STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Subcommittee,

Thank you for the opportunity to testify at this important hearing. We are pleased to appear on behalf of the federal judiciary.

Introduction

Recruiting and retaining talented judges and judiciary employees with broad experience is essential to maintaining a credible, respected judiciary. In order to maintain the rule of law fundamental to our democracy, Americans need to know that their issues will be resolved by skilled, impartial arbiters. These officials are the face of the judicial branch, visible to Americans, and are the judiciary's most important assets.

To continue to recruit and retain the best talent both on the bench and in the top management of the judiciary, we believe that the following needs to be done: (1) COLAs for the judiciary should equal COLAs for General Schedule employees, so that these adjustments better reflect annual inflation; (2) four years of missed COLAs for both the judiciary and the Congress should be restored, alleviating, in part, their substantial losses in real dollars; and (3) top-level salaries must be raised to alleviate pay compression and inversion in the judiciary.

The Judicial Conference believes that equitable compensation for all public servants, including high-ranking government officials such as judges, is important for the long-term good of our nation. In the view of the Conference, the compensation of these

officials should be raised and maintained in proportion to their peers and to increases in the cost of living.

The following factors support the need for immediate improvements in the salaries of federal judges and judiciary executives: (1) the purchasing power of their salaries has declined since 1993; (2) the compensation of their peers in the not-for-profit and private sectors has spiraled upward; (3) the quadrennial salary review mechanism provided under the Ethics Reform Act of 1989 has not been allowed to operate as intended, so the appropriateness of their salary levels has not been reviewed in nearly two decades; and (4) the combination of pay fragmentation and statutory salary limits has resulted in egregious pay compression and pay inversion.

The ability of the federal judiciary to provide the highest-quality service to all litigants is a matter of great importance, not only to the legal community, but also to the public at large. Every day, the federal bench faces the enormous challenge of promptly and fairly resolving complex disputes that affect not only individual rights and liberties, but also corporate governance, stockholders' rights, and the marketplace.

The judiciary competes in the marketplace with other federal, state, and local government employers as well as private and non-profit sector employers in the so-called "war for talent." As discussed below, the current federal salary structure hampers the judiciary's ability to successfully compete in this "war". In addition, the federal courts

require an increasingly high level of technological expertise in their workforce in order to function efficiently, raising the stakes in this "war".

2006 Government Accountability Office (GAO) Report on Executive and Judicial Pay

The judiciary believes that the GAO's recent report, *Human Capital: Trends in Executive and Judicial Pay,* is a step in the right direction. The report underscores the urgent need for an immediate increase in the salaries of judges and other high-level federal officials. Not only does this report show that the real pay of these officers has declined sharply relative to inflation; it also shows that this pay decrease was permitted during a time period when the pay of average Americans increased.

While the judiciary believes this report understates the impact of inflation on judges' purchasing power (due to the GAO's decision to use the Gross Domestic Product (GDP) price deflator to correct for inflation), the GAO report focuses much-needed attention on the broken quadrennial salary review process and the government's fragmented pay system for high-level officials, which have led to the twin problems of salary compression and inversion. Although GAO has stated its rationale for including the GDP index in its analysis, we believe the Consumer Price Index is the more accurate reflection of what individual citizens actually experience in their daily economic lives.

Compensation of Article III and Fixed-Term Judges

We would direct the Committee's attention to the landmark report, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, in which the Second National Commission on the Public Service (hereinafter referred to as the Volcker Commission) concluded that "[j]udicial salaries are the most egregious example of the failure of federal compensation policies," and recommended that "Congress . . . grant an immediate and significant increase in judicial, executive and legislative salaries to ensure a reasonable relationship with other professional opportunities." *See* http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf. In response to this recommendation, President Bush, in May 2003, publicly endorsed Senate legislation (S. 1023, 108th Cong.) that would have authorized a 16.5 percent increase in judicial salaries.

It is not necessary to restate the findings that led the Volcker Commission to conclude that the problem of federal judicial compensation required the immediate attention of Congress and the President. Those findings are discussed in detail in *Urgent Business for America*,[1] as well as in a May 2003 report published jointly by the American Bar

[1] We have also appended, for the information of the Committee, a letter from Leonidas Ralph Mecham, then Director of the Administrative Office of the U.S. Courts, to the Volcker Commission that includes the statements of individual judges concerning the problem of judicial compensation. See Attachment 1.

Association and the Federal Bar Association entitled, *Federal Judicial Pay: An Update on the Urgent Need for Action. See* http://www.uscourts.gov/newsroom/judgespayaction.pdf.

The lot of federal judges has not improved since 2003. Indeed, all evidence indicates that it has worsened. Judges' salaries continue to lag well behind the salaries of their peers in law schools, the not-for-profit sector, and the private sector. As most judges know from their conversations with current and former law clerks, federal judicial salaries are commonly eclipsed by the compensation of relatively inexperienced associates in large law firms. In February 2006, Senator Dianne Feinstein observed that "[t]oday, partners at major law firms routinely make three, four or five times what federal judges make. Furthermore, first year law school graduates at these law firms make more than experienced Federal judges." 152 Cong. Rec. S1073 (daily ed. Feb. 10, 2006).

In the executive branch, the basic pay of members of the career Senior Executive Service (SES) is now equivalent to the salaries of district judges, members of Congress, and Executive Schedule level II officials, which are fixed at $165,200. Just three years ago, the locality-adjusted pay of these officials was capped at Executive Schedule level III, which is currently $152,000. The aggregate compensation of members of the SES is capped at the salary of the Chief Justice of the United States,[2] which is currently $212,100. The problem is not that members of the career SES are paid too much. We do

[2] The Chief Justice's salary is the same as that of the Vice President and the Speaker of the House of Representatives.

not advocate that they be paid less, or are any less important than federal judges. Members of the SES, like federal judges, are career federal employees, and they should be paid reasonable compensation. Instead, the problem is that the ad hoc fragmentation of the federal salary structure creates perceptibly unfair federal pay scales.

There is another problem. Judges' real pay, like members' pay, erodes over time for two reasons: (1) the combination of congressional and Presidential denial of five COLA-based adjustments during the 1990's; and (2) inadequate COLA levels that do not keep pace with inflation. This salary erosion threatens the very strength of the federal bench and impacts on all judiciary employees. Since 1993, the compensation of federal judges (as well as members of Congress and Executive Schedule officials) has increased by 23.7 percent. The cost of living rose by 31.8 percent during this same period of time. Had these officers received the COLA-based pay adjustments they were entitled to by statute, their salaries would now be fixed at $184,900. See Attachment 2. In contrast, the compensation of General Schedule employees rose by 57.5 percent, due to annual base pay and locality pay adjustments and exclusive of any within-grade increases and awards and bonuses, during this same time period.

In view of these developments, it is not surprising that some notable judges have elected to resign or retire from the federal bench to pursue more lucrative careers in other sectors of the economy. If the problem of judicial compensation is not addressed soon,

we believe the inadequate judicial salaries will negatively affect the ability of the judiciary to continue to attract the most qualified attorneys from all segments of the legal profession.

Compensation of Judicial Staff

The compensation of judicial executives is grim as well. The judiciary is confronted by a pay gap with the executive branch, the twin problems of salary compression and salary inversion, and an impending wave of retirements at the court unit executive level.

It is therefore not surprising that the judiciary is experiencing egregious salary compression and salary inversion. See Attachment 3. In many geographic locations within the continental U.S., the locality-adjusted pay of nearly two hundred court unit executives (e.g., clerks of court) and their deputies now exceeds the salaries of bankruptcy and magistrate judges (currently $151,984, as set by statutory formula). Non-foreign cost-of-living adjustments (COLAs) for court unit executives (and comparable executive branch officials) who are located outside the continental U.S. have pushed their adjusted salaries above the district judge salary.[3]

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

Currently, compensation levels for judiciary executives are lower than those for executive branch executives, affecting the judiciary's ability to recruit and retain high-level, experienced senior professionals. Under legislation enacted by Congress in 2002 and 2003, the basic and aggregate pay caps for career senior executives were raised. The judiciary was omitted from the 2003 legislation. As a result of this legislation, the aggregate compensation of career senior executives in the executive branch may be set at either $212,100 or $183,500, depending on whether the agency has a certified performance management system. (The basic compensation of these officials may be set at $165,200 or $152,000, depending on whether the agency has a certified performance management system.) In contrast, through a combination of statutory and Judicial Conference policy limits, judiciary executives[4] generally receive no more than $165,200[5] in aggregate compensation (i.e., basic pay plus locality adjusted pay and performance awards).

This disparity in the total compensation of judicial and executive branch officials now places the judiciary at a serious disadvantage when competing for talent with

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[4] This term includes certain Administrative Office executives, circuit executives, district court executives, clerks of court, chief probation and pretrial services officers, chief preargument attorneys, circuit librarians, and senior staff attorneys.

[5] This policy is a long-standing one, and the Judicial Conference believes it is consistent with sound principles of compensation and the unique nature of the judicial branch (where constitutional officers serve for life and not for a fixed term of years).

executive branch agencies. (Of course, the judiciary must also compete with the private and not-for-profit sectors for seasoned executives and professionals as well.) While the Judicial Conference, as a matter of policy, has determined to lift the locality-adjusted cap from Executive Schedule level III to level II on the basic pay of judiciary executives, this is only a temporary solution to the problem. A permanent solution could be achieved by raising federal judicial salaries (as well as the salaries of comparable officials in the political branches of government), which would have the additional beneficial effect of lifting the cap on the compensation of judiciary executives.

Currently, the salaries of approximately 40 percent of senior court unit executives are capped at the Executive Schedule level III salary of $152,000. (As discussed earlier, Judicial Conference policy permits a chief judge or circuit judicial council to fix the locality-adjusted pay of a circuit or court unit executive at a level equivalent to the district judge salary, in order to relieve salary compression in the court.) In addition, 10 percent of deputy court unit executives are capped at that same salary level.

This narrowing of the differentials between top executives is unfair and should be fixed. The current salaries do not adequately compensate court unit executives and other senior judicial officials for their higher levels of leadership and scope of responsibility. Also, the difference in salary levels is so small that the financial incentive for talented deputies and supervisors to aspire to positions of greater responsibility is disappearing.

We believe that this situation is counterproductive. There should be greater comparative rewards as one moves to the top rung of the career ladder. Congress and the President must do something to correct this compression dilemma.

Like many executive branch agencies, the judiciary is concerned about its aging work force, as well as about developing its next generation of top executives. Of 375 court executives, 163 or 43.5% are currently eligible to retire. Within the next two years, 211 or 56.3% of all current court executives will be eligible to retire.

The drain of knowledge resulting from the departure of our current generation of highly capable, experienced, and accomplished executives may adversely affect the judiciary's ability to provide the outstanding service that judges, the bar, and the public deserve and have come to expect. In order to develop and effectively recruit the necessary talent to replace those who retire, the judiciary needs the necessary tools to attract experienced and accomplished executives. As the judiciary prepares to meet this challenge, it is hamstrung by a widening pay gap with the executive branch, as well as with private sector and not-for-profit organizations, an antiquated federal benefits package which lags well behind the private sector and state courts (since it omits cafeteria-style benefits, including leave conversion), and severe pay compression.

The judiciary is also experiencing similar problems to executive branch agencies in recruiting and retaining rank-and-file employees, especially in high-cost metropolitan

areas such as Los Angeles, San Francisco, New York, and Washington. For example, in May 2005 former Administrative Office Director Mecham reported that "the number and quality of applicants for a chief probation officer position in a large court were poor and sparse...the same is true for recent clerks' vacancies in a large district court and a large bankruptcy court." Federal courts are finding it increasingly difficult to recruit and retain highly qualified court reporters and information technology staff. There is a growing demand for individuals who possess the necessary skills to provide realtime broadcast captioning. Consequently, the courts must now compete with the media and information technology firms for experienced court reporters.

The Administrative Office of the U.S. Courts has encountered similar problems. It is increasingly difficult to recruit and retain accountants and senior budget staff in the Washington metropolitan region. More than 20 percent of the accounting positions in the Administrative Office's Accounting Division are currently vacant on account of the applicable federal caps.

The judiciary believes these problems are fixable. If Congress were to fix the compensation system in the ways outlined above, it would enable the third branch to continue to attract and retain a highly capable, experienced cadre of executives, and conduct appropriate succession planning for executive positions.

Broken Quadrennial Review Mechanism

The judiciary knows that the problem of federal compensation is a complex one. The problem may be traced in substantial part to the Ethics Reform Act of 1989. When that legislation was enacted by Congress, the former Quadrennial Salary Commission was replaced in the process for fixing the salaries of top federal officials by a so-called Citizens Commission on Public Service. The Commission process was intended to bring a degree of fairness and regularity to the politically charged issue of the compensation of members of Congress, judges, and other high-level officials. It has demonstrably failed to serve this purpose. Congress effectively canceled the 1993 Commission by rescinding its appropriation, and none of the later Commissions has been impaneled. While the Citizens Commission was arguably doomed from the start, the reality is that there is no practical machinery today for reviewing the adequacy of the salaries of top federal officials.

While the judiciary would urge you to recommend that the President and the Congress establish a new quadrennial salary review process to avoid repeating the problems we face today, we do not believe that pay relief for judges, members of Congress, and Executive Schedule officials should be put off until such a commission is impaneled. On behalf of the Judicial Conference, we would urge Congress to enact legislation to remedy promptly the problem of judges' and judicial executives' compensation.

Conclusion

In closing, I would direct your attention to a statement made by Irving Shapiro, retired Chairman of DuPont, who told the 1981 Quadrennial Salary Commission:

> In industry, we know that good employees get better with years of experience, and we have to do what we can to make it worth their while to stay with us. Industry recognizes its own self interest and finds ways to keep these people. I ask that a way be found for the government to do the same.

Mr. Chairman, thank you for the opportunity to appear before your Committee today. We would be happy to expand on any of these points now or in the future. Again, we are grateful to the Committee for demonstrating leadership in examining the problem of the compensation of judges and other high-level federal officials.