No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST, HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF NATIONAL, STATE AND LOCAL BAR ASSOCIATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The National, State and Local Bar Associations[1] (collectively the "Bar Associations"), are voluntary professional associations representing more than 250,000 lawyers. They are formed in order to provide attorneys in their communities with certain services such as continuing legal education, up-to-date information about changes in the law as well as other programs to assist lawyers and judges in their work. Also, these Bar Associations promote and support various initiatives to maintain the independence of the state and federal judiciary and improve the legal system. The fairness of judicial pay and the overall quality of the federal bench are of utmost concern to the Bar Associations.

The Bar Associations participating as *amici* in the filing of this Brief are as follows:

Boston Bar Association
Chicago Bar Association
Connecticut Bar Association
Federal Bar Association
Federal Bar Council
Illinois State Bar Association
Los Angeles County Bar Association
The Association of the Bar of the City of New York
New York County Lawyers' Association
Ohio State Bar Association
Philadelphia Bar Association
The Bar Association of San Francisco

The bar represented is deeply concerned about the damage caused to a independent judiciary by inadequate compensation and the demoralizing effect of a diminishment of compensation of federal judges in office while other federal employees receive an increase in salary to keep pace with the cost of living. The members of the bar associations represented here observe and have observed first hand the impact this continuing process has on the federal judiciary. We may not expect these highly competent and dedicated individuals

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1. Pursuant to Sup. Ct. Rule 37.6, the Bar Associations assert that neither Petitioners nor Respondent assisted the Bar Associations or their counsel, in any way (even with expenses), in preparing or submitting this brief. Letters of consent from the parties have been lodged with the Clerk.

to continue to serve as they have in the face of this unnecessary adversity.

SUMMARY

Review should be granted by this Court because the case below presents an important question of federal law that has not been but should be settled by this Court. We believe that the court below decided the question in conflict with Supreme Court decisions.

Twenty federal judges[2] brought this case to challenge the constitutionality of Congressional legislation passed in 1995, 1996, 1997 and 1999 that withheld annual cost-of-living allowances ("COLAs") that were provided for under the Ethics Reform Act of 1989 (the "Ethics Reform Act"). The plain language of the Ethics Reform Act mandates the award of this annual salary adjustment as a form of compensation protected by Article III, section 1 of the United States Constitution. The court below held that the COLA award is an optional event. However, the plain text of the statute and its legislative history entirely refute that suggestion. Judicial interpretation further shows that the promulgation of the Ethics Reform Act instituted a statutory system entirely different from previously-enacted schemes.[3] Further, preventing COLAs from being awarded has, in effect, caused real injury, that is loss of compensation, to federal judges, which violates Article III, section 1 of the Constitution.

The Ethics Reform Act establishes the annual COLA award as a form of judicial compensation that the Compensation Clause unequivocally protects.

2. Eight of the original twenty judges are deceased.

3. The Ethics Reform Act makes annual pay increases mandatory for federal judges when awarded to other government employees.

REASONS FOR GRANTING THE PETITION

I. The Ethics Reform Act Commands That Federal Judges Be Awarded COLAs As Part Of Their Constitutionally-Protected Compensation

The court below held that Congress could, on a selective basis, block salary increases provided to federal judges by the Ethics Reform Act of 1989 and that to do so did not violate the Compensation Clause of Article III of the Constitution by diminishing the compensation of federal judges while in office. This ruling undermines the constitutional standing as well as the independence of the federal judiciary. It presents an important question of federal law that has not been and should be considered by this Court.

A. Statutory Framework

1. The Ethics Reform Act Of 1989

The Ethics Reform Act, 5 U.S.C. § 5318, was adopted on November 30, 1989, following a three-year period in which the federal judges received no adjustment in pay. The Ethics Reform Act was the result of seven months of hearings and deliberations by a Bipartisan Task Force on Ethics (the "Task Force") appointed by the Speaker and Minority Leader of the House of Representatives.

The main purpose of the Ethics Reform Act was to re-establish the principle that public officials should be paid only by the public. In order to realize this important goal, Congress recognized the need to remove government pay levels from the arena of "politics for hire." In the pay system enacted prior to the Ethics Reform Act, members of Congress supplemented their salaries by taking fees from outside sources as compensation for so-called "private speech making" and for attending meetings of various special interest groups. Congress intended the interplay of provisions comprising the Ethics Reform Act to balance new limitations on outside income with statutorily-mandated wage adjustments.

In enacting the Ethics Reform Act, Congress established an entirely new process for providing annual COLAs to high-level government officials including federal judges. The Ethics Reform Act repealed the discretionary powers previously delegated to the

President (and his agent) in fixing the amount of salary adjustment under the former system. The Ethics Reform Act automatically awards annual COLAs to senior officials and guarantees annual COLAs to the federal judges, whose salaries are protected by the Compensation Clause, so long as General Schedule ("GS") salaries for government employees are adjusted for the same year.

Congress modified the system existing previously to provide that federal judges' rates of pay "shall be adjusted by an amount . . . equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI [Employment Cost Index] . . . as determined under section 704(a)(1) of the Reform Act of 1989." The Ethics Reform Act ties federal judges' salaries to a well-recognized index, the ECI, a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics.[4] The Ethics Reform Act provides for an automatic COLA adjustment as part of the federal judges' constitutionally-protected compensation in any year GS employees receive a cost-of-living increase.

2. The Cancellation Statutes

In 1995, 1996, 1997 and 1999 Congress adopted resolutions, which withheld the scheduled adjustments that were provided for under the Ethics Reform Act.[5] These cancellation statutes were contained in annual appropriations bills and applied only to judges, Members of Congress and other policy-making positions covered by the Executive Schedule.

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4. It provided, however, that under no circumstances would the increase exceed five percent in any year.

5. Treasury, Postal Service and General Government Appropriations Act of 1995 Pub. L. No. 103-329, 630, 108 Stat. 2424 (1994); Treasury, Postal Service and General Government Appropriations Act of 1995 Pub. L. No. 104-52, 633, 109 Stat. 507 (1995); Department of Defense Appropriations Act of 1997 Pub. L. No. 104-208, 110 Stat. 3009 (1996); The Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub L. No. 105-277, 112 Stat. 2681-518 (1998). The Cancellation Statutes correspond to salaries paid in 1995, 1996, 1997 and 1999.

In 1995, 1996, 1997 and 1999, the GS salary rates were adjusted under the Federal Pay Comparability Act of 1970 ("Comparability Act"), 5 U.S.C. § 5303, and government employees received a salary increase for each year based upon the ECI. Federal judges' pay, however, was not adjusted. The Cancellation Statutes acknowledged that the trigger for judges' COLAs under the Comparability Act had taken effect. Nevertheless, the Cancellation Statute enacted in 1994 and blocking the 1995 adjustment, stated that "no adjustment under section 5303 of title 5, United States Code [the Comparability Act], shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems." Pub. L. 103-329, § 630(a)(2). The Cancellation Statutes enacted in 1995, 1996 and 1998 contained identical language.

B. The Plain Language Of The Ethics Reform Act Mandates The Award Of Annual COLAs To Federal Judges

The plain text of the Ethics Reform Act requires the award of annual COLAs with respect to federal judges' compensation.[6] This Act provides in pertinent part:

> [T]he annual rate of pay for positions at each level of the Executive Schedule *shall* be adjusted by an amount . . . equal to the percentage of such annual rate of pay which corresponds to the most recent percentage change in the ECI . . . as determined under section 704(a)(1) of the Ethics Reform Act of 1989.

5 U.S.C. § 5318 note (emphasis added).

The use of the term "shall" in the Ethics Reform Act constitutes a mandatory command with respect to the payment of annual COLAs. The unambiguous language of this Act modifies the previously-enacted Adjustment Act by tying the federal judges' "annual rate of pay" to "the most recent percentage change in the ECI."

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6. Pub. L. No. 101-194, 103 Stat. 1716 (codified at 5 U.S.C. § 5318).

This statutory scheme signaled a radical departure from the previous system under the Executive Salary Cost-of-Living Adjustment Act of 1975 ("Adjustment Act"), 28 U.S.C. § 461. Whereas the Adjustment Act tied the salary adjustment of senior officials to the discretionary review process under the terms of the Comparability Act, the Ethics Reform Act pegs the "annual rate" of judges' salaries to the ECI, an objective cost index. When there is an adjustment in the GS salaries, then the judges are to receive an adjustment as well. In enacting the Ethics Reform Act, Congress detached the living wage of the senior officials from a process, which subjected the determination of their living wages to the political discretion of the President and an independent agent. Instead, Congress created an annual entitlement on the part of those high-level employees encompassed by the Ethics Reform Act.

C. The Ethics Reform Act's Limiting Provisions Require The Award Of Annual COLAs

The comprehensive structure of the Ethics Reform Act indicates that the COLA provision constitutes a statutory requirement. The interwoven scheme of ethics reforms and salary rights comprising the Ethics Reform Act makes the annual COLAs an essential component of a larger scheme to limit the outside income of senior officials. Indeed, the upward adjustment under the COLA provision merely offsets the obvious disadvantage created by the statute's strict provisions limiting the outside income opportunities of high-level employees including federal judges.

These strict provisions severely restrict the outside income options of federal judges. The statute limits federal judges from earning outside income through teaching or writing, limits the receipt of honoraria and imposes mandatory work loads on Senior Judges. Ethics Reform Act, §§ 501(a), 601 and 705. The provisions limiting the options of federal judges by adversely affecting their earning options make it unambiguous that the new system for automatic cost-of-living adjustments established under the Act was "interrelated" to the ban on honoraria and other salary limitations. *Boehner v. Anderson*, 809 F. Supp. 138, 141 (D.D.C. 1992), *aff'g*, 30 F.3d 156 (D.C. Cir. 1994).

Viewed in its entirety, the full structure of the Ethics Reform Act implies that the annual COLA is a form of required compensation, not merely a discretionary adjustment. By instituting a new statutory scheme that balances strict limitations on outside income with the statutory right to a living wage, Congress radically transformed the previously-enacted system. The COLA provision was an integral and required part of this statutory scheme.

It is important to note that while Congress enacted legislation repealing the COLA provision in 1994, 1995, 1996 and 1998, Congress did not relieve judges of the Ethics Reform Act's ban on honoraria and other limits, which were "interrelated" to the COLA provision. *Id.* With respect to federal judges, who are protected by the Compensation Clause of the Constitution against a reduction of compensation while in office, any failure to award the annual COLA constitutes a diminishment of compensation.

D. The Legislative History Of The Ethics Reform Act Supports Petitioners' Position

The legislative history of the Ethics Reform Act is clear — it was the intent of the Act to award automatic annual COLAs to the federal judges as a form of compensation under the terms of the Ethics Reform Act. The court below not only conceded as much but lamented it was not able to carry out the obvious intent because of its view of applicable law. *United States v. Williams*, 240 F.3d 1019, 1031 (Fed. Cir. 2001). The Task Force[7] submitted its report, "Fairness For Our Public Servants," to the House of Representatives on November 15, 1989, which found that the system under the Adjustment Act "only reopened to political gamesmanship what was intended to be a more objective and automatic cost-of-living adjustment." 135 Cong. Rec. H9264 (daily ed. Nov. 21, 1989). As a result, the Task Force determined that the previously-enacted

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7. The Task Force was appointed by Congress to study the system then in place for adjusting the salaries of Executive Level positions and federal judges. The Task Force's conclusions and recommendations led to the enactment of the Ethics Reform Act.

system was incompatible with the need to adjust senior level salaries for inflation.[8]

In addition, the Task Force stated that the award of annual COLAs was an entitlement, not merely an adjustment that the federal judges were eligible to receive:

> Currently, under the provisions of P.L. 94-84 [the prior law], the positions under the Commission's review are *eligible* to receive adjustments in basic pay at the same rate and at the same time as the comparability adjustments for the General Schedule. This Act *provides* annual comparability adjustments for these officials. However, the rate of adjustment would correspond to the percent of change in the Employment Cost Index (ECI), less one half of one percent.

Id. at H9269 (emphases added).

E. Congress' Failure To Award COLAs To Federal Judges In 1995, 1996, 1997 And 1999 Constitutes An Unconstitutional Diminishment Of Judicial Compensation

The Compensation Clause of the United States Constitution unequivocally protects federal judges from a reduction in compensation. It provides in unambiguous terms that federal judges shall "receive for their Services, Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III., § 1. The purpose of Article III, Section 1, is to protect the

8. The Task Force found that the loss of several annual COLAs forced the Quadrennial Commission on Executive, Legislation and Judicial Salaries to be "in the near-impossible position of recommending politically unacceptable increases, simply to restore lost purchasing power." To redress the growing disparity between top salaries in the government and the private sector, the Task Force recommended that beginning in 1991, "a separate index be used to determine whether or not there should be an annual salary adjustment for these top officials" and that "prospective adjustments be pegged to the rate of change in the Economic Cost Index (ECI), minus one-half a percent (0.5%)." 135 Cong. Rec. H9264 (daily ed. Nov. 21, 1989).

balance of power of the federal government, as it was envisioned under Articles I, II and III of the Constitution. The Compensation Clause preserves the separation of powers among the legislative, executive and judicial branches of the federal government as the Framers saw the need for an independent judiciary and bestowed a special protection in the form of life tenure and irreducible compensation while in office. As Alexander Hamilton explained in *The Federalist* No. 79, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."[9]

Even though Congress unquestionably has the power to repeal previously-enacted legislation, and can therefore rescind the 1989 COLAs with respect to the majority of affected federal employees, the Compensation Clause creates a group of Article III federal judges whose salaries are to be protected from political disputes. It thus prevents Congress from repealing the Ethics Reform Act, a statute that guarantees these judges annual COLAs, without providing an alternative that would avoid a diminishment of compensation of judges then in office. The Compensation Clause would not prevent Congress from providing a reduced or different compensation for federal judges not yet in office.

II. Judicial Interpretation Of The Ethics Reform Act Reinforces Petitioners' Position

The court below decided a question of federal law in conflict with existing Supreme Court decisions. This Court should review the decision below for this reason. The decision below is inconsistent with this Court's more recent decision in *Hatter v. United States*, 121 S. Ct. 1782 (2001). In *Hatter*, this Court reaffirmed its earlier decisions that laws with a discriminatory effect on judicial compensation violate the compensation clause. The Cancellation Statues discriminate against the judiciary by reducing the compensation of the judiciary and certain other high level executives, without reducing the compensation of other federal employees.

9. THE FEDERALIST No. 79 at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The court below also misinterpreted this Court's decision in *United States v. Will*, 449 U.S. 200, 101 S. Ct. 471 (1980). *Will* addresses a now-defunct statutory scheme for determining federal judges' salaries, and the Ethics Reform Act is materially different from the legislation analyzed in *Will*. In *Will*, this Court interpreted a statute which "did not . . . alter the compensation of judges; it modified only the formula for determining that compensation." *Will*, 449 U.S. at 227, 101 S. Ct. at 486. The language of the Ethics Reform Act is mandatory in nature. In it, Congress struck a political bargain and erased many other sources of income for high government officials in exchange for annual increases to be awarded when GS salaries are adjusted. Federal judges are entitled to these increases as of the effective date of the 1989 legislation.

A. The Cancellation Statutes Discriminate Against The Judiciary And Thus Violate *Hatter*

Last term, this Court considered the effect of a 1983 law which made participation in the Social Security system voluntary for most federal employees but required certain high-level officials — in particular the judiciary — to pay Social Security taxes. In *Hatter*, this Court held that the law discriminated against the judiciary and thus violated the Compensation Clause. 121 S. Ct. at 1795. This Court held that there was no sound basis for imposing a financial burden on the judiciary when that same burden was not imposed on other federal employees. *Id.* at 1793. "Were the Compensation Clause to permit Congress to enact a discriminatory law . . . it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees . . . ." *Id.* at 1795.

The Cancellation Statues violate the Compensation Clause in the same manner as the Social Security tax addressed in *Hatter*: they discriminate against the judiciary by diminishing the compensation of federal judges without imposing the identical burden on all federal employees. The Cancellation Statutes also create a perception that the Legislature might exercise an impermissible influence over the federal judiciary by reducing their compensation. This Court should be ever vigilant in protecting against violations of the Compensation Clause to avoid even the appearance that Congress might be permitted to use the threat of Cancellation Statutes to influence the otherwise independent judiciary.

B. *Will* Is Not Dispositive

The court below misapplied the *Will* decision. 449 U.S. 200, 101 S. Ct. 471 (1980). This Court's analysis in *Will* was limited to the previously-enacted scheme under the Adjustment Act. Contrary to the Court's suggestion, *Will* merely underscores the significant distinction between the automatic and mandatory nature of the COLA awards under the Ethics Reform Act and the discretionary system under the Adjustment Act.

In *Will*, thirteen federal district court judges challenged the validity of four repealing statutes that withheld their COLAs in four consecutive years, commencing in 1976. The Court held that statutes, which eliminated COLAs before scheduled salary increases had taken effect, did not violate the Compensation Clause, since these statutes in no sense diminished compensation. However, this Court in *Will* also held that statutes purporting to withhold previously authorized COLAs by repealing salary increases already in force were held to "diminish" the compensation of federal judges in violation of the Compensation Clause.

In the present case, the court below held that because Congress enacted the Cancellation Statutes before January 1 of each calendar year where the COLA increase would be paid, the challenged legislation does not violate the Compensation Clause under *Will*. However, this assumes that the COLA provision of the Ethics Reform Act is similar to the Adjustment Act in that it becomes effective on January 1 of each calendar year, if it is not eliminated before that date. The court below held that the challenged legislation repealing the COLA provisions of the Ethics Reform Act became effective before the adjustments were paid.

The Ethics Reform Act, which was enacted in part to resolve the problems highlighted by the *Will* decision in 1980, is significantly different from the 1975 Adjustment Act. In contrast to the Adjustment Act, the right to COLA awards became effective on January 1,

1991, when the Ethics Reform Act was enacted, and are not subject to the discretion of Congress or the President. In fact, the precise terms of the Cancellation Statutes buttress this construction of the Ethics Reform Act, declaring "no adjustment shall be considered to have taken effect." If the right to the adjustments had not already become law, Congress could have simply declared that the adjustments for the year in question "shall not take effect." Instead, Congress stated that "no adjustment shall be considered to have taken effect," which indicates an acknowledgment that the right to the adjustments had already become law.

In enacting the Ethics Reform Act, Congress purported to redress the very indeterminacy of COLA awards under the Adjustment Act by providing for the automatic adjustment based on the ECI. In *Will*, this Court described the scheme under the Adjustment Act as granting "previously authorized cost-of-living increases initially intended to be automatically operative under the statutory scheme, once the Executive had determined the amount." *Will*, 449 U.S. at 201, 101 S. Ct. at 474. While the COLAs under the Adjustment Act scheme were "initially intended" to be automatic, the COLAs mandated under the Ethics Reform Act actually "took effect" when the Ethics Reform Act was enacted. *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). The Ethics Reform Act eviscerated major provisions of the Salary Act and the Adjustment Act that allowed for discretionary review, and altered the previous statutory scheme so as to render the Salary Act's system of quadrennial review defunct. *Id.* at 159.

Even though it dealt with materially different legislation, the *Will* Court reaffirmed the same special protection afforded by the Compensation Clause to federal judges. The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions. *Will*, 449 U.S. at 226, 101 S. Ct. at 486. Indeed, Congress is fully empowered to declare that a salary adjustment, which has taken effect as a matter of law, shall not take effect or shall not be considered to take effect for *other*

federal employees. Congress, however, does not have the power to do so as to judges alone under the Compensation Clause.

C. *Boehner* Supports Petitioners' Argument That The Annual Increases In Salary Rate Under The Ethics Reform Act Are Mandatory

In *Boehner*, the D.C. Circuit confirmed the mandatory nature of the COLA provision under the Ethics Reform Act. Congressman Boehner argued that the COLA provisions of the Ethics Reform Act violated the Twenty-Seventh Amendment by increasing congressional pay without required annual legislation and intervening elections.[10] Congressman Boehner argued that the operative date for examining the COLA legislation is "the date upon which the payment of the [COLA] raise first occurs, not the effective date of the statute." *Boehner*, 30 F.3d at 161 (internal quotes omitted). The premise of his argument is that each annual adjustment under the Act was a new law varying the compensation of members of Congress. The defendants including the Department of Justice, the Senate and the House, argued that each annual adjustment was not a new law varying pay because the COLA provisions of the Ethics Reform Act became law in 1989.

The D.C. Circuit held that the Ethics Reform Act did not run afoul of the Twenty-Seventh Amendment because "the COLA provision became law in 1989" and the first COLA was not paid until after the 1990 election and that the 1993 COLA at issue was "fixed by law," "already in force," or "in place" since 1989.[11] *Boehner*, 30 F.3d at 162. *Boehner* thus demonstrates that 1989

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10. The Twenty-Seventh Amendment provides that no law "varying the compensation [of Members of Congress] shall take effect until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII.

11. The *Boehner* Court stated that:

> The Reform Act became a law on November 30, 1989, when the bill, having passed both Houses and been presented to President Bush, he signed it into law. . . . The provision calling for an annual COLA is part of that 1989 law. *Boehner*, 30 F.3d at 161.

was the single effective date for a statutory command requiring annual COLAs by "automatic" operation of the law. Congress' attempts to undo these increases through the Cancellation Statutes it enacted in 1995, 1996, 1997 and 1999 are patently unconstitutional.

In *Will*, this Court struck down statutes which purported to reduce judicial compensation in years where the increases had "taken effect". *Will*, 449 U.S. at 224-225, 230, 101 S. Ct. at 485, 488. The court below agreed with the *Boehner* court that the Ethics Reform Act had taken effect in 1989. *Williams*, 240 F.3d at 1036. But the court below held that the automatic COLA increases had not yet been implemented and, thus, did not vest under the new vesting rules created in this Court's decision in *Will*. In so holding, the court below ignored the substantial differences between the 1975 Adjustment Act — which was the subject of the *Will* decision — and the Ethics Reform Act which was intended to correct the problems addressed in *Will*.

The *Boehner* Court recognized that the adjustments provided for under the Ethics Reform Act are different in form and substance from the adjustments, which were provided for under the 1975 Adjustment Act. Under the Adjustment Act, which was in effect when *Will* was decided, judges were to receive whatever adjustment the President, under his delegated authority, determined should be received by GS employees under the Comparability Act. Until the President acted Judges were merely "eligible" for an adjustment.[12] Under the Ethics Reform Act, by contrast, Congress delegated no authority to the President to make law. Congress established the compensation of judges by law through the adoption of a well-established index, the ECI, postponing only the administrative implementation of subsequent adjustments.

III. Federal Judges Suffer Injury When COLAs Are Withheld

The Court should review the holding below because it has and will have a real impact on the ability of the federal judiciary to carry out its Constitutional role. The Ethics Act of 1989 was intended to address a number of long standing concerns about compensation

12. 135 Cong. Rec. H9269 (daily ed. Nov. 21, 1989).

for the federal judiciary. Federal judges earn relatively modest pay for their demanding workloads.[13] This is particularly true when compared to the salaries that the federal judges could be receiving in private practice. The gap between federal judges' salaries and private practice salaries is great, especially now when work in private practice is "more lucrative than ever."[14] Top base salaries for first-year associates in private law firms have broken the $150,000-per-year mark. There are now first-year associates earning more than federal district court judges and fifth-year associates earning more than the Chief Justice of the Supreme Court (even without annual associate bonuses, which ranged from $25,000 to $55,000 at many firms in 2000).[15] The average partner's compensation among the nation's ten highest-grossing law firms in 2000 was $1,069,000.[16] A partner at one of the ten firms with the nation's highest per-partner compensation in 2000 earned almost double that amount, at $1,819,000.[17]

13. Federal Judicial Pay Erosion: A Report on the Need for Reform, The American Bar Association & The Federal Bar Association (February 2001) at 13. Caseloads for district courts have nearly tripled from 110,778 cases in 1969 to 320,194 cases in 1999. *Id* at 14.

14. The nation's law firms are "particularly healthy" in 1999, "continuing a trend that started in 1995." Profits per partner and associates' salaries at the nation's largest firms "shot up" in 1999. These raises "pale" beside the raises for in-house counsels in top corporations. Margaret Cronin Fisk, *Most Lawyers Benefit from Boom*, NATIONAL LAW JOURNAL, June 14, 1999, at B07.

15. The top salary in the nation offered to the incoming class of associates in the spring of 2001 was $150,000 (offered by Boston's Testa Hurwitz & Thibeault). New York Law Journal, January 4, 2001. New York Law Journal, February 4, 2000.

16. *The Am Law 100*, THE AMERICAN LAWYER (2001). The figure is derived from adding up the average partner compensation for the nation's ten highest-grossing law firms, then dividing the total by ten. The number is rounded to the nearest $1,000.

17. *Id.* at 128.

A. The Canceled COLAs Represent A Loss Of Real Dollars

The federal judges in the present case do not seek salaries commensurate with those paid in private practice. Rather, they ask only for the same yearly increases granted to other government employees to keep up with the rising cost of living. Accordingly, the federal judges should be provided no more (and no less) than the same COLAs granted to other federal employees by the Ethics Act of 1989.

The denial of these COLAs from 1995 through 1999 created a real loss for federal judges. During the years 1995, 1996, 1997 and 1999, the gross domestic product grew respectively by 2.7%, 3.6%, 4.4%, and 4.1%, or 14.8% in the aggregate.[18] The consumer price index increased by 2.5%, 3.3%, 1.7%, and 2.7%, or by a total of 10.2% in the four years. To keep up with these changes, the salaries of most federal employees were adjusted upward. For fiscal years 1995, 1996, 1997, and 1999, GS rates of pay were increased respectively by 2.0%, 2.0%, 2.3%, and 3.1%, or 9.4% in the aggregate.[19] Federal judges, however, did not receive the increases in 1995, 1996, 1997 and 1999 because Congress adopted, and the President signed, resolutions that purported to withhold the adjustments. If the judges had received these adjustments, their salaries would have increased by more than 9.4%[20] by the beginning of 2000, which translates into a total increase of approximately $12,600 for district court judges, $13,300 for circuit judges, $15,500 for Supreme Court associate

18. BUREAU OF ECONOMIC ANALYSIS, (visited Aug. 13, 2001) <http://www.bea.doc.gov>. .

19. THE U.S. OFFICE OF PERSONNEL MANAGEMENT (visited Aug. 10, 2001) <http://www.opm.gov>.

20. This figure (9.4%) and the figures in the table which follows, do not take into account the effect which compounding would have judicial salaries had Congress not purported to withhold the adjustments.

justices, and $16,100 for the Chief Justice.[21] Instead, the judges' salaries have increased only 2.3% since 1995 (as a result of the 2.3% ECI adjustment in January 1998), which is an increase of only about $3,000 for district court judges, $3,300 for circuit judges, $3,800 for Supreme Court associate justices, and $4,000 for the Chief Justice. These facts are summarized in the chart below:

Annual % changes in:	1995	1996	1997	1999	Total Change
Real GDP	2.3	3.4	3.9	3.9	14.80
Consumer Prices	2.5	3.3	1.7	2.7	10.20
GS Salaries	2.0	2.0	2.3	3.1	9.40
Federal Judges' Legal Salaries	2.0	2.0	2.3	3.1	9.40
Federal Judges' Actual Salaries	0	0	0	0	0

The differences in these amounts are not insignificant. For example, federal judges paying for their children's college education, these differences represent the cost of a public university for approximately two semesters or attending a private college for approximately one semester.[22]

21. The figures are derived from multiplying the judges' salaries in 1995 by .094 and rounding the numbers to the nearest $100. The 1995 salaries are assumed to be the same as salaries given in 1997, before the 2.3% ECI adjustment was provided in 1998 (the only adjustment given since 1995). Accordingly, in 1995, a district court judge was paid $133,627, a circuit judge was paid $141,740, a Supreme Court associate justice was paid $164,125, and the Chief Justice was paid $171,457.

22. According to the College Board, the average tuition in 1999-2000 for a four-year private college is $16,332, and for a four-year public college is $3,510. The estimated total expenses for attending a four-year private college for one year is $24,357 and for attending a four-year public college for one year is $10,725. *Paying for College*, THE COLLEGE BOARD (visited August 1, 2001) <http://www.collegeboard.com>.

B. Sub-Standard Judicial Pay Causes Resignations From The Bench

Although Judges have expressed dissatisfaction with their low salaries since the nation's earliest years, Congress' attempts to block further raises can only exacerbate the problem and accelerate the pace of judicial resignations. Of the 127 federal judges who left the bench between 1789 and 1993, 71 of them, or 56% of the total, stated that they left to return to private practice, to engage in other employment, and because of inadequate salary.[23] The number of judges explicitly citing low salary as their reason for resignation has grown dramatically during the past several decades. Judicial resignations due to low pay during the 1970s and 1980s exceeded "all judicial resignations for all reasons combined for the preceding 200 years."[24] Chief Justice Burger, in an interview with the *ABA Journal* in 1985, stated that 43 federal judges had resigned since he took office, with about thirty of them citing "economic reasons" as a large factor. "In our nation's history," he bemoaned, "we have not lost so many able judges by resignation for economic reasons [since 1970]."[25] In the decade of 1961-1970, 5 federal judges resigned from the bench. In the 1990's, 52 resigned.[26]

C. Lagging Judicial Wages Impair The Quality Of The Federal Bench

The problem is not only retaining competent judges but also recruiting competent lawyers to help fill the vacancies. The federal bench is graced with highly competent and dedicated judges but

23. Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service*, prepared for the National Commission on Judicial Discipline and Removal (1993), at 14.

24. *Id.* at 15.

25. *Q&A with the Chief Justice*, 71 A.B.A.J. 90 (1985).

26. Federal Judicial Pay Erosion: A Report On The Need For Reform, February 2001, jointly prepared by The American Bar Association and The Federal Bar Association, at p. 16, Chart G.

the quality may not be expected to remain unaffected by a diminishment in wages. The number of lawyers who have declined to be considered for federal judgeships due to low compensation is "undoubtedly far greater" than the number of judges resigning for that reason.[27] "Without a doubt," the *ABA Journal* claimed, federal judges' low salary is "the single most important impediment to a high caliber, independent judiciary."[28] Noting the large number of resignations in the 1970s and 1980s, Chief Justice William Rehnquist warned that fewer judges "will possess the first-rate talent which has always been a hallmark of the federal bench."[29] Morris Harrell, former chairman of the ABA's Commission on Federal Judicial Compensation, noted that "a number of distinguished lawyers . . . could bring their expertise to the judiciary but are not interested because of insufficient compensation."[30] In 1989, a *New York Times* editorial predicted that the "income squeeze would produce more and more federal judges who are rich or who see a judgeship as a brief interlude in professional life."[31]

D. Judicial COLAs Are Not Withheld Because Of Economic Constraints

If federal judges had received the annual COLAs in 1995, 1996, 1997 and 1999 to which they were entitled, the extra sum required to pay their legal salaries would have been a minuscule

27. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service — and Disservice — 1789-1992*, 142 U. PA. L. REV. 333, 356 (1993).

28. Collins T. Fitzpatrick, *Depleting the Currency of the Federal Judiciary*, 68 A.B.A.J. 1236 (1982).

29. Bill McAllister, *The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition*, THE WASHINGTON POST, Jan. 21, 1987, at A19.

30. Gary A. Hengstler, *Salary Woes: Judges' Pay Still on Hold*, 72 A.B.A.J. 18 (1986).

31. Anthony Lewis, *What Kind of Judges*, THE NEW YORK TIMES, Mar. 9, 1989, at A31.

portion of the federal budget. Funding the 9.40% increase due to the federal judges would have cost approximately $2.4 million. This was less than .00012% of the FY 2001 total federal budget, and only about .009% of the federal budget dedicated to the administration of justice.[32] These figures show that the withholding of the COLAs was not precipitated by economic constraints. On the contrary, the economy performed well during the years that Congress and the President withheld COLAs from the federal judges. Their decision to cancel the COLAs was motivated by political, not legal or economic considerations.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted and the federal judges should be awarded annual COLA adjustments for Fiscal Years 1995, 1996, 1997 and 1999 under the Ethics Reform Act as part of the protected judicial compensation to which they are entitled in accordance with the Compensation Clause of the United States Constitution.

Respectfully submitted,

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32. The figures are derived from the following calculations: (Number of federal judgeships x Amount of salary increase withheld from each judge) / federal budget outlay for 1 year (approximate).