No. 09-1395



In The
# Supreme Court of the United States

PETER H. BEER, U.W. CLEMON, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, LAURENCE H. SILBERMAN, AND A. WALLACE TASHIMA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether the Compensation Clause of Article III prevents Congress from withholding the future judicial salary adjustments established by the Ethics Reform Act of 1989.

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), the American Bar Association ("ABA") respectfully submits this brief as amicus curiae in support of petitioners.[1]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions. It includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Rule 37.2(a), the parties' counsel of record were notified ten days prior to the due date of the intention to file this brief. Copies of letters consenting to the filing of this brief by the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

As the principal voice of the American legal profession, the ABA has long worked to preserve an independent and diverse judiciary as one of the cornerstones of our democracy. Based on nearly 50 years of study of federal judicial compensation, the ABA believes that Congress' periodic withholding of the judicial cost-of-living adjustments ("COLAs") established by the Ethics Reform Act of 1989 has resulted in judicial pay that is now so low that it seriously compromises the independence that life tenure was intended to ensure, and is insufficient to attract and retain well-qualified jurists from diverse economic and societal backgrounds. The ABA requests that the petition be granted so that this Court may consider whether Congress may constitutionally withhold COLAs that were established by a prior Congress, or whether these actions violate the constitutional guarantee of undiminished compensation for the Article III judiciary.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For almost 50 years, the ABA has issued reports documenting the deleterious effects of judicial "pay erosion," including those issued in December 2008 and August 2007, as well as a joint study with the Federal Bar Association issued in February 2001 (and updated in May 2003). *See, e.g., In Support of a Fair and Impartial Judiciary* (ABA Dec. 2008);[3] *Background Information on the Need for Federal Judicial Pay Reform* (ABA May 2007);[4] *Federal Judicial Pay Erosion: A Report on the Need for Reform* (ABA/FBA Feb. 2001) ("*Judicial Pay Erosion*")[5] (documenting the significant decline of judicial salaries through 2001), updated by *Federal Judicial Pay: An Update on the Urgent Need for Action* (ABA/FBA May 2003) ("*Urgent Need for Action*").[6] An unbroken chain of 15 ABA policy statements from 1963 to 2010 have supported increased judicial pay. *See, e.g., ABA Report with Recommendation #300* (policy adopted

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[3] *Available at* www.abanet.org/poladv/transition/2008dec_judiciary.pdf (last visited June 15, 2010).

[4] *Available at* http://www.abanet.org/poladv/priorities/judicial_pay/pospaper2007.pdf (last visited June 15, 2010).

[5] *Available at* http://www.abanet.org/poladv/priorities/judicial_pay/fedjudreport.pdf (last visited June 15, 2010).

[6] *Available at* http://www.abanet.org/poladv/documents/2003judpay.pdf (last visited June 15, 2010).

Feb. 2010).[7] The ABA's studies and reports document how declining judicial pay is undermining the purposes of the Judicial Compensation Clause. *See, e.g.*, *Independence of the Judiciary: Judicial Salaries* (ABA May 10, 2010).[8]

The ABA's data and analyses are of particular significance here because, as discussed below, they demonstrate that inflation has substantially eroded the value of judicial compensation. Although Congress has enacted a series of statutory regimes designed to maintain the value of judicial pay and remove salary adjustments from the shifting priorities of the political process, those efforts have uniformly failed. The statute at issue in this case, the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, attempted to address Congress' past failings by establishing automatic self-executing and non-discretionary annual cost-of-living adjustments (up to a maximum of five percent) for judges and

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[7] *Available at* http://www.abanet.org/poladv/priorities/judicial_pay/10M300.pdf (last visited June 15, 2010). Only recommendations that are adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD has more than 500 delegates, representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html.

[8] *Available at* http://www.abanet.org/poladv/priorities/judicial_pay (last visited May 28, 2010).

other senior officials. *See generally Urgent Need for Action* at 9.

But in six of the past 20 years, Congress has refused to authorize those "non-discretionary" COLAs. *See* Pet. 8-9, 12-13. And even in those years in which salary adjustments were made, judges continued to lose ground; Congress' failure to authorize earlier COLAs reduced the base compensation to which those percentage adjustments were made. Pet. 13. Over this same period of time, as the data below show, federal judges' workloads have increased dramatically. The effects of these trends are undisputed: highly qualified and experienced jurists are leaving the bench in unprecedented numbers, often to assume more lucrative posts in the private sector.

The diminishment of judicial compensation and the exodus of federal judges from the bench have continued unabated since this Court declined to grant review in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), cert. denied, 535 U.S. 911 (2002). Believing that the constitutional dimension of judicial "pay erosion" must be addressed, the ABA requests that review now be granted.

## ARGUMENT

### REVIEW IS WARRANTED BECAUSE THE CONTINUING DIMINUTION OF JUDICIAL SALARIES THREATENS THE INDEPENDENCE AND QUALITY OF THE NATION'S JUDICIARY

This Court should grant review to decide whether Congress' withholding of judicial cost-of-living increases established by the Ethics Reform Act of 1989 violates the Judicial Compensation Clause, U.S. Const. art. III, § 1.

1. *Declining Pay Threatens Constitutional Goals.* The continuing decline in judicial compensation threatens to undermine the dual objectives of the Compensation Clause. The Clause is the Framers' response to a lesson learned from colonial experience, namely that the judicial branch cannot function effectively if it is beholden to the other branches. *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 PENN. L. REV. 1104 (1976). The Framers recognized that the judiciary is "beyond comparison the weakest of the three" branches of government, as it has "no influence over either the sword or the purse." THE FEDERALIST NO. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed. 1888). They included the guarantees of life tenure and undiminished compensation in Article III to ensure the quality and "complete independence of the courts of justice." *Ibid.*; *United States v. Hatter*, 532 U.S. 557, 568-569 (2001). As this Court has explained, these two constitutional objectives are "no less

important today than in earlier times." *Hatter*, 532 U.S. at 569.

The Framers understood that Congress' failure to adjust judges' salaries for inflation could also imperil judicial independence and quality. As a result of "fluctuations in the value of money" over the life tenure of judges, Alexander Hamilton observed, "a stipend, which would be very sufficient at their first appointment, [could] become too small in the progress of their service." THE FEDERALIST NO. 79, at 492 (Alexander Hamilton) (Henry Cabot Lodge ed. 1888). Hamilton's fear that inflation might ultimately render judicial salaries "penurious and inadequate," and thus weaken the judicial branch, now threatens to become a reality. *Id.* at 491-492.

Over the last 40 years, Congress has repeatedly tried and failed to develop a legal regime that would achieve the Framers' objectives by removing adjustments to judicial compensation from political debate. *See United States v. Will*, 449 U.S. 200, 203-205 (1980). The core problem with these efforts has been the congressional decision to link judicial salary adjustments to similar adjustments for members of Congress and other government officials.[9]

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[9] Congress reduced or rejected several COLAs under both The Federal Salary Act, Pub. L. No. 90-206, 81 Stat. 613, 624 (1967), and The Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 419. *Judicial Pay Erosion* at 8. This Court found Congress' revocation of two judicial

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When judicial and congressional salary adjustments are inextricably intertwined, the shifting political priorities that affect congressional pay invariably affect judicial compensation as well. The Framers' concerns about judicial independence are unquestionably implicated when, for example, judges must "implore Congress to restore fair compensation at the same time those same judges are sitting in review of congressional enactments." Hon. John M. Walker, Jr., *Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association*, 12 ST. JOHN'S J. LEGAL COMMENT. 45, 55 (1996).

2. *The Decline in Real Judicial Pay Continues.* Congress' repeated failure to insulate judicial compensation from the political process has resulted in substantial reductions in judicial pay.[10] In real terms, a federal district judge's salary declined approximately 27 percent from 1969 to 2010.[11] The

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COLAs in the 1970s to be unconstitutional because the increases had "vested" before Congress acted. *Will*, 449 U.S. at 224-229.

[10] *See* Richard A. Posner, *The Federal Courts* 21-34 (2d ed. 1996) (illustrating the decline in the real value of judicial salaries); Comment, *Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform*, 55 CATH. U. L. REV. 513, 515 (2006) ("Inflation has decreased judges' purchasing power and ability to maintain a constant standard of living.").

[11] Statistics regarding inflation and cost-of-living were compiled by using the Bureau of Labor Statistics Consumer Price Index Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl. A salary of $40,000 in 1969 has a value of $237,611 in 2010.

decline in judicial pay is particularly acute when measured against the skyrocketing cost of significant family expenditures for which judges are often personally responsible, particularly housing and college tuition.[12] From 1969 to 2006 the real cost of a house increased 42 percent and the real cost of a college education rose more than 126 percent.[13]

While judicial compensation has fallen in real terms since 1969, the average American worker's inflation-adjusted wages have risen 19.5 percent.[14] The diminution in judicial income is even more dramatic when compared to the salaries earned by other members of the legal profession—the pool from which federal judges are generally drawn. From 1969 to 2006, partner earnings at American law firms increased 74.1 percent in real terms to an average of $264,000. *2008 CRS Report* at 24 (Table 2). Today, at 68 of the nation's 100 largest firms, average profits-per-partner have eclipsed the $1 million mark.[15] In many cases, former judicial law clerks earn more in salary and bonuses in their first year in private

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[12] Larry D. Thompson & Charles J. Cooper, *The State of the Judiciary: A Corporate Perspective*, 95 GEORGETOWN L. J. 1107, 1109 (2007) (citing *Urgent Need for Action* at 20).

[13] *Id.* at 1110.

[14] Chief Justice John Roberts, *2006 Year End Report on the Federal Judiciary* 3 (2007) ("*2006 Year End Report*"); Denis Steve Rutkus, CRS Report RL34281, *Judicial Salary: Current Issues and Options for Congress* (Sept. 16, 2008) ("*2008 CRS Report*").

[15] *AmLaw 100*, AMERICAN LAWYER (May 1, 2010).

practice than the federal judges for whom they clerked. *See* Paul A. Volcker, *Judgment Pay*, WALL ST. J., Feb. 10, 2007 (Op-Ed).

Lawyers who opt for careers in teaching and the government also have fared better than federal judges in real terms. In 1969, federal judges made more than senior professors and law school deans. *2006 Year End Report* at 2. Between 1969 and 2006, however, senior professors' real pay at the top 25 law schools rose 114.6 percent to an average of $330,000 and deans' real pay rose 95.7 percent to an average of $430,000. *2008 CRS Report* at 24 (Table 2).

A number of government lawyers likewise now earn as much or more than Article III judges. For example, an Internal Revenue Service lawyer can earn up to $174,000, a Commodity Futures Trading Commission lawyer can earn up to $212,000, and a Securities and Exchange Commission lawyer can earn up to $222,000. *See Fed. Judicial Compensation: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 73-82 (2007) (statement of Justice Samuel Alito). In many high cost-of-living areas, the locality-adjusted salaries of some court employees exceed the pay of bankruptcy and magistrate judges and are nearly equivalent to the salaries earned by Article III judges. *Ibid.*

These trends have not abated since the Federal Circuit's 2001 decision in *Williams*. Instead, the gulf between the changes in real pay earned by judges and

that earned by the average American worker has widened. App., *infra*, 1a. The Ethics Reform Act was supposed to prevent this outcome by creating a statutory regime, unlike the one at issue in *Will*, in which salary adjustments would be self-executing and non-discretionary. The *Williams* court's misunderstanding of this distinction (*see* Pet. 21) has enabled Congress to elide the statutory mandate. Congress refused to authorize the "non-discretionary" COLAs in 1995, 1996, 1997, and 1999. *See* Pet. 8-9, 12-13. Since *Williams,* Congress withheld them in 2007 and 2010, resulting in an additional three percent decline in real judicial salaries over the last three years. If federal judges had received all of the COLAs established by the Ethics Reform Act, circuit and district court judges' salaries would be approximately $262,000 and $247,000, respectively—substantially higher than they are today. App., *infra*, 2a.

3. *Judicial Workloads Continue To Increase.* The decline in real judicial compensation over the last 40 years has been accompanied by a dramatic increase in workloads. The total number of civil and criminal cases filed in the district courts has more than tripled during this period, from 110,778 new filings in 1969 to 353,052 in 2009.[16]

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[16] *Compare Urgent Need for Action* at 18, *with* Administrative Office of the United States Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 1, 4 ("*AOUSC 2009 Annual Report*"), *available at* http://www.uscourts.

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As a result, the average caseload for a federal district court judge increased 75.2 percent, from 339 to 594. The courts of appeals experienced an even greater increase. Appellate filings jumped more than five-fold, from 10,709 in 1969 to 57,740 in 2009, with the average caseload for a circuit judge increasing 210.5 percent, from 123 to 382.[17] *Urgent Need for Action* at 18-19; *AOUSC 2009 Annual Report* at 7. Individual judges' caseloads would have risen even more if it were not for the significant contributions of senior judges, who carry substantial caseloads despite retirement from regular active service. *Urgent Need for Action* at 19.

The nature and complexity of federal caseloads also have changed significantly over the last 40 years. Federal statutory causes of action such as RICO, CERCLA, ERISA, CFAA, EEA, new cyber crime and cyber terrorism cases, immigration cases, the liberalization of class action requirements under Fed. R. Civ. P. 23, and tightened judicial scrutiny of expert witnesses have all made federal cases progressively more complex in recent years. *E.g.*, *Manual for Complex Litigation* 4th (Fed. Jud. Ctr. 2004); *Reference*

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gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf (last visited June 10, 2010).

[17] The workload statistics were calculated based on the actual number of district court and circuit court judges in office (594 and 151, respectively), not authorized judgeships (678 and 169, respectively).

*Manual on Scientific Evidence* 2d (Fed. Jud. Ctr. 2000). At the same time, new developments in intellectual property, medical science, social media, electronic commerce, and globalization all require judges to apply greater intellectual flexibility and procedural creativity to the cases before them. With each year that passes, federal judges must adjudicate more cases of greater complexity, and yet do so in exchange for declining compensation.

4. *The Threat To The Judiciary Is Grave.* Judicial independence is endangered when federal judges must participate in the political process to obtain cost-of-living adjustments. The Framers expressed concern that "judges might tend to defer unduly to the Congress when that body was considering pay increases." *Will*, 449 U.S. at 219. Congress' actions under the Ethics Reform Act have left judges no choice but to engage with the legislature over compensation matters.[18]

Judicial independence is also threatened when declining pay forces judges to leave the bench prematurely. Federal judicial attrition was virtually nonexistent until the last twenty years. Since then, "the numbers are sobering." *2006 Year End Report* at 6. There has been a growing exodus of federal judges

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[18] The Federal Judges Association has collected recent congressional testimony, including from members of this Court, on the need for higher judicial pay. *Available at* http://www.federaljudgesassoc.org/docs.asp?id=16 (last visited June 15, 2010).

from the bench, many of whom have returned to private life to put children through college or to provide for unexpected financial needs. *2006 Year End Report* at 6-7. Chief Justice Roberts explained that "many judges who must attend to their families and futures have no realistic choice except to retire from judicial service and return to private practice." *Ibid.* Indeed, since *Williams* was decided almost 10 years ago, 53 federal judges have left the bench and returned to the private sector, with 15 judges resigning in the last three years alone. *See* AOUSC, Archive of Judicial Vacancies (2001-2010);[19] *2006 Year End Report* at 6-7. Congress' failure to protect judicial salaries from inflation has "seriously compromise[d] the judicial independence fostered by life tenure." Chief Justice William H. Rehnquist, *Judicial Compensation, Statement Before the Nat'l Comm'n on the Pub. Serv.* (July 15, 2002).

Judicial attrition likewise undermines the Compensation Clause's goal of ensuring judicial quality. The *Will* Court recognized that the Compensation Clause was designed to assure "a prospective judge that, in abandoning private practice—more often than not more lucrative than the bench—the compensation of the new post will not diminish." 449 U.S. at 221. By doing so, the Clause historically "served to attract able lawyers to the bench and thereby

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[19] *Available at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (last visited June 15, 2010).

enhance[ ] the quality of justice." *Ibid.*[20] Today, however, "[w]e are in real danger of losing, through a gradual but steady decline, the highly qualified judiciary on which our nation relies." *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 75 (2007) (statement of Justice Anthony M. Kennedy).

Increasing attrition also affects judicial quality by imposing systemic costs on our judicial system. The process of recruitment, appointment, and confirmation of new judges can take months or even years. And "[b]ecause it takes time for new judges to gain [comparable] experience and skills, when an experienced judge leaves the bench, the nation suffers a temporary, but significant, loss in judicial productivity." Chief Justice William Rehnquist, *2002 Year-End Report on the Federal Judiciary* 3 (2003).

Finally, the declining value of judicial compensation has diminished the nation's ability to recruit individuals "of the first talents" to the federal bench. 2 Records of the Federal Convention of 1787, at 429 (Max Farrand rev. ed. 1937) (remarks of

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[20] *See also Hatter*, 532 U.S. at 568; Charles Gardner Geyh & Emily Field van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 42 (1998); 1 James Kent, *Commentaries on American Law* 294 (1826) (the guarantees of life tenure and undiminished compensation were designed 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").

General Pinkney). Commentators have found "substantial anecdotal evidence suggest[ing] that many of our most talented and experienced lawyers are unwilling to accept nomination to the federal courts" because of concerns about pay. Thompson & Cooper, *supra*, at 1109. Judicial compensation is also cited as a significant reason why more African American, Asian American, Latino and Native American candidates do not seek appointment to the federal bench. Letter from Karen K. Narasaki, President, Asian American Justice Center, to Howard L. Berman, Chairman, Subcommittee on Courts, the Internet and Intellectual Property (April 19, 2007). The issue is not that prospective appointees expect to become wealthy from judicial service, but "they do expect to receive, in real terms what the job paid when they took it." *Fed. Judicial Compensation Hearing, supra*, 110th Cong. at 73 (statement of Justice Samuel Alito).

Although federal judges enjoy the intrinsic rewards of public service, those rewards are not inexhaustible. Congress' actions have created an ever-widening chasm between the real salaries of federal judges and their professional peers, which threatens to render judicial compensation "penurious and inadequate" and thus "breaches faith with the Constitution." U.S. Comm'n on Exec., Legis. & Jud. Salaries, *Report, Quality Leadership: Our Government's Most Precious Asset* 189 (1986). Former Chief Justice Rehnquist succinctly summarized the danger the nation now faces: "Our judges will not continue to

represent the diverse face of America if only the well-to-do or the mediocre are willing to become judges." *Judicial Compensation*, *supra*.

Congress' use of automatic self-executing and non-discretionary annual cost-of-living adjustments in the Ethics Reform Act held the promise of removing judicial compensation from the pressures of politics, but that promise remains unfulfilled. This Court, not a divided court of appeals, should decide whether Congress' diminution of judicial compensation through periodic withholding of cost-of-living adjustments established by the Ethics Reform Act violates the Compensation Clause. For if judicial pay continues to decline, and "judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy." *2006 Year End Report* at 6.

## CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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