JUDGE NOT, LEST YEE BE JUDGED UNWORTHY OF A PAY RAISE: AN EXAMINATION OF THE FEDERAL JUDICIAL SALARY "CRISIS"

MICHAEL J. FRANK*

> But when we come to the higher offices I am not one of those who think that mere increases of salary will prove an adequate solution of the problem. I also share the feeling that we should be cautious about increasing the chance of drawing men to the public service who seek it for the sake of the compensation. It is idle to suppose that emoluments can be given which can rival those obtainable by men of first rate ability in their lines of chosen effort. . . . [J]udges must be content to serve for annual pay less in amount than may be received in a single case by the lawyers arguing before them.
>
> —Charles Evans Hughes[1]

I. INTRODUCTION

Although members of the American judiciary frequently disagree with each other on a host of fundamental legal issues, they easily find common ground when the topic of judicial salaries arises. On this subject they all concur that their compensation is inadequate and that Congress should increase their salaries post haste. Brought together by a common financial interest and the solace that can be gained from enduring a common plight, America's federal judges have banded together to encourage Congress to increase their salaries immediately. The Chief Justice, one of the most vocal critics of the present pay scale, has repeatedly urged Congress to raise judicial salaries, arguing that present salary levels are jeopardizing the excellence of the federal judiciary.[2] According to Chief Justice Rehnquist and other proponents of judicial salary increases, the present compensation level is

---

* Mr. Frank serves as a judge advocate in the U.S. Army Judge Advocate General's Corps. He wishes to thank Jon M. Coen for his assistance.

1. CHARLES EVANS HUGHES, CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT 49 (1910). It is worth noting, however, that in the interlude between his two terms on the Court, Chief Justice Hughes lobbied Congress for a salary increase for federal judges.

2. Linda Greenhouse, *Pay Erodes, Judges Flee, and Relief is Not at Hand*, N.Y. TIMES, July 17, 2002, at A14.

sounding the death knell of the federal judiciary as we know it,[3] a problem that should strike fear in every American's heart.[4]

The deleterious effect of the present salary structure is purportedly twofold: (1) The "paltry" salaries of federal judicial officers are so insufficient that they discourage qualified attorneys from seeking federal judicial positions, and (2) these same salaries encourage veteran judges to seek the greener pastures of private law firms.[5] In short, law firms pay handsomely, the federal bench does not, and quality attorneys and judges are choosing the former over the latter.[6] This is eroding the quality of the judiciary by keeping the best and brightest off the federal bench, or so salary critics argue. Therefore, it is incumbent that judicial salaries be increased immediately, as any delay exacerbates the problem.

To assess the legitimacy of this argument, three key questions must be answered: (1) Is there really a quality crisis plaguing the federal judiciary; (2) If there is a quality crisis, is it caused by quality candidates refusing judicial positions and by quality judges fleeing the bench in search of better financial

---

3. According to Justice Breyer, if America does not increase judicial salaries, "'eventually you'll wake up and the Judiciary just won't be what it quite was . . . .'" *"Truly Extraordinary and Frightening": Commission Hears Testimony on the Problem of Judicial Pay*, THE THIRD BRANCH (2002), *available at* http://www.uscourts.gov/ttb/aug02ttb/commission.html (quoting Justice Stephen G. Breyer).

4. Apparently America's federal judges are not the only members of the judiciary that believe they are under-compensated. According to the American Bar Association, state judges are also underpaid. AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 67 (Fannie J. Klein, ed., 6th ed. 1981) ("Historically, state legislatures have provided inadequate judicial salaries. Often judges have gone for years without pay increases. As a result there has been considerable tension between the two branches of government, causing the resignation of some highly competent jurists.") (citation omitted). Similarly, Canadian judges are clamoring for a pay raise. *See* Canadian Press, *Salaries of Judges Take Flight*, EDMONTON J., Mar. 27, 1999, at A13; G. Scotton, *Judges Seek Raise of $47,000 A Year*, 19 LAW. WKLY. 1 (1999); L. Chwialkowska, *Judges Press for 26% Raise*, NAT'L POST, Feb. 15, 2000, at A1.

5. The Compensation Clause is not implicated in the legislative fixing of judicial salary levels. Williams v. United States, 535 U.S. 911, 920 (2002) (Breyer, J., dissenting from the denial of certiorari) ("The Compensation Clause, of course, is not concerned with the absolute level of judicial compensation."). The Compensation Clause merely "guarantees federal judges a 'Compensation, which shall not be diminished during their Continuance in Office.'" United States v. Hatter, 532 U.S. 557, 560 (2001) (citing U.S. CONST., art. III, § 1). The Clause was designed to prevent the legislature or executive from using an ability to control judicial salaries as a mechanism for controlling the judiciary. As Alexander Hamilton believed, "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." THE FEDERALIST NO. 79, at 528 (Alexander Hamilton) (Carl Van Doren ed., 1979).

6. In Chief Justice Rehnquist's own words: "It is becoming increasingly difficult to find qualified candidates for federal judicial vacancies. This is particularly true in the case of lawyers in private practice." Chief Justice William Rehnquist, *2001 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (2002), *available at* http://www.uscourts.gov/ttb/jan02ttb/jan02.html [hereinafter *2001 Year-End Report on the Federal Judiciary*].

opportunities; (3) If the quality crisis is due to judicial or attorney flight, will increasing judicial salaries alleviate this problem, or will a salary increase merely exacerbate the problem? In the following pages, this Article addresses each of these questions, concluding that while pay raises are in order, and some attorneys will not serve as judges because of the present salary level, the level of judicial compensation is hardly oppressive and is not seriously impairing the federal judiciary. A less costly and more efficacious means of attracting quality candidates can be found in eliminating the ill treatment and unpleasantness of the Senate confirmation process, which is a much greater obstacle to a quality judiciary than the present pay scale.[7]

II. IS THE FEDERAL JUDICIARY FACING A CRISIS IN QUALITY?

Many of the judicial salary coterie argue that without a pay increase, the federal judiciary will be relegated to the dustbin of history, so to speak, as the best and brightest leave the bench or refuse to staff judicial posts. Few of these critics have gone so far as to assert that the judiciary is presently being staffed by second-rate judges (presumably because they might be asked to offer examples), but this assertion is implicit in their arguments. Since they lack the courage to name names, or because they do not want to embarrass second-rate judges, it is easier for these critics to make general assertions about the declining quality of "the judiciary" opposed to individual judges.[8]

---

7. Chief Justice Rehnquist acknowledges that the partisan confirmation process is at least partly to blame for the reluctance of some quality attorneys to serve as judges. *See 2001 Year-End Report on the Federal Judiciary*, *supra* note 6 (offering that the difficulty in obtaining quality candidates is due in part to "the often lengthy and unpleasant nature of the confirmation process"). *See generally* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994). For a discussion of Judge Robert Bork's confrontation with the Senate Judiciary Committee, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990).

8. Perhaps they learned a valuable lesson from Justice Kennedy, who mistakenly stated that a judge left the bench for monetary reasons. During one of his pilgrimages to the great purse on the Hill, Justice Kennedy warned the Senate Appropriations Committee of the impending demise of the judiciary that a failure to enact a pay raise would certainly entail. Tony Mauro, *The Judicial Pay Issue is Now in Congress' Court*, NAT. L.J., Mar. 11, 2002, at A8. Like any good lawyer presenting his case before the High Court, Justice Kennedy offered an example of one judge who fled the poverty of the judicial life to pursue the riches of private practice. According to Justice Kennedy, this occupational migrant "probably was among the 10 most knowledgeable people in the United States on class actions. He handled our asbestos litigations. He had computer Web sites, he had models for how attorneys intervene, etc. It was just like a symphony the way he conducted that massive suit." *Id.* But this judge left behind the glory of the bench to pursue private practice with a Birmingham, Alabama law firm. According to Kennedy, "We lost him, he left, because the Congress wouldn't even grant him a cost of living raise to keep his salary even." *Id.* As touching as Justice Kennedy's story was, its primary flaw is that it was not completely accurate. The judge did not leave because his salary forced him to endure starvation, or because he could not live on a six-figure

Alternatively, these critics steep their arguments in future terms, predicting that a major crisis will certainly befall the courts if Congress does not quickly raise judicial salaries.[9] Chief Justice Rehnquist, for example, opined that "[o]ur system cannot long tolerate the regular loss of experienced, seasoned judges that is now occurring."[10] Similarly, Judge Harlington Wood, Jr., of the Seventh Circuit, observed that underpaid judges are more susceptible to the temptations of bribery,[11] but he offered no examples of judges who have supplemented their federal salaries with graft. According to Justice Breyer, even human liberty is riding on increases in the judicial pay scale. Breyer warned that the judiciary has "reached the place where the institution is threatened with irreparable injury,"[12] and if salaries are not increased, "'eventually you'll wake up and the Judiciary just won't be what it quite was, and the effort to be independent, the effort to have an effective judicial system that guarantees human liberty, among other things, will be seriously diminished.'"[13]

Taking these words of warning to heart, one might think that the judiciary

---

judicial salary, or even because he loved money a little more than he loved being a judge. The judge in question was Sam Pointer, Jr., who served as a district judge in the Northern District of Alabama for thirty years. Tony Mauro, *Mystery Judge* (Apr. 15, 2002), *available at* http://www.law.com/cgi-in/gx.cgi/AppLogic+FTContentServer?pagename=law/View&cid=Z (on file with author).

When told of Kennedy's remarks, Judge Pointer agreed that judicial salaries needed to be increased, but he said that salary was only one minor factor that led to his decision. *Id.* The major reason was Pointer's desire to broaden his horizons after spending thirty years on the bench. *Id.*

9. Elliot A. Spoon, *Compensation of the Federal Judiciary: A Reexamination*, 8 U. MICH. J.L. REFORM 594, 597 (1975) ("The ultimate danger is a decline in the quality of the judiciary.").

10. Greenhouse, *supra* note 2, at A14. Those making the case for an increase in upper-level executive department salaries use similar arguments. *See* Editorial, *The Top Officials Need a Raise*, WASH. POST, Nov. 18, 1981, at A30 ("[S]ome of the best talent in Government is deprived and driven away.").

11. Harlington Wood, Jr., *Judges Forum No.2: "Real Judges,"* 58 N.Y.U. ANN. SURV. AM. L. 259, 264 (2001) ("A well-paid judge is less susceptible to deserting the bench for the more lucrative private practice or, in the very rarest of circumstances, succumbing to the temptation to do judicial favors for a fee."). *See generally* JOSEPH BORKIN, THE CORRUPT JUDGE (1962). Judge Wood is not the first to use the threat of bribery to argue for salary increases. *See* A. Aldrich Mooney, *Federal Judges Compensation–Proposed Legislation*, 27 N.Y.U. L. REV. 457, 462 (1952) ("[T]he despicable tactic of attempting to influence judicial action by offers of favors loses its greatest appeal when judges are well paid.").

12. Greenhouse, *supra* note 2, at A14 (quoting Justice Stephen G. Breyer); *see also* Judge Robert A. Sprecher, *The Threat to Judicial Independence*, 51 IND. L.J. 380, 380 (1976) ("The crucial problem of inadequate judicial compensation has become a crisis.").

13. *"Truly Extraordinary and Frightening": Commission Hears Testimony on the Problem of Judicial Pay*, THE THIRD BRANCH (2002), *available at*: http://www.uscourts.gov/ttb/aug02ttb/commission.html (quoting Justice Stephen G. Breyer). This view might entail a slightly exaggerated view of the judiciary's importance. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 353 (1990) ("Our freedoms do not ultimately depend upon the pronouncements of judges sitting in a row.").

is truly on the short road to perdition. Fortunately, however, these predictions of apocalyptic catastrophe are gross exaggerations. For starters, despite doomsday claims that judicial salary levels have reached unprecedented lows, historical data demonstrates that judicial salaries have always been less than the market rate for lawyers, without any serious consequences.[14] Furthermore, shrill predictions that these salary levels will spell the end of the judiciary are similarly not a new phenomenon,[15] having been made in previous eras, and having resulted in neither the demanded salary increases nor the terrible plagues predicted by these prophets.[16] Rather than showing the necessity of salary increases, these salary critics have simply demonstrated the truth of Yogi Berra's observation: "[I]t's tough to make predictions, especially about the future."[17] One safe bet, however, is that critics will continue to complain about judicial salary levels and make predictions of doom, yet no serious harm will befall the judiciary, or at least none related to judicial compensation. This prediction is based on over two hundred years of history, and although the past does not foreordain the future, it offers a good roadmap for determining where the judiciary is headed.[18]

A. A Brief History of Dissatisfaction With Judicial Salaries

Professor Paul M. Bator has noted that "[f]ederal judges, as a group, complain more about their pay than any other group I have ever encountered."[19] This annoying practice is not a recent phenomenon. "Historically, the United States has not paid its judges very generously . . . ."[20] Not surprisingly, then, dissatisfaction with judicial salary levels has been part of federal judicial service almost since the judiciary's inception,[21] and like

---

14. *See infra* Part II.A.

15. Spoon, *supra* note 9, at 594.

16. True, it may be that these critics are so prescient they can foresee the distant future. But such a claim hearkens back to the same fallacy employed by defenders of the ill-fated Leon Trotsky, who argued that "[p]roof of Trotsky's farsightedness is that none of his predictions have come true yet." GEORGE F. WILL, THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS 1990-1994 132 (1994).

17. Adam Piore, *So Predictably Unpredictable*, NEWSWEEK, Sept. 16, 2002, at 34Z (quoting Yogi Berra).

18. Or, as Justice Cardozo wrote: "[H]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 53 (1921).

19. Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1148 (1985).

20. Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 334 (1976).

21. Spoon, *supra* note 9, at 594 ("The compensation of the federal judiciary has been a persistent issue since the enactment of the Judiciary Act of 1789."); *Judicial Salaries and Retirement*

much of the American common law, it may have been inherited from the English courts.[22] "In the early years of the federal judiciary, the pay was low, the work was sparse, and the physical requirements involved in holding court were quite onerous,"[23] much more so than today, yet many lawyers still sought appointment to the bench.

In 1791, merely two years after the passage of the first Judiciary Act, district court Judge Nathaniel Pendleton of Georgia complained about his salary to President Washington.[24] When he sought his judgeship he "imagined Congress would have made a more ample provision for their Judges."[25] Pendelton also noted that his salary did not compare to the gains he made in private practice, and "that the salary allowed [him], is but a small compensation, nor is it indeed an adequate provision for a family in this Country."[26] He resigned in 1796 because he could not afford to educate his children on a judicial salary.[27]

In the early 1800s, "[a] prominent lawyer usually took a cut in income if he became a judge. The salaries of judges, as of public officials in general, were not generous. Judges continually complained that they were pinched for money."[28] Moreover, "[t]here is abundant if anecdotal evidence that [judicial] salaries were considered very low throughout the nineteenth century . . . ."[29] One attorney who, upon becoming a judge, became pinched for money was the legendary Joseph Story. In 1811, associate justices of the Supreme Court were paid $3500 a year, which is exactly what they made in 1789.[30] This low

Plans in the United States, 54 JUDICATURE 184, 184 (1970) ("Judicial salaries in the United States have traditionally been inadequate.").

22. John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 293 (1991) (noting that English judges complained that they were underworked when their pay was based on the amount of business before the court). Orth poignantly asked: "Could it be that if judicial compensation today depended on output, we would hear less about judicial overload?" *Id.*

23. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 346 n.47 (1993).

24. *Id.* at 356.

25. *Id.*

26. *Id.*

27. *Id.*

28. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 121 (1973). Others disagreed. William Grayson, in a letter to Patrick Henry after the passage of the Judiciary Act of 1789, opined that the "'salaries, I think, are rather high for the temper or circumstances of the Union and furnish another cause of discontent to those who are dissatisfied with the Government.'" CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 13 (rev. ed. 1926) (quoting William Grayson).

29. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 21 (1996) (hereinafter POSNER, THE FEDERAL COURTS); *see also* Albert Dickerman, *The Business of the Federal Courts and the Salaries of the Judges*, 24 AM. U. L. REV. 78, 85,86 (1890).

30. Rosenn, *supra* note 20, at 320 & 345 tbl. III ("[B]etween 1789 and 1819, when Congress first raised the salaries of the members of the Supreme Court, the purchasing power of the original

wage caused Story, who was accustomed to earning more than this meager sum in private practice, to "hesitate in accepting appointment to the Court."[31] According to one historian, "[t]he wartime inflation of 1812-1815 cut the purchasing power of the sum even more, a development that pressed Story particularly hard, for he had come to the Court without inherited or accumulated fortune . . . ."[32] Story was "sorely tempted to resign after Congress failed to increase salaries to offset the sharp increase in prices caused by the War of 1812."[33] Despite these hardships, only one judge left the bench due to inadequate pay between 1810 and 1819.[34]

In 1816, still hoping to obtain relief from inflation, Justice Story wrote a memorandum to Congress asking that it increase judicial salaries.[35] In the memorandum he noted that "'the necessaries and comforts of life, the manner of living and the habits of ordinary expense, in the same rank of society, have, between 1789 and 1815, increased in price from one hundred to two hundred per cent,'"[36] while judicial salaries had not. Although raises were not immediately forthcoming, and thus the judges continued to face financial burdens, Story and most of his colleagues did not abandon their judicial posts. There were, however, predictions and rumors of salary-induced departures. In February 1819, for example, a newspaper reported that Justice William Johnson would resign his seat on the high court to take a position with better pay, perhaps as the collector of customs at Charleston.[37]

Nevertheless, rumors such as these did not immediately induce Congress to act, in part because many attorneys continued to find the federal judiciary an attractive career option. For example, consider the great Chief Justice John Marshall, who received only $500 more than the associate Justices. Marshall "received $4,000 a year when he was first appointed, and that was increased to $5,000 in 1819. This, of course, was far below the potential available to him if he had remained a lawyer in private practice and indicates why he felt

---

salary of the office had fallen quite sharply.").

31. WARREN, *supra* note 28, at 416.

32. GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 151 (1970); *See* LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 558 (1974) ("Story complained that the Justices had not received a salary increase since the first Congress had set their salaries at $3,500 a year in 1789."). Among the attractions that lured Story, despite the inferior salary, were the prestige, life tenure, and opportunity to pursue juridical studies that the position offered. WARREN, *supra* note 28, at 416.

33. Rosenn, *supra* note 20, at 320.

34. EMILY FIELD VAN TASSEL, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992 133 (1993).

35. Rosenn, *supra* note 20, at 320 (internal quotations omitted).

36. WARREN, *supra* note 28, at 416 n.1.

37. *Id.*

compelled" to earn outside income writing a biography of George Washington and speculating in land development.[38]

Members of the Supreme Court were not the only judges dissatisfied with federal salaries in the nineteenth century. In the 1820s, the federal bench lost five judges to other positions, including Judge Theodric Bland of the District of Maryland after he sought a higher-paying post with the Maryland courts.[39] In the 1830s and 1840s, the departure of five judges could reasonably be attributed to dissatisfaction with compensation levels.[40] Later, following Judge Bland's lead, Associate Justice Benjamin R. Curtis resigned from the bench in 1857 "because he considered his $6,000 per year salary to be inadequate."[41] Between 1860 and 1890, although six departing judges cited dissatisfaction with salary or with judicial office as their motivating factor for leaving, another eight judges left the bench to pursue private practice or other office.[42]

Many other members of the judiciary felt that they deserved more for their efforts, with Chief Justice Salmon P. Chase being the first among these.[43] Chase was a former Senator and Governor of Ohio, as well as Secretary of the Treasury, and in these positions he had acquired expensive tastes.[44] Although he was forced to lead a simpler life while serving as Chief Justice,[45] he still enjoyed the finer things. For example, Chase "surrounded himself with servants" and "enjoyed the privileges of a private railroad car."[46] Realizing that his annual salary of $6500 was inadequate to sustain this lifestyle, Chase petitioned Congress for a pay raise around 1866, arguing that the Supreme Court Justices' pay should be comparable to that of the recently victorious American military leaders who pulled down three times more than Chase and the Supremes.[47] Because the money for these salary increases would have to

---

38. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 558 (1974).

39. Van Tassel, *supra* note 23, at 355-56.

40. *See* VAN TASSEL, *supra* note 34, at 133.

41. Spoon, *supra* note 9, at 599 n.33; *see* Dickerman, *supra* note 29, at 85; Van Tassel, *supra* note 23, at 356 (noting that salary was one factor in Curtis's decision to return to private practice). "Mr. Justice Curtis then practiced law for seventeen years until his death. During that time, he had an average annual income of slightly over $38,000 per year." Spoon, *supra* note 9, at 599 n.33.

42. *See* VAN TASSEL, *supra* note 34, at 134.

43. William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were The Hardest,"* 42 U. MIAMI L. REV. 475, 486 (1988).

44. *See* JOHN NIVEN, SALMON P. CHASE, A BIOGRAPHY 399, 441 (1995) ("Chase had grown accustomed to the lavish lifestyle of his successful friends . . . ."); THOMAS GRAHAM BELDEN & MARVA ROBINS BELDEN, SO FELL THE ANGELS 247 (1956); J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 616 (1874).

45. SCHUCKERS, *supra* note 44, at 616.

46. NIVEN, *supra* note 44, at 399.

47. Rehnquist, *supra* note 43, at 486.

be found somewhere, and because he was willing to part with judicial positions other than his own, Chase suggested reducing the number of Justices on the Supreme Court by three and funding the salary increases with the savings generated by this workforce reduction.[48] Compromising on this proposal in a fashion that Chase undoubtedly had not considered, Congress happily reduced the number of seats on the Court and the expenditures they entailed, but decided to forebear on the requested salary increases.[49] This congressional action so angered Chase that he wrote to several wealthy friends in a half-hearted attempt to secure private sector employment. Congress eventually increased judicial salaries in 1871—to $8500 for the Chief Justice and $8000 per annum for associate Justices—but hardly to the extent sought by Chase and his colleagues.[50] Interestingly, despite his social connections and the ease with which he could have obtained other employment, Chase remained on the Court until his death, leaving a hefty estate worth around $100,000.[51]

In 1890, as the *fin de siècle* approached, allegedly inadequate judicial compensation levels caught the attention of legal authors. An article in the American Law Review contended that "salaries paid to all our Federal Judges are too low."[52] The author attempted to demonstrate the truth of this assertion by providing examples of judges who fled the bench for more remunerative positions.[53] Yet the judiciary continued to survive, and some might even say it prospered.

Unfortunately, the new century did not bring monetary respite for unhappy judges. In the early 1900s, the tradition of dissatisfaction with judicial compensation continued, along with more departures and threats of irreparable harm. Indeed, the "highest departure rate in the twentieth century occurred when roughly 12% of the federal judiciary left the bench in the

---

48. FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 276 (1987). Blue elaborated:

> Chase made it clear in his correspondence with other Court members that the major purpose in reducing the size of the Court was to use the revenue saved to increase the pay of those on the Court. He felt that their pay 'ought not to be less than those of the highest Military Officers.

Id.; *see also* Rehnquist, *supra* note 43, at 486.

49. Rehnquist, *supra* note 43, at 486.

50. "The Senate did accept a smaller increase, from $6500 to $8500 a year for the Chief Justice and from $6000 to $8000 for the associate Justices." NIVEN, *supra* note 44, at 442; *accord* BLUE, *supra* note 48, at 313.

51. SCHUCKERS, *supra* note 44, at 616.

52. Dickerman, *supra* note 29, at 96.

53. *Id.*

decade between 1910 and 1920."[54] During this period, "twelve judges left for other employment or other office, and three cited salary as their motivation for doing so."[55]

Even with these losses, a mass exodus from the federal bench never resulted "despite the fact that dissatisfaction with salaries had been a persistent complaint of judges for many decades, dating back to the 1920s,"[56] and the fact that "[b]etween 1915 and 1920 a Supreme Court justice's salary fell by about 50 percent in real terms."[57] Between 1920 and 1945, three judges cited dissatisfaction with compensation as their reason for departing the bench, while twenty-three others returned to private practice or sought other offices without specifically stating they were unhappy with their judicial salary.[58]

From shortly after World War II through the 1950s, federal judges repeatedly warned Congress that they "[could] not live adequately on their official salaries."[59] In the early 1950s, the clamoring for salary raises became more shrill;[60] this clamoring is epitomized by excerpts from an article in the New York University Law Review in which the author warned of the "increasing difficulty in inducing men of high caliber to accept appointments to the bench, and the alarming fact that some of our most competent judges have felt compelled to resign from office and return to private practice in order to replenish" savings decimated by years of judicial service.[61] Articles in the ABA Journal parroted these sentiments, with one claiming that "able judges are resigning because they cannot afford to live on the judicial stipend,"[62] and that "judges who are worried about the sharp decline of their actual income and the financial future and security of their families are not in

---

54. Van Tassel, *supra* note 23, at 348.

55. *Id.* at 361.

56. CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 49 (1995).

57. POSNER, THE FEDERAL COURTS, *supra* note 29, at 26.

58. *See* VAN TASSEL, *supra* note 34, at 136; Van Tassel, *supra* note 23, at 355-56 (noting that Judge Julius Mayer of the Second Circuit left the bench in 1924 because of salary concerns); *see also* Mooney, *supra* note 11, at 457 n.* (noting the departure in 1925 of Judge Edwin L. Garvin of the United States District Court for the Eastern District of New York because he could not support his family and educate his children on a federal salary).

59. Spoon, *supra* note 9, at 597 (citing *Hearings Before the Comm. on Judicial and Congressional Salaries*, 83d Cong. (1954)). Of course, "adequately" is a classic weasel word.

60. "[T]he present compensation of federal judges is inadequate by both absolute and relative standards." Mooney, *supra* note 11, at 460.

61. *Id.* at 457.

62. Morris B. Mitchell, *The Judicial Salary Crisis: An Increase Is Urgently Needed*, 39 A.B.A. J. 197, 197 (1953).

a frame of mind to do their best work on the Bench."[63]

In 1953, a federal statute created the Commission on Judicial and Congressional Salaries to determine the appropriate salaries of judges, congressmen, and the Vice President.[64] The Commission heard a slew of "experts" testify that judicial "salaries are causing financial hardship to many Federal Judges,"[65] and that without a substantial pay increase, America would see the demise of its judiciary. But even according to salary critics, dissatisfaction with judicial salary induced only seven judges to leave the federal bench in the 1950s[66]—hardly the deluge of departures that other critics predicted and probably an inflated number.[67]

Despite further predictions of woe, only seven judges left the federal bench during the entire decade of the 1960s, and inadequate salary was not the impetus for any of these.[68] Notably, 1969 was the high water mark for the actual value of judicial compensation.[69] Inflation ran rampant after this time, and judges were again dissatisfied. According to Judge Kaufman (a Democrat and frequent salary critic who, despite dissatisfaction with judicial salaries, campaigned relentlessly to obtain a seat on the Second Circuit),[70] the inflation

---

63. *Id.* at 198.

64. *Commission on Judicial and Congressional Salaries: Hearings Before the Commission on Judicial and Congressional Salaries*, 83d Cong. (1952). The Commission was composed of eighteen members: six appointed by the President; six appointed by the Chief Justice; three appointed by the Vice President; and three appointed by the Speaker of the House. *Id.* at 1.

65. *Hearings Before the Commission on Judicial and Congressional Salaries*, 83d Cong., 2d Session, 15 (Dec. 16, 1953) (Testimony of Morris B. Mitchell, Chairman of the American Bar Association Standing Committee on Judicial Selection, Tenure and Compensation). Mitchell also introduced an article from U.S. News & World Report with sensational charges that the "[p]ay of judges is scaring good men away from the bench," and that because of dissatisfaction with salary, "President Eisenhower is having trouble finding the kind of men he wants for the Federal judiciary." *Id.* at 21-22 (quoting *Are Judges, Congressmen Underpaid?*, U.S. NEWS & WORLD REP., May 29, 1953).

66. Stuart Taylor, Jr., *Pay Rise Called Dissatisfying Victory for U.S. Judges*, N.Y. TIMES, Dec. 22, 1980, at A18.

67. *See* VAN TASSEL, *supra* note 34, at 136. Only ten judges left the federal bench in the 1950s, and Professor Van Tassel identifies only two judges as leaving for salary reasons: Simon Rifkind of the Southern District of New York and Harold Maurice Kennedy of the Eastern District of New York. *Id.* Because of the thoroughness of Professor Van Tassel's research, it is reasonable to assume that she is correct on this point, and that at least some salary critics are willing to massage the numbers to prove their case.

68. *See* VAN TASSEL, *supra* note 34, at 136.

69. *See* Rosenn, *supra* note 20, at 345 tbl. IV; Administrative Office of the United States Courts, Fact Sheet: The Need for a Federal Judicial Pay Increase, www.uscourts.gov/newsroom/judicialpayincrease.htm ("Between 1969 and 2002 real pay for federal judges declined approximately 23.5%.").

70. Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WIS. L. REV. 186, 202-03 (1967).

of the 1970s eroded "'the real income of a judge at an alarming rate,'"[71] a problem that he believed caused the "epidemic of judicial resignations."[72]

Throughout the 1970s and 80s, various federal judges tendered their resignations while complaining that insufficient compensation levels were at least partially to blame for their departures.[73] Inadequate salary purportedly motivated twenty-four judges to leave the bench in the 70s,[74] while the departure of nineteen federal judges in the 1980s arguably is attributable to low salaries. [75] At this time, a departing judge could increase his salary an estimated eighty-four percent by abandoning the bench and pursuing a career in private practice.[76] Statistics such as these led, yet again, to critics cautioning that "federal judges are leaving the bench and the black robe

---

71. Arnold H. Lubasch, *Judges' Panel Presses Congress on Pay and Benefits*, N.Y. TIMES, Apr. 12, 1981, at 45. Complaints about salary levels in the 1970s had as much legitimacy as they do now: "In view of the fact that the median income of American families in 1972 was $11,116, one might question a claim that a person can not adequately live on $40,000 per year, the present salary of a federal district court judge." Spoon, *supra* note 9, at 598 (citation omitted).

72. Lubasch, *supra* note 71, at 45.

73. Ronald Kessler, *D.C. Bankruptcy Judge Resigns With Blast at Congress*, WASH. POST, Sept. 7, 1983, at A6 ("As a secondary issue in his decision to resign, Whelan, who makes $63,600 a year as a judge, said he finds it difficult to put four of his children through college on his salary."). In 1981, federal judges became so concerned about their financial predicament and Congressional inaction on pay raises that they formed the Federal Judges Association to lobby Congress and educate the public about their cause. Fred Barbash, *Judges Proposing to Organize for Salaries, Benefits*, WASH. POST, June 13, 1981, at A1 ("A group of federal judges, much to the dismay of Chief Justice Warren E. Burger, has proposed organizing the federal judiciary into a Federal Judges Association to lobby for higher salaries and fringe benefits.") (citation omitted).

74. Lubasch, *supra* note 71, at 45; *see* Sprecher, *supra* note 12 at 383 ("[S]even federal judges resigned within a 12-month period in 1973-74 for economic reasons."). Only three judges specifically cited inadequate salary as a motivating factor in their decision to leave the bench: Thomas Masterson of the Eastern District of Pennsylvania; Sidney Oslin Smith of the Northern District of Georgia; and Arnold Bauman of the Southern District of New York. VAN TASSEL, *supra* note 34, at 137. Five others left to pursue private practice or other employment; five sought other government appointments or elected office (a move that may or may not have been motivated by salary concerns), and three cited dissatisfaction with judicial office as their reason for leaving. *Id.*

75. VAN TASSEL, *supra* note 34, at 137. Among those who specifically stated that they were leaving because of salary concerns were William Hughes Mulligan of the Second Circuit (1981); Howard David Hermansdorfer of the Eastern District of Kentucky (1981); Frank H. McFadden of the Northern District of Alabama (1982); Lynn C. Higby of the Northern District of Florida (1983); Emory M. Sneeden of the Fourth Circuit (1986); Raul A. Ramirez of the Eastern District of California (1989). *See* Peter Kihss, *Official Calls Annuities for New U.S. Judges' Families Totally Inadequate*, N.Y. TIMES, Feb. 6, 1981, at B3; Arnold H. Lubasch, *U.S. Appellate Judge Quits Over His Salary and Benefits*, N.Y. TIMES, Feb. 5, 1981, at B1. In addition, between 1980 and 1989, eleven other federal judges returned to private practice, private life, or sought other employment, suggesting that these judges also found their federal salaries inadequate. VAN TASSEL, *supra* note 34, at 137. Three others left the bench citing dissatisfaction with their job, which might also have been because of their salaries. *Id.*

76. T.R. Reid, *The Rich Man's Club*, WASH. POST, Mar. 14, 1977, at A1.

behind in record numbers."[77] In 1976, a judge on the Seventh Circuit announced that the "problem of inadequate judicial compensation has become a crisis."[78]

In 1981, Judge Kaufman predicted that "'without a fair wage we will, in the not too distant future, reduce the quality of men and woman who hold judicial office,'" which would, in turn, "'necessarily reduce the quality of justice available in the courts of this nation.'"[79] He also predicted that if salaries were not increased, Americans could soon see a "decline in the quality of the courts."[80] In 1984, in his State of the Judiciary Report, Chief Justice Burger again sought a salary increase for judges and cautioned that "fair adjustments" in salary were necessary to attract and keep the best judges.[81] Burger's successor, Chief Justice Rehnquist, continued his efforts to obtain salary increases. In March 1989, while federal judges were enjoying incomes that exceeded the salaries of ninety-five percent of Americans,[82] Rehnquist argued that "inadequate" judicial salaries were "'the most serious threat to the future of the judiciary and its continued operations that I have observed.'"[83] Justice Kennedy also spoke out against the "assault by neglect" that the federal judiciary sustained and warned that unless pay was increased in the near future, "the independence and integrity and traditions of the American judiciary will be compromised."[84] Despite thirteen intervening years, Kennedy's prophecies of doom remain unfulfilled—even though the 1990s brought more departures, with some arguing that as many as fifty-two judges left the bench for salary reasons.[85] To this day, salary critics make the same dire predictions of doom that have gone unfulfilled for over 200 years.

---

77. Lynn Darling, *Pay Freeze Drives Top Federal Aides Out of Government*, WASH. POST, Feb. 7, 1977, at A1.

78. Sprecher, *supra* note 12, at 380.

79. Lubasch, *supra* note 71, at 45 (quoting Judge Kaufman).

80. *Id.* at 43.

81. Philip Hager, *Warns of "Brainwashing Expeditions" in Screening Federal Panels*, L.A. TIMES, Jan. 1, 1985, at 10; Al Kamen, *The Judiciary: Burger Urges Pay Raise for Federal Judges*, WASH. POST, Dec. 31, 1984, at A11 ("Budget deficits notwithstanding, Burger wants the judges to get another raise . . . .").

82. *See infra* note 155.

83. Linda Greenhouse, *Rehnquist, in Rare Plea, Urges Raise for Judges*, N.Y. TIMES, Mar. 16, 1989, at 1.

84. Tony Mauro, *Scalia Steals the Show in Honolulu*, MANHATTAN LAW., Aug. 29, 1989, at 10.

85. Seth Stern, *Limited Pay, Ugly Fights for Senate Approval Yield Fewer Applicants for Job of 'Judge,'* CHRISTIAN SCI. MONITOR, Jan. 22, 2002, at 1.

B. Unfulfilled Prophecies of Doom and the Continued Strength of the Judiciary

The foregoing history of the judicial salary "crisis" is not meant to be an encompassing overview of the subject. Rather, it is meant to catalyze further understanding of the contemporary clamoring for raises by showing that dissatisfaction with salary levels is not a recent phenomenon, and that, despite over two hundred years of dissatisfaction with judicial salaries, the evils forecast by salary critics have not yet come to pass.[86] The idea that a desire for greater remuneration frequently motivated departures from the bench is likewise not of recent origin, but has been voiced for centuries. Furthermore, this history poignantly illustrates that judges who remain on the bench are savvy enough to point to the departure of their brethren at the same time they remind Congress about a pay raise. The import of this veiled threat is not ignored, however empty this threat usually is.

History has also shown that the number of judges departing the bench has increased in recent years.[87] Some of these departures undoubtedly are based upon financial concerns engendered by judicial salaries.[88] However, the inconvenient truth for salary critics remains: In "the last 200 years, relatively few judges have explicitly cited low pay as their reason for resignation."[89]

This brief account of the salary "crisis" demonstrates that, despite much wailing and grinding of teeth, the federal judiciary remains a powerful (some might say too powerful)[90] and viable entity that shows no sign of losing its vigor.[91] Generally, the judiciary continues to be recognized for its excellence.[92] Yet, some critics still point to judicial problems as evidence that low judicial salaries have a deleterious effect on America's justice system. Among these problems are the crowded dockets, the inferior judges producing

---

86. *See* VAN TASSEL, *supra* note 34, at 10 ("If large size and low salary are having an adverse impact on the prestige of the federal judiciary, and thus on the desire of people to serve, it is not yet resulting in large-scale resignations.").

87. *See supra* notes 73-74, 83.

88. One judge who recently felt compelled to depart for financial reasons is Joe Kendall of the Northern District of Texas. Stern, *supra* note 85, at 1.

89. Van Tassel, *supra* note 23, at 355. Professor Van Tassel continues: "For the period studied, only twenty-one judges have actually said as much, but forty-nine additional judges returned to private practice or accepted other employment." *Id.*

90. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 96 (1996) ("It is arguable that the American judiciary—the Supreme Court abetted by the lower federal courts and many state courts—is the single most powerful force shaping our culture.").

91. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 300-04 (1996).

92. *See, e.g.*, LOIS G. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 81-82 (1984) ("[T]he level of competence of the federal bench since the 1940s has been remarkably high.").

pedestrian opinions, the increased risk of bribery and corruption, and the threat that the judiciary will become a club for only the wealthy. As the analysis below demonstrates, none of these charges have much merit.

1. Surviving Crowded Dockets

In light of heavy caseloads faced by some courts, salary-level critics could argue that these caseloads are somehow related to inadequate salaries. Perhaps judges feel less compelled to maintain a consistent work level, and maybe crowded dockets are a symptom of a judiciary in crisis—a crisis caused by low salaries. Such an argument, however, is easily shown to be devoid of merit.

Despite dissatisfaction with salary, the federal courts have continued to function well, even while encountering increased demands and expanding caseloads. Crowded dockets are essentially unrelated to the judicial pay scale and instead have their genesis in congressional activity (the federalization of crimes),[93] and congressional inactivity (the failure to promptly confirm judicial nominees and to create judgeships).[94] Not surprisingly, then, caseloads are excessive in many districts and circuits where nominees are awaiting Senate confirmation[95] or where the drug trade has increased the number of federal criminal cases.[96] Contrary to salary critics' arguments, judges generally work harder today than they did even fifty years ago, despite their ability to make more money in the private sector. Accordingly, salaries have not had a deleterious effect on the amount of judicial work being produced.

Problems with busy caseloads and crowded dockets are hardly recent phenomena.[97] In 1921, Roscoe Pound complained as follows: "[T]he

93. *See* United States v. Gregg, 226 F.3d 253, 269 (3d Cir. 2000) (Weis, J., dissenting) (noting several examples of congressional intrusion into criminal law "traditionally within the province of the States").

94. *2001 Year-End Report on the Federal Judiciary*, *supra* note 6 (The Southern District of California "ha[s] the highest number of filings per judge of any federal district court in the nation and the Judicial Conference has requested that eight additional district judgeships be created for this district.").

95. *See* Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 515 (1993) ("The rate at which a judicial district's docket moves is a function . . . of the number of judges available to hear those cases.").

96. *See id.* at 514 ("The Federal Courts Study Committee . . . attributed the current 'crisis of the federal courts' to a recent surge in criminal case filings.").

97. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring). As the *Bivens* Court opined:

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when

condition of pressure under which causes are passed upon in the American urban communities of today, where crowded calendars preclude the thoroughness in presentation and deliberation in judicial study which were possible a century ago, prevent judicial lawmaking from achieving its best."[98] A few years later, Justice Cardozo lamented: "Crowded dockets make it impossible for judges, however able, to probe every case to its foundations."[99] One can hardly ascribe crowded dockets to any recent drop in the purchasing power of federal judges. Thus, the act of increasing salaries will probably not alleviate busy dockets, despite arguments to the contrary. After all, it is not as though judges have agreed to a work slowdown to pressure Congress to increase judicial salaries, despite the fact that this practice has proven successful for other workers. In short, judicial salary levels, though lower than what judges could make as attorneys in private practice, are not so pathetic as to disrupt the functioning of the judiciary.

2. Inferior Judges Producing Substandard Decisions

Salary-level critics also suggest that existing salary levels have resulted in an inferior judiciary that produces inferior decisions. As discussed above, the federal judiciary has not reduced its caseload, which would be one sign of a judiciary in crisis. Similarly, federal judges are not producing noticeably lower-quality opinions, or at least none that are attributable to "inferior" judges, and critics have not identified a rash of poor quality opinions that might support their contentions. Although some critics suggest that the modern judiciary is of a lower quality because of inadequate salary levels, none of these salary critics have identified these "inferior" judges, suggesting that no such identifiable group exists. As Judge Posner has observed: "Although federal judges like everyone else consider themselves underpaid and would like higher salaries, I do not think that the current salary level is a serious threat to the quality of the federal judiciary . . . ."[100] Indeed, despite a number of unpopular rulings, the federal judiciary still retains a high degree of

> we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Id.

98. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 8 (1921).

99. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 5 (1924).

100. POSNER, THE FEDERAL COURTS, *supra* note 29, at 29. Judge Posner makes two qualifications: Judges who live in Manhattan and other high-cost areas are underpaid, and salary level may become inadequate if cost of living adjustments are not commensurate with the rate of inflation. *Id.*

respect among the American public and is generally considered one of the bright spots of the federal government.[101] This scenario is not exactly the gloomy scenario that critics of salary levels have been forecasting.

The academic credentials of judges tell a similar story. The judges of today generally endure a more systematic and intensive formal education than their predecessors enjoyed. This is especially true if one considers that before the 1900s, few lawyers or judges even attended law school, much less three years at a premier legal academy.[102]

Critics would be hard pressed to name more than a handful of sitting federal judges who do not possess judicial acumen. Undoubtedly, inferior judges on the federal bench are ubiquitous (by definition, not every judge can be the best), just as there likely are bad lawyers practicing at the bar. But believing that judicial salaries attract judges to the bench or keep them from pursuing private practice is baseless. Indeed, many a law firm would hire any federal judge with alacrity, and in light of the prestige and revenue that attracting a former federal judge would likely entail, it is probable that many a law firm would hire even an incompetent one.[103] Furthermore, even the prestige of the bench follows departing jurists to the private firm: "Retired judges (even judges who have resigned to pursue a career in practice) usually retain the title 'judge,' and the title commands some deference even when separated from the office."[104] If such a judge were interested only in his financial well-being and some modicum of prestige, he would quickly jump to a private law firm. Other than the back-loaded nature of the judicial compensation scheme,[105] the level of judicial salaries gives such a judge little

---

101. George Melloan, *America's Rule of Law Displays Disturbing Trends*, WALL STREET J., Nov. 5, 2002, at A23 ("The judicial system and the enforcement of its decrees and orders appears to be in good shape . . . .").

102. RICHARD A. POSNER, OVERCOMING LAW 48-49 (1995) [hereinafter POSNER, OVERCOMING LAW]. As Posner stated:

> As late as 1951, 20 percent of American lawyers had not graduated from law school and 50 percent had not graduated from college. But by 1960 four years of college (more precisely, a college degree, which rarely is earned in fewer years), plus three years at an accredited law school, plus receipt of a passing grade on the bar exam administered by the state in which the candidate wanted to practice, plus satisfying a bar committee that the candidate was of sound moral character, formed a series of hoops through which almost everyone who wanted to become a licensed practitioner of law in this country had to jump.

Id. (citations omitted).

103. "There is value in the prestige of having been a federal judge." Sprecher, *supra* note 12, at 384 n.17 (internal quotations omitted).

104. POSNER, OVERCOMING LAW, *supra* note 102, at 120 n.24.

105. After a certain number of years on the bench, a money-maximizing judge will "have limited incentive to pursue job opportunities outside of the judiciary because of the back-loaded nature of judicial compensation." Christopher R. Drahozal, *Judicial Incentives and the Appeals*

incentive to stick around. Accordingly, there is little basis for arguing that the present salary structure results in the retention of incompetent judges while encouraging talented jurists to depart for the greener pastures of a private law firm.

It is true, of course, that judicial salaries hardly compare to the earnings achievable in the private sector. From time to time, this disparity has encouraged some judges to leave the bench and discouraged talented members of the bar from committing to the judiciary,[106] at least temporarily. But salary has never seriously affected the quality of the judiciary. In fact, some of the greatest American jurists have served in times when judicial salaries were on the leaner side.

One giant of the bench, Chief Justice Charles Evans Hughes, initially declined judicial service because his expenses exceeded the judicial income of his day.[107] Yet, at the same time, other notable judges were happy to undertake the judicial role, despite their ability to attract larger salaries with private firms. Thus, around the time that Hughes found the judicial salary unappealing, great jurists such as John Marshall Harlan and Oliver Wendell Holmes, Jr. graced the Supreme Court. Both probably could have commanded more money in private practice,[108] but both, for various reasons, found service on the high court more desirable, despite the lackluster judicial salaries. And it was not the lure of just the Supreme Court that attracted such high-quality jurists. Others, like Second Circuit Judge Learned Hand, knowingly elected to forego the financial rewards of private firms to serve in the trial and appellate courts. Like many who modernly seek the federal

---

Process, 51 SMU L. REV. 469, 476-77 (1998); *see also* SMITH, *supra* note 56, at 50 ("[F]ew people have a taste for switching careers after age 60, especially since the financial attractiveness of a federal judgeship increases as retirement age approaches.").

106. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 139 (1994). As Gunther stated:

> The low priority the government gave to the needs of federal judges was reflected even more clearly in its provisions for their salaries and staff assistance. Hand's salary was $6,000 when he took his seat. With his inheritance added on, he could get by on that well enough, but the amount was insufficient for judges whose sole income it was, and several federal judges resigned to seek better income in private practice.

Id.

107. MERLO J. PUSEY, CHARLES EVANS HUGHES 110 (1951) (Around 1897, Hughes "replied in the negative when a White House intimate asked if he would be interested in a federal district judgeship. Considering his family obligations and the salary then paid federal judges, he thought he could not afford to go on the bench.").

108. Justice Harlan served on the Court from 1877 to 1911; Holmes served from 1902 to 1932. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1264 (4th ed. 1991).

bench, his work at a private law firm did not fulfill Hand.[109] Desiring a greater challenge for his considerable skills, he actively sought a position on the bench despite his father-in-law's full-fledged fight against this course of action. His father-in-law reminded Hand that the rewards of a judgeship were insignificant as compared to the rewards of a partnership at a large firm, and that a judgeship "does not buy houses, maintain them, educate children, or afford them a fair start in life."[110] Yet, Hand was willing to trade his Wall Street salary for the $6000 salary that federal judgeships paid in the early 1900s.

Today, many judges follow in the tradition of Learned Hand. Consider the quality of the judiciary that present judicial salaries buy for the American taxpayer. Those pushing for a judicial pay increase fail to mention the number of excellent jurists that continue to toil on the federal bench, despite present salary levels. Excellent judges, such as the Seventh Circuit's Richard A. Posner and Frank H. Easterbrook and the Fourth Circuit's J. Michael Luttig, to name but a few,[111] serve despite their obvious ability to command superior salaries in the private sector. And these judges are no fools: They know they could greatly increase their salaries, yet, for love of their duties, they choose to remain in their present positions. Perhaps they are wise enough to realize that money is not the only thing that makes for a fulfilling career in the law.

Besides warning that the quality of judges is declining or will decline if salaries are not increased, critics also take aim at the quality of judicial work product. Because of the high quality of the judiciary, deficient decisions are uncommon, and most are based on legal theories that did not originate with the judges who have adopted them.[112] A meaningful discussion of the quality of judicial opinions would require more ink than can be spilt on the subject here, but it is worth noting that critics of the present judicial compensation structure have not been able to show that salaries have adversely affected the quality of judicial decisions.

Admittedly, it is difficult to conceive of a suitable standard by which to measure the overall quality of judicial decisions—it would entail an analysis of the grammar, syntax, clarity, conciseness, organization, and sophistication

109. GUNTHER, *supra* note 106, at 106 ("Hand's sense of defeat in law practice helped to prompt his first effort to obtain a federal judgeship, in 1907.").

110. *Id.*

111. This is obviously an abbreviated list, especially considering that it does not include the Supreme Court Justices, and that even a "mediocre" court of appeals judge could command a respectable salary at any of the hundreds of law firms that would vie for his or her attention.

112. *See* Richman & Reynolds, *supra* note 91, at 302 ("There has been no noticeable reduction in . . . quality as the circuit bench has tripled in size in the last forty years.").

of decisions, as well as an analysis of their outcome, their basis in the law, the complexity of the issues presented, the citation to precedent, the amendments to the opinion required to garner majority support, the time required to produce the decision, and the legislative or judicial reversal rate, to name but a few factors. In the end, however, the complexity in evaluation really makes no difference because under any system of measurement, modern judicial opinions fare no worse, and probably much better, than those of previous generations, some of whom were paid more (in actual purchasing power) than the present judiciary.[113] Take reversal rates, for example. There has been no noticeable increase in the rate of reversal in the federal system, despite the decline in the real value of judicial salaries.[114] The stylistic quality of judicial opinions has not significantly diminished either,[115] and possibly because of developments in computer technology and the adoption of citation standards, they have arguably improved. The same thing goes for the quantity of decisions produced: Federal judges produce more opinions (with more citations to precedent) than ever before. The workload of the federal judiciary, which was never light, has increased significantly with the explosion of federalizing legislation that makes every citizen's sneeze a federal concern.[116] True, better technology and law clerks serve to lighten the load for many judges and may be partly responsible for this increased productivity,[117] and judges of previous generations did not enjoy these

---

113. Of course, one could argue that the relative parity that modern judges share with their forebears indicates nothing about their quality, as their predecessors might also have had inferior abilities. Presently no one seems to be making this argument.

114. Even if there were a spike in reversals, this spike would not necessarily indicate that either the reversing or reversed court was composed of inferior jurists. As Justice Robert Jackson pointed out:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

115. According to Judge Posner, this quality of opinions might have something to do with the liberal use of law clerks. *See* POSNER, OVERCOMING LAW, *supra* note 102, at 112 ("As long as they pick competent law clerks they will be able to churn out, regardless of their own efforts or ability, professionally adequate opinions . . . .").

116. "Think about it. Is there now *any* human want or difficulty that is not considered a federal policy problem?" GEORGE F. WILL, THE WOVEN FIGURE: CONSERVATISM AND AMERICA'S FABRIC, 1994-1997 19 (1997).

117. POSNER, OVERCOMING LAW, *supra* note 102, at 122-23 ("This readiness to delegate judicial duties to nonjudges, such as law clerks, has enabled the federal judiciary to increase its output enormously with only a modest increase in judicial effort . . . .").

privileges,[118] but it is ultimately the judge himself who is responsible for the outcome of a case and the final form of a written decision, regardless of whether the first draft of the opinion had its genesis in a law clerk. In short, no matter how you slice it, there is just no hard evidence that the modern federal judiciary or its work product is inferior to that of prior generations.

3. Judicial Salaries and the Incidence of Bribery

Despite warnings that deficient salaries might increase the incidence of bribery,[119] this evil has not materialized. Notwithstanding allegedly inadequate salary levels, most judges have not sought to supplement their incomes through graft and corruption, and no correlation has been shown between the incidence of judicial corruption and the rate of judicial compensation. Indeed, federal judges are thought to be among the most respectable and honest members of the federal government. Perhaps this is because an individual's salary level is not indicative of his or her personal honesty. For example, take Brazilian judges, whose salary "is over thirty times that of the average salary," an amount that, according to the logic of salary critics, decreases "the incentives for corrupt behavior."[120] Perhaps these generous salaries diminish some of the incentive for corruption, but Brazilians, whose average monthly income is just $260,[121] are hardly getting

---

118. "Congress first authorized a single clerk for each Supreme Court Justice in 1886. Circuit judges did not receive a law clerk until 1930, and district judges did not receive a similar authorization until 1936." Rosenn, *supra* note 20, at 327 (citations omitted); *see also* PUSEY, *supra* note 107, at 276. When Charles Evans Hughes served as an Associate Justice:

> The clerical help provided was meager. Each Justice had only $2,000 a year to pay a secretary. Hughes hired a young lawyer to do this work—three of them served him in succession while he was Associate Justice—but, hating to write in longhand, he kept the young man busy with dictation and did most of his own research. The question of securing more help was occasionally discussed, but some of the Justices feared that if they had law clerks the public might suppose that the clerks were writing their opinions.

Id.

119. *See* Van Tassel, *supra* note 23, at 363 ("[L]ow salaries relative to the rest of the legal profession may have some effect on judicial misbehavior."). The reasoning goes something like this: "Today there is a greater consciousness that judicial salaries need to be higher.... Salaries of a reasonable life style may remove the temptation of corruption." Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 398 (2000). But do high salaries really remove the temptation of corruption? Weren't the criminals at Enron, Qwest Communications, Worldcom, and Adelphia Cable paid handsomely? They still wanted more. No salary is sufficient to satiate the lust for money found in a corrupt heart, even if that heart beats in the breast of a federal judge.

120. Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87, 109 (1999).

121. Miriam Jordan, *Knock Knock: In Brazil, an Army of Underemployed Goes Door-to-Door*, WALL STREET J., Feb. 19, 2003, at A1.

their money's worth. With no disrespect to Brazilian judges, they certainly do not enjoy an international reputation for above-average moral rectitude commensurate with their salary level. Indeed, "Brazil is replete with tales of corrupt judges, arbitrary rulings and requests for bribes."[122] Demonstrating the law of diminishing returns, it is apparent that paying judges thirty times the average Brazilian salary is not purchasing thirty times the average amount of Brazilian honesty,[123] nor is there any reason to believe that increasing the salary of American judges would increase the American's moral rectitude. Because honesty is not a commodity that can be bought and sold, Brazilians, like Americans, could better spend their tax revenue elsewhere. Taxpayers cannot purchase integrity for morally weak judges, and they should not be forced to enrich judges who are willing to prostitute their honesty for material gain.[124]

The rationale behind the critics' theory—that well-compensated judges do not need bribes to survive, while under-compensated judges do—is probably accurate only in extreme situations when judicial salaries are only slightly above the poverty level, a situation not faced by members of the American judiciary.[125] Thus, for example, if a judge could not buy food for his children, his moral resolve might be overcome by a strong desire to preserve his family, perhaps by accepting money from litigants in exchange for desired rulings.[126] No one contends that American federal judicial salaries are close to the poverty level. "The salaries judges receive do not impose the sort of economic hardship that could even begin to explain, let alone justify, a judge's decision to shade her rulings for economic gain."[127] The problem

122. Stephen Buckley, *Floating Court Delivers Law Along Amazon*, WASH. POST, Oct. 31, 2000, at A1.

123. *See* Larry Rohter, *Brazil's Leader Undercut by His Quarreling Allies*, N.Y. TIMES, July 8, 1999, at A10 (mentioning that the Brazilian Congress is investigating "the corrupt and inefficient Brazilian judiciary"); *Brazil's Senate to Launch Corruption Investigation*, BALT. SUN, Apr. 8, 1999, at 22A ("Brazil's Senate prepared yesterday to launch probes into alleged judicial corruption . . . .").

124. Bribery is not the only external influence that could cause a judge to rule contrary to the dictates of law. ARTHUR T. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 30 (1958) ("The requirement of integrity of character is primary; in order for judges to be independent and impartial they must be courageous and able to withstand external influences whether in the form of bribes, pressure of friend or family, antipathies of class or religion.").

125. *See* SMITH, *supra* note 56, at 64 ("In a worst case scenario, unconscionably low salaries may invite bribery and corruption.").

126. *See, e.g.*, J. Clifford Wallace, *Independence From What and Why*, 58 N.Y.U. ANN. SURV. AM. L., 241, 248 (2001) ("I was recently in two African countries where judges at the lowest level are paid insufficient wages to feed their families. All are aware that these judges supplement their income through bribes.").

127. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 538 (1999).

judges and would-be judges face is more likely to be a problem with sending their children to prestigious (read: expensive) universities[128] and maintaining an affluent lifestyle. As Professor David Barnhizer mused, "[J]udicial corruption is generally not related to levels of judicial compensation. Judges receive a respectable amount of compensation on both state and federal levels."[129]

This is not to say that wealthy politicians and judges never seek bribes. They obviously do.[130] But increasing salaries is not an effective means of inhibiting such conduct. In fact, it is arguable that increased salaries will actually attract those who value money above other goods—such as honesty—and such judges would be more inclined to accept bribes.[131] Higher salaries might "attract the venal to office, plausibly increasing rather than decreasing the incidence of corruption."[132] As Archbishop Fulton Sheen once wrote: "Riches in great abundance have a peculiar quality; they make men more greedy."[133] Thus, encouraging the wealthy to join the judiciary or making judges wealthy is not a wise course of action, at least from the perspective of preventing bribery. "Simply increasing judicial salaries will

---

128. *See* AMERICAN BAR ASSOCIATION & FEDERAL BAR ASSOCIATION, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM 11 (2001) [hereinafter FEDERAL JUDICIAL PAY EROSION] ("Some judges are worried that they will not have enough money to send their children to college."); Frank M. Coffin & Robert A. Katzmann, *Steps Toward Optimal Judicial Workways: Perspectives From the Federal Bench*, 59 N.Y.U. ANN. SURV. AM. L. 377, 384 (2003) (judicial salaries are a "particular problem for those who have young families, with the prospect of children of college age"); James L. Oakes, *Grace Notes on "Grace Under Pressure,"* 50 OHIO ST. L.J. 701, 715 (1989) ("And for those of us who are past the age of college or graduate-school tuitions, there are grandchildren who need educations, too."); FORER, *supra* note 92, at 85 (When one considers the tuition levels at "Ivy League and other private universities, a judge who has two or three children and does not have independent means or a working spouse has financial problems."); Sprecher, *supra* note 12, at 382 n.11 ("But judges have family obligations, too; children who go to college . . . ."); Spoon, *supra* note 9, at 597 ("The judge's complaints tend to emphasize that their salaries cause uncertainty about their ability to provide adequately for their children's education . . . ."); Mooney, *supra* note 11, at 461 (arguing that salaries are inadequate because judges "must educate their children"). But it is worth asking, "if judges are struggling with the cost of education, what must their fellow citizens be facing?" SMITH, *supra* note 56, at 58.

129. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 396 (2001).

130. "Trying to cheat the public is a game that is constantly being played . . . ." HUGHES, *supra* note 1, at 15.

131. *See* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 536 n.142 (2002); *see also* Glen R. Winters, *Salaries of American Judges*, 28 J. AM. JUDICATURE SOC'Y 173, 174 (1945) ("It is likewise unwarranted to assume that the payment of disproportionately high salaries would solve every difficulty. It would, in fact, create some new ones, for it would induce some unsuitable men to become candidates and might . . . lower the level of competition for judicial office.").

132. Vermeule, *supra* note 131, at 536 n.142.

133. FULTON J. SHEEN, ON BEING HUMAN: REFLECTIONS ON LIFE AND LEARNING 80 (1982).

not automatically improve the quality of the judiciary. The higher the salary the more desirable the position becomes to the least desirable candidates."[134] Judges who desire financial wealth more than serving honestly will likely either resign their posts or pursue graft, regardless of what they are paid. Because the public fisc could never afford to satisfy such a judge's lust for riches—even if such satisfaction were possible—it is also doubtful that a substantial increase in pay would persuade these judges to serve faithfully and honestly. Therefore, the present salary scheme wisely encourages judges who value money at a level above the non-monetary benefits of serving on the judiciary to depart the bench.

4. The Underpaid Judiciary: A Club for Only the Wealthy?

Many critics of the present salary structure have argued—almost as if they were class-struggling Marxists—that judicial salaries permit only those with independent wealth to pursue a judicial career,[135] as the common man cannot afford the financial sacrifice necessitated by donning the judicial robe.[136] They argue that "the socio-economic pluralism of the Federal Bench is jeopardized by declining judicial compensation,"[137] or as Judge Harlington

---

134. FORER, *supra* note 92, at 85-86.

135. As Morris Mitchell stated:

> [I]f federal judicial salaries are not placed on a sufficiently high level to make it possible for successful lawyers to accept appointment without hardship to themselves and their families the result will inevitably be that judges must, in the main, be selected from either (1) lawyers who have acquired financial independence, or (2) lawyers who have been so unsuccessful in practice that their present earnings will bear favorable comparison with present federal judicial salaries.

See Mitchell, *supra* note 62, at 198. Of course, Mitchell omits at least one other alternative: Lawyers who are willing to control their spending and live modestly in order to serve their country. True, selfless service is not a pervasive virtue, but some people are still likely to strive to inculcate it.

136. *See* Robert N. Weiner, *Making Less than New Lawyers*, NAT. L.J., Aug. 27, 2001, at A20 (Some attorneys will still pursue a judicial career "because they do not need the money"); Cokie & Steve Roberts, *Why Federal Judges Deserve Higher Salaries*, TULSA WORLD, July 26, 2002 ("[T]he current system is attracting two kinds of judges: those who have already made or inherited a pile of money; or younger lawyers who see a judgeship as a steppingstone to a lucrative career down the line."). Similarly, former Chief Justice of the Virginia Supreme Court, Harry L. Carrico, believes that unless judicial salaries are increased, only three types of lawyers will pursue judicial careers: "'Those who are independently wealthy, those who have been successful in the practice of law and wish to "top off" their careers with service on the bench before finally retiring, and those whose lack of success in private practice suggest that financial security is their principal motivation in seeking judicial office.'" Al Kamen & Ed Bruske, LAWYERS, WASH. POST, June 6, 1983, at D2 (quoting Harry L. Carrico); *see also* Mooney, supra note 11, at 462 ("If the judges' salary remains at its present level it is possible that in the future judges will have to be drawn from one of two groups—men of independent means, or men who will use the office as a stepping stone for something else.").

137. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at ii.

Wood, Jr. offered: "If serving as a judge were to mean a financial sacrifice impacting prospective judges and their families, only the rich would become federal judges."[138] Similarly, Chief Justice Rehnquist believes that, if judicial salaries are not increased substantially, such a crisis will arise that "only the wealthy or the mediocre" would accept judicial appointments.[139] Demonstrating that this argument contains the seeds of its own demise, Judge William Hughes Mulligan of the United States Court of Appeal for the Second Circuit opined in 1981: "'We have reached the point where only those with substantial independent means can accept judicial appointment . . . .'"[140] If Mulligan were correct, because most of the present federal judiciary accepted appointment after 1981, most of the judiciary must be substantially wealthy and would not need a salary increase after all.

But logical defects in this argument have not prevented salary critics from advancing it; indeed, the argument has long been the staple of those clamoring for a pay raise. Part of their argument is that salaries must be increased to prevent the federal judiciary from becoming a bastion of elitism. Apparently they have not yet discovered that elitism in government had its genesis long ago, and the phenomenon is bound to continue well into the future regardless of the salary paid to federal judges or other government officials. Even when judicial salaries were at their pinnacle, federal judges were consitently "drawn from the ranks of educated political elites."[141] Increasing salaries will not change this one bit. "Elitism—meaning a disproportionate role in government and society by small groups—is inevitable. The question for any society is not whether elites shall rule, but which elites shall rule. The problem for any democracy is to achieve consent to rule by suitable elites."[142] As the theologian/physicist Pierre Teilhard De Chardin offered: "The essential law of cosmic development is not the egalitarian fusion of all beings, but the segregation that allows a chosen elite to emerge, to mature and to stand out alone."[143] Because elites will always rise to the top, and because there are not any poor elites, raising the salaries of legal elites will not alter the status quo. Because the present judicial salary is sufficient to attract low-income lawyers, along with middle-class ones, doubling or tripling judicial salaries would not

---

138. Wood, *supra* note 11, at 264.

139. Chief Justice Rehnquist, *quoted in* David S. Broder, *Rehnquist and Breyer Argue for Judicial Pay Increases*, WASH. POST, July 16, 2002, at A15.

140. Lubasch, *supra* note 71, at B1 (quoting Judge Willaim Hughes Mulligan).

141. SMITH, *supra* note 56, at 60.

142. GEORGE F. WILL, THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS *1990-1994* 131 (1994).

143. PIERRE TEILHARD DE CHARDIN, THE PRAYER OF THE UNIVERSE 64 (Rene Hague trans., 1968).

substantially increase the number of non-elites motivated to seek judicial office. Indeed, higher salaries will simply increase the number of wealthy judges serving on the bench.

All that salary increases do is make it easier for financial elites to serve on the judiciary, an outcome not bad in itself, but not the stated goal of the salary critics. Take, for example, Learned Hand's case. Were it not for Hand's sizeable inheritance, he probably could not have afforded both his judicial position and his comfortable Manhattan lifestyle, at least initially.[144] As Professor Gerald Gunther related: "Hand's salary was $6,000 when he took his seat. With his inheritance added on, he could get by on that well enough, but the amount was insufficient for judges whose sole income it was, and several federal judges resigned to seek better income in private practice."[145] Thus, increasing Hand's salary would simply have made it easier for him to enjoy the comforts he was used to, but it was not necessary to keep him on the bench. Importantly, Hand was not much different from recent nominees, of whom "a much larger share is independently wealthy."[146]

The relevant question, of course, is whether America would have been better served by excluding wealthy judges like Learned Hand—"numbered among a small group of truly great American judges of the twentieth century"—from the federal bench.[147] Anyone familiar with the depth and quality of Hand's work would quickly answer with a resounding "no."[148] Moreover, Hand is certainly not the only wealthy judge whose presence on the bench was a boon to American law. As best anyone can tell, wealth, or even the lack thereof, does not in itself make a judge better or worse.[149] Instead of arguing that salaries need to be increased to keep wealthy elites off the bench, salary critics who truly care about the quality of the judiciary should expend their energy finding ways to keep suitable elites on the bench, regardless of their financial net worth. But, of course, salary critics really do not care about keeping the wealthy off the bench, nor should they.

If the goal of salary increases truly is to defend the federal courts from invasion by the wealthy, and even if this were a wise course of action, there are much more effective means of achieving this goal than those afforded by

144. GUNTHER, *supra* note 106, at 139.

145. *Id.*

146. Stern, *supra* note 85, at 1.

147. GUNTHER, *supra* note 106, at xv.

148. Judge Posner calls Hand "the greatest judge in the history of the federal courts of appeals." POSNER, OVERCOMING LAW, *supra* note 102, at 71.

149. *But see* HERBERT JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS 121 (3d ed. 1978) ("Justices of humble family background were more likely to abandon precedent than those coming from upper-status families . . . .").

across the board salary increases. In the words of Charles Evans Hughes: "The way to get rid of abuses is to attack them directly."[150] If the high incidence of wealthy judges is an abuse in need of correction (and it is not), the better course of action would be to petition the President not to appoint any attorneys of substantial wealth, an amount that could easily be defined as those with a net worth in excess of a specified amount. Failing that, there is always the Senate: A person could petition for net worth limitations before confirmation.[151] Alternatively, the ABA, which constantly clamors for judicial salary increases,[152] could amend the judicial rules of ethics to hold that judges must not possess any wealth beyond a specified amount. If they really were serious, critics could seek to impose further restrictions on the acceptance of outside income, lest judges increase their net worth while serving on the bench. Of course, none of the salary critics have proposed such sweeping measures, nor will they ever do so for the simple reason that keeping the wealthy off the bench is not the true motivation behind salary increases and would be a foolish course of action.

a. Wealthy Denizens of the Federal Bench

The federal judiciary is already made up of largely financially successful individuals and people of better than average means. While they may not be the super-rich, they have a financial comfort level above the average American.[153] As Judge Jack Weinstein mused: "Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum,"[154] and he does not mean the financially destitute. Similarly, in the words of Judge James Buckley: "The federal judiciary is recruited from a professional elite, it enjoys life tenure, and, at the appellate level at least, it is sheltered from the rough and tumble of everyday life."[155] This financial elitism has probably had an effect on at least

150. Charles Evans Hughes, *Address at the Union League Club Meeting in the Auditorium at Chicago, February 22, 1908*, *in* ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916 129 (2d ed. 1916).

151. For the full Marxist effect, this proposal should be put forth in the Senate while banging one's shoe on the podium, in a Kruschevian fashion.

152. *See, e.g.*, *supra* notes 4, 62, 128.

153. *See* Linz Audain, *The Economics of Law-Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function*, 42 AM. U. L. REV. 115, 127 (1992) ("The demographics of these judges are startingly similar, with the vast majority of the federal bench being white, Protestant, male, politically active, middle-aged, middle- to upper-income . . . .").

154. Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998).

155. Hon. James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J. L. & PUB. POL'Y 189, 200 (2000). Justice Clarence Thomas's early life may be an exception to this rule. *See* Justice Clarence Thomas, *Freedom: A Responsibility, Not a Right*, 21 OHIO N.U. L. REV. 5, 10 (1994). "Compared to the majority of Americans, judges have extremely

some of these judicial decisions,[156] as judging sometimes entails following one's preexisting views,[157] which can be shaped by, among other things, socio-economic status.[158] Yet, America has been willing to tolerate the elitism in the courts almost from the judiciary's founding, so why should it stop now? Are wealthy judges less likely to reach the correct decision than impoverished judges?[159] Would indigent judges be more skilled and produce better reasoned decisions than their wealthy counterparts? The answers to these questions are obvious—so obvious that they categorically demonstrate the facile reasoning of the argument that salaries must be increased lest the wealthy hordes wrest control of the judiciary from other slightly less-wealthy folks.

As it stands now—during both the Republican and the Democratic presidencies—federal judgeships frequently go to those wealthy enough to afford substantial campaign contributions or to those who belong to the league

---

high incomes. According to figures from the Census Bureau, only the top 5.3 percent of American families shared the federal judges' annual income level of $90,000 or more in 1989." SMITH, *supra* note 56, at 57.

156. *See* CARDOZO, *supra* note 18, at 174-75. As Cardozo opined:

> The sprit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.

Id.

157. SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT viii (1951) (Judges "cannot divorce themselves, if they would, from the social milieu into which they are born and in which they are nurtured."); CARDOZO, *supra* note 18, at 167 ("Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.").

158. Eric Rakowski, *Posner's Pragmatism*, 104 HARV. L. REV. 1681, 1682 (1991) ("If no uniquely correct resolution exists to a particular legal dispute, judges must decide as their personal convictions or political preferences dictate rather than as authoritative legal materials prescribe."). These convictions and preferences may (in some instances) have some correlation with a judge's financial status. This does not necessarily make them incorrect, however.

159. Perhaps so, since an inordinate pursuit of wealth is indicative of vanity and a lack of wisdom. *See* THOMAS À KEMPIS, THE IMITATION OF CHRIST 32 (Richard Whitford trans. 1955) (1427) ("It is therefore a great vanity to labor inordinately for worldly riches that will shortly perish . . . ."). For a similar criticism, see HUGHES, *supra* note 1, at 8 ("Increasing prosperity tends to breed indifference and to corrupt moral soundness."); FULTON J. SHEEN, ON BEING HUMAN: REFLECTIONS ON LIFE AND LEARNING 192 (1982) (For the rich, money "becomes important not because it has value to purchase, but because it is 'more'; it gives a sense of power; it salves the conscience by making the possessor believe that he must be worth something since he has something of worth."); BORK, *supra* note 90, at 8-9 ("Affluence brings with it boredom. Of itself, it offers little but the ability to consume, and a life centered on consumption will appear, and be, devoid of meaning.").

of wealthy elites governing America.[160] Take, for example, George W. Bush's appointees to the federal bench, fifty-eight percent of whom were millionaires as of a specific date, followed closely by Bill Clinton's appointees, fifty-one percent of whom were millionaires.[161] Of course, there are rare exceptions like Clarence Thomas, who grew up in abject poverty, but like most lawyers, he had obtained a level of material comfort before his appointment to the bench.[162]

Almost every American lawyer is wealthier than the average American, and so long as federal judges are appointed only from the ranks of attorneys, judges are going to fall above the mean in terms of disposable capital.[163] Appointing wealthy lawyers is not itself the problem. The real dilemma is that many judges find their salaries pitifully low because they have grown used to the extreme wealth and abundance available at silk-stocking law firms.[164] Wealth is not the problem, but the habituation to comfort and excess that wealth often produces is. For example, in 1977, the late Judge Fred J. Cassibry, a district judge from New Orleans first appointed to the bench by President Johnson,[165] complained that his federal salary left him in serious financial straits.[166] His judicial salary entailed a number of financial hardships, including the following (quick, grab a tissue!): (1) His wife was forced to work outside the home (a common phenomenon for many American families); (2) "He has sold a dearly beloved 24-foot inboard motor boat" (a luxury that most Americans do not enjoy); (3) He cannot eat at expensive

160. As with court of appeals and district judges, "the choice of a Supreme Court nominee is rarely a merit-selection process." GUNTHER, *supra* note 106, at 568. That is not necessarily a bad thing (loyalty can be virtuous) so long as these judges are qualified for the positions. Whom, after all, should a president appoint to the bench? His political enemies? Judges who disagree with his core values and political views?

161. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 707 (2002).

162. *See* Thomas, *supra* note 155.

163. In fact, many federal judges:

> [H]ave significant financial assets and investment income that they bring to the judiciary with them, on top of their annual salaries, as a result of coming from affluent families or of working in lucrative legal and business careers prior to service on the bench. Compared to the rest of American society, judges' investment holdings constitute significant financial resources that supplement their relatively high salaries.

SMITH, *supra* note 56, at 57.

164. Marian H. Neudel, *They Shouldn't Be In It Only for the Money*, NAT'L L.J., Dec. 10, 1990, at 12 ("[O]ur current judges lament about their inability to keep up the standard of living they acquired while they were corporate partners.").

165. *See Judges of the United States Courts*, http://airfjc.gov/servlet/uGetInfo?jid=396, (Oct. 15, 2002).

166. *See* Darling, *supra* note 77, at A1.

restaurants with his wealthy friends (at this point tears should be rolling); and (4) He had to give up his membership in a country club.[167] If only all Americans had financial problems of only this magnitude! More than anything, these lamentations show how far removed some judges are from the difficulties that most Americans face every day. Selfish complaints such as Judge Cassibry's demonstrate "an absence of sensitivity to the harsh realities of life in American society and the undeniably privileged position enjoyed by citizens who receive the relatively high salaries of federal judges."[168] No wonder Congress does not seriously consider judicial pleas of poverty. No wonder nobody believed the ABA when it claimed that "current federal judicial salaries require federal judges to live on a very modest scale."[169]

b. Higher Salaries Simply Enrich Wealthy Judges

As to the second point—that higher salaries will actually lead to an increase in the number of wealthy judges—even assuming that it is undesirable to have the judiciary saturated with wealthy judges, increasing judicial salaries will hardly solve this problem. Indeed, more generous salaries will actually exacerbate this problem by making it feasible for financial elites to serve on the federal judiciary with less financial sacrifice than if salaries were maintained at the status quo. If the goal truly were the reduction of the number of wealthy individuals serving on the bench, a better approach would be to *freeze* judicial salaries, not raise them. Salary increases would simply permit the wealthy to succeed to judicial positions while maintaining their escalating standard of living. An increase also would encourage the venal to seek judicial office, an occurrence that would hardly raise the quality of the bench.[170]

Because less-wealthy attorneys are already skilled in living a frugal life, they, more than the wealthy, are able to adapt to moderate judicial salaries. As the socialist Mark Green opined in 1977, moderate judicial salaries "help filter out" judges and would-be judges "who find they can't live on anything less than $70,000 a year."[171] Lower salaries can prevent lawyers who do not

167. *See id.*

168. SMITH, *supra* note 56, at 56.

169. Mitchell, *supra* note 62, at 198.

170. *See* POSNER, THE FEDERAL COURTS, *supra* note 29, at 30 ("[I]t is not at all clear that increased salaries would result in abler judges, since much higher salaries would increase the number of candidates for each judgeship, and if history is a guide, merit would not be the exclusive or even the paramount criterion for choosing among the candidates.").

171. Lynn Darling, *supra* note 77, at A1 (quoting Mark Green). More specifically, Green opined that moderate salaries will filter out "conservative" attorneys, who, apparently in Green's mind, are typically wealthier than liberals. Because the wealthy are more likely to be liberal, however, it is hard to see the basis for Green's view. *See* CLARENCE MANION, THE KEY TO PEACE

have the requisite spirit of sacrifice from taking the bench. Thus, moderate judicial salaries may serve a "'filtering' function by discouraging individuals who are relatively inclined toward selfishness from seeking or accepting judicial appointments."[172]

The real concern here is not that federal judges are impoverished. Rather, an increase in judicial salaries would, in most cases, simply ensure that wealthy judges are maintained in the financial comfort to which they have become accustomed.[173] But why should the American taxpayer—who works over four months each year just to pay local, state, and federal taxes—foot the bill for such luxury?[174] If quality judges can be had at a lower price, why should taxpayers pay a premium? Those who clamor for increased judicial salaries must begin to recognize that "certain lawyers in private practice with stratospheric salaries may never be attracted to any salary that the government could reasonably afford to offer."[175] It is senseless to try to entice judges to the bench by increasing salaries, especially since there are a number of excellent candidates who are less enamored with wealth. America does not need judges for whom the privilege of serving on the federal bench is worth less than owning a yacht or being a member of a prestigious country club. Furthermore, since federal judicial salaries are geographically uniform, paying the higher rate to all judges, simply because it is necessary to attract a few, is a waste of the taxpayer's money.[176] This act would entail "overpaying" many judges. No such expenditures are necessary to maintain an accomplished judiciary.

---

82 (1951) ("Many of our most rabid and influential American Communists are in the very highest income tax brackets year after year."). Indeed, at least one of the moral vocal critics of judicial salaries was a liberal appointee of Lyndon Johnson. *See supra* Part II.B.4.a.

172. Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1623 n.46 (2002).

173. Oakes, *supra* note 128, at 715 ("Even when one has capital, it is annoying, even scary, always to be invading it to live in the style or fashion to which one is accustomed.").

174. *See* Lawrence J. McQuillan, *Limiting State Taxes and Spending*, SAN DIEGO UNION-TRIBUNE, Apr. 29, 2003, at B9 (noting that April 29, 2003 was Tax Freedom Day for California: The day "the typical taxpayer has earned enough money to pay their annual federal, state, and local tax bill.").

175. SMITH, *supra* note 56, at 53.

176. As Posner stated:

> But what of the more money-minded, or less saving-oriented, of the ablest practitioners—shouldn't we try to snag some of them, by means of generous salaries, to serve as federal judges? It would be nice, but it would be pricey, as it would mean "overpaying" the vast majority of judges in order to get the handful whose reservation price is high.

POSNER, THE FEDERAL COURTS, *supra* note 29, at 30.

III. IS SOCIETY'S EXPECTATION OF LIFE TENURE THE REAL PROBLEM?

Part of the whining about judicial salaries and retention levels can be attributed to the fact that most judges spend the majority of their productive lives on the bench, never leaving it, thus preventing them from taking at least temporary advantage of private salaries. Because one of the privileges of a federal judgeship is life tenure, most judges apparently feel compelled to exercise this privilege. Some judges do so out of loyalty or a desire to preserve their school of judicial or political philosophy. Others like observing the power their ideas wield in the law and the influence their work compels.[177] Thus, even though some would like to retire, they hang on, waiting for the election of a President who will hopefully appoint a successor with the judge's same ideals,[178] along with a Senate that will confirm that successor. Indeed, studies have shown that Republican-appointed judges were significantly more likely to retire during the tenure of a Republican president than under a Democratic one.[179] Some speculate that Chief Justice Rehnquist has chosen to follow this path,[180] and that even though the Bush

---

177. On this point, Judge Hand wrote poetically:

> A judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work .... [But] when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form .... [O]ut of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master.

Learned Hand, quoted in GUNTHER, *supra* note 106, at 402. What Hand may have been trying to articulate is that judging satisfies man's natural longing and need to create. As Hand also wrote:

> Somewhere there lurks a craving to impress some form upon the stuff about us .... I must be friendly with the whole of this Me, in which I live and move and have my being, this formless thing, wayward, unaccountable, inconsequent and wanton. In its deep recesses it has the itch to leave upon an indifferent universe even the print of its hand upon the clay.

Id. at 401.

178. Akhil Reed Amar and Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23.

179. Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220 & n.22 (1999) (citing James F. Spriggs & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals*, 1893-1991, 48 POL. RES. Q. 573 (1995)).

180. Robert C. Greenberger, *Congress Girds for Possible High Court Exit*, WALL STREET J., June 12, 2003, at A4 ("Chief Justice Rehnquist, who was appointed to the court in 1972 by President Nixon, tops the list of likely resignees. Speculation has it that at age 78, having put his conservative stamp on the court, he might want to retire knowing a conservative Republican president will replace

administration has been in power for over two years at the time of this writing, he initially was waiting for the Republicans to take over the Senate before retiring,[181] and is now waiting for the Republicans to overcome the filibuster dilemma presently plaguing Bush's judicial nominees. After Senate Republicans have done so, America will see whether this theory has predictive value. But even if Rehnquist does not follow this strategy, it certainly makes sense, at least for judges who seek the survival of their judicial philosophy.

Critics of the present salary structure, however, lament the fact that judges are presently departing the bench to take advantage of private-sector salaries.[182] According to them, because judges can serve for life, they should do so,[183] and if higher salaries are the price America must pay to retain judges, then so be it. According to one salary critic: We expect judges "to shoulder crushing caseloads. And we expect them to do so for life."[184] Leonidas Ralph Mecham, secretary of the Judicial Conference of the United States, believes that leaving the bench to serve in private practice "'is inconsistent with the traditional lifetime calling of federal judicial service.'"[185] According to Chief Justice Rehnquist, "The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance."[186] When asked why it was important for judges to remain on the bench permanently, Rehnquist responded that federal judgeships are supposed to be "'lifetime' careers rather than a stepping stone to other positions."[187] But the Chief Justice never clarified why this should be so, and has "cited no particular harm to the judiciary" from departing judges.[188]

The expectation of ending one's legal career as a judge may be part of the salary problem, and divorcing America from this expectation may be part of the solution. Americans should begin to realize that a ten to fifteen-year stint on the bench may be more desirable than a lifetime stint. This length of time would give jurists a chance to make a significant contribution to society

---

him with an ideological twin.").

181. In contrast, Justice Stevens is thought to be waiting for a Democratic president.

182. FORER, *supra* note 92, at 82 ("Federal judges are also dissatisfied with their salaries .... Many have left the bench for more lucrative work.").

183. Weiner, *supra* note 136, at A20.

184. *Id.*

185. Stephen Barr, *Salary Squeeze May Drive Away More and More Judges, Executives*, WASH. POST, June 16, 2002, at C3 (quoting Ralph Mecham).

186. *"Truly Extraordinary and Frightening": Commission Hears Testimony on the Problem of Judicial Pay*, THE THIRD BRANCH (2002), *available at* www.uscourts.gov/ttb/aug02ttb/commission/html.

187. SMITH, *supra* note 56, at 50.

188. *Id.*

before or after ensuring their own financial welfare. Not only would the taxpayer enjoy a respite from the calls for higher salaries, but also judges themselves could be freed of the periodic haggling with Congress over raises. Rather than decreasing the prestige of judicial office, such a system would increase the respect with which society views the judiciary, since all would realize that judicial service was not undertaken for personal enrichment. Furthermore, when judicial service is undertaken after a lengthy career as an attorney, judges bring to the bench invaluable knowledge and experience that cannot be gained solely by serving on the bench. Similarly, those judges who depart the bench for private practice take to the bar a perspective that can benefit only the practice of law for all concerned, including the judges who remain on the bench. True, some skill and knowledge is lost when judges leave the bench, but these departing judges continue to assist the bench by tutoring their advocate-colleagues on what the bench looks for in briefs and arguments and how they can be more zealous and principled advocates. Society has much to gain from departing judges, even if their departure from the bench is engendered by dissatisfaction with salary levels.

IV. THE NEXT GENERATION OF JUDGES: ATTRACTING THE BEST AND BRIGHTEST TO THE BENCH

A. Warnings About Recruiting New Judges

Akin to their argument that quality judges are fleeing the bench, salary-level critics also argue that inferior salaries can attract only inferior candidates to the bench,[189] and even if the quality of the judiciary is not demonstrably suffering currently, it will in the future.[190] According to critics, "the inadequacy of judicial salaries is adversely affecting the government's ability to attract highly qualified judicial candidates,"[191] and the only way to attract such candidates is to raise salaries significantly:[192] "Successful lawyers

189. *See* Mooney, *supra* note 11, at 461 ("Men of high calibre are reluctant to serve in a position which results in drastic reduction of their standard of living."); *see also* POSNER, OVERCOMING LAW, *supra* note 102, at 140 ("The more costly it is to become a judge and the lower judicial income is relative to income in practice, the less likely a lawyer is to accept a judgeship.").

190. Spoon, *supra* note 9, at 602 ("It has been frequently suggested that there has been and will be difficulty in attracting qualified people to the federal bench. Inadequate and inequitable salaries may induce judges to leave the bench and discourage qualified candidates from seeking judgeships.").

191. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at i.

192. Morris B. Mitchell, *The Judicial Salary Crisis: An Increase Is Urgently Needed*, 39 A.B.A. J. 197, 198 (1953) ("[T]he most important effect on the federal judiciary of these inadequate judicial salaries is the difficulty of getting good men to accept appointment at present salaries and the inevitable decline of the calibre of the federal judiciary unless salaries are substantially increased.").

provide the source that must be looked to in obtaining judges. To attract these men to seek judicial office it is necessary to provide an attractive salary and reasonable retirement benefits."[193] As proof of their forecasts of doom, salary critics offer anecdotal evidence that many top-notch attorneys are declining offers of appointment to the judiciary, presumably leaving mediocre attorneys to take their places on the bench.[194] Since there obviously is no shortage of lawyers interested in serving as a federal judge,[195] the gist of their argument must be that low judicial salaries are not attracting the best and the brightest,[196] and instead are inducing unworthy, mediocre lawyers to seize a golden opportunity that normally would not be available to them.[197] The critics argue that although the present salary level may be adequate to attract attorneys with pedestrian abilities and limited career opportunities, it "is discouraging other candidates from even considering a judicial career."[198]

According to salary critics, the "chasm in earnings between the public and private sectors inevitably will divert the best and brightest from the bench."[199] Additionally, the "quality and diversity of the federal bench will suffer."[200]

---

193. Elmo B. Hunter, *Judicial Compensation*, 54 JUDICATURE 180, 180 (1970).

194. Van Tassel, *supra* note 23, at 358 ("The number of people who have declined to be considered for federal judgeships because of the low salary is undoubtedly far higher than those resigning from judgeships for that reason. Nonetheless, this number can only be approximated."); Charles H. Percy, *No Royal Road to Justice*, 60 JUDICATURE 184, 185 (1976) ("During the past seven years, many individuals who were among my first choices as judicial candidates decided that they could not accept such positions because of salary considerations.").

195. *See* Richman & Reynolds, *supra* note 91.

196. Sprecher, *supra* note 12, at 385 ("[T]he top quality lawyer has neither the desire nor the economic ability to take on the difficult job at a great sacrifice in compensation.").

197. Mooney, *supra* note 11, at 457 ("The need to examine the adequacy of present compensation of federal court judges is emphasized by the increasing difficulty in inducing men of high caliber to accept appointment to the bench.").

198. Cokie & Steve Roberts, *supra* note 136; Editorial, *U.S. Judicial Branch Weakened by Politics and Inadequate Pay*, TAMPA TRIBUNE, Jan. 7, 2002, at 12 ("[M]any private-sector lawyers who would make fine judges are unwilling to even consider the lifetime appointment because it would mean great financial sacrifice."); *see also* THOMAS SOWELL, THE QUEST FOR COSMIC JUSTICE 24 (1999). Sowell writes:

> While the existing practitioners in a given field may be adequately (or even excessively) rewarded for their performance level, there may nevertheless be a case to be made for raising salaries in a particular field, in order to attract a higher caliber of person, capable of a higher level of performance, than the current norm in that field.

Id.

199. Weiner, *supra* note 136, at A20. Of course, this is not necessarily true; low salaries will only discourage the best and the brightest if they value private salaries more than a judgeship. As discussed more fully below, not everyone has the same value system. Even Mr. Weiner concedes this point: "To be sure, some gifted lawyers still will choose the bench as a career, despite the pay." *Id.*

200. *Id.*

Some fear that it is becoming impossible to recruit the next generation of judges.[201] Chief Justice Rehnquist cautions that "[i]t is becoming increasingly difficult to find qualified candidates for federal judicial vacancies. This is particularly true in the case of lawyers in private practice."[202]

Of course, these predictions, like those of a stampede of judges fleeing the bench, are nothing new. In 1984, in his State of the Judiciary Report, Chief Justice Burger warned that without a pay raise, lawyers were apt to turn down appointments to the bench.[203] Officials who served in the Reagan Justice Department noted that recruiting was more difficult, and some candidates declined judicial office, because of the unattractiveness of judicial salaries.[204] In 1980, Judge Kaufman, lobbying to get raises for his judicial brethren, predicted that "more and more outstanding lawyers would shun judicial service unless Congress voted substantial raises for judges next year."[205] In 1976, Judge Sprecher noted that "[a]nyone who has been connected with judicial selection knows how many times recruitment of the most qualified lawyers among those available for judicial appointment is frustrated by their inability to accept the financial sacrifice that is entailed."[206] But these warnings of doom concerning the recruitment of quality candidates—like those about retaining quality judges—go back much farther than the 1970s[207] or even the 1870s.[208]

Undoubtedly, some well-qualified attorneys have refused, and will in all likelihood continue to refuse, a judicial career because they cannot or will not

201. Barr, *supra* note 185, at C3.

202. *2001 Year-End Report on the Federal Judiciary*, *supra* note 6.

203. Al Kamen, *The Judiciary: Burger Urges Pay Raise for Federal Judges*, WASH. POST, Dec. 31, 1984, at A11 ("Budget deficits notwithstanding, Burger wants the judges to get another raise lest too many qualified lawyers turn down judicial job offers.").

204. VAN TASSEL, *supra* note 34, at 10 n.30.

205. Taylor, *supra* note 66, at A18.

206. Sprecher, *supra* note 12, at 382 n.11. Also in 1976, former Illinois Senator Charles Percy related: "Attracting first-rate attorneys to federal judicial service at current salary levels is a serious problem. During the past seven years, many individuals who were among my first choices as judicial candidates decided that they could not accept such positions because of salary considerations." Charles Percy, *supra* note 194, at 185.

207. For example, among those who previously declined a position on the bench was the future Chief Justice Charles Evans Hughes who "replied in the negative when a White House intimate asked if he would be interested in a federal district judgeship. Considering his family obligations and the salary then paid federal judges, he thought he could not afford to go on the bench." PUSEY, *supra* note 107, at 110.

208. Van Tassel, *supra* note 23, at 358 ("In the nineteenth century, when some Presidents had a habit of nominating individuals for judgeships without consulting them first, a number of candidates declined nomination or declined to serve after confirmation because of the low salary."). Among those who faced recruiting difficulties was President Zachary Taylor, who was rebuffed by nominees who found lucrative employment elsewhere. VAN TASSEL, *supra* note 34, at 13.

afford the reduction in salary that service on the bench would entail.[209] But this fact is hardly endangering the quality of the federal judiciary. For every individual who cannot or will not accept the present pay scale, many other equally-qualified attorneys are willing to make the requisite financial sacrifices. Even in the 1970s, when inflation was virulently eating away at the earning power of judicial salaries, there was never "any shortage of lawyers willing to stand in line for judicial appointments."[210] And despite Judge Kaufman's warning that "outstanding lawyers would shun judicial service,"[211] many excellent lawyers and state judges accepted appointment to the federal bench.[212] Indeed, in the years immediately following Kaufman's admonition, some of the most talented judges ever—including Judge Richard A. Posner in 1981 and Frank H. Easterbrook in 1985—accepted appointment to the federal bench.[213] There is every reason to believe that judges of comparable abilities will take the place of judges who depart now and in the future.

B. The High Quality of President Bush's Nominees

Although there is much apocryphal anecdotal evidence about attorneys declining appointment to the judiciary, there is much more verifiable, concrete evidence that quality candidates are ready and willing to serve in a judicial capacity. Salary critics need to look no further than President George W. Bush's nominees to see that America's tradition of judicial excellence will continue. The nominees are eager to take their rightful places on the federal bench, even though doing so will entail some financial sacrifice. Although left-leaning members of the Senate Judiciary Committee have found the traditional views of Bush's nominees undesirable, no one can seriously deny that the nominees are highly qualified for judgeships and that many are at the pinnacle of the legal profession.

---

209. Suggesting that federal salaries are right on target, the state courts also pay their judges salaries comparable to the federal rate. Of course, critics clamoring for increases in state pay use the same arguments used for federal judges. Kate Thomas, *Judges From Lobbying Group*, NAT. L.J., Sept. 16, 1996, at A4 (noting that in Texas it "is difficult to attract mature people to the bench when we are paying what for some are associate-level salaries").

210. Taylor, *supra* note 66, at A18. Contrast this view with that of Judge Sprecher, who obviously had a strong financial interests in convincing the world that salary increases were necessary: In the early 1970s, "in one section of the country 15 lawyers declined judicial appointment, and in another area 13 lawyers declined before the fourteenth accepted an appointment." Sprecher, *supra* note 12, at 384.

211. Taylor, *supra* note 66, at A18.

212. Richman & Reynolds, *supra* note 91, at 302 ("[C]ircuit judgeships have not become harder to fill as their number has increased almost threefold since 1950, nor is there a dearth of able and willing applicants.").

213. *See* Noreen Marcus, *Rule of Law (and Economics)*, THE AM. LAWYER 38 (June 1988).

Consider Miguel Estrada—nominated by President Bush to serve on the District of Columbia Circuit—whose success story could have come straight out of a Horatio Alger novel. Like Felix Frankfurter,[214] Estrada came to America barely able to speak English.[215] Undeterred by the language barrier, which many would find an insurmountable impediment to success, he distinguished himself at Columbia University and Harvard Law School, where he served as an editor of the law review and graduated magna cum laude. Following law school, he clerked for a Second Circuit judge and then for Associate Justice Anthony Kennedy.[216] He later served as Assistant Solicitor General (during which time he argued fifteen cases before the Supreme Court) and is presently a partner at the prestigious law firm of Gibson, Dunn & Crutcher.[217] Although Estrada eventually withdrew from consideration in light of an intractable Senate filibuster,[218] apparently the "paltry" salary of a Circuit Judge has not dissuaded this erudite attorney from taking up the gavel and robe.

Estrada is merely one recent example of the top-notch candidates willing to forego big-firm salaries to serve as federal judges. Another example is Professor Michael McConnell, famous for, among other things, his analysis of

---

214. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 4-5 (1960). As Frankfurter stated:

> English, of course, was a great barrier. We had a teacher, a middle-aged Irish woman, named Miss Hogan. I suppose she was one of my greatest benefactors in life because she was a lady of the old school . . . [S]he told the boys that if anybody was caught speaking German with me, she would punish him. She would give gentle uppercuts to the boys. It was wonderful for me that speaking English was enforced upon my environment in school, all thanks to Miss Hogan.

Id. Of course, today Miss Hogan and the school district would probably face a lawsuit for language discrimination.

215. Editorial, *Rush to Judgment: Estrada Nomination Has Been Blocked for Too Long*, DALLAS MORNING NEWS, Feb. 17, 2003, at 18A.

216. Clerking is thought to be an excellent preparation for an eventual assumption of judicial duties.

217. Vernadett Ramirez Broyles, *Democrats Thumb Noses at Latinos*, ATLANTA JOURNAL CONSTITUTION, Sept. 10, 2003, at 13A.

218. *Id.* Broyles writes:

> Having been nominated for the prestigious D.C. Circuit Court of Appeals more than 2 ½ years ago, Honduran-born Miguel Estrada has recognized where his kind is not wanted. He has withdrawn his nomination. And he withdraws it without ever having received an up or down vote before the Senate–the target of an unprecedented Democratic filibuster.

Id.; *see* Editorial, *Democrats for Estrada*, WALL STREET J., Feb. 26, 2003, at A16. For a brief discussion of the unconstitutionality of these filibusters of judicial nominees, see Douglas W. Kmiec, *The Judge Game: Where Filibusters Rule . . . .*, MILWAUKEE JO. SENTINEL, June 2, 2003, at 13A.

the Religion Clauses.[219] Similarly, Texas Supreme Court Justice Priscilla Owen—who worked on the law review at Baylor Law School and received the highest score the year she took the Texas Bar Exam—has expressed her willingness to serve as a judge on the Fifth Circuit.[220] Although her nomination was defeated ten to nine in the partisan Judiciary Committee when the Democrats controlled the Senate,[221] President Bush has wisely renominated her. Like Estrada and Alabama Attorney General William Pryor, however, a partisan filibuster concocted by a vocal minority of liberal Senators is blocking her confirmation,[222] and this will probably be the fate of other Bush nominees.[223] Despite these hurtful partisan antics and low judicial salaries, Owen remains willing to take a seat on the Fifth Circuit.

Also nominated by President Bush is John G. Roberts, former head of

---

219. McConnell has produced more scholarship on the Religion Clauses than perhaps anyone else. *See, e.g.*, Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Michael W. McConnell, *Government, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 850 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163 (1993); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to The Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. L. REV. 146 (1986); Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. McConnell's expertise is hardly limited to the Free Exercise and Establishment Clauses, though. *See, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL'Y 103 (2000); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

220. David Pasztor, *Texas Jurist Sailing into U.S. Senate Storm*, AUSTIN AM. STATESMAN, July 14, 2002, at A1; Jonathan Groner, *Nomination Heat Focuses on Texas Jurist*, FULTON COUNTY DAILY REPORT, July 9, 2002.

221. Helen Dewar, *Senate Panel Rejects Bush Court Nominee*, WASH. POST., Sept. 6, 2002, at A1 ("With all Democratic members voting against her and all Republicans supporting her, the committee killed Owen's nomination in three successive 10-9 votes, refusing even to send it to the Senate floor with a recommendation that it be rejected.").

222. Robert C. Greenberger, *Congress Girds for Possible High Court Exit*, WALL STREET J., June 12, 2003, at A4 ("Thus far, Democrats have used multiple filibusters to stall two Bush appeals-court nominees sent to the Senate floor for votes, and are threatening to block a third.").

223. Jim Wooten, *Benefactor a Believer in Principles*, ATLANTA J. CONST., June 17, 2003, at 11A (quoting Senator Saxby Chambliss's prediction that California Judge Carolyn Kuhl and federal district court Judge Charles Pickering will also be filibustered).

Hogan and Hartson's appellate practice group.[224] Like Estrada,[225] he served on the Harvard Law Review and graduated from Harvard Law School magna cum laude; also like Estrada, he clerked for a judge on the Second Circuit before clerking for then Associate Justice Rehnquist.[226] Roberts also served as a special assistant to United States Attorney General William French Smith, as Associate Counsel to President Reagan, and as Principal Deputy Solicitor General.[227] Of course, with experience like that, Roberts commanded a private practice salary well in excess of anything he will ever make with the federal judiciary. But that did not stop him from accepting appointment.

Perhaps Estrada, McConnell, Owen, Roberts, and Bush's other nominees realize that serving the American people entails rewards that in some respects surpass those afforded by a lucrative salary. They may also have political and judicial ambitions that they feel compelled to satiate regardless of the salary involved. Of course, these ambitions and willingness to sacrifice are not indigenous to lawyers, as many American workers tolerate the pain of undesirable salaries in an effort to advance their careers or other goals. Just as corporate America gets a free ride on workers who temporarily (they hope) sacrifice salary for advancement, so too is the American taxpayer entitled to the benefits of politicians and attorneys willing to forego top notch salaries in the pursuit of career goals. There is no dearth of qualified nominees; indeed, if applications for bankruptcy and magistrate positions—both of which pay less than district and circuit court judgeships—are any indication, there is a large body of lawyers who seek judicial office.[228] This demonstrates that, despite complaints about salary, "[a] seat on the federal bench remains one of

---

224. Thomas B. Edsall, *White House Prepares Judicial Nominating Blitz*, WASH. POST, Apr. 25, 2001, at A29.

225. There are numerous similarities between Estrada's and Roberts's qualifications, experience, and education. The key difference, and the only difference that explains the Senate's failure to confirm Estrada, is his Hispanic ethnicity, probably because Estrada would be on a conservative President's short list for the Supreme Court. *See* Alberto R. Gonzales, Editorial, *Double Standard Filibuster*, WASH. POST, June 2, 2003, at A17 ("The 45 Senate Democrats who are filibustering Estrada's nomination are applying a double standard. There is no rational or legitimate justification for the disparate treatment of Roberts and Estrada . . . .").

226. Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES MAGAZINE, Aug. 11, 2002, at Sec. 6, p. 38.

227. Daniel Klaidman, *Bush Chooses Deputy SG for D.C. Circuit*, LEGAL TIMES, Dec. 16, 1991, at 1.

228. There is some anecdotal evidence that, in some localities, interest in magistrate and bankruptcy positions has declined, but not to a point where qualified candidates cannot be found. Importantly, this decline may not be related to salary. *See, e.g.*, Stern, *supra* note 85, at 1. For example, it may be because of poor advertisement of the openings, or a reluctance to expend valuable time submitting the lengthy application and obtaining the supporting documents and references.

the most coveted jobs in the American legal profession."[229] Thus, the present judicial salary is sufficient to attract highly qualified lawyers, if not the very best. And if there is little or no harm resulting from the present salary structure, there may be no reason to alter it, particularly in light of the other, more pressing needs of America.[230]

C. Passive Aggressiveness: The Disincentive of Filibusters and Acrimonious Confirmation Hearings

In claiming that qualified candidates are refusing to take the bench because of low salaries, salary critics fail to take into account much stronger disincentives to judicial service: Senate filibusters, the interminable waiting for Senate hearings, and confirmation fights. The angst engendered by these phenomena can make the financial sacrifice of a judicial salary seem insignificant in comparison. Thus, assuming for the sake of the argument that President Bush were having difficulty convincing the best attorneys to serve as judges, this problem may very well be attributable to factors other than judicial salaries. Indeed, many have noted the toll that partisan Senate confirmation fights exact from nominees, not to mention the fortitude required to endure the interminable delays before a nominee even gets a hearing.[231] Even salary critics acknowledge the following: "Money may well be the primary disincentive, but certainly the ordeal of confirmation must weigh heavily on lawyers who would be willing to take the pay cut."[232] White House Counsel Alberto Gonzales, a champion of higher salaries, admits that confirmation battles "threaten to deter the best and brightest from seeking judicial service."[233] The chief salary critic, Chief Justice Rehnquist, concedes

---

229. John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 277, 277 (1998).

230. Christopher E. Smith stated as follows:

> As a practical matter, however, can the government attempt to compete with salaries in excess of several hundred thousand dollars in order to attract candidates from the elite private bar? In an era of budget deficits and spending cuts in governmental programs, there would be little reason to use substantial salary increases in an attempt to attract such high-income lawyers to the federal bench unless there was a demonstrable harm from having lower salaries.

SMITH, *supra* note 56, at 51.

231. Editorial, TAMPA TRIBUNE, *supra* note 198, at 12 ("Indeed, upon taking office, President Bush quickly named 11 nominees to sit on federal appeals courts, but only three have been confirmed. At year's end, the White House had made 80 judicial nominations; 28 had been confirmed. There are 94 vacancies."). And making excuses only makes matters worse: "Sen. Patrick Leahy, D-Vt., the powerful chairman of the Senate Judiciary Committee, has blamed Sept. 11 for the slowness of the confirmation process. What a sad excuse." *Id.*

232. *Id.*

233. Alberto R. Gonzales, *supra* note 225, at A17.

that the difficulty in obtaining quality candidates is due in part to "the often lengthy and unpleasant nature of the confirmation process."[234]

Thus, a cheaper way to lessen the burden on would-be judges is to eliminate the partisan wrangling over obviously-qualified nominees. By quickly confirming qualified nominees, the Senate could reduce a strong deterrent to judicial service in a fashion that is much less expensive than raising salaries. Because judicial candidates presumably factor the undesirables of the job into a cost/benefit calculus of judicial service, and since they will require remuneration for the undesirable aspects of a confirmation fight, taxpayers will end up paying twice for these fights: once in the wasted salaries of the Senators and their support staff; and a second time in the extra compensation judges must eventually be paid to endure this wrangling. A cheaper, not to mention more statesmanlike, solution would be to do away with the partisan fighting. Confirming or rejecting nominees without contentious personal attacks would also help restore dignity to the Senate and the confirmation process. Nominees may very well be shying away from judicial appointment because they see this as the only means of avoiding the indignities suffered by the likes of Clarence Thomas and Robert Bork,[235] two of many well-qualified nominees who were forced to endure unnecessary partisan attacks on their character and abilities.[236] Such attacks arguably do more harm to recruitment efforts than do low salaries.

Long delays preceding confirmation hearings, to the extent that they require a nominee to put his or her life on hold, are also contrary to the goals of attracting a quality judiciary. So, for example, when a majority of the Senate is willing to confirm attorneys like Miguel Estrada, William Pryor, and Priscilla Owen, the nominees should not have to bide their time while a powerful minority of Senators prevents their nominations from coming to the floor for a vote. As Miguel Estrada's withdrawal demonstrated, quality candidates will not wait an eternity while a minority of Senators hijacks the democratic process. Contrast this behavior with the alacrity of an earlier Senate, which confirmed President Washington's *entire slate* of Supreme Court nominees *two days* after their submission.[237] Imagine that: It took the Senate only two days to consider the qualifications and confirm the Justices who would sit on the highest court in the land. Compare this process to the

---

234. *2001 Year-End Report on the Federal Judiciary*, *supra* note 6.

235. Their willingness to endure these attacks speaks much of the character of Justice Thomas, Judge Bork, and the other nominees who endured a similar fate.

236. *See generally* BRONNER, *supra* note 7; CARTER, *supra* note 7.

237. President Washington submitted his nominations for the original Supreme Court on September 24, 1789, and the Senate confirmed those nominations on September 26, 1789. WARREN, *supra* note 28, at 46 n.1.

eternity that George W. Bush's nominees, even those nominated to relatively minor district court slots, have had to endure. Such antics, more than a diminutive salary, tell a nominee that America does not appreciate his time and the sacrifices a judgeship entails. These antics also reduce whatever nonremunerative value a judicial position may have to a nominee. In the words of Judge Posner:

> A person will accept a judgeship if his net expected utility from it is positive, which is to say if that utility exceeds the utility that he obtains in his present employment (in the practice of law, let us assume) plus the cost (other than the foregone income from practice) of becoming a judge, for example the inconvenience, exasperation, and loss of privacy entailed in filling out elaborate forms and undergoing a searching investigation by the FBI and possibly a severe grilling by the Senate Judiciary Committee, with always some risk of embarrassment or even rejection.[238]

Thus, reducing the travails of confirmation is an inexpensive way to reduce the costs of becoming a federal judge and will thereby encourage quality candidates to serve on the bench. This course of action, more than salary increases, will enhance the quality of the judiciary.

V. JUDGES DO NOT SERVE FOR SALARY ALONE

A. *What Motivates a Judge to Serve?*

Also important to an understanding of the judicial salary "crisis" is the motivation of those who seek judgeships. Certainly no judge has ever been misled into believing that a federal judgeship is a fast track to wealth and material prosperity[239]—although federal judgeships entail an abundance of

---

238. POSNER, OVERCOMING LAW, *supra* note 102, at 139.

239. POSNER, THE FEDERAL COURTS, *supra* note 29, at 31 ("Anyone who accepts such an appointment does so with knowledge of current and likely near-future salary conditions."); *see also* SMITH, *supra* note 56, at 50-51 ("[T]here are large numbers of judges who take significant pay cuts in order to assume judicial office. According to the judges' own statistics, 73 percent of judges now on the bench took a pay cut when appointed, and . . . the average salary reduction was $69,708." (internal quotations omitted)); J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENTARY 9, 41 (2001) ("[O]bviously lawyers do not aspire to be appointed to the Supreme Court to get rich, any more than African Americans in the 1950s sat at Woolworth lunch counters in the South to savor the cuisine."); Sprecher, *supra* note 12, at 382 n.11 ("A differential, even a substantial differential, between earnings of the lawyer of ability and the judge of ability is to be expected . . . .").

retirement and disability benefits[240]—so it must be something else that entices attorneys to the bench and keeps them happy enough to continue in service. Many judges are happy. In the words of Justice Breyer: "I think we have a fabulous job."[241] "The fact that very few judges ever resign from the bench indicates that the nonpecuniary benefits from this work are probably worth considerably more to them" than the income they forego.[242] Similarly, judging from the number of attorneys still seeking positions on the federal bench, it is apparent that many of them share Justice Breyer's sentiments and believe that they can be fulfilled through judicial service, despite moderate salaries.[243]

B. Non-Pecuniary Income

No one disputes that federal judges work hard—perhaps harder than most government employees. Judges also face difficult decisions of great importance to the community.[244] No doubt, most could obtain greater

---

240. POSNER, THE FEDERAL COURTS, *supra* note 29, at 32 n.58. As Posner stated, if a judge:

> [B]ecomes disabled after at least ten years of service, he continues to receive his full pay for life; otherwise he receives half pay. That is another nice fringe benefit to reckon into a total assessment of real judicial incomes. Oddly, if the judge is declared disabled against his will and forced to retire, he will receive full pay for life regardless of how few years of service he has.

Id.; *see also* Rosenn, *supra* note 20, at 327-28 ("Retirement and disability benefits are extraordinarily generous . . . ."); Spoon, *supra* note 9, at 596 ("Federal judges have attractive retirement benefits."). Judges also have the ability to continue work, with a reduced caseload, by taking "senior status." POSNER, THE FEDERAL COURTS, *supra* note 29, at 33 ("And senior service is an attractive alternative to full retirement. Although in one sense senior judges are working for nothing, they have the considerable satisfaction of continuing to be active and productive long after most of their nonjudge contemporaries have been edged into full retirement.").

241. Greenhouse, *supra* note 2, at A14 (quoting Justice Breyer).

242. Paul E. Greenberg & James A. Haley, *The Role of the Compensation Structure In Enhancing Judicial Quality*, 15 J. LEGAL STUDIES 417, 424 (1986).

243. For a half-hearted response to this argument, see Mooney, *supra* note 11, at 462:

> It is argued that despite the present level of judicial salaries, judgeships do not "go begging." This would be true even if judicial salaries were below their present level, because no position which offers prestige ever lacks applicants. However, with prestige goes responsibility, and unless the salaries of our federal judiciary are raised, it will become increasingly difficult to find men with the high sense of responsibility which these position of prestige and influence demand.

Id.

244. In many instances, when the legislature finds a question too difficult to resolve through its own processes, it evades the issue entirely by leaving it for judicial resolution. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 251 (1988) ("One way to achieve compromise is to use general language, in effect shoving off on the courts the task of completing the legislation.").

compensation in private practice. But as many contemporary judges understand, there is much more to life than money, and the daily grind of a law firm partnership, while meaningful for some, may not be everyone's cup of tea. Take for example Justice Felix Frankfurter, who conceded that "I wanted to be a lawyer, but I didn't want to have clients."[245] Frankfurter could have escaped the headaches associated with clients by remaining in academia, but found the lure of the bench irresistible. Certainly he understood that serving as a judge could be downright fun, or in the words of Judge Posner, "judging is a gas."[246] Chief Justice Rehnquist is probably correct that as a matter of cosmic fairness there should be an increase in judicial salaries. But there is little basis for his claim that such an increase is necessary to recruit and maintain a first-rate judiciary, because many seek service on the judiciary for reasons other than the pay.

A large part of the reason why salary levels have not deleteriously affected recruitment or retention of judges is that attorneys and judges seek the bench for a multiplicity of reasons, many of which have little to do with money. They can derive net utility from various aspects of judging and being a judge. Indeed, "nonpecuniary satisfactions are an important part of most federal judges' 'income.'"[247] "[S]alary figures do not tell the whole story of the trend in federal judicial income. 'Income,' when used realistically to denote the features that make one job more or less attractive than another, obviously contains nonpecuniary as well as pecuniary elements; nor are the pecuniary elements exhausted in salary."[248] In the words of Judge Sprecher, monetary "compensation is not the primary attraction for those who aspire to judicial service."[249] There are at least nine non-monetary aspects of a judge's compensation that must be included in any calculation of the "income" they derive from their jobs, and which attract attorneys to a judicial career.

1. Prestige

"Public esteem is difficult to measure but it is an important factor in the

245. PHILLIPS, *supra* note 214, at 34 (quoting Felix Frankfurter). Unrestrained from the demands of clients, judges are also freed from the burdens of billing, squabbles with clients over the fee charged, being lied to by clients, and having to face clients who are unsatisfied with their attorney's performance or the outcome of the case, to name but a few of the toils Frankfurter probably never missed while on the bench.

246. Richard A. Posner, *Diary: A Weeklong Electronic Journal* (Jan. 14, 2002), *available at* http://slate.msn.com//?id=2060621&entry=2060676; *see also* Learned Hand, quoted in GUNTHER, *supra* note 106, at 404 ("The pleasure of the job [being a judge], as in every other job, is in doing the work itself. If you like it, it's good; if you don't, its hell. Personally, I like it.").

247. POSNER, THE FEDERAL COURTS, *supra* note 29, at 221.

248. *Id.* at 27.

249. Sprecher, *supra* note 12, at 382 n.11.

desirability of any job or office."[250] Many who undertake a career on the bench do so, in part, because of the prestige and honor of the job.[251] Who, after all, does not desire the esteem of one's peers? Judge Bork, certainly an authority on the judiciary, believes that the dignity of the position is "a major attraction of a career on the bench,"[252] and many other experts agree.[253] Thus, for some judges, the honors "inherent in service on the federal bench outweigh simple calculations of personal income potential."[254] Money takes second place to the esteem that can be gained on the bench: Litigants stand when judges enter the courtroom; judges are addressed by a special title; judges wear special robes; judges are the center of attention in court; judges of even modest mental means are perceived as wise and knowledgeable; and judges enjoy privileges that make their colleagues in the other two branches salivate.[255] With this kind of stature, it is no wonder that many attorneys seek judgeships,[256] for "no position which offers prestige ever lacks applicants."[257] Accordingly, so long as judicial salaries permit the maintenance of a reasonably comfortable existence, what judges lack in money can frequently

---

250. FORER, *supra* note 92, at 88.

251. Audain, *supra* note 153, at 120 ("Arguably, the benefits sought by a judicial candidate relate in some measure to prestige and power.").

252. Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976). Professor Geoffrey C. Hazard, Jr. believes that prestige is not a substitute for a handsome salary, but that a handsome salary is a prerequisite, or is at least closely related, to respect and prestige. Geoffrey C. Hazard, Jr., *A Crumbling Judicial Base Hurts The Bar*, NAT. L.J., Nov. 19, 1990, at 13 ("Money cannot buy respect. But it can buy things that engender respect: badges of status such as a proper home and car, support systems that give a judge time to think . . . ."). It is highly unlikely, however, that the prestige and respect for judges about which Judge Bork wrote is based on the type of cars driven by these judges or the architecture of their homes. As Judge Coffin has noted: "If the work is rewarding and important, there will be more than sufficient prestige." Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1867 (1990).

253. *See* Sprecher, *supra* note 12, at 382 n.11 ("There is the prestige of the judge . . . ."). The prestige of serving on the Supreme Court was one important factor that attracted Joseph Story to the bench, despite his dissatisfaction with the salary. *See* WARREN, *supra* note 28, at 416.

254. SMITH, *supra* note 56, at 51.

255. For a discussion of the mental processes behind judges who crave prestige, see Greg A. Caldeira, *The Incentives of Trial Judges and the Administration of Justice*, 3 JUST. SYS. J. 163, 171 (1977) ("For the status judge, the bench is of value because of the social prestige attached to it . . . . He is abnormally preoccupied with getting and keeping positions . . . .").

256. As noted above, this prestige is a durable commodity, and some of it carries on even into retirement. POSNER, OVERCOMING LAW, *supra* note 102, at 120 n.24 ("Retired judges (even judges who have resigned to pursue a career in practice) usually retain the title 'judge,' and the title commands some deference even when separated from the office.").

257. Mooney, *supra* note 11, at 462. *But see* Glen R. Winters, *Salaries of American Judges*, 28 J. AM. JUDICATURE SOC'Y 173, 174 (1945) ("We may at once reject the notion that the dignity and esteem of judicial office are sufficient to make up for low salaries.").

be made up in prestige.[258]

2. Power and Authority

Closely related to the prestige of federal judgeships is the power and authority that judges wield,[259] as judges receive respect largely because of their authority and the effect of their decisions.[260] Law impacts everyone's life; therefore, judges—as interpreters of law, arbiters of legal disputes, and creators of common law—exercise their power over the smallest and greatest among men. "We are under a Constitution, but the Constitution is what the judges say it is,"[261] and the judges have been doing a lot of saying of late.

"Count de Tocqueville remarked more than a century ago that hardly a political issue arose in the United States that was not converted into a legal question and taken to the courts for decision. Today de Tocqueville's observation is even closer to the mark,"[262] resulting in judges exercising greater control over the smallest details of the state, often to their pleasure. As St. Augustine observed: "'The desire to rule over our equals is an intolerable lust of the soul.'"[263] Undoubtedly some judges burn with this lust,[264] while others simply enjoy having people pay attention to their view on how things ought to be. As an example of the encompassing power of judges, consider that America's judiciary recently decided the outcome of the 2000

---

258. *See* FORER, *supra* note 92, at 88 ("The prestige of the federal bench is high, and deservedly so. Most lawyers would feel honored to be considered for or appointed to the federal bench.").

259. Weiner, *supra* note 136, at A20 ("And, of course, there are other, nonmonetary rewards for public service—prestige, authority, professional satisfaction.").

260. "Judges receive deference because they have power, and the power resides in their votes." POSNER, OVERCOMING LAW, *supra* note 102, at 121. Of course, they may be respected for other attributes they possess—such as their intellect or integrity—but it is unlikely they would get as much respect if they did not have the capacity to effect the lives and well being of others.

261. Charles Evans Hughes, *Speech before the Elmira Chamber of Commerce, May 3, 1907*, *in* ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916 185 (2d ed. 1916).

262. ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 1 (1968).

263. CLARENCE MANION, THE KEY TO PEACE 83 (1951) (quoting St. Augustine).

264. Obviously, Americans would prefer that such tyrants never set foot near the bench, as they are a detriment to the common law. Yet, it is at least "possible that some independently wealthy individuals would choose to serve on the bench for the advancement of nonpecuniary objectives that may be at odds with promoting a high quality judiciary. The power that accompanies these positions may be attractive enough to induce such individuals to seek judicial appointments." Greenberg & Haley, *supra* note 242, at 420. Although some might use this as an argument against moderate judicial salaries, the problem of the power-crazed judge is one that exists independent of moderate judicial salaries, since attorneys with this motivation would seek the bench regardless of the compensation it entailed. And if America will always be stuck with a few of these, there is no sense in handsomely compensating them as well.

Presidential election.[265] Certainly the issue need not always be so lofty to warrant judicial attention. Judges are willing to give their opinion on much more pedestrian matters, such as the administration of prisons, hospitals, and public housing[266] or whom the Boy Scouts should admit to their ranks.[267] Frankly, no question is too great or too small to warrant judicial attention. Although the judiciary was originally considered the weakest of the three branches, this concept is hardly true today.[268] Because attorneys do not live in a vacuum, they are fully aware of the power they could wield as judges.

For those so inclined, then, serving as a judge entails entrustment with substantial authority; indeed, more authority than they could ever exercise in private practice. "Because prestige, power, and high incomes are commonly available amenities for partners in large law firms and because those partners are willing to take substantial reductions in income to become judges, it follows that the judiciary confers more prestige (and power) on these individuals than is available to them in the law firm context."[269] The judicial position affords them the opportunity to advance their political agenda or favorite constitutional theory well beyond the range of a mere attorney.[270] Such a lawyer, weighing the benefits of a judgeship, will consider "not only the virtually absolute authority bestowed by a judgeship over litigants and lawyers, but also the broader social impact a judge's decisions have as

---

265. *See* Bush v. Gore, 531 U.S. 98 (2000); Robert C. Greenberger, *Congress Girds for Possible High Court Exit*, WALL STREET J., June 12, 2003, at A4 ("[T]he Supreme Court, in effect, determined that Mr. Bush was the winner of the controversial 2000 presidential election."). For an excellent discussion and compelling defense of the *Bush v. Gore* decision, see RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

266. *See* Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) ("Judges have directed or managed the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on their authority."); GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 174 (1992) ("[F]ederal judges . . . have been running schools, prisons, hospitals and other things, always in the name of an expanding menu of rights.").

267. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). Needless to say, it is unfortunate that the Supreme Court had to waste its valuable time correcting the New Jersey Supreme Court's meddling into membership decisions that obviously should have been left to the Boy Scouts.

268. BORK, *supra* note 90, at 96 ("It is arguable that the American judiciary—the Supreme Court abetted by the lower federal courts and many state courts—is the single most powerful force shaping our culture."). Of course, judges are limited in addressing issues by litigants insofar as the judiciary cannot decide an issue that is not properly brought before the court. But because everything appears to be now litigable, this is only a minor, temporary limitation on the exercise of judicial power.

269. Audain, *supra* note 153, at 121 (citations omitted).

270. "Artists impose their aesthetic vision on society; judges impose their political vision on society. They do this mainly through the precedential force of their decisions, since a single decision rarely has a great impact." POSNER, OVERCOMING LAW, *supra* note 102, at 121.

precedent and as social policy."[271] For these chosen few, because they receive a benefit in the power they wield, the monetary rewards of a judgeship need not be great to recruit or retain them. They will stick around if they are reasonably well paid and perceive their position as an influential one.

3. Public Service

Not all judges who enjoy the power of the bench do so because they possess a tyrannical or authoritarian streak.[272] Many see the value that this authority has for serving the common weal.[273] After all, where else can an individual impact people's lives in such a positive way with such momentous power? Many attorneys who seek judicial positions, therefore, desire a job that entails the real possibility of contributing to the betterment of law and society.[274] Indeed, the very purpose of law is "the welfare of society,"[275] so judges who seek the position to enhance that welfare are doing so with the noblest sentiments.[276] As Senator Patrick Leahy has noted, those interested in serving on the judiciary "are motivated by public service, not by pay, and that has always been the case."[277] Because many private sector jobs are not as fulfilling to such individuals,[278] these judges obtain substantial psychic income from serving on the judiciary that they could not obtain elsewhere.[279]

---

271. Audain, *supra* note 153, at 121-22.

272. *See* George F. Will, *Mr. Jefferson Comes to Town*, *in* THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS 75 *1990-1994* (1994) (quoting Thomas Jefferson) ("'An honest man can feel no pleasure in the exercise of power over his fellow citizens.'").

273. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at i ("[R]endering public service and serving in a lifetime appointment are intangible benefits that help compensate for the reduced salary levels associated with the bench.").

274. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1940-41 (1998) (Judges "are motivated mainly by nonpecuniary rewards, such as prestige, challenge, and a sense of serving society.").

275. CARDOZO, *supra* note 18, at 66; *see also* St. Thomas Aquinas, SUMMA THEOLOGICAE, I-II, Q. 90, Art. 3, c. (Robert J. Henle, trans. & ed., 1993) ("Law, properly speaking, regards first and principally the order to the Common Good.").

276. A judgeship entails an "opportunity for enriching and rewarding service in pursuit of the highest aspiration of a people—justice under law." Sprecher, *supra* note 12, at 382 n.11.

277. Stern, *supra* note 85, at 1.

278. In the words of the Supreme Court Justice with the biggest heart but the smallest wallet:

> "I made a decision when I was in the early part of my career not to ever work for money. I would never take a job for money, never switch jobs for money. So often we think, 'I can make 15 or 20 percent more if I move over here.' But that would mean either that I wasn't working for something that was meaningful to me, or if I was working for someone meaningful, that it was for sale."

ANDREW PEYTON THOMAS: CLARENCE THOMAS: A BIOGRAPHY 175 (2001) (quoting Clarence Thomas).

279. *See* Richard A. Posner, *Diary: A Weeklong Electronic Journal* (Jan. 14, 2002), *at*

Accordingly, they are willing to serve for less remuneration than someone less inclined to public service.

4. Intellectual Challenge and Excitement

Even those who are committed to the enhancement of the public welfare may be reluctant to undertake a career that is boring or lacks intellectual stimulation. Indeed, many an attorney finds law an attractive vocation because of the intellectual challenge and excitement it provides. In a related vein, some judges are extremely "interested in problems and their solutions," and they see the judiciary as a distinct opportunity within which to exercise their problem-solving skills.[280] Indeed, this was one of the attractions that lured Justice Story to the bench, despite the inferior salary.[281]

Intellectual growth and stimulation are undoubtedly desired attributes of any position, but perhaps even more so for attorneys. They are substantial benefits that are highly valued in any attorney's career calculation, especially since drudgery is, unfortunately, a real part of almost every attorney's practice. Importantly, then, federal judgeships generally provide judges with an abundance of mental stimulation.[282] In the words of Judge Oakes, serving on the federal bench "remains one of the most challenging and interesting of all jobs, with consistently new learning experiences every single day."[283] Thus, it is not surprising that many judges—like many law professors—are willing to forego some of the monetary benefits of private practice so that they might enjoy the intellectual stimulation of being a judge. Frequently, for those judges who enjoy the intellectual nature and problem-solving aspects of being a judge, money is "of only secondary interest to him. He fills his emotional needs through the solution of complex problems."[284] This type of judge sees service on the judiciary as an "opportunity to engage in interesting, exciting and challenging work"[285] to an extent that he might not find at a law firm. Thus, such a judge can easily find substantial contentment on the bench without burdening taxpayers with the higher taxes necessary to fund a judicial

http://slate.msn.com//?id=2060621&entry=2060676 ("[W]e judges derive considerable personal satisfaction from believing that the responsible exercise of judicial power is a worthy form of public service.").

280. Caldeira, *supra* note 255, at 169.

281. WARREN, *supra* note 28, at 416. Other attractions were life tenure and the prestige of serving on the Supreme Court.

282. POSNER, THE FEDERAL COURTS, *supra* note 29, at 27 (noting that mental excitement is one of the nonpecuniary benefits of judging).

283. Oakes, *supra* note 128, at 701.

284. Caldeira, *supra* note 255, at 169.

285. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 12.

pay increase.[286]

5. Satisfaction of the Desire to Write and Create

Related to intellectual stimulation is the desire to create. According to Learned Hand, "By some happy fortuity, man is a projector, a designer, a builder, a craftsman; it is among his most dependable joys to impose upon the flux that passes before him some mark of himself, aware though he always must be of the odds against him."[287] In short, men and women have a desire to create and to impose some intellectual design upon the world around them.[288] Many of a lawyerly bent satisfy this desire by writing, but the legal writing found in briefs is often times staid and tedious. Judicial opinions, however, offer a greater opportunity for creativity, especially at the district court level, or in dissents or concurrences at the appellate level, when a judge may pen his opinions as he pleases without being penned in by the need to obtain a consensus.[289] But even when this freedom is inhibited by a need to obtain majority support, simply writing "an opinion clarifying or advancing the law is immeasurably satisfying,"[290] especially if the topic in question is of particular interest to the judge. Accordingly, judgeships entail "the intrinsic pleasure of writing, for those who like to write."[291] For such judges, "pleasurable work like judging might be considered a form of leisure,"[292] and thus is a form of non-pecuniary income supplementing the monetary rewards of the job.

6. Less Drudgery/Greater Variety of Work

Attorneys are also attracted to federal judgeships because the bench lacks

286. *See* Oakes, *supra* note 128, at 715 ("I have repeatedly said that being a federal judge is the most exciting of jobs because it presents a new challenge every day.").

287. GUNTHER, *supra* note 106, at 592 (quoting Learned Hand).

288. This innate desire has its drawbacks, however, since one "flaw in the human character is that everybody wants to build and nobody wants to do maintenance." KURT VONNEGUT, HOCUS POCUS 240 (1990).

289. In the words of Justice Frankfurter: "When you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammeled by what anybody else may do or not do if he put that out." PHILLIPS, *supra* note 214, at 298 (quoting Felix Frankfurter). Charles Evans Hughes also admitted that he "often modified his own opinions in order to win additional support for them if that could be done without compromising the integrity of the position the majority had taken." PUSEY, *supra* note 107, at 677. Additionally, Earl Warren, when writing for the majority, "sometimes par[ed] down his own language to retain a majority for his position." G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 226 (1982).

290. FORER, *supra* note 92, at 90.

291. POSNER, OVERCOMING LAW, *supra* note 102, at 122.

292. *Id.* at 136.

many of the less-desirable attributes of the law firm. For federal judges:

> [C]ertain disamenities of private practice—in particular the need to beat the bushes for clients, and the lawyer's subservient role as his client's agent—are absent. This is an especially important consideration today, when the legal profession has become much more competitive than in the past, implying even greater scrambling for clients and even greater subservience to them.[293]

Thus, for an attorney who finds these tasks unbearable or simply distasteful, a career as a judge may have great value.[294] Besides freedom from the constant need to scramble for business, the judge does not need to keep track of billable hours, and he does not have to deal with annoying clients or wrangle with them over the number of hours billed.[295] Also, unlike judges, many partners in law firms are forced to specialize in one or two areas of law,[296] perhaps even in areas in which he has little interest.[297] They may also be forced to undertake distasteful administrative duties. In contrast, judges get tp run the gamut of legal subjects, which in turn can make the job more interesting. Additionally, judges usually have fewer administrative tasks than attorneys do.[298] Thus, despite complaints that they do not pull down big firm salaries, federal judges also are not pulling their hair out addressing problems that other lawyers face daily and remain free of many of the headaches that

293. POSNER, THE FEDERAL COURTS, *supra* note 29, at 33.

294. Among those who did not miss having clients were former Justices Felix Frankfurter and Potter Stewart. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 14 (1979) (quoting Potter Stewart) (While serving as a judge on the Sixth Circuit, Stewart remarked that judging involved "'all the fun of practicing law without the bother of clients.'"); PHILLIPS, *supra* note 214, at 34 (quoting Felix Frankfurter) ("I wanted to be a lawyer, but I didn't want to have clients.").

295. *See* FORER, *supra* note 92, at 85 (recognizing that many seek the judiciary for its "relief from importunate clients").

296. *See* POSNER, OVERCOMING LAW, *supra* note 102, at 67. As Posner stated:

> As law firms grow, opportunities for professional specialization—for a more complete division of labor—grow apace . . . . Lawyers become proficient in narrow fields of law or in particular techniques, learn to work in large teams, and engage in activities characteristic of competition—such as marketing—or of large enterprises—such as supervision.

Id.

297. A more likely scenario is that the partner was shunted into a particular area as an associate because the firm experienced a demand in a particular area of law, and the attorney eventually became an expert in an area he did not particularly like, but in which he built a substantial client base.

298. Chief Judges may be an exception. Also, many judges serve on various committees, which might be considered administrative in nature.

partners in major firms encounter.

7. Greater Leisure

No matter what the job, employees generally desire less work and more pay.[299] During leisure time, an individual is no longer the servant of another; rather, he is his own master and therefore can pursue his own hobbies and interests. Although many people love their jobs, if offered a chance to get paid whether they worked for their employer or pursued their own hobbies and pleasures, most would choose the latter over the former. Along these lines, the average judge is more fortunate than the average large-firm attorney insofar as judges "usually have better hours" and enjoy "more control of their time,"[300] permitting them more leisure than their private-firm counterparts.[301] According to Judge Posner, partners at law firms "work like dogs, and most federal judges do not,"[302] or at least they do not "work as hard as lawyers of comparable age and ability."[303] In addition, district judges get the benefit of two clerks, and courts of appeals judges can have up to three clerks to assist them in their judicial endeavors. Depending on the caseload in the particular district or circuit, then, judges who are efficient and use their clerks wisely could conceivably enjoy greater leisure and a less frenetic pace than their private enterprise counterparts,[304] although this is not be true for all judges.[305] This leisure likely has substantial value to those judges who enjoy it, especially those with children or grandchildren or other outside interests. Thus, although judges are not paid as much money as some lawyers are, many judges receive the bonus of greater leisure.

---

299. The ability to take time off from work is so valuable, especially to employees suffering from an illness or caring for someone with a severe medical condition, that Congress has bestowed on them a right to leave under the FMLA. "Under the Act, an eligible employee is entitled to twelve weeks of unpaid leave during any twelve-month period for any of several reasons, including 'a serious health condition that makes the employee unable to perform the functions of the position of such employee." Thorson v. Gemini, Inc., 205 F.3d 370, 375 (8th Cir. 2000) (citing 29 U.S.C. § 2612(a)(1)(D)).

300. Geoffrey C. Hazard, Jr., *A Crumbling Judicial Bias Hurts the Bar*, NAT. L.J., Nov. 19, 1990, at 13.

301. *But see* FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at ii (arguing that in recent years the workload of federal judges "has increased markedly"); FORER, *supra* note 92, at 90 ("A conscientious judge will not have leisure to pursue hobbies and relax.").

302. POSNER, THE FEDERAL COURTS, *supra* note 29, at 29.

303. POSNER, OVERCOMING LAW, *supra* note 102, at 115.

304. Kelly J. Baker, *Senior Judges, Valuable Resources, Partisan Strategist, or Self-Interest Maximizers?*, 16 J. L. & POLITICS 139, 152-53 n.69 (2000) ("[T]he pace of federal work may be much less demanding than that of private practice.").

305. *See* John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 293 (1991) (noting that Chief Justice Warren Burger, among others, complained about judges being overworked).

8. Greater Autonomy

Part of the reason many judges enjoy greater leisure than attorneys in private practice is that they enjoy greater autonomy. "One of the more alluring aspects of the judiciary, and one that is constitutionally guaranteed, is its independence."[306] After all, what could be better than being your own boss without many of the risks and headaches that private enterprise entails.[307] Because of the separation of powers, very little oversight of judges by the other two branches occurs. Some oversight occurs, as judges depend on Congress and the President to set their salary level, they are subject to impeachment for high crimes and misdemeanors,[308] district and court of appeals decisions are reviewable by the Supreme Court, and (depending on the scope of the decision) Supreme Court decisions can be modified by legislative or constitutional amendment.[309] Of course, the ostracism of judicial peers is always prevalent,[310] but other than that, judges are free agents answerable only to their own consciences.[311] This freedom grants judges leeway and autonomy and provides some judges with considerable value in the calculation of non-monetary benefits of judging.

---

306. Greenberg & Haley, *supra* note 242, at 417.

307. *See* Audain, *supra* note 153, at 122 ("[A]n aspiring judge will also consider the issue of power defined as control over his or her person, that is, control over personal time, freedom from client problems, and greater possibilities for free activity and intellectual independence and stimulation.").

308. Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 854, 863 (1995) ("Article III does not detail a separate impeachment removal process for judges. Instead, federal judges face removal, as do other civil officers, under Article II, Section 4."); Audain, *supra* note 153, at 137 ("[W]hile Congress is responsible for monitoring the federal judiciary, the only monitoring tool Congress has to fulfill its task is the drastic remedy of judicial impeachment. That tool has been used with . . . rarity . . . .").

309. *See* POSNER, OVERCOMING LAW, *supra* note 102, at 118 (General oversight "is nonexistent in the case of Supreme Court Justices and fairly unimportant in the case of court of appeals judges because reversals of appellate decisions by the Supreme Court have become rare."). Therefore, the unelected judge "is largely free from control by superiors and from legislative oversight." *Id.* at 113.

310. *See* Geyh, *supra* note 95, at 524 ("Judges are no less susceptible to the influence of their colleagues than anyone else.").

311. *See* Greenberg & Haley, *supra* note 242, at 417. In fact, in the majority of occupations:

> [T]here typically exists an external monitor that, coupled with the threat of dismissal, functions as a disciplinary mechanism on the behavior of employees. In contrast, the independence of the judiciary removes any such disciplinary mechanisms. The only effective constraint on judicial behavior, therefore, is that which is internally imposed by the judges themselves.

Id.

9. Life Tenure and Job Security

One of the defining attributes of the American judiciary is the life tenure enjoyed by Article III judges. Originally designed—along with the protection against salary diminution—to ensure that judges were independent of the executive and legislative branches,[312] life tenure has an attractiveness to judges beyond simple independence from political control.[313] "Life tenure is often depicted as not only protecting impartial decision-making, but also a major 'perk' of the job."[314]

Contrast the benefit of life tenure—or more accurately, the possibility of life tenure, since judges are free to leave—to the reality that lawyers face. Although talented lawyers will always be eminently employable, there is always some risk that the firm they have joined will become insolvent or will become unbearable. Thus, even lawyers in the best firms face some risk of losing their jobs. Furthermore, in these days of sky-high verdicts, miniscule legal errors can have serious adverse consequences for clients, which in turn can result in staggering legal malpractice awards sufficient to endanger continued employment.

A "highly risk-averse lawyer might prefer the lifetime income guarantee associated with a judgeship to the higher but riskier future income associated with the private practice of law."[315] Such an attorney might realize that Article III judges are immune from some of the worries associated with the private sector, and can rest assured that the U.S. government will remain solvent, and that the government cannot terminate a judge's employment even in cases of incompetence or when a judge makes significant legal errors.[316] Furthermore, judges need not worry about making political enemies as they might in a law firm, as their jobs are secure even if they antagonize their colleagues. Unlike recent events in several large firms, judges can never be

---

312. As James Kent stated:

> The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (Legal Classics Library ed. 1986) (1826).

313. "The life tenure of federal judges . . . makes the job something of a plum . . . ." POSNER, THE FEDERAL COURTS, *supra* note 29, at 20.

314. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 15.

315. Audain, *supra* note 153, at 123.

316. FORER, *supra* note 92, at 84 ("Short of the threat of criminal prosecution or actual prosecution it is very difficult to force a federal judge out of office no matter how corrupt or incompetent he may be.").

forced to retire so long as they are willing and able to hear cases. This and similar benefits related to life tenure has led the likes of Judge Posner to note that judicial tenure has considerable value:

> Article III of the Constitution erects such a high hurdle to removing a federal judge from office that pretty much the only thing that will get him removed is criminal activity. A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office.[317]

Thus, considering life tenure in conjunction with the other forms of non-pecuniary compensation received by judges, it is readily apparent that judges are well compensated.[318]

C. But is Non-Pecuniary Income Enough?

As the preceding discussion demonstrates, numerous factors—other than money—motivate judges to serve on the bench. Judges' "more modest salaries are supplemented by the so-called 'psychic income' derived from the nature of their work."[319] Because judicial officers enjoy this non-monetary compensation, it is unnecessary to maintain judicial salaries at the level that private firms pay their attorneys.[320] Indeed, "some highly motivated individuals would be willing to serve as judges even if the pecuniary compensation associated with this work were eliminated entirely,"[321] although there may not be enough of these individuals to staff all judicial positions. To

317. POSNER, OVERCOMING LAW, *supra* note 102, at 111; *see also* FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 12 (life tenure helps "compensate for the reduced salary levels associated with the bench").

318. Other non-pecuniary income exists in the ability of federal judges to take senior status, which permits them to retain some of the prestige of being a judge while reducing their workload. Although salaries may not be generous, judges can always rest assured that their salaries will not be diminished. It is also worth noting that judges enjoy generous health and pension benefits. POSNER, THE FEDERAL COURTS, *supra* note 29, at 32-33; Spoon, *supra* note 9, at 596.

319. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 12.

320. *But see* FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at i (arguing that intangible benefits are insufficient to make up for the disparity).

321. Greenberg & Haley, *supra* note 242, at 422.

attract quality judges, all that Congress must do is ensure that the "net expected utility" a judge receives from judging is positive. That is, in the words of Judge Posner, Congress must ensure that the overall benefit a judge obtains from judging "exceeds the utility that he obtains in his present employment (in the practice of law, let us assume) plus the cost (other than the foregone income from practice) of becoming a judge . . . ."[322] Again, in light of the substantial psychic income judges enjoy, this is not difficult to do.

Salary critics, however, argue that "[c]ompensation in the form of money, no matter how great the prestige may be, is still of primary importance. Men of high calibre are reluctant to serve in a position which results in a drastic reduction of their standard of living."[323] They say the following: "No matter how inviting the judicial position may otherwise be, failure to provide appropriate and competitive pay demonstrably narrows the class available for judicial office."[324] They argue that the disparity between judicial and private sector income is "relevant to the issue of fair and adequate judicial compensation because a marked disparity between public and private salaries negatively affects the ability to attract highly qualified judicial candidates and to retain highly experienced judges."[325]

At some point, the monetary compensation a judge receives could be so miniscule that the benefits a judge derives from judging are exceeded by those he would obtain in private practice. That is, at some point, even psychic income is not enough to make up for the shortfall in pecuniary income; an example of this is when judges must incur substantial debt just to survive. "If judicial salaries were set too low, motivated individuals would still seek these positions but would probably find that they could not adequately provide for their families."[326] In such cases, low salary would be a detriment to the quality of the judiciary.

Of course, each judge likely values his psychic income and monetary income differently. For example, a judge responsible for feeding a wife and seven children might place a higher value on monetary income than, say, a sixty-year old bachelor who lives frugally and whose primary pleasure is the intellectual stimulation he receives from judging. But the present salary level is not so burdensome that a judge with an average-size family must become a pauper.[327] Rather, "it is clear that judgeships are sufficiently attractive to

---

322. POSNER, OVERCOMING LAW, *supra* note 102, at 139.

323. Mooney, *supra* note 11, at 461.

324. Hunter, *supra* note 193, at 180.

325. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 12.

326. Greenberg & Haley, *supra* note 242, at 421.

327. *See* HENRY ABRAHAM, THE JUDICIAL PROCESS 43 (7th ed. 1998) ("[J]udicial salaries are adequate.").

induce lawyers to reduce their incomes in order to join the federal bench."[328] Still, for those who cannot or will not live their entire lives on a judicial salary, there is also the alternative of doing a short stint on the bench.

D. For the Acquisitive: First Become Wealthy, Then Serve as a Judge

Government employment—whether judicial or otherwise—frequently presents financial challenges to those who pursue this career track, but that does not mean that salary raises for such individuals are necessary or even desirable. Alternatives exist, such as pursuing judicial service before or after obtaining a competitive private-sector salary. Take, for example, Chief Justice Charles Evans Hughes, who found it necessary to delay his judicial career because of his desire to earn a private sector salary. He initially declined a district court spot because it paid so little.[329] Later, after he had served as an Associate Justice, unsuccessfully ran for President, and served as Secretary of State, Hughes felt that he was financially tapped out by government service.[330] He consequently pursued a successful private practice, amassing a small fortune in a short period of time.[331] Once he had enough capital to survive on a judicial salary, Hughes again answered the call to public service as Chief Justice of the United States.[332]

Hughes's case demonstrates that although low salaries may momentarily delay the commencement of some judicial careers, this is frequently a temporary obstacle. As Hughes observed before making his first of two trips to the high bench[333] for an initial salary of $12,500:[334]

---

328. SMITH, *supra* note 56, at 51.

329. PUSEY, *supra* note 107, at 110 (Hughes "replied in the negative when a White House intimate asked if he would be interested in a federal district judgeship. Considering his family obligations and the salary then paid federal judges, he thought he could not afford to go on the bench.").

330. *See* PUSEY, *supra* note 107, at 613. After serving as Secretary of State, Hughes:

> had a strong yearning to earn some money. For Twenty years he has been almost continuously in public service. His expenses as Secretary of State, as during his governorship, had greatly exceeded his $12,000 salary. With his sixty-third birthdasy approaching, he felt that his primary duty was to make a satisfactory financial provision for his family's future.

Id.

331. *Id.* at 631, 636.

332. *Id.* at 663.

333. Hughes delivered this address while Governor of New York, before taking his seat as an Associate Justice of the Supreme Court. *Id.* at 274. He was no hypocrite, as he gave up a large salary by accepting the associate justiceship. "Had he chosen to return to private practice [after the governorship] Hughes could have earned from $100,000 to $400,000 a year, as indicated by the fact that his fees did reach the latter maximum after he had left the bench." PUSEY, *supra* note 107, at 273.

> [W]e should be cautious about increasing the chance of drawing men to the public service who seek it for the sake of the compensation. It is idle to suppose that emoluments can be given which can rival those obtainable by men of first rate ability in their lines of chosen effort. Attorneys-general cannot be paid what is received by leaders of the bar; heads of banking and insurance departments cannot expect the compensation paid to the presidents of banks and insurance companies; judges must be content to serve for annual pay less in amount than may be received in a single case by the lawyers arguing before them. Men of eminent ability must be found to conduct the delicate work of supervising our great public service companies for rewards which are slight in comparison with those of the managers and officers of such corporations.[335]

Although many federal judges of today disagree with Hughes on this point, there is something about these words that rings true.

If judges dissatisfied with present salary levels did as Chief Justice Hughes, there might be less wailing about judicial salaries. That is, if they spent the initial part of their careers working jobs that pay the Wall Street salaries they feel they deserve, after a sufficient period of investment and accrual they should have a sufficient stash to be able to spend the latter part of their lives serving as members of America's judiciary.[336] There could be no more fitting end to a lawyer's career than serving one's country as a judge. Certainly Chief Justice Hughes thought so, even sacrificing his son's job as Solicitor General to spend his final years on the high bench.[337] As mentioned above, however, he did so only after amassing a small fortune in private practice.[338] Broad adoption of this model not only would ameliorate the

---

334. In 1910, the salary for associate justices of the Supreme Court was $12,500. President Taft, who appointed Hughes, "said that in all probability it would be increased to $17,500 at the next session of Congress—an overly optimistic prediction, for the increase would be to $14,500." PUSEY, *supra* note 107, at 271.

335. HUGHES, *supra* note 1, at 49. Jeremy Bentham held similar views, at least with respect to judicial salaries: "It is to the interest of the public that the portion of respect which, along with salary, is habitually attached to any office should be as small as possible." 1 JEREMY BENTHAM, PRINCIPLES OF LEGISLATION 164 (C.M. Atkinson ed., 1914).

336. This scenario works best for the judges and the American public. Judges who are appointed at a young age sometimes lack the wisdom that comes with age, as well as the financial security. Thus, it is no surprise that "judges who are appointed at a relatively young age will be more likely to leave the bench to pursue other endeavors than those who are appointed when they can be expected not only to have amassed more experience, but more financial security as well." Van Tassel, *supra* note 23, at 358.

337. *See* PUSEY, *supra* note 107, at 652.

338. Perhaps he learned from his first stint on the bench that the remuneration is less than

"problem" of low judicial salaries, it would also ensure that those who serve on the federal bench have attained a high level of knowledge and practical experience with the law.

The idea that being a judge need not be a lawyer's lifetime profession is in accordance with the Jacksonian model of public service.[339] According to this model—temporarily championed by FDR when his New Deal programs were being thwarted in the courts—new blood on a court is a positive thing.[340] New personnel means new ideas and new ways of looking at problems. While law is necessarily a discipline based on precedent,[341] there is always a strong need for imagination and novel solutions to complex problems. Although there is little basis for presuming that lifetime judges are necessarily ossified in layers of anachronistic viewpoints, a system whereby lawyers serve as federal judges for only a small portion of their careers will promote turnover in the ranks and will ensure that bearers of novel legal theories also have a place on American courts. As Professors Akhil Reed Amar and Steven G. Calabresi have pointed out, life-tenure encourages judges to stay on the bench long past their prime.[342] "Judges, like other humans, sometimes fail to recognize their own limitations, desiring to continue serving the public long

---

spectacular.

339. George F. Will, *Andrew Jackson is not Amused, in* THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS 372 (1994) (Jackson, himself a lawyer, "believed in 'rotation in office' because "'I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience.' Experience, he thought, is overrated because public duties are, or should be made, 'plain and simple.'"). This Jacksonian model is probably not sound in light of the greater complexity of contemporary law, but that does not mean judges have to spend their lives on the bench.

340. On the surface, the idea of having older lawyers leave the practice of law to serve as judges seems to run contrary to the notion of instilling a court with "new blood." But if the "older" lawyers replace judges who are from a preceding judicial generation, even "older" lawyers would bring new ideas and perspectives to a court.

341. Alan Dershowitz observed:

> [T]here are no Nobel Prizes in law, because law is the only profession where you lose points for originality and gain points for demonstrating that somebody else thought of your idea first. Lawyers are prone to look to the 'authorities'—to past lawyers and judges—for their ideas. Creativity in the law consists largely of analyzing past cases so as to get around a barrier or move the law incrementally. Rarely do lawyers indulge in bold leaps of faith, in grand conceptual breakthroughs.

ALAN M. DERSHOWITZ, THE BEST DEFENSE 307 (1982).

342. Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23. Although they were writing about Supreme Court Justices, their analysis also has some applicability to district court judges and circuit court judges—who make a substantial majority of the federal common law. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING ix (1990) ("[T]he Courts of Appeals' written opinions are the final word in 99 percent of all federal cases . . . ."); Cokie & Steve Roberts, *supra* note 136 ("Most legal issues never reach the Supreme Court, so lower-court rulings often stand as the last word.").

after their capacities have declined."[343] Part of this problem may stem from the judicial pay structure in that financial benefits of judicial service are back-loaded,[344] thereby making it financially undesirable—if not impossible—for many career judges to depart early. Thus, to the extent that service in the private sector prior to judging makes these judges more financially independent and better able to retire comfortably, this is not entirely undesirable.[345]

VI. HIGH SALARIES DO NOT NECESSARILY CORRELATE WITH EXCELLENCE

It is also worth noting that if wealthy, would-be judges are unsatisfied with judicial pay, they need not seek judicial positions. Contrary to popular notions, the judiciary would not be worse off were this to happen and, indeed, it would be much better off.[346] Although some commentators assume that lawyers who toil in large firms and pull down heavenly salaries are generally the best qualified for judicial service,[347] little evidence supports this view. These attorneys, for whom judicial service would constitute a financial

---

343. AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 36 (4th ed. 1961). Even the great Justice Holmes suffered from this flaw. In October 1931

> Holmes was slipping fast. While he was still able to write clearly, it became evident in the conference of the Justices that he could no longer do his full share in the mastery of the work of the Court. His drowsiness during arguments was so uncontrollable that his head would droop almost to the papers on his desk; then he would start up suddenly; writing with concentrated effort to keep awake. The Chief shielded him whenever possible, giving him only the easier cases. But Holmes' brethren began to fear that he would bring criticism upon the court. In January, 1932, a majority of them asked the Chief Justice to request Holmes' resignation.

PUSEY, *supra* note 107, at 680-81 (internal quotations omitted).

344. Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 476-77 (1998).

345. It is arguable, however, that low judicial salaries actually force judicial bodies to become gerontocracies. Since satisfying educational debts, marriage, and the creation of a family are all expensive endeavors, and these phenomena usually occur early in a lawyer's career, younger lawyers have a great need to obtain the types of jobs that pay considerable sums of money. If they hope to pay for their own children's education, this furthers their need for well-paying (read: "private sector") jobs. Older lawyers, however, have had a number of years to recover from the financial hardships that supporting a family can entail. By the time a lawyer is fifty years old, the age when many lawyers are appointed to the bench, he or she may have enough money to live happily even on a diminished federal salary. Such individuals might not perceive judicial compensation as the same insurmountable hurdle that his or her younger and less financially-secure counterparts do. Obviously, however, these judges' tenure on the bench will not stretch as long as that of their younger counterparts.

346. Greenberg & Haley, *supra* note 242, at 418.

347. *See, e.g.*, POSNER, OVERCOMING LAW, *supra* note 102, at 141; Hunter, *supra* note 193, at 180 (financially successful "lawyers provide the source that must be looked to in obtaining judges").

sacrifice, have hardly cornered the market on skills essential to judging. The fact that a lawyer commands a whopping salary in the private sector is certainly a factor that suggests competence—assuming that their clients are rational maximizers and can differentiate between quality legal work and inferior products—since the market places a higher value on their work. But there may also be other factors that explain an attorney's heavenly salary—factors that do not correlate with excellence—such as nepotism, favoritism, family connections, lack of accountability, or client ignorance as to the quality of legal services. Because these factors undoubtedly come into play, one cannot say with certainty that a highly-compensated attorney is also a high-quality attorney simply because he commands a lofty salary. An attorney's ability to demand a high salary from wealthy clients does not guarantee his excellence,[348] just as a lawyer who voluntarily foregoes a high salary should not, by that fact alone, be presumed inferior.[349] Many talented lawyers elect not to pursue highly compensated positions, choosing instead the non-pecuniary benefits of other positions. Some of these attorneys likely place a higher priority on intellectual challenge, or the love of America, or public service. These are the same attorneys who likely will be attracted to judicial service to the extent it entails these benefits.

Take, for example, Justice Thurgood Marshall, who lost $3500 his first year of practice[350] and who preferred litigating constitutional cases to the riches of private practice. Although as an Associate Justice his left-leaning philosophy often left much to be desired, no one can deny that as an attorney he was a talented litigator who tirelessly championed one of the worthiest causes: eradication of government-sponsored racism. The fact that he was never handsomely compensated, or even that he lost money practicing law, does not mean that he was an inferior attorney; it simply means there was not a substantial market for his skills. Similarly, many law professors or government lawyers would make excellent jurists and would not object to

348. Neudel, *supra* note 164, at 12 ("[S]alary might *not* always correlate with competence.").

349. Judge Posner argues that, on average, attorneys who command higher salaries are better candidates for judgeships: "An increase in judicial salaries will also make it easier to attract candidates who have good incomes in the private practice of law, or in law teaching or other law-related activities, and these lawyers are probably on average the abler candidates." POSNER, OVERCOMING LAW, *supra* note 102, at 141. He assumes that lawyers with the ability to obtain heavenly salaries generally will do so. Omitted from consideration, however, are the exceptional attorneys who prefer public service, for example, to a handsome paycheck. This has led one critic to remark: "Posner apparently believes that high quality candidates will come disproportionately from among the group of high-income lawyers. However, for many able candidates (state judges, professors, prosecutors, and public defenders), a circuit judge's salary would come as a handsome raise." Richman & Reynolds, *supra* note 91, at 301 n.143.

350. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 62-63 (1998).

laboring at the present judicial salary levels, even though these attorneys are not presently commanding lofty salaries.[351] As Chief Justice Rehnquist has noted, judicial service often entails a pay increase for these attorneys.[352] If—whatever their motivations—these gifted individuals are willing to serve according to the present pay scale, the American taxpayer should not be forced to pay wages according to the rate of their more expensive colleagues. It simply is not true that "better pay would attract even better judges than now sit on the federal bench,"[353] and the American taxpayer should not be compelled to disprove this theory.

Not only are many less-well-compensated attorneys sufficient to the judicial task, many would be an improvement over attorneys who place money high on their list of priorities. America would be better served by such individuals—those with the wisdom and discipline to control their spending habits and live within their means—than their less-frugal counterparts.

As two scholars have posited:

> [F]or any two individuals with the same ability, the one who seeks promotion to the judiciary because of its nonpecuniary benefits rather than because of its monetary compensation will likely prove to be the better judge. This is because the nonmonetarily oriented individual would be more likely to exhibit self-restraint. Therefore, it is these individuals whom we would like to capture in our selection process. Our analysis suggests that this can be accomplished by forcing the

---

351. SMITH, *supra* note 56, at 51 (1995). Smith writes:

> In addition to the apparently large number of private practitioners who would accept a federal judgeship whether or not it required a loss of income, there are many public sector legal professionals, including prosecutors, state judges, and U.S. magistrate judges, who would see their incomes rise by joining the federal bench.

Id. Neudel, *supra* note 164, at 12 ("There is a reservoir of highly competent, experienced lawyers who have never" been paid handsomely "to whom the current salary available to federal or state judges, far from representing any sort of hardship, would be a considerable step up. I am referring, of course, to public-sector and legal services lawyers."); Greenberg & Haley, *supra* note 242, at 421 ("The appointments of these individuals might be further rationalized on the grounds that they have already demonstrated the desired nonmonetary orientation, as individuals in each of these occupations generally receive less pecuniary compensation than they could command in the private sector.").

352. *2001 Year-End Report on the Federal Judiciary*, *supra* note 6 ("United States attorneys, public defenders, federal magistrate and bankruptcy judges, and state court judges are often nominated to be district judges. For them the pay is a modest improvement and the confirmation process at least does not damage their current income. Most academic lawyers are in a similar situation.").

353. Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 L. & CONTEMP. PROB. 197, 240 (2001).

> candidates who wish to serve on the bench to accept salary reductions in giving up their private practices.[354]

America could certainly use more judges habituated to exercise restraint. Similarly, frugal judges might be a little more frugal with taxpayers' money when running prisons, hospitals, and school districts. Requiring a little sacrifice might not be so bad for the quality of the judiciary after all.

Remember, this sacrifice is not exactly severe. Attorneys who desire to be judges are not being called upon to sacrifice their first-born child or their happiness (unless their happiness is inextricably tied to lofty salaries). It is not as though federal judges must go begging in order to feed or clothe their families. Everyone concedes that the "concern here is not that federal judges are impoverished."[355] Judges "receive a respectable amount of compensation on both state and federal levels."[356] Although federal judges lacking independent wealth cannot live extravagantly, they certainly can live comfortably, and at levels higher than the average American that struggles to pay his own bills, including the taxes that pay for judicial salaries.[357] Just as nothing is inherently wrong with having a judiciary primarily composed of the wealthy, there would be nothing wrong with having those of moderate means control the courthouses of America regardless of whether judicial pay is increased, decreased, or maintained at its present level.

True, not everyone has the temperament conducive to a career in the judiciary. As Alexander Hamilton believed, the number of individuals capable of offering their wisdom in service on the judiciary is quite small.

> Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.[358]

---

354. Greenberg & Haley, *supra* note 242, at 418.

355. *See* Weiner, *supra* note 136, at A20.

356. Barnhizer, *supra* note 129, at 396.

357. TAMPA TRIBUNE, *supra* note 198, at 12 ("It will always be hard to convince taxpayers that judges who make $150,000 or more are hurting.").

358. THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Carl Van Doren, ed., 1979). Judge Robert Bork offers a genetic, though incorrect, explanation why so few are qualified for the legal pursuits:

> One night, shortly after I became a federal judge, I spoke informally to a gathering of Yale law school alumni in Washington. Someone asked how I found the quality of briefs and oral arguments, and I replied that some were quite good but a great many were poor, some

Or, as Roscoe Pound put it: "The administration of justice is not an easy task to which every man is competent."[359] The American bar produces a sufficient number of exceptional attorneys to staff the federal and state courts,[360] and not all of these are cutting their teeth at silk stocking law firms.

VII. THE "APPROPRIATE" SALARY LEVEL

Assuming, despite all the evidence and logic to the contrary, that judicial salary levels are having deleterious consequences for the quality of the American judiciary, it must then be asked what an appropriate level of compensation is. That is, how much must judges be paid in order to prevent a mass exodus of quality judges and entice the best and brightest lawyers to become judges? This question has been asked repeatedly; but even when complaining that the judiciary needs more money, both Chief Justice Rehnquist and Justice Breyer refused to provide an answer.[361] Breyer merely suggested that parity with top law professors, say $250,000, is about right.[362] Of course, that is about $100,000 more than district judges presently make, and thus, about $100,000 in excess of what many excellent judges are willing to receive. In asking for salary increases, some critics quickly add that no one thinks judges should be paid as much as partners in large law firms.[363] Others concede that they will be happy only when judges' pay is comparable to that of law firm partners,[364] since according to the logic of many critics, judges must be paid almost as much as those partners in order to attract new judges and keep qualified veterans.

Recall arguments for salary raises: Present salary levels are insufficient

---

> sadly so. The question was then put, why should that be so? I said that many areas of law and procedure had now become so complex that the gene pool was inadequate to operate the system.

BORK, *supra* note 90, at 75.

359. POUND, *supra* note 95, at 82.

360. Richman & Reynolds, *supra* note 88, at 300 (The argument "that there are not enough good judicial candidates to supply a substantial number of new judgeships . . . is hard to take seriously.").

361. Broder, *supra* note 136, at A15.

362. *Id.* ("[I]n his prepared testimony, Breyer said parity with top law school professors would imply a salary of about $250,000."); Cokie & Steve Roberts, *supra* note 135 ("Breyer offers a reasonable standard by comparing them to law professors (he used to be one).").

363. Cokie & Steve Roberts, *supra* note 133 ("No one is saying that federal judges should earn as much as private lawyers.").

364. Harvey Berkman, *Go Ahead, Call Klayman "Litigious,"* NAT. L.J., Nov. 25, 1996, at A11 (noting that Judicial Watch is preparing a plan that endorses a "significant salary boost so judges are paid commensurately with the private sector—up to, say, $400,000 a year"). But why stop at $400,000? Many judges could make more than that in private practice.

because they are less than those paid in the private sector, and judges and would-be judges do and will choose these higher salaries over the lower ones of the judiciary. If money were the only motivator of career decisions, this logic would be flawless, and it would be true that judges must be paid a salary on par to those available in the private sector. As discussed above, however, judges do not choose their careers based solely on money. Money is only one form of compensation. Other remunerations can be gained from serving on the bench, including prestige, the ability to wield power and authority, the satisfaction of seeing one's legal philosophy embodied in the common law, and the joy of public service, among others.[365] Although it is difficult to say exactly what the rate of pay for judges should be, because of these enticements, it can safely remain substantially less than salaries of partners in private firms.[366]

VIII. CONCLUSION

Even before the founding of this nation, America exacted a steep price from those who would serve her. Although judges generally do not risk their lives for America,[367] they do sacrifice the comfortable livelihood that could be earned from employment in the private sector.[368] It may even be that, for some, judicial service has come "to require an unusual degree of sacrifice."[369] Certainly no one disputes that judicial salaries—ranging from $192,600 for the Chief Justice to $150,000 for district court judges—are significantly less than what most members of the judiciary could earn in private practice, although even a district judge makes far more than the average American.[370]

365. Weiner, *supra* note 136, at A20 ("And, of course, there are other, nonmonetary rewards for public service—prestige, authority, professional satisfaction."); Bork, *supra* note 252, at 234 (Prestige is "a major attraction of a career on the bench.").

366. Greenberg & Haley, *supra* note 242, at 425 ("[I]t is incumbent on the government to set salary levels such that an appropriate reduction in income is required of all those who choose to serve on the bench.").

367. To this, some salary critics will respond that the destruction of the Murrah building in Oklahoma City, the anthrax found in the U.S. Supreme Court, and the increased threat of terrorism demonstrate that judges do risk their lives in the service of their country. But even with these dangers and the increased risk of terrorism, the odds of a federal judge being killed while performing official duties remains slight.

368. William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV 49, 115 n.305 (1991) ("[M]any court of appeals judges have high professional opportunity costs for remaining on the bench."); Spoon, *supra* note 9, at 599 ("From the perspective of a federal judge, a judicial salary is likely to represent a significant financial sacrifice.").

369. Editorial, *Some Spending Also Takes Courage*, N.Y. TIMES, Feb. 16, 1981, at A18.

370. "Judges are paid significantly more than most Americans . . . ." Williams v. United States, 535 U.S. 911, 920 (2002) (Breyer, J., dissenting); *see also* Cokie & Steve Roberts, *supra* note 136 ("Now, $150,000 sounds like a lot of money to most Americans, and it is."). Because of this "[it] will always be hard to convince taxpayers that judges who make $150,000 or more are hurting."

No doubt America is getting its judicial services at a bargain price, as even mediocre judges could triple or quadruple their salaries if they made the jump to a private law firm. From the perspective of what their large-firm colleagues are making—the attorney market rate—the worst federal judge is still underpaid. And when the salary of the "giants" of the bench—like Scalia and Posner— are considered in conjunction with their thoughtful decisions, it is readily apparent that America is making out like a bandit.

Considered from a judicial market perspective—the level of salary required to attract and retain qualified judges—the present salary level is probably about right for most markets. Certainly no one would accuse Congress of profligacy if it elected to raise judicial salaries. And it could not hurt to pay judges in expensive metropolitan areas a location premium,[371] provide automatic cost of living increases for judges,[372] permit judges to earn honoraria and similar outside income, provide monetary performance incentives for judges operating in busier or understaffed districts, and de-link increases in judicial salary from those of Congress.[373] But because judges are

---

Editorial, TAMPA TRIBUNE, *supra* note 198, at 12.

371. *See* Coffin & Katzmann, *supra* note 128, at 384 (claiming the erosion of purchasing power of judicial salaries is felt more intensely in certain metropolitan areas); *see also* Rosenn, *supra* note 20, at 340-41. This locality premium is necessary because of cost of living disparities, which cause judges in some major cities to be paid much less in real terms than their colleagues who serve in less-expensive environs. POSNER, THE FEDERAL COURTS, *supra* note 29, at 34 ("[C]onsideration should be given to abandoning the principle of geographic uniformity of federal judicial salaries. They were not always uniform. The first Judiciary Act created . . . substantial differentials in the salaries of federal district judges depending on where they sat . . . ."). Additionally, Spoon stated the following:

> A scheme of nonuniform salaries based on regional differences in the cost of living is hardly novel. From 1789 to 1891, federal district judges were paid on a nonuniform basis. In the first judicial salary scheme there were thirteen judicial districts and six levels of salary, ranging from $800 to $1,800. Increases in the salaries of the various district judges were enacted sporadically. At any one time, some districts were included in a given enactment and others were not. By 1890, the number of judges and judicial districts had increased to fifty-eight, while the number of levels of salary had decreased to four: $5,000, $4,500, $4,000, and $3,500.

Spoon, *supra* note 9, at 612.

372. *See* POSNER, THE FEDERAL COURTS, *supra* note 29, at 33; Spoon, *supra* note 9, at 608-09. To prevent inflation from eroding the value of judicial salaries, James Madison proposed indexing them to some commodity. Although this plan was not adopted, rejection of it "probably reflected more an objection to the crudity of the indexing technique proposed rather than opposing to the principle of indexing." Rosenn, *supra* note 20, at 315.

373. To provide itself political cover, Congress has been linking judicial salary increases with its own. Accordingly, when Congress refrains from increasing its own salary or granting cost of living increases due to fears of a voter backlash, judicial salaries also remain stagnant. FEDERAL JUDICIAL PAY EROSION, *supra* note 128, at 4 ("Congress [has] tried to insulate itself from such public criticism by linking its pay to that of Federal judges and top-level executives in the Executive Branch.").

attracted to the bench for many reasons other than salary, there is no compelling reason for Congress to raise salaries significantly. Throwing money at the judiciary will not improve its quality. The excellence of the judiciary "cannot always be enhanced merely by allocating more money to it."[374] If Congress elects to remain on its present course, no great catastrophes will befall the judiciary, at least none that can be tied to salary levels. The federal courts will continue to attract and retain many of the brightest lawyers in America, much to the credit of the Republic.

374. Greenberg & Haley, *supra* note 242, at 423.