Remarks of United States Circuit Judge Frank M. Coffin
at the Second National Conference of the
Federal Judges Association at the
Mayflower Hotel, Washington, DC,
May 23, 1989

I am honored to share this platform with my distinguished and dedicated co-panelists. Only the pressure of time prevents me from describing our debt to each and every one of them. I must, however, acknowledge the deeper honor, to be addressing so many of my colleagues, so large a segment of Article III itself. I cannot say enough in appreciative praise of both your first and founding president, Judge Spencer Williams, and your second president, Judge Bob Hall. Spencer's advocacy at the White House in 1986 could not have been more effective. No one could have either foreseen or forestalled the unilateral, secretive and malign one-man veto by the then chief of staff on that fateful Saturday, January 3, 1987. Since then Judge Hall and I have been co-partners, in touch with each other on almost a daily basis. He has been imaginative and indefatigable in thinking of avenues we should explore, contingencies to plan for, and people to see.

In the spring of 1987 we began to pick up the pieces. President Reagan's new Chief of Staff, Howard Baker, and White House Counsel, A.B. Culvahouse were completely supportive. They moved in most timely fashion to assemble the 7th Quadrennial Commission under the outstanding leadership of Lloyd Cutler. This was the first opportunity to make a real restoration of compensation since 1976. For our part, following up on Spencer Williams' earlier survey of judges, and with excellent help from Bill Burchill and Marilyn Holmes in the Administrative Office, we sent out a comprehensive questionnaire. Ninety percent of the active judiciary responded, helping make our "Simple Fairness" case to the Commission the best ever. The American Bar Foundation had its own excellent questionnaire. Meanwhile Paul Volcker's National Commission on the Public Service was addressing the severe brain drain in the executive branch while Common Cause was beating the drum for paying public servants adequately without relying on large honoraria for appearances before special groups. President Reagan came through handsomely on his quasi-pledge for a second installment. The nation's deliberative press was supportive. President Bush gave his endorsement as to federal judges.

There was a feeling that the stars and planets were in the right relationship. But you know what happened. Ralph Nader, teabags, and talk shows. On February 7, only 48 brave souls in the House, including our valiant friend, Vic Fazio, and 6 in the Senate stood their ground. We not only lost that fight but also have seen a gratuitous effort, not responsive to any criticism whatsoever, to limit judges even in teaching and lecturing. And, we have seen the most irresponsible press attacks on senior judges, most of them in their 80's and 90's, who gave their services for many years though not obliged to, but now are no longer able to serve.

Where are we now? Thoughtful editors and columnists have kept the issue alive. Despite the preoccupation in the House with problems associated with the Speaker, Congressman Ford and his Post Office and Civil Service Committee have been holding comprehensive hearings. The Chief Justice broke new ground in appearing before the Committee, prompting Chairman Ford to say, "You give us credibility, sir, in a way that scarcely anyone else could do." In his tough, persistent, dedicated way the Chairman will bring out a bill, probably for all three branches.

In the meantime, we have our own bill, approved by the Judicial Conference. It carries the number H.R. 2181 and was introduced on May 2, by request, by Congressman Robert Kastenmeier, Chair of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, and its ranking minority member, Congressman Carlos Moorhead. Its title is illuminating: "To restore lost compensation and establish the procedure for adjusting future compensation of justices and judges of the United States." It does three things. First, it is a bill to restore lost compensation, to the extent of 30 percent of present salaries. Or, as the Chief Justice testified, it seeks "a partial recapture of the tremendous decline in purchasing power that has affected judicial salaries over the last 20 years." Second, it is also a bill that attempts to build in automatic cost of living increases. It does this by stating that judges' compensation consists of the various judicial office salaries adjusted by (a) the 30 percent increase and (b) increases triggered both as to rate and timing as civil service retirement annuity increases. Third, should any question remain as to the automaticity of cost of living increases, it specifically repeals our bete noir, Section 140, the provision that denies us the COLAs given the civil service unless Congress affirmatively authorizes them.

At some point in the near future, hopefully after a similar bill has been introduced into the Senate, we hope to unleash you and all cooperating organizations in an effort to persuade as many Representatives and Senators as possible to sponsor these bills. This by no means excludes later support of any bill coming out of Congressman Ford's Committee, but until such makes its appearance, we would like 2181 to receive impressively broad support.

That's where we are. What are our prospects? I for one would not ask a member of Congress that question. Because I know that the easiest answer and probably the correct answer at the present time is: not good. The Senate just wishes that this issue would go away. The House has more "believers" but it is transfixed by the unfolding drama hovering over the Speaker. But we should ask ourselves: must we acquiesce in perennial pessimism? If so, will the time ever be ripe? It is my conviction, born of over five years of largely fruitless struggle, that we must not withdraw. We must stay the course, however dim our prospects may look at any given time. We must eventually prevail. Once we take the position that we've done all we can until the time of the next Quadrennial, we shall have sold out the judiciary.

What are the choices available? It seems to me that there are two ways of appealing to those who hold the power of the purse over us. The first is to do what we can to surmount the barriers to effective communication. We must, through our own committees of the Judicial Conference, the various circuits and courts, through this and other organizations, and through individual relationships attempt to develop a sympathetic, understanding, and courageous responsiveness to our legitimate needs on the part of both the Executive and the Congress. I add that, observing the FJA, and Administrative Office, the committees of the Conference, and individual judges, we are in many ways doing better at this than ever before.

But, even if we hone our communication efforts and skills to perfection, there will remain the constitutionally ordained tension among the branches. There will be obdurate matters with political risks where sweet reason will not prevail. If there can be times when even the wisest of heads cannot prevail and powerful interests can hope to influence the result solely because of their perceived power at the polls, must the judiciary sit back in quiet dignity, watching the steady erosion of the quality of the administration of justice?

If the answer is "No," is the judiciary best qualified to attempt to exercise pressure on a recalcitrant or dubious President and Congress? Apart from occasional personal bonds between judges and Members of Congress, judges seem singularly lacking in political power. Too often

they may be debtors rather than creditors.

As I reflect on your organization, I cannot help but think how feckless our efforts would have been without it. But then I think of the enormous expenditure of time, thought, and energy -- our only capital as judges -- that so many of us have made year after year. Should the goal of obtaining a fair restoration of lost compensation occupy such a substantial fraction of our substance?

If, the answer is again "No," an adversarial effort, backed by real power to influence political decisionmakers, may occasionally be called for, and if judges alone cannot hope to mount this kind of effort, what kind of surrogate should be sought?

A very able district judge in San Francisco, William Schwarzer recently wrote me as follows:

> The courts need understanding and support on many issues, including adequate funding, judicial independence, relations with the media, and the avoidance of unfairness, prejudice and delay.
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> [Similar to Paul Volcker's National Commission on the Public Service], I envision a ... National Commission for the Federal Courts, representative of the entire political and philosophical spectrum, with sufficient clout so that it can get in to see the president and that Congress will listen to it. Its membership would be large enough to raise funds to maintain a modest staff to carry on appropriate education and advocacy activities.
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> I believe that there will be no shortage of public-spirited citizens who would want to enlist in this cause, if properly motivated.

Chief Judge Howard Markey of the Federal Circuit has voiced a similar idea, in writing in the South Dakota Law Review about the appellate process, "the environment of the federal appellate process we once knew was a national resource equal to our physical environment; it needs judicial environment activists to fight in Congress for its revival. We need a Judiciary Club the equal of the Sierra Club." 33 S. Dak. L. Rev. 383-84.

Of course, we have our national surrogates -- the American Bar Association and the various state and specialized bars. The ABA's current president, our friend and co-panelist Robert Raven, was filling the role of surrogate in the highest tradition when he wrote all of us last February:

> The bar has a special responsibility to ensure the effective functioning of the justice system and we will continue to devote our full resources to gaining approval of significant judicial pay raises as soon as humanly possible. We must achieve both short-term and long-term solutions; in the short term we must gain a pay increase for the judiciary, and in the long term we must establish a compensation system in which the judiciary will not be held hostage to extraneous political considerations.

There are many issues where our fellow professionals in the bar associations can amply prosecute our needs. This is particularly true on issues of substantive law or procedure where professional judgment rather than political strength is likely to determine the ultimate issue. But, as we know, from time to time issues of deepest concern to the judiciary arise which are at the

same time likely to be overwhelmed by the voices of other constituencies or to be preempted by cheap and seductive demagoguery.

I, therefore, suggest that it is not too soon to explore the appropriateness, feasibility, and desirability, as well as the hazards and disadvantages, of a permanent, broad-based coalition or commission of citizens and organizations pledged to support the independence of the Third Branch. Is it presumptuous to suggest that the American Bar Association itself would be a sophisticated, sensitive, and responsible vehicle to conduct such an exploration? Let our surrogate explore the domain of the surrogacy of the future. This could be a vital contribution, enabling the federal judiciary to enter the twenty-first century with a serenity we have not possessed for a long, long time.