Stat. 883).

<sup>70</sup> 28 U.S.C. § 134 (c) reads: "If the public interest and the nature of the business of a district court require that a district judge should maintain his abode at or near a particular place for holding court in the district or within a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the district judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such an order the judicial council of the circuit may decide which of them shall do so."

<sup>71</sup> Office of Personnel Management, "Locality Pay Area Definitions." Available at [<http://www.opm.gov/oca/07tables/locdef.asp>].

district courts<sup>72</sup> dictates the counties which fall in each district and the locations at which courts may be held. Congress might choose to allocate judgeships among the divisions in a given district, which would limit the locations where judges may place their chambers. Congress might also consider specifying the location of chambers of court of appeals judges, who may place their chambers anywhere within the circuit to which they are appointed.<sup>73</sup> Third, Congress might choose to offer the same pay to every judge within a given district or circuit. Doing so, particularly for circuit judges, may limit the effectiveness of locality pay because the geographical size of some of the circuits is so large. Fourth, Congress might adopt a form of locality pay that is not tied directly to the Office of Personnel Management's locality pay structure and better reflects the boundaries of judicial districts and the divisions within those districts.

## Revising Retirement Benefits

Federal judges who resign forgo judicial retirement, and it may be the case that candidates for federal judgeships decline the opportunity to be nominated, in part, because the salary and other compensation offered to federal judges cannot equal those available to lawyers who remain in private practice. If Congress wishes to address this issue, it might consider altering how federal judges qualify for judicial retirement.

Judicial retirement is available to federal judges who meet the criteria of the Rule of 80 and entitles federal judges to an annuity equal to their salary at the time of their retirement when they depart active duty. Judges who take senior status continue to receive the cost-of-living adjustments Congress authorizes for active federal judges; since 1989, senior status judges have had to handle a caseload (or, since 1996, comparable administrative work) equal to that of one-fourth of the work of active judges in a given district or circuit in order to remain on senior status.<sup>74</sup>

The retirement provisions for federal judges are generous relative to those for other federal government positions in that very few other federal government positions offer a retiree with as few as 10 years of service an annuity equal to the employees' salary upon retirement.<sup>75</sup> Any offer less generous to federal judges might discourage federal judges from departing the bench while they are still healthy; Congress first enacted judicial retirement provisions to encourage judges to depart

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<sup>72</sup> 28 U.S.C. §§ 81-131.

<sup>73</sup> 28 U.S.C. § 44 (c) imposes two restrictions on the residence (not the location of chambers) of judges of the courts of appeals: that they reside within the circuit (or, in the case of the D.C. Circuit Court of Appeals and the Court of Appeals for the Federal Circuit, within 50 miles of the District of Columbia) and that "there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit."

<sup>74</sup> 28 U.S.C. § 371. The 1989 amendments can be found at P.L. 101-194, 103 Stat. 1770 (Nov. 30, 1989); the 1996 amendments can be found at P.L. 104-317, 110 Stat. 3851 (Oct. 19, 1996).

<sup>75</sup> For a comparison to the retirement benefits of members of Congress, see CRS Report RL30631, *Retirement Benefits for Members of Congress*, by Patrick Purcell.

while they retained their health.<sup>76</sup> Any other provision (e.g., a mandatory retirement age for federal judges) would violate the Constitution's provision that judges may serve "during Good Behaviour" and may only lose their positions after impeachment by the House and conviction by the Senate.

Current retirement provisions may be seen as generous from the perspective of judges who have qualified for them, but may be seen as difficult to attain for federal judges who face decisions about their financial futures before they are eligible for retirement or senior status. Judge Paul G. Cassell, who resigned from the U.S. District Court for the District of Utah in 2007, noted the issue of judicial pay in his resignation letter:

I would like to ensure that my children will have the same educational opportunities that I had. How to achieve that within the constraints on current judicial pay is more than a difficult task. My wife and I have concluded that we may not be able to do what we have always planned to do unless I make some changes.<sup>77</sup>

If Congress were concerned that potential federal judges bypass the opportunity to serve as judges due to financial concerns, it could allow federal judges to earn partial retirement after serving a certain period of time. The current system provides judicial retirement under an "all-or-nothing" premise: judges either qualify for judicial retirement, at the equivalent of full salary, or they do not. Congress may consider allowing federal judges to receive a percentage of their annual salary if they choose to resign or retire before qualifying for the Rule of 80. Doing so might increase the number of people who express interest in serving as federal judges, but might also increase the number of judges who depart office in mid- or late-career to seek additional income from a job elsewhere in the federal government, in the private sector, or in academia.

Of the legislation currently pending in Congress, H.R. 3753, as ordered reported by the House Judiciary Committee, makes several changes to the system of judicial retirement; none of the other pending pieces of legislation change judicial retirement provisions. While leaving in place the "Rule of 80" for judges to take senior status, H.R. 3753 and S. 1638 would require federal judges to meet a new "Rule of 84" if they wished to retire. The Rule of 84 works much like the Rule of 80, as federal judges' age and years of service would have to add to 84 (starting with 67 years of age and 17 years of service, ranging to 72 years of age and 12 years of service) in order to retire and receive an annuity equal to the salary they were receiving at the time they retired. Under S. 1638 and H.R. 3753, federal judges who retire and find other employment would have their annuities reduced if their earned income exceeds their annuity; for every \$2 their earned income exceeds their annuity each year, the

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<sup>76</sup> See, e.g., Artemus Ward, *Deciding to Leave: The Politics of Retirements from the United States Supreme Court* (Albany: State University of New York Press), p. 73. The first retirement provision for Supreme Court justices was part of the larger Judiciary Act of 1869 (16 Stat. 44, Apr. 10, 1869).

<sup>77</sup> Letter from Judge Paul G. Cassell, U.S. District Court for the District of Utah, to President George W. Bush, Sep. 21, 2007. Accessed at [[http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/cassell\\_presidentresign920fix.rtf](http://sentencing.typepad.com/sentencing_law_and_policy/files/cassell_presidentresign920fix.rtf)].

annuity would be reduced by \$1. This reduction would stop once it had reached 67%, so all retired federal judges would receive at least 33% of their annuity.

## Survivor Benefits

Under the Judicial Survivors' Annuities System (JSAS), "a judge's eligible spouse, former spouse, and/or dependent children are entitled to a survivor's annuity if a judge dies while in office or while receiving retirement compensation."<sup>78</sup> As of 1999, active and senior status judges contributed 2.2% of their salary, and retired judges contributed 3.5% of their retirement annuity, to the JSAS if they elected to participate.<sup>79</sup> Judges who do not elect to participate receive no survivor benefit. A judge's survivors are eligible for an annuity between 25% and 50% of the judge's average annual salary, depending on how long the judge participated in the JSAS.

If Congress elects to consider revising the JSAS system, it might consider the survivor benefits available to other federal employees under FERS and CSRS, and the contributions made by employees under those programs, as a starting point. Federal employees covered by FERS do not elect to participate and do not pay any salary to qualify for survivor benefits. Covered federal employees under FERS and CSRS, however, make contributions to retirement annuities and to any optional retirement savings (including the Thrift Savings Plan, or TSP).<sup>80</sup>

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<sup>78</sup> Administrative Office of the U.S. Courts, *Senior Status and Retirement for Article III Judges*, Judges Information Series No. 4 (Washington: Administrative Office of the U.S. Courts, April 1999), p. 27.

<sup>79</sup> 28 U.S.C. § 376 (b)(1).

<sup>80</sup> Specifically, current federal employees covered by the Federal Employees Retirement System (FERS) have a survivor benefit equal to 50% of their annual basic pay plus a lump sum payment (\$27,461 in 2007; the value is adjusted annually at the same rate the Consumer Price Index changes). Surviving spouses of federal employees with at least 10 years of service receive a lump sum and an annuity equal to 50% of the annuity that the employee has earned at the time of his or her death. Retired federal employees who have joint and survivor annuities may choose to reduce their annuities by 10% in order to guarantee a survivor benefit equal to 50% of their annuity (before the 10% reduction) should they die before their spouses. Retired federal employees may also choose to reduce their annuities by 5% in order to guarantee a survivor benefit equal to 25% of their annuity (before the 5% reduction). Federal employees hired into permanent federal employment on or after Jan. 1, 1984, are covered by FERS, as are employees working before that date who opted to be covered by FERS; different retirement benefits apply to federal employees covered by the Civil Service Retirement System (CSRS). CRS Report RS21029, *Survivor Benefits for Families of Civilian Federal Employees and Retirees*, by Patrick Purcell.

## Outside Income Limits

The Ethics Reform Act of 1989 imposed limits on the amount of outside income federal judges may earn.<sup>81</sup> The Ethics Reform Act limits government officials whose position is classified above GS-15 of the General Schedule (or, for positions outside the General Schedule, those positions where the base pay equals or exceeds 120% of the minimum pay for GS-15) from having outside earned income exceeding “15 percent of the annual rate of basic pay for Level II of the Executive Schedule.”<sup>82</sup> In 2008, federal employees covered by this provision, including federal judges, may earn no more than \$25,830 in outside income.<sup>83</sup> Federal officials, including federal judges, are also not permitted to receive honoraria for speeches, appearances, or articles. Federal judges are also expected to comply with the Code of Judicial Conduct. In particular, judges are permitted to engage in extra-judicial activities that improve the administration of justice, but are expected to avoid extra-judicial activities that may create risk of conflict with judicial duties. Perhaps most relevant, the Code of Judicial Conduct creates an expectation that judges regularly report outside compensation for law-related and extra-judicial activities.<sup>84</sup>

Before 1989, there was no restriction on the amount of outside earned income federal judges could earn. This freedom may have allowed federal judges to supplement their salaries, but it also caused considerable controversy. Controversy surrounding outside income adversely affected the unsuccessful nomination of Abe Fortas to be Chief Justice in 1968 and played a secondary role in the failed nomination of Clement Haynsworth to be an Associate Justice of the Supreme Court in 1969.<sup>85</sup>

Congress might choose to consider altering the limits on how much outside income federal judges may earn. Easing the limits might encourage federal judges to remain in active service for longer periods of time and may encourage individuals to serve in the federal judiciary who were otherwise reluctant to do so.

Congress might also choose to leave the restrictions on outside income in place. It does not appear that the imposition of outside income limits in 1989 caused federal judges to depart in numbers that exceeded historical patterns. According to the data

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<sup>81</sup> The outside earned income restrictions of the Ethics Reform Act do not apply to Supreme Court justices. S. 1638, as reported by the Senate Judiciary Committee, would apply those limits to Supreme Court justices.

<sup>82</sup> 5 U.S.C. App. § 501(a). Federal judges who have retired from active service may receive income from teaching that is not subject to the 15% limitation. See 5 U.S.C. App. § 502(b).

<sup>83</sup> Several forms of compensation, including deferred compensation and funds received from investments that do not require “significant personal services,” are not considered to be “outside income.” See “Commentary” on 5 U.S.C. App. §§ 501-505 at [[http://www.uscourts.gov/library/conduct\\_outsideemployment.html](http://www.uscourts.gov/library/conduct_outsideemployment.html)].

<sup>84</sup> Code of Judicial Conduct for United States Judges. Available at [<http://www.uscourts.gov/guide/vol2/ch1.html>].

<sup>85</sup> John P. Frank, “Conflict of Interest and U.S. Supreme Court Justices,” *The American Journal of Comparative Law*, vol. 18, no. 4 (Autumn 1970), pp. 753-759.

presented in **Figures 2 and 3**, above, imposition of the restrictions on outside income did not appear to affect the number of judges who resigned or the number of judges who retired rather than taking senior status. The proportion of judges who left active service by resignation was lower between 1989 and 1992 than between 1985 and 1988; the proportion of judges who retired rather than taking senior status rose slightly between 1985-1988 and 1989-1992 (to 5.41% from 4.95%) following enactment of the outside income limits in the Ethics Reform Act of 1989.

S. 1638, as reported by the Senate Judiciary Committee, would limit the reimbursable seminar-related travel for federal judges to \$2,000 per trip and \$20,000 per year, with exceptions for events approved by the State Department and those sponsored by the federal government, state governments (not including public educational institutions), bar associations, and the National Judicial College. S. 1638 would also prohibit the acceptance of honorary memberships valued at more than \$50 per year, and apply the regulations of the Judicial Conference on outside earned income to justices of the U.S. Supreme Court.

### **Citizens' Commission on Public Service and Compensation**

The Ethics Reform Act of 1989 created the Citizens' Commission on Public Service and Compensation that was designed to replace the Quadrennial Commission (which was composed of individuals from the private sector who recommended salary levels for Members of Congress, federal judges, and several executive branch officials).<sup>86</sup> The Citizens' Commission was to consist of 11 private citizens who would meet once every four years and recommend to the President the rates of pay for Members of Congress, the Vice President, Executive Schedule Level II employees, federal judges and justices, and governors of the Federal Reserve.<sup>87</sup> The President was to review the recommendations of the commission and then transmit his own recommendations, which would be based on what "the President considers to be fair and reasonable in light of the Commission's report and recommendations, the prevailing market value of the services rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government."<sup>88</sup> Those recommendations would then be considered by Congress. This process was intended to augment the method by which annual pay adjustments are made (the December-to-December change in the Employment Cost Index, less 0.5%).

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<sup>86</sup> The Quadrennial Commission was created in 1967. One of the primary differences between the system in place between 1967 and 1989 and the Citizens' Commission was that, in the earlier arrangement, the recommendations made by the President (after reviewing the Quadrennial Commission's recommendations) went into effect unless Congress stopped them from doing so. By contrast, recommendations made by the President after reviewing the Citizens' Commission recommendations would go into effect only if Congress approved them.

<sup>87</sup> 2 U.S.C. § 356.

<sup>88</sup> 2 U.S.C. § 358 (1).

The Citizens' Commission on Public Service and Compensation, however, has never met.<sup>89</sup> Accordingly, neither the President nor Congress has had the recommendations of the Citizens' Commission to structure discussion on salary for certain federal employees (including federal judges). Congress may wish to convene the Citizens' Commission to guide its deliberations on judicial salaries and the salaries of other federal officials. If Congress were to convene the Citizens' Commission, salary recommendations would be regularly presented to Congress by the President, with the intent of regular increases in salary. In a 2002 letter to Paul Volcker, chairman of the National Commission on Public Service, L. Ralph Meacham, director of the Administrative Office of the U.S. Courts, argued that Congress and the President intended for the Citizens' Commission, created as part of the Ethics Reform Act of 1989, to "provide top government officials with regular increases that would alleviate the future need for major 'catch up' adjustments of the type enacted in 1989."<sup>90</sup> Meacham further argued that the failure of the commission to meet meant that "Judges (as well as other high-level government officials) have received only four cost-of-living salary adjustments since January 1993. What this means is that since 1993 [until 2002], the annual cost-of-living salary adjustments for these officials have averaged only about one percent."<sup>91</sup>

## **Automatic Adjustments for Judicial Salary**

Congress might also choose to consider changing how cost-of-living adjustments are made to judges' salaries. The annual automatic recommendation for salaries of Members of Congress and federal judges is the December-to-December change in the Employment Cost Index for private-sector wages, reduced by 0.5%. In addition, the rate of adjustment for judicial, congressional, and executive officials whose salaries are covered by the Ethics Reform Act of 1989 can be no greater than the rate of adjustment for General Schedule (GS) employees.<sup>92</sup> Under current law, Congress must enact legislation each year to allow judges' salaries to change.<sup>93</sup> The salaries of Members of Congress, on the other hand, increase unless Congress acts to prevent the scheduled increase from taking effect.<sup>94</sup> Congress, however, might consider changing the law, to allow judges' salaries to increase automatically without the requirement of an authorization by Congress for each such increase.

Doing so might allow judicial salaries to increase more frequently than they have since the current method of recommending and adopting judicial and

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<sup>89</sup> Congress never appointed its members to the commission and no money has been appropriated for the Commission. Letter from L. Ralph Meacham, director, Administrative Office of the U.S. Courts, to Paul Volcker, chairman, National Commission on Public Service, June 14, 2002. Available at [<http://www.uscourts.gov/newsroom/Volcker.pdf>].

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* Parentheses in original.

<sup>92</sup> P.L. 101-194, 103 Stat. 1769 (Nov. 30, 1989).

<sup>93</sup> P.L. 97-92 § 140, 95 Stat. 1200 (Dec. 15, 1981), amended by P.L. 107-77, 115 Stat. 803 (Nov. 28, 2001). See 28 U.S.C. § 461 note.

<sup>94</sup> P.L. 101-194, 103 Stat. 1769. (Nov. 30, 1989).



congressional salaries was implemented in 1989. Changing the mechanism by which judicial salaries are adjusted to account for changes in cost-of-living, however, might not translate into more frequent increases in judicial salary, if Congress chooses to continue the practice of pay parity between judicial and congressional salaries. Should Congress choose to continue this practice, and should Congress occasionally choose to reject recommended adjustments to congressional and judicial salaries, judicial salaries will likely continue to fall relative to the salaries of private-sector workers.

H.R. 3753, as reported by the House Judiciary Committee, and S. 1638, as reported by the Senate Judiciary Committee, would raise judicial salaries each year by the base rate increase given to General Schedule employees. Doing so would effectively automate the process by which federal judges currently receive cost-of-living adjustments, as the default adjustment to the General Schedule is the December-to-December change in the Employment Cost Index, less 0.5%,<sup>95</sup> though the President may adjust this recommendation.<sup>96</sup>

## Legislation in the 110<sup>th</sup> Congress

Four pieces of legislation pending in the 110<sup>th</sup> Congress deal with judicial salary. S. 197, passed by the Senate on January 8, 2007, and pending before the House, authorizes the enactment of the 1.7% increase in judicial salary that was recommended under the procedures outlined in the Ethics Reform Act of 1989.

Three other pending pieces of legislation — S. 1638, S. 2353, and H.R. 3753 — would provide federal judges with much larger raises. **Table 3** provides a side-by-side comparison of the three pieces of legislation.

**Table 3. Side-By-Side Comparison of Current Federal Judicial Salaries and Proposed Salaries Under S. 1638, S. 2353, and H.R. 3753 (110<sup>th</sup> Congress)**

Judges	Current Salary	S. 2353 (% Increase over Current)	H.R. 3753 and S. 1638 (% Increase over Current)
District Court Judges	\$169,300	\$197,200 (16.5%)	\$218,000 (28.8%)
Court of International Trade Judges	\$169,300	\$197,200 (16.5%)	\$218,000 (28.8%)
Court of Appeals Judges	\$179,500	\$209,100 (16.5%)	\$231,100 (28.7%)

<sup>95</sup> 5 U.S.C. § 5303 (a).

<sup>96</sup> 5 U.S.C. § 5303 (b).

Judges	Current Salary	S. 2353 (% Increase over Current)	H.R. 3753 and S. 1638 (% Increase over Current)
Supreme Court Associate Justices	\$208,100	\$242,400 (16.5%)	\$267,900 (28.7%)
Chief Justice	\$217,400	\$253,300 (16.5%)	\$279,900 (28.7%)

**Source:** Data for current salaries provided by the Federal Judicial Center, available at [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)]. Data for proposed salaries from text of legislation. Percentage increases for S. 1638 and H.R. 3753 vary across positions due to rounding. The salary levels were established relative to 2007 salaries, which increased by 2.5% in 2008.

If adopted, the new salary levels proposed by S. 1638 and H.R. 3753 would be the highest real salaries federal judges have received since at least 1913. In 1969, currently the year with the highest real salaries for federal judges since at least 1913, district court judges received real salary of \$210,570; court of appeals judges received a real salary of \$222,018.<sup>97</sup> Without endorsing any specific proposals, the Bush Administration has indicated its support for raising judicial salaries.<sup>98</sup>

S. 2353, which has been referred to the Senate Judiciary Committee, provides immediate increases in salary to federal judges; however, it makes no other changes to the compensation practices for federal judges. H.R. 3753, as ordered reported by the House Judiciary Committee, and S. 1638, as reported by the Senate Judiciary Committee,<sup>99</sup> allow for annual salary adjustments for federal judges equal to the change in the base rate of pay for General Schedule employees. H.R. 3753 and S. 1638 would also change the workload of judges in senior status, requiring that they perform the equivalent of four months of the work of an active judge in a given year, whereas the current requirement is a work equivalent of three months a year. H.R. 3753 and S. 1638 also include two changes to retirement (as opposed to senior status). While federal judges will still be able to take senior status under the Rule of 80, eligibility to retire will be governed by a new Rule of 84, where age and years of service, starting with 67 years old and 17 years of service, must add to 84 for a federal judge to retire and receive an annuity equal to their salary at time of retirement. Judges who retire and whose earned income after retirement exceeds the

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<sup>97</sup> In 1969, the real salary of the associate justices of the Supreme Court was \$310,821; for the Chief Justice of the Supreme Court, the real salary was \$322,725. As noted above, these values are adjusted to reflect that judicial salaries were changed effective March 1, 1969; these values report the amount of salary a federal judge serving in active status in 1969 would have received in salary in the 1969 calendar year. Comparisons to the real values outlined in **Table 1** should keep in mind that the real values may change depending on the effective date of any legislation on judicial salary enacted by Congress.

<sup>98</sup> Letter from Rob Portman, director, Office of Management and Budget, to Rep. John Conyers, chair, House Judiciary Committee, Apr. 19, 2007. Available at [<http://www.uscourts.gov/judicialcompensation/OMBlletter.pdf>].

<sup>99</sup> See U.S. Congress, Senate Committee on the Judiciary, *Federal Judicial Salary Restoration Act of 2008*, report to accompany S. 1638, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 110-277 (Washington: GPO, 2008), 22 p.

amount of their retirement annuity would find that annuity reduced by \$1 for every \$2 they earn above the level of their annuity. This reduction could affect no more than 67% of their annuity, and the calculation is made annually, so the annuity could be restored to its full value if a retired judge stops earning outside income in excess of his or her annuity. S. 1638 also includes a provision that restricts the reimbursable seminar-related travel for federal judges to \$2,000 per trip and \$20,000 per year (these values would be indexed to inflation), with exceptions for events approved by the State Department and those sponsored by the federal government, state governments (not including public educational institutions), bar associations, and the National Judicial College. S. 1638 also limits the acceptance of honorary memberships to those valued at no more than \$50 per year and applies the regulations of the Judicial Conference on outside earned income to justices of the U.S. Supreme Court.

**Appendix 1. Number of Judgeships, Vacancies, Active Judges, Departures from Active Service, and Method of Departure for Article III U.S. District Courts, Court of International Trade, and U.S. Courts of Appeals, 1985-2007**

Year	Judgeships <sup>a</sup>	Vacancies <sup>b</sup>	Total Active Judges <sup>c</sup>	Number of Active Judges Departing Via:				
				Senior Status	Death	Resignation	Retirement	Other <sup>d</sup>
1985	748	102	646	26	3	2	0	0
1986	748	55	693	32	4	1	3	1
1987	748	55	693	18	4	3	2	0
1988	748	48	700	20	6	2	0	0
1989	748	40	708	29	3	3	0	2
1990	833	61	772	24	2	3	1	0
1991	833	125	708	43	1	1	5	0
1992	833	131	702	44	0	1	2	0
1993	833	109	724	23	4	3	0	0
1994	833	100	733	38	3	1	1	0
1995	833	70	763	30	3	0	1	0
1996	831	50	781	55	4	0	3	0
1997	830	93	737	32	0	0	0	0
1998	830	86	744	31	3	0	2	0
1999	839	59	780	23	5	1	1	0
2000	849	76	773	33	4	0	3	0
2001	849	80	769	37	1	3	1	0
2002	849	97	752	23	2	3	2	0
2003	868	60	808	30	7	1	0	0
2004	866	45	821	23	4	1	1	0
2005	866	37	829	27	0	2	1	0
2006	866	49	817	32	2	2	0	0

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Year	Judgeships <sup>a</sup>	Vacancies <sup>b</sup>	Total Active Judges <sup>c</sup>	Number of Active Judges Departing Via:				
				Senior Status	Death	Resignation	Retirement	Other <sup>d</sup>
2007	866	56	810	22	2	3	0	0
<b>Total</b>	—	—	—	<b>695</b>	<b>67</b>	<b>36</b>	<b>29</b>	<b>3</b>

**Source:** CRS analysis of data provided by the Administrative Office of U.S. Courts and the Federal Judicial Center.

- a. Number of judgeships derived from data provided by the Administrative Office of the U.S. Courts.
- b. Number of vacancies as of Jan. 1 of each year.
- c. Number of active judges was calculated by subtracting number of vacancies from number of authorized judgeships.
- d. "Other" departures include judges who were impeached and convicted, and judges whose recess appointment expired without Senate confirmation. Elevations to other positions in the judiciary, including to the Supreme Court, were not considered departures.

### Appendix 2. Nominal and Real Salaries for U.S. District Court and Court of Appeals Judges, 1955-2006

Year	District Court Judges		Court of Appeals Judges		Average Wage Earner	
	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>
1955	\$22,500	\$169,254	\$25,500	\$191,821	\$3,301	\$24,835
1956	\$22,500	\$166,765	\$25,500	\$189,000	\$3,532	\$26,181
1957	\$22,500	\$161,424	\$25,500	\$182,947	\$3,642	\$26,127
1958	\$22,500	\$156,955	\$25,500	\$177,882	\$3,674	\$25,628
1959	\$22,500	\$155,876	\$25,500	\$176,660	\$3,856	\$26,712
1960	\$22,500	\$153,244	\$25,500	\$173,676	\$4,007	\$27,292
1961	\$22,500	\$151,706	\$25,500	\$171,933	\$4,087	\$27,555
1962	\$22,500	\$150,199	\$25,500	\$170,225	\$4,291	\$28,647
1963	\$22,500	\$148,235	\$25,500	\$168,000	\$4,397	\$28,966
1964	\$30,000	\$195,096	\$33,000	\$214,606	\$4,576	\$29,761
1965	\$30,000	\$192,000	\$33,000	\$211,200	\$4,659	\$29,816
1966	\$30,000	\$186,666	\$33,000	\$205,333	\$4,938	\$30,728
1967	\$30,000	\$181,078	\$33,000	\$199,186	\$5,213	\$31,468
1968	\$30,000	\$173,793	\$33,000	\$191,172	\$5,572	\$32,278
1969	\$38,333	\$210,570	\$40,417	\$222,018	\$5,894	\$32,376
1970	\$40,000	\$207,835	\$42,500	\$220,825	\$6,186	\$32,143
1971	\$40,000	\$199,112	\$42,500	\$211,556	\$6,497	\$32,341
1972	\$40,000	\$192,919	\$42,500	\$204,976	\$7,134	\$34,406
1973	\$40,000	\$181,622	\$42,500	\$192,973	\$7,580	\$34,418
1974	\$40,000	\$163,570	\$42,500	\$173,793	\$8,031	\$32,840
1975	\$42,000	\$157,383	\$44,600	\$167,126	\$8,631	\$32,342
1976	\$44,000	\$155,894	\$46,800	\$165,815	\$9,226	\$32,690
1977	\$52,750	\$175,485	\$55,717	\$183,356	\$9,779	\$32,183

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Year	District Court Judges		Court of Appeals Judges		Average Wage Earner	
	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>
1978	\$57,500	\$177,792	\$60,700	\$187,686	\$10,556	\$32,640
1979	\$61,500	\$170,777	\$65,000	\$180,496	\$11,479	\$31,877
1980	\$67,100	\$164,167	\$70,900	\$173,464	\$12,513	\$30,615
1981	\$70,300	\$155,913	\$74,300	\$164,784	\$13,773	\$30,546
1982	\$73,100	\$152,715	\$77,300	\$161,489	\$14,531	\$30,358
1983	\$73,100	\$147,962	\$77,300	\$156,463	\$15,239	\$30,846
1984	\$76,000	\$147,465	\$80,400	\$156,002	\$16,135	\$31,307
1985	\$78,700	\$147,453	\$83,200	\$155,884	\$16,823	\$31,519
1986	\$78,700	\$144,762	\$83,200	\$153,039	\$17,322	\$31,862
1987	\$88,100	\$156,007	\$93,450	\$165,481	\$18,427	\$32,630
1988	\$89,500	\$152,520	\$95,000	\$161,893	\$19,334	\$32,948
1989	\$89,500	\$145,510	\$95,000	\$154,452	\$20,100	\$32,678
1990	\$96,600	\$149,002	\$102,500	\$158,103	\$21,028	\$32,435
1991	\$125,100	\$185,170	\$132,700	\$196,419	\$21,812	\$32,285
1992	\$129,500	\$186,081	\$137,300	\$197,289	\$22,935	\$32,956
1993	\$133,600	\$186,393	\$141,700	\$197,694	\$23,133	\$32,274
1994	\$133,600	\$181,739	\$141,700	\$192,758	\$23,754	\$32,313
1995	\$133,600	\$176,731	\$141,700	\$187,446	\$24,706	\$32,682
1996	\$133,600	\$171,662	\$141,700	\$182,070	\$25,914	\$33,297
1997	\$133,600	\$167,812	\$141,700	\$177,986	\$27,426	\$34,449
1998	\$136,700	\$169,072	\$145,000	\$179,337	\$28,861	\$35,696
1999	\$136,700	\$165,418	\$145,000	\$175,462	\$30,470	\$36,871
2000	\$141,300	\$165,425	\$149,900	\$175,493	\$32,155	\$37,645
2001	\$145,100	\$165,174	\$153,900	\$175,191	\$32,922	\$37,476
2002	\$150,000	\$168,093	\$159,100	\$178,291	\$33,252	\$37,263
2003	\$154,700	\$169,497	\$164,000	\$179,687	\$34,065	\$37,323

Year	District Court Judges		Court of Appeals Judges		Average Wage Earner	
	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>	Nominal Salary	Real Salary <sup>a</sup>
2004	\$158,100	\$168,729	\$167,600	\$178,868	\$35,649	\$38,045
2005	\$162,100	\$167,329	\$171,800	\$177,342	\$36,953	\$38,145
2006	\$165,200	\$165,200	\$175,100	\$175,100	\$38,651	\$38,651
Median	\$68,700	\$167,047	\$72,600	\$178,139	\$13,143	\$32,299
Mean	\$76,957	\$168,428	\$81,975	\$181,187	\$15,550	\$32,142

**Source:** Judicial salary data provided by the Federal Judicial Center, available at [[http://www.fjc.gov/history/home.nsf/page/salaries\\_bdy](http://www.fjc.gov/history/home.nsf/page/salaries_bdy)]. For specific dates of pay adjustments, see [<http://www.uscourts.gov/salarychart.pdf>]. Average wage earner data provided by the National Average Wage Index, available at [<http://www.ssa.gov/OACT/COLA/AWI.html>]. Adjustments for real salary data were made using the Bureau of Labor Statistics CPI Inflation Calculator, available at [<http://data.bls.gov/cgi-bin/cpicalc.pl>]. If judicial salary changed during a year, the salaries were calculated based on the salary judges received for each portion of the year. This affects calculations for 1969, 1977, and 1987. In 1987, for example, district court judges' annual salary was \$81,100 from Jan. 1-March 1, and \$89,500 from March 1 forward. A district court judge who worked for the entire year would have received \$88,100 in salary that year.

a. "Real" salaries are calculated in 2006 dollars. The nominal salary for district court judges in 2007 was \$165,200, which translates to \$160,625 in 2006 dollars. The nominal salary for court of appeals judges in 2007 was \$175,100, which translates to \$170,251 in 2006 dollars.