MEMORANDUM

TO: The Chairman and Members of the Commission on Executive, Legislative and Judicial Salaries

FROM: Circuit Judge Frank M. Coffin, Chairman of the Committee on the Judicial Branch of the Judicial Conference of the United States

DATE: October 21, 1986

Dear Mr. Chairman and Members of the Commission:

I submit this statement as Chair of the Judicial Conference Committee on the Judicial Branch, speaking for all federal judges. Our Committee has given its full support and cooperation to the preparers of the two volume report submitted to you under the apt title, "Promises Made, Promises Still Unkept . . . ." As one who has served in all three branches -- as a Member of the 84th and 85th Congresses, Deputy Administator of a federal agency, A.I.D., and as a Circuit Judge, I recommend it to your detailed scrutiny as the most comprehensive and authoritative documentation of the history, status, and real decline in top officials' compensation that has ever been compiled in this country.

Since I cannot hope to add to the statistical data in that Report, my purpose in submitting this separate statement is to try to give you some idea of how the Judiciary views its current status and how this perception is affecting the very independence of the "Third Branch" that our Constitution sought to guarantee. In contrast, I want to bring to your attention the determination exhibited by our sister countries, Canada and the United Kingdom, in preserving the status and dignity of their judiciaries.

After twenty-one years of service as a federal judge, including a decade of service as chief judge of my circuit and several years as Chair of this Committee, I have come to know many judges, old and young, in all parts of the nation. I think I can reflect three themes that underscore their thinking.

First -- a growing sense of unfairness, a realization that the minimum conditions they expected when they donned the robe have not been maintained.

Second -- a chronic concern over Congressional reaction against the judiciary in matters affecting compensation, the precise condition against which the Constitution sought to insulate.

Third -- an increasing willingness to engage in contingency planning to reenter the private practice of law, when educational and other needs require such action.

There is a fourth and deeply significant factor, which I do not address. Although I know that recent administrations, including the present one, have lost many an outstanding potential judicial nominee because of the present levels of compensation, this is not within my personal competence to describe.

Sense of unfairness -- an eroding morale. All through our history lawyers have willingly left their practices to become judges, knowing that they were making a considerable sacrifice in income and freedom of lifestyle. The opportunity to serve the broader cause of justice and to participate in the exposition and development of the law, as well as the respect generally accorded to the judiciary and the security of life tenure justified the sacrifice. Thus Benjamin Franklin in the constitutional debates at Philadelphia over who should appoint judges, could make the following jocular comments, as reported by Madison:

> Docr. Franklin observed that two modes of chusing the Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves.[1]

Those who have donned the robe have always felt that there was, to use a lawyer's term, adequate consideration supporting the contract exchanging top remuneration, excitement and freedom for a more monastic life of deliberation, service, respect, and security. This feeling has persisted in the face of three significant changes in judges' working conditions. The most dramatic has been the increase in the quantity and complexity of cases all judges have had to deal with over the past two decades. Judges today, both at the trial and appellate level, have a workload dwarfing that of judges of 15, 20 and more years ago. Second, judges today find their already restrained lifestyles limited further by both self imposed and legislatively imposed restrictions in permissible activities, associations, and financial holdings. Finally, judges face another burden or obligation that, both in kind and degree, differs from that of earlier generations: administrative duties on behalf of their courts, circuit judicial councils, and the Judicial Conference that demand from one fourth to one third of their time.

All the judges I know have willingly accepted these additional duties, burdens, and restrictions. The old bargain was still a good one. But what no judge appointed to the bench in the past two decades has ever expected to bear was an almost 40 percent reduction in his or her real compensation over the past 18 years. More and harder cases, yes. A more monastic life, yes. Greater involvement in administration, yes. But not, in addition, the erosion in both the respect and security that were always a critical part of the bargain entered into.

Our judges are acutely conscious of the fact that the quadrennial salary adjustment system has "worked" only one time since its beginnings 18 years ago. They are also aware that, for many of them, there may well be no other real opportunity for any significant compensation restoration during their working lifetime.

Chronic concern -- a form of dependence. All that I have said up to now could be dismissed by the Commission as a plaintive plea by a self-interested pleader. What I am trying to point up is that this low morale of the judiciary portends a profound impact on our tripartite structure of government.

During most of the last ten years, most judges, most of the time, have been increasingly concerned over the widening disparity between their compensation and that of lawyers generally.

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[1] James Madison, Notes of Debates in the Federal Convention of 1787, Ohio & University Press, 1966, pp. 67-68.

The current legal landscape is a perfect anomaly: virtually all lawyers, including the median, the average, and, by definition, many of the mediocre, in big firms and small, in metropolitan and smaller communities earn far more than federal judges. Judges, as a group, receive lower compensation than the senior faculty at the nation's top law schools. Increasingly, states are paying their judges more than the nation is paying its judges. Judges' law clerks, within one or two years after leaving their judges' chambers are receiving greater compensation than their recent mentors.

Wherever judges congregate, the topic is: what will happen -- or not happen -- next? The Federal Judges' Association, now comprising some 60 percent of all judges, has as its chief raison d'etre the inadequacy of judicial pay and other benefits. An inquiry made by this Association several years ago revealed that a large proportion of federal judges had (a) exhausted most of their accumulated assets, (b) been required to sell off their residence or other property and live more cheaply, (c) been stimulated to find some extra-judicial compensable work for the judge, his or her spouse, or both, or (d) had met more than one of these categories.

The Committee which I chair, for all the years of its existence, has had similar concerns: the periodic cost-of-living allowance (which judges alone have been denied for a number of years, pending affirmative action by the Congress); the long needed reforms in survivor's annuities; and, always, the usually futile quadrennial struggle for a meaningful readjustment in basic compensation.

All of this signals a disturbing orientation to the concerns of a federal judge. To the extent that judges spend their time and energies in worrying about their financial condition and their ability to educate their children, and about ways and means to obtain favorable action from the executive and the Congress, their very independence, sought to be protected by the Founding Fathers, is compromised.

Contingency planning -- the judiciary as "an experience", not a commitment. Both of the feelings noted above, the sense of a contract that has been broken and the increasing sense of dependency on executive and Congressional affirmative support have coalesced to induce a new kind of thinking in judges old and young.

In my circuit there is a highly dedicated young district judge, with seven years on the bench, though still in his mid-forties. He is the chief judge of a busy metropolitan court. Being deeply motivated toward public service, after three years as an associate in a law firm, he became, first, an Assistant United States Attorney, then a U.S. Magistrate, and, finally, Judge. This means, of course, that he has never had the opportunity to accumulate large savings or build an estate. He has five children. This past year he paid some $30,000 in tuition. With him, I fear, it is only a matter of time before he must withdraw from the judiciary. Within the past several months he rejected a starting offer of $150,000 to join a law firm. Should this year pass without a substantial increase in his compensation, I feel he would have no choice but to turn to private practice despite his intense desire to remain on the bench. This is not an isolated case. He is joined by an increasing cadre of younger judges in every one of the nation's circuits.

There is another danger. While I have been speaking of the younger judge who has belatedly found that his income does not rise to the level of his obligations, there may well be others in the future who, with their eyes all too wide open, will accept judicial appointment with the quiet intention of serving a few years and then retiring to private practice, at once enjoying the enhanced prestige of having been a federal judge and the enhanced remuneration of a leading partner in a law firm. Such a "stepping stone" approach to a federal judgeship would radically subvert the basic presuppositions of our constitutional structure.

Apart from the young judge, the problem of inadequate compensation affects two other age groups. There are, increasingly, judges who were appointed while in their early forties or even their late thirties and have served fifteen or twenty years. Traditionally, we have come to expect our judges, at age 65 or 70, to take "senior status" and to continue to serve, although with a reduced caseload. But as the younger-appointed judge completes, say, a twenty year period of service, perhaps while he is only 60 years of age, or less, he or she is tempted, should the law allow, to resign from office and enjoy a few years of top remuneration. So long as judicial remuneration remains inadequate, the pressure will build to allow such early retirement. To the extent this happens, we shall lose a priceless reservoir of our most experienced and still vigorous older judges.

The last group of judges making contingency plans about leaving the judiciary are those in their early and mid-sixties. Soon to be eligible to resign their office, without forfeiting their salary, to which they are entitled by their service, they are increasingly tempted by lucrative offers from large law firms. Formerly only a sprinkling of judges have gone this route. Today, more and more are seriously considering it. These, our most senior judges, include the "jewels in the crown" -- judges whose continued service has been much of the glory of the federal judiciary.

All of such contingency planning, by younger judges who face an educational crunch, by new judges who make a calculated and short-term commitment, by judges still young with twenty years of service, and by judges now eligible to resign from office, will be, I predict, converted into reality should the instant opportunity be allowed to pass without substantial action to rectify years of inaction.

I now wish to call the Commission's attention to the two nations that are closest to our common law -- independent judiciary tradition, Canada and the United Kingdom. In recent years both have confronted potential problems of recruiting of top quality judges. Both have seen fit to create bodies, such as yours, charged with the responsibility of assuring adequate compensation and other benefits for their judges and, in England, other top officials. Both countries have in the past few years, despite adverse economic conditions, taken tremendous strides to rectify the inroads of inflation. Both currently pay their judges more in a relative sense (Canada) or in absolute terms (the United Kingdom) than we pay ours.

In Canada, the Judges Act in 1981 required a triennial review of judicial salaries and other benefits by a statutory commission appointed by the Minister of Justice. The Canadian Justice responsible for presenting a "brief" for the judges, my opposite number, is Chief Justice N. T. Nemetz of British Columbia. As a result of the work of the triennial reviews, the salaries of Canadian judges, both federal and provincial, probably exceed those of U.S. circuit and district judges, if relative costs of living are considered. Pennsylvania Common Pleas Judge Lois G. Forer, writes in the Judges' Journal:

> All Canadian judges, both federal and provincial, are paid approximately the same salares, about $90,000. It is expected that the salaries will be raised to $100,000 in the near future. The average salary for the state judiciary in the United States is less than $65,000. American judges carry a much larger case load. Very few Canadian lawyers receive the fees of $200 an hour or more charged by many American lawyers. Although the value of the Canadian dollar is low in comparison to the United States dollar, the cost of living in Canada is, at least,

commensurately lower.[2]

In a period when the salaries of our federal judges have remained generally static, i.e., since 1981, the salaries of Canadian judges will have risen by some 25 percent. Moreover, as Judge Forer's article indicates, additional perquisites have been made available. Canada, in short, thinks it has a first class judiciary and wants to keep it so.

In the United Kingdom, I have been principally indebted for my information to Lord Desmond Ackner, a Law Lord, who has served a function similar to mine, in presenting the judciary's case to a commission such as yours. There, a system of top salary review has been in place for 15 years. In 1971 the Review Body on Top Salaries was appointed, a body of eight members, staffed by the Office of Manpower Economics, its mission being to advise the Prime Minister of the desirable remuneration of the judiciary, senior civil servants, and senior officers in the armed forces. There have been eight reports. I am enclosing Volume I of the Eighth Report for you, Mr. Chairman, to indicate the depth of concern, data collection and analysis that characterizes the English approach to the problem of giving adequate salaries to top officials in a democracy.

Perhaps the most eloquent and realistic statement of the results of inaction in the area of top official compensation was made in the Fifth Top Salary Review Body Report, in 1982 (at p. 30):

> If salaries for the highest public service jobs are allowed to deteriorate to a point at which they are seriously out of line with the responsibilities carried and with opportunities available elsewhere, there will be no disaster overnight. Those concerned will not go on strike and there will be no mass exodus. In the nature of career services the effects on quality of recruitment will only become apparent in the longer term, though there is the risk that they may appear more sharply in the case of the judiciary where appointments have to be filled by direct recruitment from among practicing lawyers.

In any event, despite England's grave economic problems, the recommendations in the Eighth Report were accepted by the Prime Minister. Very substantial increases for all judicial officers were recommended, something less than one half of all the award to take effect on July 1, 1985, and the balance on March 1, 1986.

At the exchange rates prevailing as of October 16, 1986 (1 pound = $1.44), the salaries of the English judges who are comparable to our federal circuit and district court judges are the following:

	Salary in Pounds	Salary in Dollars
Lord Justice of Appeal (i.e., a federal circuit judge)	68,310	$98,366
High Court Judge (i.e., a federal district judge)	62,100	89,424

The significance of this action can be fully appreciated when one takes note of the salary levels for these two positions existing as of May, 1983, as revealed in the Sixth Report: 45,500

[2] Lois G. Forer, "Oh, Canada! Where Judges Go First Class," The Judges' Journal, a Quarterly of the Judicial Administration Division, ABA, Vol. 25, No. 3, Summer 1986, p. 14 at p. 16.

pounds for a Lord Justice of Appeal and 42,500 pounds for a High Court Judge. By 1985, therefore, the United Kingdom had increased the compensation of her appellate judges by 50 percent and of her trial judges by 46 percent. Moreover, not only do United Kingdom judges now receive from one fourth to one fifth greater compensation, in absolute terms, than their United States counterparts, but, when the cost of living of a resident in England is considered, perhaps 60 to 75 percent more.

Considering the economic problems faced in Britain, we must respect the depth of commitment and courage evident in the recommendations of the Top Salary Review Body and, especially, in the action of the Prime Minister.

When the Eighth report was made public, some of the press predictably reacted. The Times expostulated:

> The Top Salaries Review Body's report is neither intellectually cogent nor empirically reliable . . . Ministers no longer hear what is being said in the High Street, in the saloon bar, on the golf course . . . The Prime Minister should withdraw, and quickly.

But the Prime Minister held her ground. The issue disappeared. And England's judiciary was invigorated.

The last really major step to enable our top officials' compensation to "catch up" with the effects of years of inflation occurred as the results of the actions of the First Quadrennial Commission and President Johnson in 1969. It is, therefore, fair to take this year as the benchmark; to take an earlier year would be to compound injustice by measuring current levels against levels which were concededly inadequate. Now, almost 18 years later, another catchup effort is overdue. As in Britain, this will require leadership commitment to a very sizeable percentage increase. How this may best be managed -- what compensating budgetary steps or what other reforms should accompany the increase -- is a matter for the most probing analysis. But that such an effort can be successful is demonstrated by the recent experience in the United Kingdom.