**Testimony of U.S. Circuit Judge Frank M. Coffin,
Chairman, Committee on the Judicial Branch of the
United States Judicial Conference, before the
U.S. Senate Committee on Governmental Affairs,
January 31, 1989**

Mr. Chairman and Members of the Committee:

It is a distinct honor to appear before you, speaking for the federal judiciary along with my distinguished colleague, Judge Leon Higginbotham.

First, a bit of perspective. Caught as you are between a solid case of higher compensation for the top officials in all three branches and the visceral simplistic reaction reflected in your mail, it is healthy to recall what Alexis de Tocqueville wrote about us a century and a half ago:

> In America the secondary officers are much better paid and the higher functionaries much worse than elsewhere. * * * These opposite effects result from the same cause: the people fix the salaries of the public officers in both cases, and the scale of remuneration is determined by a comparison with their own wants .... The sum which is scanty to the rich appears enormous to him whose wants do not extend beyond the necessities of life; and in his estimation, the governor of a state, with his twelve hundred or two thousand dollars a year, is a fortunate and enviable being.[1]

Implicit in his comments is the criticism that this is not the wisest of courses for a republic. In short, this issue is one which evokes Burke's memorable speech to the Electors of Bristol in 1774: "Your representative owes you, not his industry only, but his judgment: and he betrays, instead of serving you, if he sacrifices it to your opinion."

In fairness, we should recognize that opinions on the pay issue are divided and that not every opinion is equal to every other. A fair question is this: Is the instinctive, understandable reaction of a person struggling to make both ends meet as weighty as the reflective judgment of a newspaper publisher and its editorial staff, whose business it is, while keeping the common touch, to focus their readers' minds on values important to their good governance. I have counted over fifty newspapers and periodicals, which I have received from judges in every part of the nation, endorsing the recommendations of the Quadrennial Commission and the President. I list them in the margin herewith.[2] I add that this is only my own collection; I think it safe to say that there are at least two or three times this many similarly thoughtful and favorable endorsements throughout our nation. I urge you, therefore, to give the most reflective consideration to such a

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[1] "Democracy in America," Phillips Bradley, ed. NY: Vintage Books, 1955, Vol. I p. 225.

[2] My file includes these publications: Newsweek, The Sunday Oregonian, The Chattanooga Times, The Houston Post, The San Francisco Chronicle, The Los Angeles Times, The National Law Journal, The Wilkes-Barre Times Leader (article by Tom Bigler), Roll Call, Judicature, The Portland (Maine) Press Herald (article by David Broder), Evening Express and Maine Sunday Telegram, The Washington Post, The New York Times, The Wall Street Journal, The Chicago Tribune, The Chicago Sun Times, The Democrat and Chronicle Times-Union (Rochester, New York), The Kansas City Times, The Boston Globe, The Boston Herald, The Atlanta Journal, The Atlanta Constitution, The Times-Picayune (New Orleans), The Recorder (Bay Area, San Francisco), USA Today, The Star-Ledger (Newark), The Norfolk Virginian - Pilot (article by James Kilpatrick), The Temple (Texas) Daily Telegraph, The Brunswick (Georgia) News, The Sun Republican (Springfield, Massachusetts), The Sun (Baltimore), The Savannah Morning News; The Miami Herald, The Florida Times-Union, The San Diego Union, The San Diego Daily Transcript, The Philadelphia Inquirer, The Desert News (Salt Lake City, The Los Angeles Daily Journal, The Advertiser (Montgomery, Alabama), The Akron Beacon Journal, The Commercial Appeal (Memphis), The Wisconsin State Journal, The Fresno Bee, The Cincinnati Enquirer.

consensus of editorial approval from papers big and small, urban and rural, north, south, east and west.

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The issues underlying the presidential compensation recommendations this year go to the very health of our government -- stopping infection by removing the reality and appearance of special interest influence; stopping anemia and malnutrition by making it possible for those with families, who are neither rich nor poor, to serve in all three branches; and stopping the excessive bleeding which occurs when top quality judges and administrators leave prematurely for greener pastures. On November 20, 1988, the General Accounting Office, your governmental watchdog, issued two vital transition reports to President Bush and House and Senate leaders. The first was perhaps expectable; it sounded the alarm for the most strenuous efforts to slash the deficit. The second, perhaps less expected, was that the Congress and the new administration must deal with a federal work force that is too often underpaid, unmotivated and demoralized. The report said: "Concern is mounting that the government's ability to acquire and retain good people is diminishing .... [T]he federal government's pay structure has broken down."

In other words, your Congressional watchdog signaled that controlling the deficit and reestablishing a realistic pay structure were both priority tasks.

Insofar as the pay structure of the federal judiciary is concerned, you are dealing with 700 Article III judges (roughly 544 district judges and 156 circuit judges). On these do our 260,000,000 people depend for the administration of justice in our federal courts -- a ratio of a third of a million people to one judge. Also vital parts of this system are our 271 bankruptcy judges and our 290 magistrates.

From this point on, I want to make my testimony a very condensed fact sheet. I have reviewed the submission our Committee on the Judicial Branch made to the Quadrennial Commission, "Simple Fairness," a copy of which has been given to each Senator. I have reviewed the testimony of others before the Commission and its own excellent report, "Fairness for our Public Servants." I have tried to distill the salient facts.

A. <u>The breach of contract and frustration of expectations</u>

1. While wage earners generally have just about kept up with the cost of living since 1969, judicial pay in real terms has eroded by 30 percent for district and circuit judges and 43 percent for Supreme Court justices.

We pick 1969 as the benchmark year because that was the first year reflecting the fairly successful efforts of the <u>first</u> Quadrennial Salary Commission to implement a realistic pay scale.

2. The 73 percent of all serving federal judges who took a very substantial pay cut on being appointed bargained for that -- but not the subsequent erosion.

3. It is true that since 1981 judges have suffered very little erosion and in some years have even made a slight gain on the cost of living. But these judges, on the average earned $120,000 before being appointed. They took a 40 percent cut on the expectation that in 1984 their pay would be equitably adjusted through the quadrennial process and that the erosion the system had suffered since 1969 would be rectified. But in that year there was no salary recommendation. And two years later, despite a recommendation for a substantial increase by the Commission, the final increase was a meager 10 percent. In 8 years, therefore, when the rest of the legal profession was steadily realizing increasingly greater

compensation, newly appointed judges experienced a period of prolonged frustration of their expectations.

B. The impact of these breaches

1. On judges' standard of living and security: Our Federal Judges Survey reveals:

- 43-44 percent of judges report a decline on their standard of living;
- 61-63 percent report lowered savings and increased debt;
- One-third report the need for the judge or spouse to work part time;
- Over half have had to sell assets.

[I attach, for further details of the impact on judges -- financial, intellectual and emotional -- a copy of excerpts from the judges responses to Question 23 of our survey.]

2. On resignations

- More judges resigned between 1969 and 1986 than in the 180 years between 1789 and 1969;
- Between 1958 and 1973, 6 judges resigned; between 1974 and 1988, 57 resigned;
- We conducted exit interviews of 26 judges who resigned in the past 10 years; the level of their compensation was a factor in 20 of these cases;
- Resignations have also hit bankruptcy judges and magistrates. In 10 years over 60 percent of the bankruptcy judiciary has suffered turnover; and between 40 and 55 percent of magistrates have given consideration to resigning or not seeking reappointment because of salary levels.

3. On prospective resignations

Even more ominous than the actual resignations to date is the very real and present prospect of large scale withdrawals from the judiciary of younger judges. In recent years one third of the new appointees have been 45 or younger; with the increasing costs of education, housing, medical care, etc, they now contemplate resigning if substantial relief is not forthcoming.

- Item: Our own survey indicates that 1 in 10 judges have already taken specific action looking to leaving the bench.
- Item: A survey by the American Bar Foundation shows 30 percent of judges planning on early resignation; of these 30 percent plan to leave within 5 years. The group most likely to leave are judges between the ages of 53 and 57 with 5 to 8 years of service.

4. On recruitment

The American Bar Foundation reports that 56 percent of state judicial selection commissioners say there are not enough qualified candidates for state judicial posts; a similar difficulty faces federal judicial selection officials. See pages 40-42 of our submission to the Salary Commission, "Simple Fairness" -- statements of former Chief Justice Burger, Attorney Richard Donahue, and former Deputy Attorney General Edward Schmultz. More specifically, testimony

before the Quadrennial Commission of representatives of the Hispanic National Bar Association, (Gilbert Paul Carrasco), Ms. Janine Harris of the National Conference of Women's Bar Associations, and Thomas A. Duckenfield of the National Bar Association revealed that:

> Minorities and women are still at the point where relatively few of them have reached a status where they would be considered top flight judicial candidates. And those representatives would be at a level of compensation where they could not consider a judgeship.
>
> As federal district judge, Joseph H. Rodriguez, himself of Hispanic background, puts it: "The judiciary is almost off limits to worthy candidates in minority communities."

C. The source of judges: the legal profession

The task of attracting and keeping top quality judges is conditioned by compensation levels in the legal profession. While judges willingly trade top compensation for the satisfactions of the judicial life, they see no merit in being near the bottom in compensation. As former district judge Gabrielle McDonald, recently resigned, put it: "Why, if we're chosen as the best, are we paid the least?"

Leaving aside the astronomical salary figures commanded by partners in the large urban firms, we merely note the following comparisons, all of them representing lawyers are roughly median levels.

• Perhaps the most realistic measure: The median income of a partner of 25 years experience in a firm of any size all across the country: $157,479.
• Average salary of corporate general counsels: $234,902.
• A seven year associate at a top New York law firms: $169,000.
• 9 month salary for a professor at one of the 25 top law schools: $102,000 - $121,000.

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D. Are Candidates for Judqeships Fungible?

A theme frequently voiced when we present our data on judicial resignations and the contemplated premature retirement or resignation of many judges is that there is no lack of judicial candidates waiting in the wings.

It is probably true that there are many very able wealthy lawyers, many very able public interest lawyers, and perhaps some lawyers without family responsibilities or with a spouse contributing substantial income. It is also probable that some state judges who have qualified for a state pension would be interested in a federal judgeship. But so to limit the federal bench would spell the end of the pluralism that has been one of the saving graces of the federal judiciary.

What would have been excised would be highly competent younger middle class, minority and women lawyers with family responsibilities ... a description that fits a vast part of our society. Perhaps these kinds of candidates would not be entirely excluded. There exists the very real threat that they would accept a judgeship and, after a period of 4 or 5 years resign, to accept a partnership paying several times their judicial rate and to retain the honorable title of "Judge" for the rest of their lives. This would make a federal judgeship a

waystation in the career of a successful lawyer.

To settle for a bench of the rich, the poor, the elderly, the ascetic, the ideologue, and the upward mobile transient would in a very basic sense be to scuttle independence, excellence, balance, and stability of the Third Branch.