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WEDNESDAY, FEBRUARY 14, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Hearing was convened, pursuant to notice, at 10:04 a.m., in room 216, Hart Senate Office Building, Hon. Patrick J. Leahy (chairman of the committee) presiding.

Also present: Senators Kohl, Durbin, Cardin, Whitehouse, Specter, Sessions, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Some Senators will be joining us a little later. The weather has somewhat slowed some, but I think how this committee proceeded with hearings after the 9/11 attack, and then during the anthrax attack that shut down the Senate office buildings. A little snow is not going to stop us, especially when you have Senators from Pennsylvania and Vermont. We're actually aware of it.

Although, I must admit, things are opening slightly late in my home State of Vermont. We had two feet of snow overnight, and I'm told that a number of places opened as much as an hour late. It's a new generation that goes slowly.

But it's with great pleasure that we welcome to the committee today the Honorable Anthony Kennedy, Associate Justice of the U.S. Supreme Court to discuss issues of judicial security and independence.

Both Senator Specter and I had the privilege of serving on this committee when Justice Kennedy was confirmed. In today's society, our independent judiciary faces many and varied types of threats. We've seen judges' physical security being threatened, but also the institutional security and independence under rhetorical attack by some affiliated with political branches.

There are more subtle threats. As the Chief Justice recently reemphasized, there is pervasive uncertainty about the judiciary's financial security and ability to function as an efficient and effective arbiter of justice because of stagnant salaries year after year.

It is my hope that, working together, we can make some real progress on these important issues. We need to do our part to ensure that the dedicated women and men of our judiciary have the resources, the security, and the independence necessary to fulfill their crucial responsibilities.

Our independent Judiciary is the envy of the world and we have to take care to protect that. I have told this story a number of times. Shortly after the Soviet Union broke up, a group of parliamentarians from Russia were in my office and they were asking about how the judiciary works.

One of them said, "Is it true that in America people sometimes sue the State? I said, it happens all the time. He said, "Is it also true that sometimes the State loses?" I said, "Trust me, it happens all the time." And he said, "Do you then replace the judge when that happens?" It was at that point I think they finally understood the independent judiciary.

Now, we're going to take up the matter of court security this year by reintroducing legislation that I wish had been enacted last year. The Court Security Improvement Act is a bipartisan measure. I introduced it along with Senator Specter, along with the Majority Leader, Senator Durbin, and other members of this committee.

House Judiciary Chairman Conyers has introduced an identical measure in the House. It is bicameral, it is bipartisan. It should have sent the signal we intend, finally, to complete action on our work and increase protection for the judiciary and their families. I have this bill on our mark-up tomorrow.

Our efforts gained increased urgency after the tragedy that befell Judge Joan Lefco of Chicago. I remember as though it was yesterday her testimony before this committee. She is a Federal judge whose mother and husband were murdered in their home 2 years ago. What she told us left a mark on every single member of this committee.

And in the shooting last summer of a State judge in Nevada, it provided another terrible reminder of the vulnerable position of our Nation's State and Federal judges. We can't tolerate or excuse violence against judges. No one should seek to minimize what a corrosive effect that has on our system, so we should enact the Court Security Improvement Act as soon as possible.

It helps, again, in another way, of protecting the independence of our judiciary. Our Nation's founders knew that, without an independent judiciary to protect individual rights from the political branches of government, those rights and privileges would not be preserved.

The courts are the ultimate checks and balance in our system of government. In recent years, Justice Sandra Day O'Connor has spoken out against the attacks on the judiciary and the need to reinforce its security and independence, and she continues to lend her voice to this important subject, even though she has now stepped down from the court.

But it is most unfortunate that some in this country have chosen to use dangerous and irresponsible rhetoric when talking about judges. We have seen Federal judges compared to the Klu Klux Klan, called "the focus of evil", and in one unbelievable instance referred to as "more serious a fear than bearded terrorist who fly into buildings."

A prominent television evangelist even proclaimed: "The Federal judiciary is the worst threat America has faced in 400 years, worse than Nazi Germany, Japan, and the Civil War." This is beyond the pale. It is totally irresponsible. And perhaps more regrettably,

we've seen some in Congress threaten the mass impeachment of judges with whom they disagree.

Some—in one case even on the floor of the Senate—refer to the suggestion that violence against judges has been brought on by their own rulings. This is wrong. It is inexcusable. There is no place in political discourse of our country for that. The high-pitched rhetoric should stop for the sake of our judges and the independence of the judiciary.

Judicial fairness and independence are essential if we're going to maintain our freedoms. Our independent judiciary is a model for the rest of the world. It's also a great source of our strength and resilience in this country.

During the last few years, the courts have acted to protect our liberties and our Constitution, and we should be protecting them, physically and institutionally. We owe the our gratitude, and we owe them more. We could also demonstrate our respect and appreciation for our judiciary by making appropriate adjustments to their pay.

One of the first bills that we passed in the Senate this year was a bill to authorize cost of living adjustments for the salaries of U.S. judges. Senator Specter, Senator Feinstein, Senator Cornyn joined me in co-sponsoring this bill. I thought it should have been taken the last Congress. I'm glad it's been taken now.

I hope the House of Representatives would join with us in this and, of course, that legislation is but a modest step toward addressing issues raised by Chief Justice Roberts in his recent year-end Report of the Federal Judiciary.

I've commended the Chief for speaking out on this matter. But I also want to commend Justice Kennedy for doing so today in the interest of preserving the judicial independence that is so critical for preserving our system of government. I told Justice Kennedy when I talked to him yesterday how much I appreciated him being here. His testimony today, like the Chief Justice's year-end report, provides important consideration.

Let me yield to Senator Specter, who has spent more time than anybody I can think of in the Senate on these issues.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you, Mr. Chairman. I join Senator Leahy, the Chairman, in welcoming you here, Mr. Justice Kennedy. I recollect well your confirmation hearing. You came before the Judiciary Committee after the very contentious hearing in October 1987 for Circuit Judge Bork, and then the nomination of Circuit Judge Douglas Ginsberg, who withdrew. Then the waters were quieted when you came in and was unanimously confirmed.

I compliment you on your outstanding service and your approach to the judicial duties, non-ideological, non-doctrinaire, and you have come to be the so-called swing justice. It is always interesting to observe the court, the Rehnquist court, the O'Connor court, and the commentary about the Kennedy court.

On the subject matters at hand, most of us have spoken out. We're going to get the Court Security bill passed. We should have passed it a long time ago. We had a hearing back in June of 2005.

Almost 2 years have passed. The way the Congress works, when we were in conference, somebody wanted to add on some things, the death penalty for juveniles, and it was not acceptable and the matter ended. But that's a high-priority item. The pay raise is going to come through. Courts shouldn't be held hostage to the Congress, and we'll get that worked out.

And on the issue of independence, many of us have spoken out when the court has been attacked for doing its duty on speaking out on the law. When these ridiculous suggestions were made about impeachment, they are quickly squelched.

One subject which is very much in the news today is the question of televising the court. Before we started in the back room, I said to Justice Kennedy, "Would you mind if I asked you some questions on televising the court?" He shot back instantaneously, "Not if you don't mind my answers."

[Laughter.]

I won't mind his answers; no matter what they are, I'm prepared to listen.

But there's been a lot of commentary. Two days ago, the Washington Post had an article on televising the court. Last week, the Legal Times had an article about televising the court. Last month, an article also in the Post, was once Cloister, now it's Chief of Nightline, and recently Justice Roberts and Justice Stevens appeared on ABC TV, and Justice Ginsberg on CBS with Mike Wallace, and Justice Bryer on Fox News Sunday.

We thought those spots were reserved for Senators, and turned it on 1 day and saw Justice Bryer there. That's very dangerous activity. Justice Scalia and Justice Bryer had a debate and were on the web. Justice Kennedy presided over the trial of whether Hamlet was insane or not. Maybe if there's a second round of questioning we can get the answer to that, Justice Kennedy.

But I have long believed that the court ought to be televised because the court's functions ought to be better understood. The court decides all of the cutting-edge questions: who lives, late-term or partial birth abortion, who dies on the death penalty cases, what is the power of the President.

Not a blank check, the Supreme Court has delineated the power, and also what is the power of the Congress. And the court has handed down standards where part of the legislation protecting women against violence was stricken for our "method of reasoning", I have often wondered what happens when you leave the Senate steps and go across the green to the Supreme Court, how the method of reasoning is improved.

If you were televised, I might get a little better understanding of that. The court is frequently challenged as being a super-legislature, and I think the public would benefit by better understanding the function of the court.

Justice Kennedy and I have discussed the standard which he articulated, adopted by the court in the complex situation where Congress legislatures under Article 5 of the 14th Amendment, and the State interposes sovereign immunity under the 11th Amendment, and the Supreme Court has a test as to whether the legislation is congruent and proportionate.

And I've told Justice Kennedy in the back room, I understand what "proportionate" means, but I haven't yet figured out what "congruent" means. The nominations for the court are very much an issue in the Presidential campaigns, very much an issue as to the approach of the candidates for the presidency, as to the composition of the court. I think there's been great public interest in the confirmation proceedings with Chief Justice Roberts and Justice Alito.

My own view is that when you talk about government—and this isn't entirely applicable, but pretty much—when you talk about transparency, that's what we seek so people understand what goes on in government, or in Brandeis' words, that "sunlight is the best disinfectant". Well, we don't need a disinfectant, really. There's a lot known about the court. But the reality is, television is the way people understand what is happening in the world.

A number of the justices have spoken on the subject. I believe we have it right when the Supreme Court has the final word. Somebody has to be the ultimate arbiter, and I think that *Marbury* v. *Madison* had it right.

But understand, the court is of really high value. When the court decides all of these questions, including who will be the President—in *Bush* v. *Gore* in the year 2000, the Presidency was decided by a single vote, 5 to 4.

The Congress has a good bit of decisionmaking power on how many justices there are. We set the number at nine. We all recollect the court-packing effort to try to raise the number to 15, but that's a congressional decision. Congress decides when the court will start to sit, the first Monday in October. Congress decides what is a quorum on the court, six. We respect the issue of separation of powers.

It has been my hope that the court would see the public interest and come to accept televising on its own, but I think the Congress has something to say and the Judiciary Committee voted out, 12 to 6, legislation to call for televising the court, subject to the court's decision not to on individual cases. A bipartisan bill has been introduced again this year, so it is a matter of considerable concern.

I know that what Justice Kennedy says here today will have extra currency because many people will watch it on C–SPAN. My concluding comment, Mr. Justice Kennedy, is the Judiciary Committee has special standing with C–SPAN. Our programs are broadcast at 3 a.m. We have a tremendous following among America's insomniacs.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

The only problem with that following among insomniacs, Justice Kennedy, is that if I really screw up in one of these hearings, I hear from every single one of those insomniacs in letters and e-mails.

But I want to thank the Justice for appearing here. It was 19 years ago that he last appeared before this committee as a nominee to the high court. I was a member of the committee at that time.

As Senator Specter says, it was a tumultuous time following Justice Powell's retirement and the unsuccessful nomination—controversial nomination—of Judge Robert Bork. We overcame that di-

vision and we united to support the confirmation of Justice Kennedy. Both Senator Specter and I voted for him in the committee and on the floor.

He is a native of Sacramento, California. He received his AB from Stanford University in 1958, spent a year at the London School of Economics, graduated Phi Beta Kappa.

After graduating cum laude from Harvard Law School in 1961, he returned to California, taking over his father's law practice in 1963. In private practice, he taught constitutional law.

In 1975, he was nominated by President Gerald Ford for a vacancy in the U.S. Court of Appeals for the Ninth Circuit, becoming the youngest judge in that court. Something I did not realize until the Justice mentioned it out back, he is one of only three Circuit Court judges nominated by President Ford.

He's seen as a conservative in what was then a more liberal court. He has always been an active member of the judiciary, serving on committees of the Judicial Conference. I don't recall the last time a sitting justice appeared before the Judiciary Committee to discuss legislative issues affecting the judiciary.

I know Senator Specter and I are always treated with great respect when we appear before the Judicial Conference. I would hope members would accord the same. Not so when we appear before court for arguments, though.

[Laughter.]

And you have reminded the Judicial Conference and the members of the court of that fact.

Justice Kennedy, the floor is yours, sir.

STATEMENT OF ANTHONY M. KENNEDY, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES, WASHINGTON, DC

Justice KENNEDY. Thank you, Mr. Chairman and members of the committee. It is a pleasure to be with you today.

With me in the front row to attend these hearings and to answer detailed questions on the legislation, if I do not have those responses for you, is U.S. District Judge Hornby from the District of Maine. The Director of the Administrative Office of Courts, Jim Duff, and the Administrative Assistant to the Chief Justice of the United States, Jeff Mineave.

You mentioned my unanimous confirmation, Senator Specter and Senator Leahy. If I was of some small catalytic assistance in bringing about broad senatorial consensus, I am very proud.

In my written statement, which I will not read but refer to just briefly, I began by saying that "separation of powers" and "checks and balances" are terms that we use interchangeably, synonymously, but they actually have very different thrusts.

Separation of powers is designed to assure that each branch of the government has the resources and the authority to perform certain of its constitutional duties without over-reliance on the other. The President has the power to pardon, the Senate has the sole power to initiate legislation, and of course, the power of the purse. The judiciary has the power to issue final judgments. Judges have life tenure. This is essential if each branch of the government is to be efficient and forthright in the exercise of its duties.

On the other side is the mechanism of checks and balances, and it works somewhat the other way. Checks and balances recognizes that the three branches of government are really engaged in a common enterprise, a common purpose, and we have to have substantial interaction with each other.

As Senator Specter mentioned, the jurisdiction of the courts, the rules of venue, the size of the courts, the structure of the courts, the structure of the circuits, is for the legislature to decide, and this is as it should be.

Students both here and abroad are fascinated that Justice Thomas and I, for the last 10 years or so, appeared before the Subcommittee on Judicial Appropriations in both Houses of the Congress. It is more than a formality. It is more than simply a courtesy. It has a legal effect which is of tremendous importance.

By custom we are very cautious about our budget requests, and we think there's a custom that the Congress gives great deference to that request. When we appeared before those committees in recent years, the questions have ranged rather far afield from the budget and from our appropriations request.

Justice Thomas and I have talked about that and we have concluded that the questions are actually quite educational for us. They help us understand the difficulties that Congress has in allocating resources, and we hope that the answers we give are somewhat informative to the other side of the witness table.

So when we received your invitation to testify, Mr. Chairman, when the Chief Justice received that invitation, we initially had some pause as to whether we should come, but for a number of reasons we concluded that it was quite proper for us to do so, and we willingly do so. We appreciate your invitation, although we have to be guarded and come before you not too often so that we do not intrude on your functions.

This is an important time for the judiciary. It's an important time for the concept of judicial independence. The Chief Justice asked me to appear and it is my pleasure to be here. Thank you. Thank you very much for asking us.

Chairman LEAHY. Thank you, Justice Kennedy.

Justice KENNEDY. I would like to mention just a few more points about my opening statement.

Chairman LEAHY. Sure.

Justice KENNEDY. But please interject as you choose, Mr. Chairman.

Chairman LEAHY. No. Go ahead. If you wanted to add something more, please feel free.

Justice KENNEDY. Just a few things.

Judicial independence is just like separation of powers and checks and balances. Those phrases do not appear in the Constitution. They are part of the constitutional dynamic that we use. They are part of the constitutional custom, part of the constitutional tradition that we have.

Judicial independence is sometimes overused by judges. Just because you can't get a few more volumes in your library doesn't mean judicial independence is under attack. It's unfortunate if we over-use the term, because it is essential as a principle to establish

the idea that the rule of law depends on an independent judiciary, or else you have the rule of power, not the rule of law.

Judicial independence is something that is eagerly sought by judiciaries throughout the world, and they look to the judiciary of the United States as an example. The Congress of the United States has been very generous with the courts, with courthouses, with staff, with libraries, with software. Our physical facilities are the envy of the world.

But as you mentioned, Mr. Chairman, the condition of our salaries is something that requires discussion. It is a subject that is, frankly, most awkward for me to talk about. It is a sensitive subject, but I think we should discuss it in a candid and frank way.

The raw fact is that the congressional policy with reference to judicial compensation is threatening the excellence of our judiciary. Judicial independence presumes an excellent judiciary.

I have got some graphs in my statement showing that the real income of the average American worker has risen by 15 percent, and the real earnings of the judiciary and the Congress have decreased in the same period of time by 25 percent. That is a 43 percent differential.

This committee recognizes that urgent action is required, just as urgent action is required for the security measures that you're considering in the bill today.

It is very important that you keep in mind the objective of restoring the judiciary to its preeminent place, the sum of $160,000 for a District judge, the present salary, sounds like a lot of money to the average American, and it is. But it is insufficient for us to attract the finest members of the practicing Bar to the bench. The Anglo-American tradition has been that we draw judges from the finest ranks of the practicing Bar. We are no longer able to do that.

No one says that a judge should get as much as a senior partner in a New York law firm, or anything close to a one-to-one ratio. But there are benchmarks: what a senior associate in a major law firm gets in a city in the United States, what a junior partner gets, what a beginning lawyer gets.

Our law clerks leave and they are paid more the year after they leave us than we are. These are benchmarks that are real. It is not just a matter of the two staffs sitting down and talking about alternatives and coming up with some number.

It is a question of restoring the place of the judiciary so that it has the eminence that it once did, because we simply can not attract the people we once did. The U.S. District Court for the Central District of California, which is in Los Angeles, has a number of vacancies. Judges have to work 6 days a week. They have a terrible backlog. But we just can't attract new judges. They look at the salary and they do not want it. We have a chart showing the declining number of judges who are entering from private practice that is attached to this statement.

Now, of course, the intangible rewards of public service are of tremendous importance. I grew up in Sacramento, California. Most of my parents' friends were employees of the State of California: Director of Finance, Director of Department of Natural Resources, Director of Transportation, Legislative Counsel. These were the finest civil servants I had ever met. They were like the British civil

servants. They were proud to work for the government of the State of California. Looking back, I think they were my role models.

Of course, there are intangible rewards to judicial service, to civil service, to government service. My colleague, Justice Breyer, observed to me the other day, the government is not the only way to get those intangible rewards. You can teach. You can transmit the values of our Constitution. You can transmit our heritage to those young people who will soon be the trustees of that tradition, the trustees of that heritage.

There is a tremendous intangible reward for teaching. And we're losing judges to the teaching profession. One of the finest judges in the United States, a U.S. district judge, the Chief Judge for the Eastern District of California, left in the middle of his career. He left everything on the table: no retirement, no pension, and became dean of a major law school. So not only are we losing judges coming in, attorneys coming in, we are losing judges from the bench.

Now, the present Chief Justice and the former Chief Justice referred to this as a crisis, and I think what this was intended to convey is that this is an important moment. If salary relief is not given with the objective that I indicated, of restoring the judiciary to its proper position, I think it is almost counter-productive.

You referred to the court-packing incident, Senator Specter. That was a real judicial crisis, just like Dred Scott's self-inflicted wound was a judicial crisis. In the court-packing crisis, it was 1937. There were 16 Republicans in the U.S. Senate. The President was very powerful, and he wanted to pack the court. The Senate found, the President found, that the American people were offended, that there was a reservoir of trust and respect for the courts that far exceeded what the President thought. That must continue to remain true. The law lives in the consciousness of the people and the people's respect for law is, in large part, linked to the respect for the judiciary.

We have senior judges who are very hard-working judges. They keep our system afloat, many of them. Some of them do not have to work full-time, but most of them are required to take a one-third workload. They are required to take a one-third workload to keep the staff in their chambers. Most of them take a full load.

I think it's quite wrong for the Congress to barter this commitment, this diligence, this good faith, this civic dedication for purposes that have nothing to do with judicial pay.

So, Mr. Chairman, thank you very much for allowing me to make these remarks. I hope that the committee will understand that the judges cannot really make the case for their position, and your committee can be of great assistance in helping us state the issues, in explaining it to your colleagues, and explaining it to the entire Congress, and by your very prompt action to address the problems of judicial security and judicial independence. You indicated your continuing interest in the judiciary of the United States, and for that we thank you. It is my pleasure to be here.

[The prepared statement of Justice Kennedy appears as a submission for the record.]

Chairman LEAHY. I thank you. I would note that the judges cannot make the case. You, as did the Chief in his year-end report, made the case very strongly. It is interesting.

Both you and Senator Specter talked about the court-packing matter. Here was a case where you had a Democratic President, highly popular, overwhelming Democratic majority in the Senate, but instead of acting like a rubber stamp, as Congresses sometimes do with a President of their own party, the checks and balances of our system work very well, because a Democratic-controlled Senate said no.

Even though there were a lot of reasons why most of them were disagreeing with decisions in the Supreme Court at that time, especially with some of the New Deal legislation, but instead of acting like a rubber stamp, as we've seen in recent times, they did not. It's a good example for all of us, not only for the courts, but for the Congress, for each of the separate branches. There's supposed to be checks and balances.

As I mentioned earlier, we will be going further into the pay issue. I noticed with great apprehension the rise in volume and vehemence on attacks on judges and their decisions, both from the outside, and sometimes inside, the government.

I know Justice O'Connor was criticized in civil tones of attacks on the judiciary. In a speech, she said that this would actually endanger the independence of the judiciary: when you hear rhetoric comparing judges to terrorists, of threatening judges with punishment for decisions they don't like, that's irresponsible; when James Dobson compares the Supreme Court to men in white robes, the Klu Klux Klan, it shows how out of touch he is with American values; when a Chief of Staff to a U.S. Senator calls for consideration of mass impeachments, it's wrong; as the then-Republican Majority Leader of the House espoused an impeachment threat against justices who decided cases in which he disagreed.

I've been here 32 years and I can point to a lot of cases over the years where I may disagree, and other members of this committee would agree, and vice versa. Are we going to, those who are in disagreement, we automatically start impeachment procedures? I mean, how do you respond to that? Do you agree with Justice O'Connor's concern about this kind of attack?

Justice KENNEDY. Well, a few things occur to me. Democracy is a pretty hurly burly operation, rough and tumble.

Chairman LEAHY. Wouldn't have it any other way.

Justice KENNEDY. And the court, since the beginning of our history, has been involved in cases that have political ramifications. Courts do not decide them in a political way. They do not decide them in a political language. For example, slavery was not something talked about, it was so controversial.

Aside from that, the most controversial issue in the first 30 years of our history was whether there should be a national bank. The court rushed right into the controversy by deciding *McCullough* v. *Maryland*. It didn't decide it in a political way, it decided it in its own judicial language.

There was tremendous controversy over what the court did. And it is right that people debate both the Constitution and the decisions of the court. The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to the people.

If a President is not an attorney, he has the obligation, still, to interpret the Constitution. We know that. If a Senator or Congress-

man is not an attorney, he or she has the obligation to interpret the Constitution.

So the idea of criticism and disagreement is nothing new. I think that the scurrilous, really shameful remarks that you refer to are something that democracy has learned to live with. Democracy is old. Plato and Aristotle wrote about it. But democracy, with the mass media, is still something we're getting used to. We still have to find the right tones so we have a civil, rational, respectful, principled dialog.

Chairman LEAHY. But to go to a bottom line on that—

Justice KENNEDY. And I, frankly, don't think judges are intimidated by some of these words. I think they're improper, and coming from attorneys, I think they're wrong.

Chairman LEAHY. But Chief Justice Rehnquist said, and said in a very straightforward way, "Judges judicial acts may not serve as a basis for impeachment," and then said, "any other role would destroy judicial independence." Do you agree with that? Of the judicial acts?

Justice KENNEDY. Of course. The first impeachment of Justice Chase established, again, a good separation of powers rule. The Constitution does not say exactly the grounds of impeachment. It says the judges hold their offices during good behavior. But it has been established and it is part of our constitutional tradition that the decisions of the court, as you indicate, Mr. Chairman, are not the bases for impeachment—it is part of our constitutional tradition.

Chairman LEAHY. You've spoken quite a bit about the risk to administration of justice in this country if we don't rectify the pay issue. I assume you agree with the position I've taken, and others have here, to de-link the cost of living adjustment for Congress and the judiciary.

Justice KENNEDY. Well, I do. Linkage has been a failed policy for both sides of the bargain. I understand that Congressional Members often maintain two residences. They have tremendous travel expenses that we do not. So, that's a problem that should be addressed.

On the other hand, we simply cannot wait another 20 years. We have benchmarks. I think you should set judicial salaries and, in due course, whenever in your discretion you decide to do so, set congressional salaries as well. But the so-called linkage has been unfortunate and it has hurt the judiciary badly. I think it's quite unprincipled and quite unfair.

Chairman LEAHY. Thank you.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Justice Kennedy, your appearance here today is powerful. When people see you on television, a sitting Supreme Court Justice speaking about the rule of law and independence and compensation, you carry great weight.

People don't ordinarily see a Supreme Court Justice addressing these kinds of issues. It is powerful. I think it is powerful, as I listen to it. I've had the opportunity to know a great deal about the Supreme Court. When I walk into the Supreme Court chambers,

I'm in awe, quite frankly. You're used to it because you are there all the time.

Very few people can get into Supreme Court chambers because of limited seating, and once there, they stay only a few minutes and rotate out. This is part of why I would like the American people to know more about the court, to see you there. When you say it doesn't belong to the judges and a bunch of lawyers, it belongs to the people, I think you're right on the money. The question is, how do we get it there?

The Supreme Court, in a major case, *Richmond Newspapers* v. *Virginia* back in 1980, said this: "A public trial belongs not only to the accused, but to the public and the press as well. People acquire information on court proceedings chiefly through the print and electronic media."

Well, when you talk about a public trial or you talk about judicial proceedings, you talk about, you said, respect for law is dependent on respect for the judiciary. The direct implication is, respect for the judiciary is understanding what the judiciary does. Now, when the court said that in the Richmond case in 1980, television was much less pervasive than it is today.

While there are objections in terms of lawyers playing to the cameras, or maybe even justices changing their approach, isn't there necessarily great value in communicating to the people what the court does if the people could see the inside of that room and see the nine of you there in your black robes, and see the way you approach these issues?

Justice KENNEDY. There is no question, Senator, but that the working of the Supreme Court, because that's a good perspective to understand constitutional dynamics, is of intrinsic interest. It is also an essential interest if we are to have an informed and enlightened citizenry. I have no quarrel with that.

A majority of my court feels very strongly, however, that televising our proceedings would change our collegial dynamic. We hope that the respect that separation of powers and checks and balances implies would persuade you to accept our judgment in this regard.

We do not discuss a case in advance of going on the bench. It's a fascinating dynamic. I ask a question. I say, "Isn't it true there's standing because Congress has granted it under the statute?" And one of my colleagues, say, Justice Scalia, will say, "But isn't it true there is an Article 3 component? "We are talking with each other, and sometimes the dynamic works and sometimes it does not, but we are using the attorney to have a conversation with ourselves and with the attorney.

This is a dynamic that works. We have only a half hour per side, an hour per case. Please, Senator, do not introduce into the dynamics that I have with my colleagues the temptation, the insidious temptation, to think that one of my colleagues is trying to get a sound bite for the television. We do not want that.

Please do not introduce this into our intercollegial deliberations. We do not want it. We are judged by what we write in the Federal reports. We have a timeline, a language, a grammar, an ethic, an etiquette, a formality, a tradition that is different from the political branch. It is not better. It is not worse. It is different.

It's a different language, a different dynamic. We teach when the cameras do not come in the courtroom. We teach. They do not come into the courtroom because we are judged by what we write in the United States report and we're judged over a long period of time, not by the moment. We think cameras would change our dynamic. We think it would be unhelpful to us. We understand the intrinsic interest in much of what we do, and that's beneficial. We probably should do more in the way of teaching, et cetera.

But we have come to the conclusion that it will alter the way in which we hear our cases, the way in which we talk to counsel, the way in which we talk to each other, the way in which we use that precious hour, and I hope that the Senate would defer to us, as a separate branch of the government. You mentioned, we told the Congress about its reasoning in, what was it, *Morrison* v. *Roncella*?

Chairman LEAHY. Method of reasoning.

Justice KENNEDY. It's a non sequitur to use that, to say that you can have cameras in the courtroom. We did not tell Congress how to conduct its proceedings. We said that, in a given statute, we could not find any evidence that Congress had shown us that interstate commerce was involved.

Senator SPECTER. Mr. Chairman, a very brief, concluding comment.

Justice Kennedy, I understand your concern about changing your collegial dynamics, and I respect your conclusion on that. I think you overstate it when you refer to some insidious conduct. I think that overstates it. But it seems to me that it balances all of what we decide is, to the potential impact on the way you conduct your proceedings with the public benefit for knowing what you do.

I've always admired the way the court presents itself as "opinion" of the court. It's not dogma. It's not for holy writ. It's an opinion. If Congress passes my bill, it will be only the opinion of the Congress because you have the last word.

You can say it is inconsistent with the separation of power, and we would respect it. So it's our opinion, and that would be your opinion, and we would defer to your opinion in that context, obviously.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Kohl?

Senator KOHL. Thank you very much.

Justice Kennedy, many of us have been concerned for years about the continuing use of secret settlements in our courts. This issue received a lot of attention in the Bridgestone Firestone cases in the late 1990s, yet little was done to reform the system in the wake of that scandal and the use of these agreements, as you know, continues today.

One of the most recent examples involves Eli Lilly and one of its drugs, Iprexa. In 2005, it settled about 8,000 cases, all of which prohibited plaintiffs from discussing the facts of their case publicly. As a result, Lilly continued to sell their product and had sales of over $4 billion in that year.

But in 2006, lawyers in an unrelated case leaked documents detailing some of the drug's serious side effects and Lilly was then

forced to settle another 18,000 cases. Many of these injuries would have been avoided had those original settlements not been sealed.

These secrecy agreements allow plaintiffs to get a respectable award and a defendant is able to keep damaging information from getting out. The public remains unaware of the critical public health and safety information, and they pay a heavy price. Many of us feel strongly that protective orders are not supposed to be used for the purpose of hiding damaging information from the public.

Do you believe that courts should be required to review such settlements to ensure that public health and safety information is not being hidden from the public?

Justice KENNEDY. Senator, this is a complex and quite interesting issue that I have not thought through. I see some real dangers of abuse in what you have pointed out. There are some things that have to be sealed: probation, pre-sentence reports, where we have witnesses whose lives are in danger, cases with trade secrets where one company is stealing another's trade secrets, formulas, and so forth. These should be sealed.

You point to a different area, which is products liability. I think there are some serious concerns in what you say. How the dynamics of it would work, I am not sure.

It could be, if you had, say, an absolute prohibition against stealing, you would just divert that to arbitration, which would, I think, be counterproductive. I am very concerned that we are arbitrating too many things and the courts are not seen as the purest, finest fora for litigation of issues.

Perhaps there could be some appellate procedure, some discretionary oversight. I just have not thought it through, Senator. But I have to say that you have pointed out a potential abuse that I think requires further study.

Senator KOHL. Well, those of us are concerned that it would require—and I have a piece of legislation—that a judge review a settlement of that nature and make a determination whether public health and safety is involved. So it's not absolute. It would be subject to a judge's opinion, exercised in a flexible and a reasonable manner. How does that hit you?

Justice KENNEDY. Then I would have to ask if he makes that decision before the settlement has been reached.

Senator KOHL. No. Once a settlement has been reached—

Justice KENNEDY. Because otherwise that settlement might be conditional. I just do not know the dynamics of it.

Senator KOHL. I guess I would conclude by marking that what you are saying is it does deserve consideration.

Justice KENNEDY. Absolutely. Absolutely. Although I haven't thought it through.

Senator KOHL. One more, please. States are required to provide meaningful access to court proceedings for individuals with limited English proficiency.

Unfortunately, too many State courts do not have the resources to provide adequate interpreter services and as a result many non-English speakers do not understand what is happening when they appear in court.

The shortage of qualified interpreters has become a national problem and it has serious consequences. In Pennsylvania, a committee established by the State Supreme Court called the State's interpreter program "backward" and said that the lack of qualified interpreters "undermines the ability of the court system to determine facts accurately and to dispense justice fairly."

Other States have had some success. My own State of Wisconsin got a program off the ground in 2004 using State money and a $250,000 Federal grant; certified interpreters were scarce, but they were there.

Now, just a few years later we have 43 certified interpreters. I will soon be introducing legislation to provide additional Federal assistance to our State courts by authorizing a grant program to help States improve their State court interpreter programs.

Do you see this as a serious problem in our court system, and can you give us a system of how inadequate translation services can, indeed, affect individuals' access to our courts?

Justice KENNEDY. It is a problem, Senator, that has been around for a number of years. In my own State of California, we were familiar with the problem. You have a long colloquy between the interpreter and the witnesses, and then the interpreter turns and says "yes" or "no". This is frustrating for the jury. It is frustrating for the judge.

We have had cases where the jurors will be bilingual and will be hearing the conversation, and one of the jurors will say, "That's not what he said, you're an idiot," to the reporter. So, we have these outbursts. This is not how the judicial system should be run.

So, of course it's a problem. You ask me to quantify it. I know the problem has been around for many years as we have an increasing population of non-English-speaking people. I am sure that it is being aggravated, and I think it is very important that adequate provision be made.

Sometime you ought to go to the central dispatch headquarters in the Los Angeles police department. They have interpreters for 40 or 50 languages so they can give Miranda warnings over the radio. It is quite fascinating to see.

Senator KOHL. Thank you, Mr. Chairman.

Chairman LEAHY. I chuckle listening to this, because in my early days of trying cases in Vermont, translating would usually be French and English, and half the jury would be bilingual at that time.

I find this fascinating. When I was in law school, we had an opportunity where a number of us, for a particular reason, were invited to a luncheon where almost every member of the Supreme Court came, and their insistence had been that each member would sit at a separate table with a group of students.

My wife and I were able to sit with Hugo Black. I was listening to his discussions. I was thinking it was a seminar all by itself, a semester seminar all by itself, at lunch. Now, in many ways your testimony has been the same.

Senator Sessions?

Senator SESSIONS. Justice Kennedy, thank you for your appearance here and your comments. I've got to say that I think the American judicial system, in particular the Federal court system,

is one of the great strengths of our Nation. I've had the opportunity in this office to travel around the world and to see the difficulties other nations have in progressing.

I've become more convinced than ever that our fundamental strength lies in a legal system, in a perception by the people that the courts make objective decisions based on the law and the facts, and therefore they're willing to acquiesce in them. Congress acquiesces even if we disagree sometimes.

But we're not really interested in courts' opinions on foreign law. We're interested in the fidelity of the court to the Constitution and the laws of this country, which requires a certain degree of self-restraint that I think, in the last 30 years or so, has not always been there.

I think it has a danger to corrode public confidence, and rightly so. When the court declares something that is more appropriately a policy decision, instead of a decision ordered by the Constitution, instead of the Constitution says this, then basically the American people are denied that policymaking capability.

So, that's a sore spot with the American people. I know you understand that, but I just wanted to share that with you because in the long run, acceptance by the public and respect by the public of the court is critical to this magnificent legal system that we have. And we must make sure that we are within that ambit of what's legitimate interpretation and not going beyond that. It has the danger of corroding that public respect.

Maybe if you want to comment. I just wanted to share that as an opening thought in light of my other colleagues' suggestions.

Justice KENNEDY. When you go to these foreign countries, Senator, I know you see systems struggling to have an independent judiciary. And the judges understand it. They really want it. It is tragic to see that there are one or two steps forward, then another step back. Some judiciaries, which I thought were moving quickly toward independence, are now going the other way. So, of course, we must continue to be a model.

We don't think much about Nepal. It's a small country, 3 million people. They had the Shakespearean tragedy of the king being shot by the heir apparent, and then they found out that the legislative branch had embezzled all the money.

They had a Maoist conspiracy, a Maoist uprising, a Maoist terrorist group. The only person in the country who had any credibility was the Chief Justice. He came to Washington. There was an assassination attempt and four people were killed in an assassination attempt on the court.

He came to the State Department and they sent him over to me. He was a scholarly, erudite, wonderful man. And, you know, judges check each other out. You could tell he had the temperament of a fine judge. So I asked him about Nepal, what was going on. I said, "What can we do for you? What can I do?"

He said, "Justice, just keep on doing what you're doing. You're an example for the rest of the world." Then he walked down the steps by himself. That made me feel good, as the host. I could tell this to my colleagues. But it also occurred to me that we are not doing enough to indicate that the American Constitution defines our people.

By historical accident, providence, and design, I think, Americans identified with their legal documents, the Declaration of Independence and the Constitution. When we told England that we wanted our freedom, people were puzzled. They said, "What are the Americans talking about? They are the freest people in the world already. What do they want?"

We gave them a legal answer. We gave them the Declaration of Independence, which was like an indictment of King George, III, then, later, the Constitution. If you ask an American what he is, what she is, they say we are bound together by this Constitution that we have. You're so right, that we must never endanger that link, that fortuitous, that providential connection that the American has with his or her Constitution.

Now, insofar as the sources that judges use, I think the judge has to tell the litigants what he thinks, what she thinks, and why they think it. I think we have to find wisdom where we can. This is quite different from saying that we are bound by some foreign document.

Senator SESSIONS. Thank you. My time is about up.

Chairman LEAHY. Did you have something further? Briefly.

Senator SESSIONS. Briefly, I will just say this. I think it is a threat to the independence of the judiciary if a judge, at confirmation, is required to pre-judge a case that he's not yet heard. I think that's a danger that we got close to in recent confirmations, and perhaps we drew back before going too far.

With regard to salaries, I don't think it's unprincipled to link salaries in Congress and the judiciary and would note, it depends on when you pick the date. When you became—I believe on the Supreme Court—your salary as a Court of Appeals judge, was $95,000 in 1988.

Today, that salary is $175,000, which represents $13,000 more in cost-adjusted 2006 dollars than would have been the case. So there's some points, if you go back, it's worse; there will be some points where it's better. I wanted to mention that and thank you for your comments about television.

You explained, in an articulate way, my unease about requiring cameras in the courtroom. I think about—the lawyers know what the judge means. The other judges know what the judge means when he asks a certain question.

Do you think that the judge might feel it necessary, if the whole country is looking at it, to go into a long explanation of why he or she is asking this question, and other things that could undermine that dynamic?

Justice KENNEDY. Precisely. I do not even want to think that that is what is happening.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEAHY. Would that be considered a leading question, Senator Sessions?

[Laughter.]

Going by our normal procedure, alternating sides and at the time when Senators come in, I would yield to my distinguished colleague from Maryland, Senator Cardin.

Senator CARDIN. Thank you very much, Mr. Chairman.

Justice Kennedy, it is a pleasure to have you before this committee. This is a unique opportunity to be able to question a Supreme Court Justice, so I want to move forward on the independence of the judiciary, because I am concerned about the points that you've covered in your comments before our committee in response to questioning.

The compensation issues are critically important, and we need to address the concerns that you have brought out, the unfair, or going overboard on criticisms of judges that has been pointed out here today, and threatening impeachment.

But I want to go a little bit further and just get your views as to other areas that we should be looking at that are important to maintain the independence of the judiciary. I don't mean just at the Federal levels. I'm also talking about our State courts.

It seems to be fair game here to strip courts of jurisdiction if we don't like the decisions, at least try to do that, either by changing the ability to get into Federal courts or by literally taking away the Federal court's jurisdiction.

When I served in the House, there were several bills that passed the House that dealt with taking away from the Federal courts jurisdiction because Congress didn't like the decisions of the Federal court, or at least those that had the votes in the Congress. Those bills were not going to pass the U.S. Senate. I think we all knew that at the time.

I'm just interested as to your views on the points that you've raised about maintaining the quality of our bench and maintaining the independence of our judiciary, whether these are issues that we should be concerned about, whether there are other issues in addition to compensation and unjust criticisms of our judges, are ones that we should at least put on our radar screen.

Justice KENNEDY. Thank you, Senator. I think one of the big concerns about judicial independence is a subject that probably is not one that the Congress of the United States, as a Federal entity, would want to address, and that is the problem of elected judges in the States.

The experience has been that if there's a contest and the challenger says something about the existing judge that the judge is soft on crime because he's followed Supreme Court decisions, that judge has to answer. They cannot let that charge go unanswered, so he or she has to have a campaign chest.

I had hoped that Bar associations, interested groups who are concerned about our civic dialog, would use these judicial elections as a way to explain what judicial independence means. What are the requisites of judicial independence? What is good judicial temperament? What qualities do you look for in a judge? That is not happening. I do not think it is a subject that you can easily address, or perhaps that you should address because of the Federal balance.

But I think we should be aware of it and assist the States that are trying to bring some logic, some fairness, some civic discourse into State elections. I think that is a big concern for judicial independence.

Senator CARDIN. In regards to election of judges, in my own State of Maryland, for our appellate court judges, they now run

against their record. It seems to be working successfully as a way of getting around competitive elections.

It's a tough issue politically to deal with because it's not necessarily challenging the independence of the judiciary, but the appropriate diversity on the bench. It's difficult to take on those issues in many of our States. But I agree with you. I have always supported removing our State judges from the election process, but we have not been successful in doing that at our Circuit Court level.

Justice KENNEDY. I think in most States you are not going to be successful. This was an Andrew Jackson doctrine for elected judges. In a country where judges have such authority, I can see why the voters would be very reluctant to surrender the authority they have to choose them.

The challenge, and perhaps the opportunity, is to use these elections to educate the public and to educate ourselves better as to the requisites of judicial independence. I think we have an opportunity here we are not using.

Senator CARDIN. Without commenting on a specific effort to take away jurisdiction from the courts based upon a decision, but just a general strategy of the Congress to try to adjust jurisdiction when we don't particularly favor the court opinions, do you look at that as a concern or you just look at that as part of the political realities of the legislative branch of government?

Justice KENNEDY. I think that were such statutes to be enacted, that they themselves would have some constitutional questions about them and I'm reluctant to comment. As you know, it's been around a long time. The Bricker amendment in the 1950s was an example of attempts to strip the Federal courts of jurisdiction, and there were other proposals concerning school bussing and school integration. It has been around. But I think I should not comment on the constitutional dynamics of it.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Cardin.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Justice Kennedy, thank you for being here, and thank you for your longstanding service to our Nation and the judiciary.

Justice KENNEDY. Thank you.

Senator CORNYN. As you may remember from our previous conversations, I've had the honor of serving as a member of my State judiciary for 13 years, so it seems kind of surreal for me to be here on this side and talking to you, a member of the U.S. Supreme Court.

But getting to the point of some of the questions earlier, from that experience and my experience practicing law, I'm sort of led to the conclusion that one of the things that has damaged our civil discourse the most is the predisposition, and it seems to infect folks once they get inside the Beltway more than otherwise, to regard adversaries on a particular point of view of from a particular perspective as personal enemies.

One of the things I value the most about my legal experience and training is the idea of trying cases against an adversary in a court

of law, and then obviously the next time you might end up being on the same side. But I do think that we can have disagreements, and hopefully we'll keep those civil. But I, for one, am not particularly concerned that disagreements with the decisions of the judiciary have any real potential to endanger judicial independence.

Here again, I know judges disagree. Matter of fact, we've had judges' decisions read back during the course of confirmation proceedings when judges have said things like, "This is an act of judicial activism," "ignores the text of the statute," "to reach a predetermined result". Things that you might consider are pretty tough things that you would say but are the standard fare of a lot of judicial opinions.

In fact, you made the point that Dred Scott was a self-inflicted wound on the judiciary itself. That's certainly fair commentary. I happen to agree with that. But I think we can carry this idea of criticizing the decisions of the judiciary as perhaps endangering judicial independence too far, while at the same time I certainly would agree that we ought to try to make sure that we don't view our people we disagree with as personal enemies. We ought to regard them, perhaps, as adversaries and conduct our discussions, our debates in a civil and respectful way.

I remember, you were the author of an opinion in a case I argued and lost on the U.S. Supreme Court. Thankfully, you authored the dissenting opinion and agreed with me, and I thought that opinion was exceedingly wise and I agreed with it 100 percent. But it won't surprise you that some of the things we have talked about here today I will agree with you on, and some of the things I will disagree with you on.

I agree with you on the issue of judicial compensation. I happen to be the father of a first-year law student and I'm astonished at the starting salaries of new lawyers in some of the best law firms, the people that graduate at the top of their class, the kind of people that you want to recruit, and do recruit, as your law clerks. It is, I think, a serious problem and one that Congress ought to address and fix.

With regard to televised proceedings, I would have to fall back on my own experience and disagree with your comments earlier about television and courtroom proceedings. From my own experience on the Texas Supreme Court, we had a fixed camera in the courtroom that was very unobtrusive and that recorded the proceeding.

And while I agree with your concern, at least, that you don't want to have judges trying to outdo one another in terms of asking questions in sound bites or hoping to get on the evening news, that it really did not exacerbate that problem, which, I have to tell you, my observation is that judges do tend to compete a little bit with, maybe not on the Supreme Court, but on appellate panels, who can ask the biggest zinger of a question, who can baffle the advocate by the question.

I think there is a public educational function. I agree with Senator Specter, of allowing the American people to see how you do your work day in and day out on the bench.

I understand your concern. I would just wonder if there might be some opportunity for us to work with you and your colleagues to

try to find a way to allow the American people to see what it is you do day in and day out rather than to suspect that the Supreme Court is really not all that much different in the way it operates than, perhaps, Judge Judy or Law & Order episodes, where people do, I think, get a misimpression of how the judiciary does operate.

Well, the rules of evidence don't apply to these proceedings, as you can tell, because I've taken up all the time. But I do want to ask you one last question here. This has to do with the men and women who work in the U.S. Marshals Service. I think the safety and security of our judiciary is certainly one of the ways that we can maintain an independent judiciary.

I am concerned that the current appropriation bill that we have on the floor of the Senate cuts $18 million from the U.S. Marshals Service, and I've offered an amendment which would restore that money. I won't ask you about getting in the middle of that. I think it's always dangerous, obviously, for the judiciary to get between members of the Senate and take sides.

But I will just ask you to comment, if you will, on the importance of the role that the U.S. Marshals Service plays in the safety and security of the Federal judiciary.

Justice KENNEDY. It is a vital role, Senator. As you well know from your experience on the judiciary, from being a lawyer, the litigant often sees the judge as the personal embodiment of the harsh law that is going to be applied against him or her, and even in civil cases—sometimes especially in civil cases. Domestic relations cases are ones where the emotions, for obvious reasons, run rampant.

Then, of course, we supervise the whole criminal population, the criminal system where we had drug lords and gangs, people who have a real interest in disrupting the judicial system and intimidating judges.

U.S. Marshals, we see nationwide. They protect us when we go to different cities. It is always reassuring to see the high quality of the people that we attract to the U.S. Marshals service. They are wonderful young people, very experienced ones that are coming in, and very experienced people who are in charge.

I have not seen the numbers and I think it is not in the judicial budget so it is not something I would address at the Appropriations Committee hearing, but I am quite surprised that, in this day and age, they would cut funds for the Marshals Service. I, frankly, do not understand it. I am surprised that that is being proposed. But they are essential for us.

I forgot to say when Senator Sessions was here, he would remember, and I was U.S. Circuit Judge for the 11th Circuit when Judge Vance a very fine U.S. Circuit Judge, from Birmingham, Alabama, was assassinated. The judges who are on the front lines and are the most visible, are U.S. District Judges.

Circuit judges, too, can be targets, as the tragic case of Judge Vance will show. So the U.S. Marshals have to be ready to be there. Judges on the Circuit Courts and District Courts do get threats, and they are very upsetting and terrifying for yourself and your family. To have the U.S. Marshals Service there is necessary. It is not just the psychological assurance, it is necessary.

Chairman LEAHY. Thank you.

Senator CORNYN. I remember when John H. Wood was assassinated in San Antonio, or my hometown as well.

Justice KENNEDY. Yes.

Senator CORNYN. Thank you.

Chairman LEAHY. Thank you.

Senator CORNYN. Mr. Chairman, could I ask, just by unanimous consent, I know my time is overdone. On the matter of the division of the 9th Circuit, I would just ask unanimous consent to introduce a letter dated August 17, 1998 from Justice Kennedy to Justice White on that subject.

Chairman LEAHY. Without objection, so ordered.

Senator Durbin, you have been waiting here very patiently.

Senator DURBIN. Thank you very much. Thanks, Mr. Chairman.

Justice Kennedy, we are honored by your testimony.

Justice KENNEDY. Thank you.

Senator DURBIN. I'd like to also acknowledge that Judge Hornby has submitted some information for the record about the issue of court security, a particularly important issue to us in Chicago, Illinois because of a tragic situation a year or two ago involving one of our District Court judges.

For the record some 80 percent of the Federal judiciary has taken advantage of home protection that's been available through the U.S. Marshals Service. It's an indication of their concern and I hope that this is helpful in giving them peace of mind.

I also want to say that Senators Leahy and Specter are pushing the Court Security Improvement Act, which I think will even enhance our efforts to protect members of the judiciary from threats. We want them to be safe not only in their dealings on the bench, but also in their home life, and we're going to do everything we can to make that happen.

I'd like to address an issue which you characterized in your opening remarks as "delicate" and "difficult", and that's the issue of compensation. I'd say at the outset that I have supported increases in judicial pay, but I'd like to ask you to bear with me for a moment and comment on another observation of this challenge. At the current time, members of the Federal judiciary are compensated by and large at the same level as members of Congress.

You also, in the Federal judiciary, under the Rule of 80, have a circumstance where a judge can take senior status and take full pay for the rest of their lives. That is the nature of the retirement, which is a generous retirement offered to Federal judges. By most standards, 100 percent pay would be something most workers would dream of.

I'd also note that you left private practice to engage in this public service, as most of us did here, now serving in Congress and those of us who are lawyers, and on this Senate Judiciary Committee. At the current time, our compensation—those on the panel and the compensation of most Federal judges—exceeds the compensation of 95 percent of the people who live in America.

The suggestion of giving Federal judges an additional $100,000 a year, which some have suggested, would mean that our Federal judges would be paid more than 99 percent of all the people living in America working today.

I find it hard to imagine that our founding fathers believed that an independent judiciary required compensation at a level higher than 99 percent of the people whom they work for in the United States.

I understand what you say about the lure of private practice and compensation. I have a son who's an attorney and I know what is paid by Chicago law firms to those fresh out of law school. I am happy that his salary is good—better than mine—and I think most fathers would feel that way about their children.

But I ask you this. Two things. How do we deal with the reality that every day there are prosecutors and defenders and public sector lawyers who make a conscious decision that they are more committed to public service than they are to compensation, that they are prepared to do their jobs, understanding that in a short period of time they could move into the private sector and make dramatically more money, but they believe that public service is good and that the amount that they are earning is adequate for a lifestyle of at least minimal comfort, maybe a little more?

Are we suggesting then that the only way to bring quality people and keep them in the judiciary is to keep a compensation level that is always at the highest level compared to private practice?

Justice KENNEDY. Senator, as I indicated in my statement and as I said initially, there is no way that we can have anything approaching a one-on-one ratio with a senior partner of a firm, and you are not supposed to go on the bench to become wealthy. That is not the object. I do think that the framers wanted to have an excellent judiciary.

John Marshall had to have his arm twisted to go into public service. Washington asked him for 3 days after Washington had retired to Mt. Vernon—please go into public service. Marshall was going to sneak out early in the morning, and there was the general in his uniform saying, "You've got to do this." He left private practice with great reluctance, but, providentially, he gave a great gift of public service to the United States.

But the statistics are something that we simply must face. We are losing our best judges, Senator, and we are not getting the highly qualified judges that we want. That is a fact. That is an economic fact. As I indicated in my statement, judicial resources is a tough sell. Even a rich country needs resources for schools, hospitals, health care, and roads.

In poorer countries, it is the same. I tell parliamentarians and legislators in foreign countries, I say, "I know this is a tough sell. You go home and tell your constituents, oh, I raised the salaries of the judges." They say, "What are you talking about?" But a functioning, efficient, capable, highly qualified judiciary is part of the infrastructure. It is part of what makes the system, the rule of law, work.

We had a judge, Senator—I can name any number of examples. I will use one of a judge who is deceased. You would probably remember, Mr. Chairman, Milton Pollack, a U.S. District Judge.

Chairman LEAHY. I do, indeed.

Justice KENNEDY. From the Southern District of New York, New York City. We had 100 cases in the wake of the fall of an invest-

ment firm called Drexel Burnham Lambert. There were 100 cases, each with well over $100 million of real damages.

We looked at it and we thought that the Federal judiciary would be tied up for 10, 15 years with these cases. We went to Milton Pollack, a U.S. District judge, then 82 years old. We said, "Will you take these cases?" Within 24 months, the assets of the company had greatly increased under his management.

He settled 100 percent of the cases and he ordered the trustee to write out a check for over $600 million in fines to the U.S. Government, and for that you pay them $100,000 a year. I can't get those judges to come any more.

We had a judge who, by any account, would be one of the 10 most knowledgeable people in the world on class actions, a U.S. District judge in Birmingham, Alabama. We had him in charge of our complex litigation and mass tort litigation. He left the bench because of compensation. His departure from the bench caused litigants in those cases to pay attorneys' fees, I would think, in the tens of millions of dollars a year, and years of delay, and I cannot get those kind of judges in my system.

Now, there has to be a mix. We can get talented, dedicated judges from the State system, but we need to draw more attorneys from the ranks of the practicing Bar and we cannot do it.

Now, you mentioned the salary for life. Senior judges are required to take a one-third workload in order to keep their staff and their salary. Routinely they take far more than that. When I came to the bench, my predecessor told me, now I am going to have to take a one-third workload. He said, you know, it is bigger than my active workload when I came.

And I could have said the same thing when I left. We cannot get judges in the Central District of California because of the workload. When I came, I think we had 500 cases a year per panel. It is now over 1,200. You need very capable, very dedicated people to do this.

And it is not fair for you to trade upon the dedication and the commitment of these senior judges knowing they are going to stay. They are going to stay and they are going to serve you. But as a constitutional matter, you have a good-faith duty to pay them fairly. Linkage has prevented that, and congressional neglect has prevented that.

Senator DURBIN. I would just say, Mr. Chairman, I don't disagree with your observations. You know these men and women who are engaged in this better than I do, and the choices they are making, some personal, some professional, and the like. But the bottom line on public services, I don't think any of this took this to get rich, or even to keep up with the rich.

I think we have to understand the balance that has to be struck here that still gives a premium for public service in the compensation that we're doing a public good, and I hope we can strike that balance.

Justice KENNEDY. I think there's no question but that the intangible rewards are important and satisfying. Although, as I indicated, we are losing judges to the nonprofit sector in teaching. We are losing some of our best judges to the law schools and we cannot get professors to come to the bench.

Senator DURBIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. Justice, how are you?

Justice KENNEDY. Fine. Thank you, Senator.

Senator WHITEHOUSE. Good. I served as a U.S. Attorney during the pre-*Blakely*, pre-*Booker* sentencing guidelines regime, when it was extremely strict and mandatory. I have not participated actively as a prosecutor, or in any other capacity, since those decisions. They have fairly dramatically changed the landscape.

And setting aside the constitutional legal questions that *Blakely* and *Booker* resolved, my question to you is, there is an ideal balance that cabins the judges' sentencing discretion to a degree so that people have an idea what's coming and there's less room for caprice, and at the same time frees a judge to make sensible, fair, and independent sentencing decisions based on the facts in front of them, which are often not ones that a sentencing commission can pre-ordain or pre-figure with great precision.

Are you comfortable that *Blakely* and *Booker* put us into that place or do you think that there is action required of the Congress in order to improve the balance in Federal sentencing?

Justice KENNEDY. I am not comfortable with anything in the Federal correctional system and with our sentencing policy.

Senator WHITEHOUSE. What should it be, ideally?

Justice KENNEDY. *Booker Fan-Fan*, and *Blakely* were cases in which I dissented on the law, and I probably should not comment on how they should be accommodated. I think the Congress and your committee have to undergo a study of where we have been, where we are, and where we should go in the sentencing system. You've seen it as a U.S. Attorney. Mandatory minimums, I think, are wrong. When the sentencing guidelines first came out, I wasn't too sure about them. I now think they are necessary.

Senator WHITEHOUSE. You think sentencing guidelines are necessary?

Justice KENNEDY. Yes. I think some guidelines, for consistency purposes.

Senator WHITEHOUSE. Yes.

Justice KENNEDY. It's just wrong for this judge to be particularly harsh on drug dealers, and this judge on bank robbers. I used to go to the district judges' dining room, and I concluded the only thing that's worse than sentencing under the guidelines is sentencing without them. So, you have to have guidelines in order to have uniformity.

Still our sentences are too long, our sentences are too severe, our sentences are too harsh. You have, in the Federal system, close to 200,000 prisoners. In my State of California, we have an equal number, almost 200,000. Its costs $28,500 to $32,500 per year, per prisoner.

You asked about U.S. Marshals. We've been talking about. They will take away a kid who's 18 years old. Well, he was doing what he shouldn't have done. He was growing marijuana in the country in his parents' cabin and he had his father's .22, and he was giving it to his friend.

OK. He is a distributor, he has a weapon, and I think it is mandatory for 12 to 15 years. Mandatory. An 18-year-old does not know how long 15 years is. The pardon power is not being used. They pardon only a handful of people in the States and in the Federal system because they are afraid of re-offense, and so forth. So, there is no compassion in the system, there is no mercy in the system.

When you are spending, let us say, again in the State of California, $30,000 a year on a prisoner and $4,500 a year per student in elementary school, there is something wrong. Now, that is apples and oranges because in the prisons you have full-time care. But to have, in the United States close to, two million people behind bars for lengthy terms, is just not working.

We had some studies in which some of the prosecutors had some of the most innovative suggestions for pre-trial diversion, for rehabilitation programs, and so forth, and I just hope the Senate looks at this whole area. We are not going in the right direction.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator.

I see what you're saying about mandatory minimum, Mr. Justice. As you know, my background was originally as a prosecutor. I am sure in the past I have voted for some of these mandatory minimums, usually because of something, as oftentimes when we Federalized crimes that should have been just left in the State. I agree with you. I think it is a mistake. I think it's a mistake to set these. I think they end up being abused. I think that they end up being abused. I really feel that we have to look at that again. I think we have to look at all these mandatory minimums. I think we have to start over again.

Frankly, I wish that we could find some way in the Federal Criminal Code, whether it's through an outside group to first look at it and make recommendations, and then have us vote on it, I wish we would. There are too many crimes that may have sounded good, may have felt good by adding huge penalties, and unless the prosecutors show discretion, which they should, you get the case of the 18-year-old that you spoke of. We've got to go back and look at that.

Too often, a legislature will say, we'll stop crime. We'll double the penalties. That doesn't stop crime. Improving law enforcement does. Changing some of the social backgrounds does. So, I applaud you for saying that.

Let me go into another area. We had stories about golfing junkets and lavish gifts received by members of Congress that have made lobbying and governmental reform ethics a major topic now. We've passed a significant ethics reform bill in the Senate. The matter is still up in the air, even as some Members of Congress have gone to jail.

But also judicial ethics and conflicts are important. At least in our case, voters get a chance, in the House, every 2 years to toss somebody out if they think they're not ethical, in the Senate, every 6 years.

There was a feature last year in the Washington Post about a 6-day global warming seminar in Yellowstone Park funded by polluters. It was attended by two DC Circuit judges who later issued a Clean Air Act ruling very favorable to the polluters. Maybe they

would, with or without it, but the impression it gave the public was a very serious one.

We hear about members of the judiciary receiving gifts from parties that may appear before them or attending private seminars sponsored by corporations who have personal financial interests in litigating parties. It undermines the public's trust.

Now, last year the Judicial Conference took a significant step to improve transparency and public accountability and so on, with full disclosure of the financing for private seminars, mandating that. I think that's a good step forward.

Would you support efforts to go further and establish a fund where the courts pay for judicial attendance at these seminars? I kind of liken it to, our duties oftentimes take us overseas. You can have a special interest group pay for that overseas travel. You can say, now, this is important for legislative reasons and the government will pay for the travel. I like the latter far better than the former.

But what do you think about that, for these seminars, having a fund within the judiciary? You determine how it is, whether it's the chief judge of a circuit that determines it, or something like that?

Justice KENNEDY. I do think we have to be very careful about perceptions of impropriety, especially the judiciary. It must be above any perceptions of impropriety.

Seminars are part of the American way of life. That is what makes our society very efficient. You go into any hotel in any major city of the United States and you find doctors, nurses, social workers, prosecutors, and they are learning about the newest thing. And judges should not be left out of that.

Chairman LEAHY. When I was a prosecutor I went to a lot of those seminars, but my office paid for it.

Justice KENNEDY. I think it is certainly worth looking at. If the tradeoff is that judges can only go to those—I would have to think about it. I would have to look at it.

Chairman LEAHY. Well, we'll follow up on this. I'd like to discuss it further with you. I'm going to discuss it with the Chief, also.

Now, judges and justices are allowed some honoraria today, are they not?

Justice KENNEDY. No.

Chairman LEAHY. No?

Justice KENNEDY. Well, for teaching.

Chairman LEAHY. All right.

Justice KENNEDY. Although I can earn less now than in 1975, but that is something else again.

Chairman LEAHY. I mean, is this for all judges or just justices?

Justice KENNEDY. No. Justices can teach. We are set at—I will make it up—20 percent of some high government grade. I think it is about $22,000 a year to teach.

Chairman LEAHY. By "teaching", you can have a group set up and say, we are the—

Justice KENNEDY. No, that is not my understanding.

Chairman LEAHY. [Continuing]. Polluters R Us, and—

Justice KENNEDY. No. My own position is teaching at an accredited school.

Chairman LEAHY. OK. What do you think about a ban on that?

Justice KENNEDY. It has been a tradition that judges teach. I see no particular abuse of it.

Chairman LEAHY. Provided it's at an appropriate—

Justice KENNEDY. I taught night law school for over 25 years.

Chairman LEAHY. And obviously if the law school has been there for 25 years, it's not set up for the purposes of teaching.

Let me just conclude with this. First off, I have found this fascinating, I really have. I have found this, aside from my personal respect for you, fascinating to hear the give-and-take. I wish it was not a day when most of us are on half a dozen meetings going on at the same time, and more could have been here.

I'm glad, when we have leaders, including justices, who appreciate America's leading role in the world, which you spoke about. I had a great deal to do during this Nepal time, both in foreign aid and the so-called Leahy law involvement there.

But what you said about the Chief Justice of Nepal saying, keep on doing what you're doing, I think that reflects the importance of America's role. We played a key role in the creation of the universal declaration of human rights, our Bill of Rights, our independence judiciary.

You know yourself how many countries have basically followed that, especially when they become newly democratic. Justice Jackson's role at the Nuremberg trial. I mean, this is something every law student should have to read about, every history major should have to read about, and our support for war crime tribunals for perpetrators of genocide, crimes against humanity in the form of Yugoslavia, Rwanda, Sierra Leone. These are things we can be proud of as Americans.

I was not so proud when our government declined just last week to join 57 other countries in signing a treaty already adopted by the U.N. General Assembly which prohibits governments from holding people in secret detention, something we have abhorred when other countries have done it. We have condemned those countries for detaining people in secret and covering up that detention.

But now we have chosen not to join much of the rest of the world in condemning this. It is an outrageous tactic after our President admitted last fall that our government has been doing that. And even more inexplicably, our government declined last week to join 58 other countries who signed a non-binding ban or accord banning the use of child soldiers.

I can think of few things so tragic than those countries, whether in civil war or insurrection, or whatnot, who brought in child soldiers, who taught 8-year-olds, 9-year-olds, 10-year-olds how to kill, how to maim. I don't know why our government would pass up the chance to condemn this.

America's reputation is important, whether it is at Abu Ghraib, Guantanamo, or secret prisons, I think this hurt us. We do want to use this example. The rest of the world holds us to a high standard. They want us to live up to our own ideals.

The anecdote I told was actually true of those from the former Soviet Union saying to me, "And you do not fire the judge when the state loses?" I mean, these are examples that we can be proud of. If we fall short of that standard, I think it is not only our rep-

utation that suffers, I believe the cause of justice everywhere suffers.

So I would say that looking at the rest of the world is a good idea. There is no sin in doing research over the Internet. I would say that, even though some excoriated you for that. Most importantly, there is no sin—in fact, I call it a virtue—to recognize that there is a larger world around us and that we can set the example. If we fail to set the example, I think it hurts the rest of the world. If we set the example the right way, we're better. We're better as a people and the rest of the world is better.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Justice Kennedy, I concur with Senator Leahy that it is a fascinating process. It is a peephole into the way the court works and the way a justice thinks, and the way the rule of law is carried out. I want to ask you a question about the court's declining docket and the intersection of a number of factors which have been raised by the commentators on why the court's docket has declined. The statistics are fairly dramatic. One involves the cert pool where, as reported, eight of the justices, excluding only Justice Stevens, have their clerks work in a pool.

When Chief Justice Roberts was practicing law, it has been reported that he objected to that or raised a question about it because there may be less intense scrutiny on petitions for certiori.

For those watching on C–SPAN, the court has the discretion in almost all cases to take cases; if four justices concur, it is a case worthy of court review. So the issue is framed that if there were nine individual reviews of these applications for cert, it might be more thorough and more cases might be taken, and that may impact on the court's docket.

I am going to give you the whole picture because the factors are interrelated. Then there are questions raised about the court concluding its term customarily at the end of June or beginning of July, issuing opinions on the pending cases, and then by statute resuming on the first Monday in October.

The question is raised as to whether that period where the court is not in session impacts on having fewer cases because the court does not sit for that 3-month period. I think Congress legislated to remove in a number of situations where the parties had a right of appeal, so called mandatory jurisdiction. You had made a comment earlier about not wanting to comment about whether the Congress had the authority to take away the jurisdiction. I believe we do not.

Chief Justice Rehnquist, in his confirmation hearings for Chief, said that after some dialog he expressed the opinion that Congress did not have the authority to take away the jurisdiction of the court on constitutional issues, implicating the First Amendment, and that might be carried beyond.

We have had some debates on the subject, but I do not see how the court can function as the interpreter of the Constitution if the Congress can take away the jurisdiction of the court. Congress has exercised some authority on jurisdiction on rights of appeal, so-called mandatory jurisdiction.

The court does not take all cases involving conflicts between the Circuits. On the surface, it would appear that if the Circuits are in conflict, that would be the kind of a case the Supreme Court ought to hear. So let me begin with the first question. Does the cert pool have an adverse impact on individual lives' consideration of petitions for cert, that more might be granted if the justices looked at the cases individually?

Justice KENNEDY. We think just the opposite. The cert pool allows a clerk to spend a tremendous amount of time on that case. We have close to 9,000 petitions a year. Nine thousand a year Each one of those—

Senator SPECTER. Do you need more clerks? We can give you more clerks.

Justice KENNEDY. I do not particularly want more clerks. It is about right.

Senator SPECTER. Four is all right?

Justice KENNEDY. But this is their principal job most of the time. This is how they spend a tremendous amount of time. They look at each of these cases with a tremendous amount of care. If we did not do that, then everyone would look at it with less care, and I would not approve of that.

On the docket, we have asked ourselves the same question. When I first came, we had close to 160 cases a year. It was far too much because, as you know, all nine of us sit on every case. In recent years we were down to 80, which we thought was too light. Recently, we have granted a number of cases—so we're climbing back.

I am surprised that we do not take cases involving inter-circuit conflicts. That is one of the principle reasons for taking the case. It may be that we did not think the conflict was real, or that it would go away, or there was some other case that would present it better. I am quite surprised at that.

The commentators have not really come up with the answer, and neither have we, but there are three or four answers. One, a lot of our work is generated by new Federal statutes. There have not been major Federal statutes recently like the Clean Air Act, or the Clean Water Act, or the Bankruptcy Reform Act. Those always generate a tremendous amount of litigation. We just have not had those new enactments.

Second, we understand boundaries of the administrative state. That is settled. There are difficult questions as to application, but the basic rules for when the agency has jurisdiction and authority and when it doesn't are fairly well known, and so our intervention is not required.

I think, the emphasis on information technology, electronic technology, has made people more conscious of following precedents in other circuits and following our precedents. I think, really, there is more consistency and uniformity in the law.

I do not think my colleagues would say we are underworked. We are very proud, Senator, that we get our work done every year on schedule and on time. Our docket is 100 percent finished on July 1, and we're very proud of that. The way we can do that is by taking 2 months to read and recover and so forth before we come back

to the cert pool in September, so I would not want to alter that dynamic.

Senator SPECTER. You say, "two months to read and recover"?

Justice KENNEDY. Yes. And to do cert petitions, and so forth, and to be in contact with our offices. We're just not hearing arguments.

Senator SPECTER. Do you do cert petitions over the summer?

Justice KENNEDY. Generally we don't discuss them. If we see one that we are sure is going to be heard and is very important, we will notify each other and by mail we will grant cert. We like to be all in the room, and we usually do that the last week in September.

Senator SPECTER. Thank you very much, Justice Kennedy.

Justice KENNEDY. Thank you.

Senator SPECTER. I think, along with Senator Leahy, that it's very useful. I agree with you, it can't be too often. It has to be well modulated. But I think your appearance here today does a great deal to communicate to the public what the court does, what a Supreme Court justice is like, his reasoning, and how he applies the rule of law, which is the example.

I concur with my colleagues on my foreign travel. I'm asked again and again by jurists in other countries who have great respect for the exmaple which is set here. We'll return another day to how to best inform the American people of the important work you do. Thank you, Justice Kennedy.

Justice KENNEDY. Thank you, Senator, for the interest that you always show in the courts, for your own expertise, and your own dedication to preserving the judiciary of the United States to be an independent branch that's admired for its commitment and its dedication. Thank you very much. You have done a great deal to help us.

Chairman LEAHY. And Justice, we'll include in the record further remarks by Senator Durbin, where he also refers to Judge Hornby in his capacity as Chair of the judicial branch's Committee of the Judicial Conference, his references to what the Marshals have done.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman LEAHY. I will leave the record open for anybody else who has a statement.

But let me close again by thanking you, Justice Kennedy. At the risk of embarrassing you, I want you to know that during the last decade you've done a lot to advance the cause of human dignity and your decisions are going to stand as a landmark throughout time in that regard. Human expression is fundamentally and constitutionally a manifestation of the freedom upon which this country is founded, freedom of individuals, freedom, I might say, of our spirit as a Nation. You give life to the heart of liberty in recognizing human dignity.

We have spoken today of rhetorical attacks on the judiciary. Actually, Justice Kennedy, nobody has suffered more slanderous treatment than you have from some segments of the body politic, but no one has reacted with more grace and dignity than you have, and I applaud you for that.

Justice KENNEDY. Thank you.
Chairman LEAHY. We stand in recess.
[Whereupon, at 12:02 p.m. the hearing was adjourned.]
[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses to Questions from Senator Brownback

Question: Do you continue to support restructuring of the Ninth Circuit? Why or Why not?

Answer: For the reasons stated in my August 17, 1998, letter to the Commission on Structural Alternatives for the Federal Courts of Appeals, I continue to support a change in the structure of the Ninth Circuit. In my view, a well-conceived restructuring of the Ninth Circuit would better serve the administration of justice.

Question: If you do support restructuring, is there a particular configuration which you believe would yield optimal benefits in terms of the administration of justice?

Answer: As I stated in my February 14, 2007, testimony before the Senate Judiciary Committee hearing on "Judicial Security and Independence," the structure of the circuits, including the Ninth Circuit, is ultimately for the legislature to decide. The Judicial Conference can continue to provide information on the current status of court administration and case management in the Ninth Circuit to assist Congress in determining how best to reshape the circuit.

Question: If Congress were to adopt the appellate judgeship recommendations of the Administrative Office of the U.S. Courts and to award seven new judgeships to the Ninth Circuit Court of Appeals (five of which would be permanent), would you find the case for restructuring of the Circuit more compelling?

Answer: The need for additional judges can be documented with objective data. If additional judges are needed, it would be unfair to burden litigants and the courts by withholding the judges necessary for efficient administration of justice. It is also true that one of the principal reasons for restructuring the Ninth Circuit is the number of judges assigned to that court. If additional judges are added, the need for restructuring becomes all the more urgent.

SUBMISSIONS FOR THE RECORD

Department of Justice

STATEMENT

OF

JOHN F. CLARK
DIRECTOR
U.S. MARSHALS SERVICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

JUDICIAL SECURITY AND INDEPENDENCE

PRESENTED ON

FEBRUARY 14, 2007

Statement of John F. Clark, Director
United States Marshals Service
for the Senate Committee on the Judiciary
Hearing on "Judicial Security and Independence"
February 14, 2007

Mr. Chairman and Members of the Committee, I am pleased to present the views of the United States Marshals Service on the issues of "Judicial Security and Independence." Since my appointment as Director of the United States Marshals Service (USMS) in March 2006, I have made it my first priority to instill public confidence in the nation's judicial process by ensuring its security and integrity. I am proud to say that we have undertaken a number of initiatives to address the judicial security concerns previously expressed by both the Judicial Conference and this Committee during hearings on the subject in 2005.

As you know, Congress provided the USMS $11.9 million in emergency funding in Fiscal Year 2005 to improve and expand our judicial security mission. I would like to take this opportunity to provide you with some specifics on how those funds have been used, and how the structure and focus of our Judicial Security Division has evolved in the past year.

- Restructuring of the Judicial Security Division (JSD): This Division was reorganized on November 1, 2006. A new Assistant Director was appointed to lead it, and a significant number of senior field operational personnel were brought to USMS headquarters to assist in managing the Division's core functions. It is now comprised of two mission-oriented components, Judicial Operations and Judicial Services. The Judicial Operations component includes the greatly expanded Office of Protective Intelligence (OPI), which brought ten new criminal investigators and one intelligence research specialist on board

in 2006 alone, to provide 24-hours-a-day/7-days-a-week threat response capabilities, and to analyze and investigate all threats to the federal judiciary and others for whom USMS has protective responsibility. Additional hiring is expected in 2007, and we appreciate the continuing support this Committee can give us to reach our staffing goals.

In FY 2006, JSD investigated over 1,100 judicial threats, safely handled 230 Personal Protection Details, provided security for nearly 200 judicial conferences, protected Supreme Court Justices while on travel around the nation, responded to numerous bomb and hazardous material threats, and improved interior and exterior security at numerous courthouses. JSD is also in the final stages of constructing its Threat Management Center, which will function as the nerve center for threats and inappropriate communications against judicial officials and other USMS protectees.

- Home Intrusion Alarm Initiative: By the end of 2006, 1,616 federal judges had requested or expressed interest in having a home intrusion alarm installed in their residence. Working in conjunction with the Administrative Office of the U.S. Courts (AOUSC), the USMS has scheduled or completed Pre-Installation Plan surveys for **all** of those residences. Installation has been completed in 1,413 of the 1,616 residences, or almost 90 percent.

- Training of Court Security Officers (CSOs): Within the new Judicial Services component, a more aggressive approach is now being taken to CSO training and in exploring new screening technologies that CSOs can use in their efforts to secure federal

courthouses. The CSO Orientation Curriculum has been completely updated, and training which formerly occurred on an annual basis is now being conducted quarterly at the Federal Law Enforcement Training Center in Glynco, Georgia. Hands-on training is being conducted on new and current screening equipment, with added emphasis on detecting disguised weapons and explosives, and response plans for dealing with weapons of mass destruction.

With regard to advances in screening equipment technology, selected judicial districts are being asked to test next generation technologies, and the data obtained from these tests will assist the USMS in selecting and procuring the best possible screening equipment in support of our judicial protection mission.

- Communication with the Administrative Office of the U.S. Courts: I have personally met with the Chief Judges and Judicial Security Inspectors in many of the 94 judicial districts around the country to discuss courthouse and residential security needs in each district. As part of our commitment to providing the highest level of protection possible to the federal judiciary, senior-level JSD staff regularly meets with AOUSC to ensure ongoing dialogue and communication on security issues. I have had many productive meetings and conferences with AOUSC Director James Duff, and recently hosted the Judicial Conference Committee on Judicial Security at our Regional Technical Operations Center in Houston, Texas. There, we highlighted USMS improvements in tracking, investigating and deterring persons who threaten the judiciary.

- Improvements in the Protective Investigations Program: During FY 2006, the USMS conducted training in behavioral methodologies of investigation for 190 Deputy U.S. Marshals (DUSMs) and Judicial Security Inspectors (JSIs) at the Federal Law Enforcement Training Center. A Judicial Protective Training Conference for 210 DUSMs and JSIs was also held in Baltimore, Maryland. These training seminars were provided by experts within the USMS, as well as the United States Secret Service, United States Attorney's Office, Diplomatic Security Service, Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Federal Bureau of Investigation.

- National Center for Judicial Security (NCJS): During FY 2007, the USMS will begin to establish the NCJS, to be operated, staffed and managed by members of the Judicial Security Division. It will provide a wide range of services and support to federal, state, local and international jurisdictions as they seek advice and assistance on questions of judicial security. It will initiate programs and activities directly related to threat assessment, training, information sharing, and technology review.

I trust you will find this information useful. I assure you that the USMS will continue to work diligently to prevent, detect, deter and disrupt threats to the judiciary, and provide an environment where judges, court employees and the public feel safe. Thank you for considering these issues, and I look forward to working with you in 2007 to accomplish the important objective of judicial security.

CONFERENCE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS

WRITTEN TESTIMONY

by

Chief Judge Robert M. Bell
President
Conference of Chief Justices

On

Improving the Security of Our State Courts

Submitted to the

COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE

Committee Hearing
Wednesday, February 14, 2007
216 Hart Senate Office Building
10:00 a.m.

National Center for State Courts
Government Relations Office
2425 Wilson Boulevard, Suite 350
Arlington, Virginia 22201
Tel: (703) 841-0200 Fax: (703) 841-0206

Chairman Leahy, Ranking Member Specter, and Members of the Committee,

On behalf of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), it is a privilege to provide testimony for consideration in the Subcommittee's hearing examining judicial security and independence in the Nation's state and federal courts. The Conferences' memberships consist of the highest judicial officers and the state court administrators in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the Northern Mariana Islands and the Territories of American Samoa, Guam and the Virgin Islands. The National Center for State Courts (NCSC) serves as the Secretariat for the two Conferences and provides supportive services to state court leaders including original research, consulting services, publications, and national education programs.

We believe that Congress has an opportunity to make an important and tangible difference in improving the safety of our courts and upholding the fundamentals of our democratic society.

INTRODUCTION

This morning thousands of judges, prosecutors, public defenders, lawyers, law enforcement officers, court personnel, court reporters, jurors, witnesses, victims, and members of the general public entered a courthouse. They come for one purpose – to seek justice in a safe and neutral forum. It is vital that we ensure that the public's ability to resolve their disputes, present evidence before a judge or jury, and expect a judge to rule solely based upon the law uninfluenced by intimidation. To accomplish this, we must provide a forum free from fear, threats, and violence. People will be hesitant or refuse to bring their disputes to courts if a likely consequence is intimidation or physical harm. Judges and jurors cannot pursue the truth if they or their families are threatened.

A democracy cannot long endure if those entrusted with resolving disputes are targets of violence and become enmeshed in an environment of fear and intimidation, if officers responsible for security do not have the resources to detect and respond, and if lawyers, parties, and the public must evaluate their own personal safety in deciding whether to participate in the process. Freedom from such an environment and the ability to carry out the judicial responsibilities in an open and accessible manner are fundamental components of the exercise of the rule of law.

We appreciate the problem of violence in the workplace. Indeed, if there is any workplace in America where the potential for violence is great, it is the judicial workplace. With the exception of marriage and adoption ceremonies, people generally are not appearing in court voluntarily, but are appearing because they are legally required to attend court. Jurors are summoned to court. Witnesses are subpoenaed to court.

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Defendants are compelled to go to court to face criminal charges or civil actions. People who have given up on resolving their disputes – disputes with their neighbors, disputes with their children, disputes with their families, disputes with their employers – go to court as a last resort. Emotions can run high because these disputes invariably involve human relationships, and human relationships can evoke strong feelings. Also, there is confrontation – the right to confront your accusers. Although most of us spend a lot of time trying to avoid problems, in court a person often must directly confront an adversary.

Consequently, in the judicial workplace, there is confrontation between people under highly charged sets of emotional circumstances regarding disputes that they have been unable to resolve on their own. Also, by the nature of the adversarial process, there are winners and losers in court. Not only is there confrontation and emotion, but at least one of the parties will often leave feeling disappointed or angry that they have lost – and that they may have lost in some sort of a final, binding way. Despite the fact there is no workplace with greater potential for violence, it is also true that there is no workplace in America where it is more critical that the workplace be free of violence.

Access to peaceful resolution of disputes is fundamental to our system of government. Coupled with the principle of judicial independence these concepts are the envy of the world. Neither access to justice nor judicial independence can exist in an environment of intimidation, fear or violence. Under the rule of law, court proceedings are supposed to be open and public. How long will court proceedings be truly open to the public if members of the public fear that they are going to become embroiled in some sort of a threatening, fearful, or violent situation?

Mr. Chairman, recent incidents of courthouse violence show a disturbing pattern with regards to how some people view the security of courthouses and the risks of public service. These attacks and threats towards members of the judiciary are rapidly reaching a crisis point for us. Let me recount just a few recent examples of security threats and incidents that have been provided by our members:

- Alaska - Many judges in this state have received threatening communications with repeated references to the Chicago murders. Last year, a serious communication to one judge required the intervention of the Federal Bureau of Investigation (FBI). Also during this past year, large numbers of weapons have been confiscated as a result of magnetometer screenings.

- Arizona - In the past year, there has been a suicide outside a divorce court, the firebombing of a Justice of the Peace Court, death threats towards judges, a visit by a disturbed litigant to a judge's home, explicit communications with pictures and diagrams to the homes of judges on pending cases, and threats by

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constitutionalists to "arrest" and execute a judge. Finally, there was a threat against a judge that mentioned death utilizing a high powered rifle.

- California - Various bomb threats have been received in the past 2 years, including an incident in which law enforcement was able to arrest the perpetrator before he was able to carry out the actual bombing, an incident in which a firebomb was discovered in a courthouse before it went off, and an incident in which a litigant came into a clerk's office with a small home-made bomb. Explicit threats have been made against judges to carry out violence against them. Graffiti has been painted on underpasses and buildings detailing threats against the court system. A court received correspondence that contained a vial of blood that tested positive for HIV and Hepatitis C. A wallet was found in a courtroom with a description of a judge's car and license plate number. An individual with a pending court case was recently arrested videotaping the judges' parking lot.

- Maryland - Several threats against judges have been received in the past year. Several of these have required additional home protection patrols to be done on our judges. In addition, there have been attacks on hearing officers, especially on those officers assigned in juvenile courts. Finally, bomb threats are a constant problem requiring local law enforcement to assist in building evacuations and implementation of prevention measures.

- Mississippi - Death threats have been made against several trial courts judges. Threats of destruction of property (buildings) and physical attacks on Justices of the Supreme Court have been made.

- New Hampshire - There was a recent incident where an individual entered a courthouse and attempted to assault a Court Security Officer during the screening process. A recent threat to "shoot up" one of the courthouses was also made.

- Pennsylvania - Several serious threats against judges, and court officers were reported. Numerous confiscations of weapons from individuals attempting to bring them into the courthouse were catalogued. Finally, Molotov cocktails were thrown at a magisterial judge's office that, thankfully, did not start a fire. Both the FBI and the federal ATF helped us investigate this incident.

- New York - The New York State court system receives approximately 140 death threats against judges a year.

Even though we do not have quantitative data, it is the perception of the state court leadership that the number and severity of these threats and security incidents have been

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increasing in recent years. Furthermore, given that the state courts try approximately 96 million cases per year, the opportunities for incidents and the magnitude of the problem cannot be overstated. Also, let me emphasize that while judges and court personnel are seriously at risk during any incident, the risk to the public is also significant.

THREATS AGAINST JUDGES

Since the Fulton County (Atlanta), Georgia incident and the murders of U.S. District Judge Lefkow's husband and mother, we have been inundated with requests for information about threats that state court judges receive on the job. The simple fact of the matter is that, because of the cost of compiling such a large amount of data, we do not know the full extent of the problem.

In a survey by the family law section of the American Bar Association, 60 percent of respondents indicated that an opposing party in a case had threatened them. From the U.S. Marshals Service, we know that they record an average of 700 inappropriate communications and threats each year against federal judicial officials. This is a marked increase from the 1980s when the average was closer to 240 per year. If you compare the number of federal judges to the approximately 32,000 state court judges, there is the possibility that we may find a large number of judges that face or have faced some sort of physical threat.

Naturally, we must always remember that the potential for violent attacks on judges is not limited to the courtroom. An aggressor who targets a specific judge may attack the weakest security link in that judge's world – most likely the home. While more difficult, this area of protection cannot be overlooked.

FUNDING CHALLENGES

Perhaps the greatest challenge facing state courts wishing to implement enhanced security measures is the issue of resources. The majority of courts depend on local law enforcement for the personnel to operate the equipment, provide adequate response, and run security operations in a courthouse. As you know, most local governments struggle to meet day-to-day operations of running their governments and have little options to improve or implement new security measures in courthouses. Because there is no adequate funding source, many courts report that they have no formal security plan.

CCJ, COSCA, and NCSC have been disseminating promising practices for court security. Our efforts in this area have been well received. For example, we developed and have circulated the "Ten Essential Elements for Courtroom Safety and Security." NCSC also has compiled a wealth of information for state courts looking to upgrade their court security. Materials range from sample local court security plans to specific

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recommendations in courthouse architectural design, computer disaster recovery, and equipment.

While we have made progress, I must caution you that there is only so much that can be achieved by streamlining and refocusing present resources. State courts need resources to fund enhanced security measures. We hope that you will favorably consider our recommendations to allow state courts greater access to federal funds for much needed security improvements.

THE NEW DIMENSION - COURTHOUSE TERRORISM

On September 11, 2001, terrorist attacks threw New York City's court system into disarray because many court buildings and other criminal justice offices were located near the site of the World Trade Center. Three court security officers perished when they tried to assist in the rescue efforts. The Court of Claims Courthouse, located at Five World Trade Center was destroyed. Other courthouses were deep within the so-called 'frozen zone,' an area that city officials ordered off-limits to all but essential personnel.

The New York state court leadership, however, moved quickly to ensure that the disruption did not last more than one day. Under the leadership of New York State Chief Judge Judith Kaye, the focus of the hours following the attacks was to do everything possible to reopen all the courts.

The threat of terrorism has created a new dimension in courthouse security. The courthouse is a visible, tangible symbol of government. The September 11th attacks painfully showed that government and other prominent buildings are targets. Thus courts, being a core function of American government, now suffer increased exposure to attacks from those external to the court process. They must be provided the same protection that is being provided to other government institutions in order to keep them open and accessible. The state courts are dealing with the threats posed by terrorism. We, however, need more assistance from the federal government as the large focus shifts to protecting the homeland. The needs of state courts must be considered in the plans for distributing funds because terrorists often target the positive symbols of the American way of life like courts and the law.

In order to better position courts and judges to address and respond to security threats and incidents, we ask your consideration of the following provisions. The first three items were included in HR 1751, which was approved by the House of Representatives in the 109th Congress.

- **Establish a Repository for a New Threat Assessment Database** - Establish a web-based site where threats can be reported and local action taken in each state.

Federal dollars would support each state in establishing these web-based sites. This coordinated effort would result in: 1) establishing and defining a core set of data elements used by each state and 2) obtaining data from states for analysis of trends and patterns. This information could then be used to assist states in preventing acts of domestic terrorism and crime and in enhancing their security procedures. By having the information from this threat database, we can target our resources where they will be most needed. Under the current system, most courts are taking an all or nothing approach with virtually no information to guide them in overall security planning.

- **Create a New Federal Grant Program Specifically Targeted to Assess and Enhance State Court Security** – This program would assist states to conduct assessments and implement court security improvements deemed necessary based on the assessments. We ask that the highest state court in each state or territory be eligible to apply for the funds. Federal funds would provide valuable seed money for state courts.

- **Ensure that State and Local Courts Are Eligible to Apply Directly for Discretionary Federal Funding** - State and local courts have not been able to apply directly for some Department of Justice (DOJ) administered programs because of the definition of "unit of local government" that has been included in the enabling legislation for the various programs. The result of this language is that state and local courts are not able to apply directly for these discretionary funds, but must ask an executive agency to submit an application on their behalf. As you perform your oversight roles on the DOJ and as grant programs are revisited, we ask that the definition of eligible entities is broadened so that state and local courts can apply directly for discretionary federal grant funds.

    - As an example, when the Violence Against Women Act (VAWA) was reauthorized in 2001, the reauthorization legislation contained specific language authorizing, "State and local courts (including juvenile courts) ..." to apply directly for VAWA funds.

    - Clarification is particularly needed in relation to the Omnibus Crime Control and Safe Streets Act of 1968, the Edward Byrne grants, Armored Vests grants, and the Child Abuse and Prevention and Treatment Act (CAPTA).

- **Ensure that State Courts Are Included in the Planning for Disbursement of Federal Funding Administered by State Executive Agencies** – Statutory language for grant programs that impact the justice system should include specific

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language requiring consultation and consideration of state court needs. The language that we have suggested is as follows:

> "An assurance that, in the development of the grant application, the States and units of local governments took into consideration the needs of the state judicial branch in strengthening the administration of justice systems and specifically sought the advice of the chief of the highest court of the State and, where appropriate, the chief judge of the local court, with respect to the application."

CONCLUSION

The state courts of this country welcome the Judiciary Committee's interest in the security of courts. We look forward to working with the Committee to develop legislation that addresses state court security needs and takes into account the varied needs of the state courts of this country. We commend the Committee for holding this hearing and recognizing the national interest in ensuring that our judiciary and courts must operate in a safe and secure environment.

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ABOUT CCJ

The Conference of Chief Justices (CCJ) was organized in 1949 and its membership consists of the highest judicial officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands. The purpose of the Conference is to provide an opportunity for consultation among the highest judicial officers of the several states, commonwealths, and territories, concerning matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on these matters.

The Conference accomplishes its mission by the mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- Develop, exchange, and disseminate information and knowledge of value to state judicial systems;
- Educate, train, and develop leaders to become effective managers of state judicial systems;
- Promote the vitality, independence, and effectiveness of state judicial systems;
- Develop and advance policies in support of common interests and shared values of state judicial systems; and
- Support adequate funding and resources for the operations of the state courts.

ABOUT COSCA

The Conference of State Court Administrators (COSCA) was organized in 1955 and is dedicated to the improvement of state court systems. Its membership consists of the principal court administrative officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands. A state court administrator implements policy and programs for a statewide judicial system. COSCA is a nonprofit corporation endeavoring to increase the efficiency and fairness of the nation's state court systems. State courts handle 98% of all judicial proceedings in the country. The purposes of COSCA are:

- To encourage the formulation of fundamental policies, principles, and standards for state court administration;
- To facilitate cooperation, consultation, and exchange of information by and among national, state, and local offices and organizations directly concerned with court administration;
- To foster the utilization of the principles and techniques of modern management in the field of judicial administration; and
- To improve administrative practices and procedures and to increase the efficiency and effectiveness of all courts.

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Remarks of Sen. Dick Durbin
Senate Judiciary Committee Hearing
"Judicial Security and Independence"
February 14, 2007

Welcome, Justice Kennedy. Thank you for appearing today before the Senate Judiciary Committee to discuss the important issues of judicial security and independence.

Judicial Security

This month marks the second-year anniversary of the tragic murders of Chicago Federal Judge Joan Lefkow's husband and mother. The killer broke into Judge Lefkow's home to commit these heinous crimes. He was a bitter plaintiff in a medical malpractice lawsuit before Judge Lefkow.

This tragic event in my home state has been a wake-up call for the country about the need for more and better judicial security.

Sadly, threats against our judges are on the rise. The U.S. Marshals Service reports that they investigated over 1,100 judicial threats in 2006. This is more than a 500% increase in threats since 1996, when there were 201 reported threats.

In May 2005, just a few months after her family members were slain, Judge Lefkow bravely came before this committee to testify. She urged us to pass legislation to improve the security of judges and their families.

Congress responded. Senator Obama, Senator Kennedy, and I worked to ensure that $12 million was appropriated so that every federal judge in America could have a home alarm system.

I have met on several occasions with the U.S. Marshals Service and am pleased with the leadership of its new Director, John Clark. In his statement submitted to this Committee today, Judge Brock Hornby [chair of the Judicial Branch Committee of the Judicial Conference of the United States] said that Mr. Clark has provided "exceptional leadership" and has improved the communications between the Marshals Service and the federal judiciary. I am happy to hear that.

But more work needs to be done. Congress must pass the Court Security Improvement Act, which has strong bipartisan support. I commend Chairman Leahy and Senator Specter for introducing this bill, and I am proud to be an original co-sponsor. This bill passed the Senate late last year but, regrettably, wasn't taken up in the House of Representatives. I am optimistic the bill will meet a better fate in the 110th Congress.

The Court Security Improvement Act would ban dangerous weapons in our federal courthouses; it would protect judges and their families by prohibiting publication of their personal information; it would provide more funding for the Marshals Service to protect judges and require that office to consult with the federal judiciary regarding security requirements; and it would provide grant money to enhance the security of state courts.

Judicial Independence

We must protect our federal judges not only from physical threats, but also from threats to their judicial function. Verbal attacks, like physical attacks, strike at the heart of judicial independence.

The Constitution makes it clear that there are three independent branches of government. Each has a vital role in the governance of our democracy. The independence of our judiciary has been the envy of the world. But it is under attack today in a way we have not seen in quite some time. There has been an assault on the independence of the judiciary about which every American should be concerned.

Over the past few years, we have heard extreme statements from political ideologues and even attempts by some members of Congress to punish federal judges for their decisions. It is one thing to criticize a judicial opinion with which we disagree, and another thing to threaten judges with impeachment, to try and strip them of their authority to hear certain types of cases, and to subject them to the whims of a politicized inspector general.

Today's witness, Justice Kennedy, has earned a reputation as a thoughtful, non-doctrinaire jurist. But in some quarters, he is vilified for that very quality. For example, at a conference in April 2005, conservative activist Phyllis Schlafly

said that Justice Kennedy's opinion banning capital punishment for children "is a good ground of impeachment."

Shortly thereafter, former House Majority Leader Tom DeLay lashed out at Justice Kennedy in an interview on Fox News. Among other criticisms, Tom DeLay said it was "incredibly outrageous" that Justice Kennedy did his own research on the Internet. After hearing Tom DeLay say this, I went to the Senate floor and asked: has the Internet become the devil's workshop? Is it some infernal machine? If so, I think we're all in trouble.

Our federal judges should not be intimidated and bullied by members of Congress or political extremists who see things differently.

Last September, former Supreme Court Justice Sandra Day O'Connor wrote a compelling op-ed in the *Wall Street Journal* and said the following: "[A]ll of society has a keen interest in countering threats to judicial independence. Judges who are afraid – whether they fear for their jobs or fear for their lives – cannot adequately fulfill the considerable responsibilities that the position demands."

I hope that every member of the Senate shares Justice O'Connor's commitment to protecting the men and women who don these robes for lifetime appointments and have the courage to rule in controversial cases. And I hope that both houses of Congress will quickly pass long overdue legislation to enhance the security and protection of our federal judges.

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Chairman, Senate Appropriations Committee
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The Honorable Thad Cochran
Ranking Member, Senate Appropriations Committee
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The Honorable David Obey
Chairman, House Appropriations Committee
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The Honorable Jerry Lewis
Ranking Member, House Appropriations Committee
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The Honorable Richard Durbin
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The Honorable Ralph Regula
Ranking Member, Subcommittee on Financial Services and General Government
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February 15, 2007

The Need for a Substantial Salary Increase for Federal Judges

Gentlemen:

As General Counsel of the sixty major U.S. corporations signing below, we write to urge you to respond positively to Chief Justice John Roberts' plea in his year-end report on the Federal Judiciary[1] for a substantial increase to the salaries of federal judges. We agree with Chief Justice Roberts that the judicial

[1] www.supremecourtus.gov/publicinfo/**year-end/year-endreports**.html

compensation situation, dire for years, has reached a crisis point and that judicial salaries have fallen below any reasonable measure of what is appropriate.

Starting salaries for freshly minted law school graduates now exceed in many markets what district judges with decades of experience are paid. The disparity between judicial salaries and pay for private practitioners with the qualifications to be federal judges is so enormous as to almost lack relevance, as Chief Justice Roberts points out in his Report. But now a substantial disparity has opened between judicial salaries and pay for law school deans and senior professors, a comparison which in the late 1960's favored federal judges. Further, as Chief Justice Roberts reports, pay for federal judges has declined in real terms compared to pay for the average U.S. worker.

We agree with Chief Justice Roberts that the shrinking percentage of federal judges drawn from the private bar, as opposed to the public sector, creates serious concern, as does the increasing number of judges resigning from the bench with years of active practice still before them. The Chief Justice is correct in highlighting both the quality and independence concerns that arise from the image of a federal judgeship as a stepping-stone to an enhanced career in the private sector. The New York Times, in an editorial on January 5, agrees, commenting: "Mr. Roberts is right to note the link between maintaining an adequate standard of judicial compensation and preserving the quality and independence of the judiciary, and to prod Congress on this issue."

Each of our companies has a significant litigation docket and thus we share a deep interest in the quality of the civil justice system, both federal and state. We are vitally interested in a high-quality, neutral and independent judiciary. We agree with Chief Justice Roberts that failing to restore judicial salaries to an appropriate level threatens the administration of justice by undercutting the quality and diversity of candidates drawn to and retained on the bench.

Accordingly, we urge you to take up Chief Justice Roberts' challenge and pass a substantial increase in federal judicial salaries. We understand that these salaries are, as a matter of law, linked to the salaries of congressmen, making consideration of this issue much more complex. To avoid that entanglement now and in the future, we urge that congressional and judicial salaries be decoupled and that the judicial salaries be significantly increased soon as suggested by Chief Justice Roberts.

Very truly yours,

Richard F. Ziegler
Senior Vice President - Legal Affairs and General Counsel
3M

Laura J. Schumacher
Senior Vice President, Secretary & General Counsel
Abbott Laboratories

Anastasia D. Kelly
Executive Vice President, General Counsel, & Senior Regulatory and Compliance Officer
American International Group, Inc.

Louise M. Parent
Executive Vice President and General Counsel
American Express Company

Ivan K. Fong
Executive Vice President, Chief Legal Officer and Secretary
Cardinal Health, Inc.

Charles A. James
Vice President & General Counsel
Chevron Corporation

Mark Chandler
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Stephen F. Gates
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Citigroup, Inc.

Irving B. Yoskowitz
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Charles J. Kalil
Corporate Vice President, General Counsel and Secretary
The Dow Chemical Company

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Charles W. Matthews
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Exxon Mobil Corporation

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The Hartford Financial Services Group, Inc.

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Intel Corporation

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Kimberly-Clark Corporation

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Lockheed Martin Corporation

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A. Peter Lawson
Executive Vice President, General Counsel and Secretary
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James A. Hixon
Executive Vice President, Law & Corporate Relations
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Microsoft Corporation

Lawrence A. Jacobs
Senior Executive Vice President and Group General Counsel
News Corporation

W. Burks Terry
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Northrop Grumman Corporation

Daniel Cooperman
Senior Vice President, General Counsel & Secretary
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Larry D. Thompson
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Catherine A. Lamboley
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Dan D. Sandman
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William H. Trachsel
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United Technologies Corporation

Michael D. Fricklas
Executive Vice President, General Counsel & Secretary
Viacom Inc.

Lawrence V. Stein
Senior Vice President & General Counsel
Wyeth

cc: The Honorable Harry Reid
Senate Majority Leader

The Honorable Mitch McConnell
Senate Minority Leader

The Honorable Nancy Pelosi
Speaker of the House of Representatives

The Honorable John Boehner
House Minority Leadder

The Honorable Patrick J. Leahey
Chairman, Senate Judiciary Committee

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee

The Honorable John Conyers
Chairman, House Judiciary Committee

The Honorable Lamar Smith
Ranking Member, House Judiciary Committee

James C. Duff
Director, Administrative Office of the U.S. Courts

STATEMENT OF SENATOR GRASSLEY FOR SENATE JUDICIARY COMMITTEE HEARING "JUDICIAL SECURITY AND INDEPENDENCE", FEBRUARY 14, 2007

Mr. Chairman, I'd like to discuss a couple of issues with Justice Kennedy. First, as you know, I'm the lead sponsor of legislation to open up the federal judiciary to television cameras and radio broadcasts. I've introduced the Cameras in the Courtroom bill five times now – the first time in the 106th Congress - and this bill has been approved on a bipartisan basis by the Senate Judiciary Committee on a number of occasions. This is common sense legislation, plain and simple. The American people should know what is going on in the courthouse, and opening the doors for all to see will just improve the public's understanding of how our system of justice works. I also believe that the legislation will help promote accountability in the judicial system, and make judges do a better job. As you know, the bill would also open up the United States Supreme Court to media coverage. I hope that the Justices will acknowledge that more openness in our legal system is something that would be beneficial to all, and that it's time for us to let the sun shine in on our federal courtrooms.

Moreover, Justice Kennedy, you probably are aware that I've reintroduced the Judiciary Transparency and Ethics Enhancement Act here in the Senate, which would create an Inspector General for the judicial branch. I've always found that Inspector Generals improve efficiency and accountability in the offices they oversee. Because there have been reports that federal judges have violated ethical rules or engaged in judicial misconduct, having such an office in the judicial branch would not only help root out potential waste, fraud and abuse, it would also improve the public's confidence in our judicial system. I understand that there are concerns about this kind of legislation possibly interfering with the independence of the judicial branch. I'd like to assure you that I'm a firm believer in the independence of the judiciary. In fact, we've incorporated changes in the bill that I believe address any such concerns. I hope that the Justices can take a look at this bill, and recognize that the judicial branch is accountable not only to the Constitution and the laws of the United States, but it is also accountable to the American people.

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE D. BROCK HORNBY

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

FOR THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
JUDICIAL SECURITY AND INDEPENDENCE

FEBRUARY 14, 2007

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

STATEMENT OF JUDGE D. BROCK HORNBY
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ON
JUDICIAL SECURITY AND INDEPENDENCE

I would like to present the views of the Judicial Conference of the United States on S. 378, the "Court Security Improvement Act of 2007", and to thank Chairman Patrick Leahy, Senator Arlen Specter, and the other members of the committee for taking time to address seriously the security issues facing the federal judiciary.

The murder of Judge Joan Lefkow's husband and mother in her Chicago home in February 2005 sent shockwaves throughout the judicial branch. With Senator Richard Durbin's leadership, Congress quickly approved funding for home intrusion detection systems which have since been deployed throughout the federal judiciary by the U.S. Marshals Service. These systems are an important improvement in how security, especially off-site security, is provided to federal judges. We are particularly appreciative of Senator Durbin's work on this issue as well as that of Senator Edward Kennedy and Senator Barack Obama. In addition, the current director of the U.S. Marshals Service John Clark played a key role in making the program operational. Since that time numerous other incidents have occurred in places such as Atlanta, Georgia and Las Vegas, Nevada where judges have been seriously threatened due to compromises in their security. While these events occurred in state courts, they highlight security breaches that cause all judges to be concerned for their safety and well-being.

During the 109th Congress, Senator Leahy and then Chairman Specter introduced S. 1968, the "Court Security Improvement Act of 2005" a bill that addressed several key security

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issues

facing the federal courts. These issues include the authority of the Judicial Conference of the United States to redact sensitive information from judges' financial disclosure forms, a requirement that the U.S. Marshals Service consult with the federal judiciary in the development of court security policies, and the creation of a penalty for malicious filing of fictitious liens.

With the assistance of, the then Minority Leader, Senator Harry Reid, the bill was attached to the Defense Authorization Act of 2007. Unfortunately the Court Security part of the bill died in conference when House conferees objected to its inclusion. The issues contained in that bill continue to be critically important to the federal courts and we are extremely pleased that a comparable bill has been introduced in the 110th Congress. S. 378, the "Court Security Improvement Act of 2007" is an extremely important bill. On behalf of the judicial family, I thank the sponsor of the bill, Chairman Leahy, and the bill's cosponsors Senators Specter, Reid, Durbin, Kennedy, Cornyn, Hatch, Schumer, and Collins.

When enacted, this bill will contribute significantly to the security of federal judges and their families. I would like to discuss the provisions of the bill that are of interest to the federal judiciary.

SECTION 101: REQUIREMENT THAT THE UNITED STATES MARSHALS SERVICE CONSULT WITH THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE SECURITY REQUIREMENTS OF THE JUDICIAL BRANCH

Section 101 of S. 378, is a very important change that will formalize the positive relationship that has recently developed between the federal judiciary and the U.S. Marshals Service under the exceptional leadership of Director John Clark. The primary statutory mission

of the Marshals Service is to provide security to the federal courts and we believe this section will contribute to that end. By requiring the Marshals Service to "consult" with the judiciary, this provision will ensure that the judiciary has greater input into those programs and policies of the U.S. Marshals Service that pertain to personnel, equipment, and other resources used in performing the important mission of providing security to the federal judiciary. We believe it is important to formalize the relationship between these two institutions and support this section of the bill with one minor change.

The current language of section 101 in the bill calls for the U.S. Marshals Service to "consult on a continuing basis," with the "Judicial Conference of the United States" on the security requirements of the judicial branch of government. Consulting with the "Judicial Conference" is impractical because the Conference convenes only twice a year, once in September and once in March, and thus is not available to "consult on a continuing basis" with the U.S. Marshals Service. Furthermore, the Administrative Office of the United States Courts already provides direct liaison, on a continuing basis, with the U.S. Marshals Service. Because the Director of the Administrative Office also provides support to the Committee on Judicial Security of the Judicial Conference, it would be more appropriate that the "Director of the Administrative Office of the United States Courts" be substituted for the "Judicial Conference of the United States" in the bill. This is a minor change but one that will more accurately reflect the existing relationship between the U.S. Marshals Service and the judiciary and will allow for easier implementation of the legislation.

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SECTION 102. PROTECTION OF FAMILY MEMBERS

This section corrects an omission in the provision of the Ethics in Government Act that authorizes the Judicial Conference to redact sensitive information from financial disclosure reports of judges and judiciary employees (see Section 103). As the tragedy involving Judge Joan Lefkow demonstrated, members of a judge's family may be attacked as readily as a judge. The current language of the redaction statute considers only whether the release of the information would endanger the individual who has filed the report, even though the Ethics in Government Act requires the disclosure of information that creates risks for the safety of family members as well as the filing individual.

Section 102 ensures that members of a filer's family are provided the same protection that the current law provides for the individual who files the report. This modest expansion of the scope of protection is urgently needed to fulfill the purpose of preventing attacks or the threat of attack.

SECTION 103: AUTHORITY TO REDACT SENSITIVE INFORMATION FROM FINANCIAL DISCLOSURE FORMS

Many judges experience a unique security risk in the form of personal contact with violent offenders or other disgruntled litigants every day in which they preside over a trial or sentence a convicted person to prison or to death. This close contact can result in animosity directed toward the judge who is personally identified with the laws being enforced against a particular individual. Congress recognized the distinctive risks faced by judges and amended the Ethics in Government Act in 1998 to authorize the Judicial Conference to redact from a financial disclosure report sensitive information that could endanger the judge. This authority expired

December 31, 2005. Section 103 would reinstate the authority until December 31, 2009. Prompt action to restore this authority is urgently needed to provide security to judges, court employees, and their families.

Financial disclosure reports reveal several types of information that can endanger the filer or members of the filer's family. As noted in the discussion of Section 102, above, a filer is required to disclose several categories of information that create risks for the safety of filers and their families.

Filers are required to enumerate the specific items that they request be redacted from their reports, and those requests are reviewed by the Judicial Conference Committee on Financial Disclosure. In determining whether to redact information from a report, the Committee consults with the United States Marshals Service. As required by the statute, the Director of the Administrative Office has provided an annual report on the number of redactions approved by the Committee in the preceding year.

All judges' financial disclosure reports for calendar year 2005 and several previous years are already posted on several Internet websites. Without the authority to redact sensitive information, it will be much harder to maintain the minimal zone of security that has helped in the past to shield judges from personal attacks by disgruntled litigants and anti-government organizations.

While we would prefer permanent authority to redact sensitive information, we believe that the extension contemplated in the current bill would be an effective and appropriate interim step. As currently drafted in S. 378, the authority to redact would terminate on December 31,

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2009. As a practical matter this would give the Judicial Conference of the United States authority to redact sensitive information from financial disclosure forms for only two-and-one-half years, assuming this legislation is enacted by June of this year. We respectfully request that the sunset on redaction authority be extended to December 31, 2011 thereby giving the Judicial Conference four-and-one-half years to exercise this important authority. We believe that this is a more appropriate duration because it will remove the concern on the part of threatened judges that the protection is about to disappear once again and give administrators of the program sufficient time to manage the requirements properly. It will also give Congress additional time to consider the merits of the program so that it can make a more informed judgment when the question of eliminating or extending the sunset arises again.

SECTION 104: PROTECTION OF UNITED STATES TAX COURT

The intent of this provision is to expand the duties of the U.S. Marshals Service to cover the protection of the U.S. Tax Court, an Article I court that is not a part of the judicial branch. While the judiciary takes no position on whether the U.S. Marshals Service should be required to cover these additional duties, we are concerned that such expansion, without the accompanying necessary funding to provide these new services, will strain the already limited resources of the U.S. Marshals Service and, in turn, hinder its primary statutory mission to protect the federal judiciary. We would also note that the provision proposes the phrase "any other court" to refer to

the U.S. Tax Court. This phrase is unnecessarily broad and could be misconstrued to expand the duties of the U.S. Marshals Service beyond the protection of the U.S. Tax Court. If the

Committee believes it is necessary to provide expanded protection to the U.S. Tax Court, we respectfully request that the provision be more narrowly tailored, replacing the phrase "any other court" with "U.S. Tax Court." In addition, we suggest that authorizing language be included to provide the U.S. Marshals Service with the financial resources necessary to perform these new duties without compromising its already limited resources.

SECTION 105: ADDITIONAL AMOUNTS FOR UNITED STATES MARSHALS SERVICE TO PROTECT THE JUDICIARY

Section 105 would authorize the appropriation of $20 million for fiscal years 2007 through 2011 to allow the U.S. Marshals Service to hire additional deputy marshals and additional personnel for its Office of Protective Intelligence. Although the judiciary fully supports this provision and is grateful to the bill's sponsors for including it, the Committee might wish to consider authorizing additional funds to ensure that the U.S. Marshals Service has adequate and appropriate resources to fulfill its statutory mandate to protect the federal judiciary. We certainly appreciate any support that the Committee might give to ensure that the authorization is fully funded.

SECTION 201: PROTECTION AGAINST MALICIOUS RECORDING OF FICTITIOUS LIENS AGAINST JUDGES AND FEDERAL LAW ENFORCEMENT OFFICIALS

This provision would provide significantly greater penalties for the recording of malicious liens against federal judges. In recent years, members of the federal judiciary have been victimized by persons seeking to harass or intimidate them by the filing of false liens against the judge's real or personal property. These liens are usually filed to harass a judge who has presided over a criminal or civil case involving the filer, his family, or his acquaintances.

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These liens are also filed to harass a judge against whom a civil action has been initiated by the individual who has filed the lien. Often, such liens are placed on the property of judges based on the allegation that the property is at issue in the lawsuit. While the filing of such liens has occurred in all regions of the country, they are most prevalent in the state of Washington and other western states.

SECTION 502: BANKRUPTCY, MAGISTRATE, AND TERRITORIAL JUDGES LIFE INSURANCE

The Judicial Conference supports Section 502 that would address certain inequities in the way that the Federal Employees' Group Life Insurance (FEGLI) is made available to bankruptcy, magistrate, and territorial judges.

In 1998, the Office of Personnel Management (OPM) launched an effort to increase premium rates significantly for Federal Employees' Group Life Insurance (FEGLI) for employees over age 65, including federal judges. Previously, Article III judges were authorized to carry full FEGLI coverage into retirement by continuing to pay the premium in effect when they turned age 60, in recognition of their life tenure. On April 24, 1999, OPM put into place the higher premium rates, which would have been applicable to federal judges. These changes threatened the financial stability and estate plans of judges. Congress responded by enacting a law, Pub. L.

No. 106-113, to authorize the Director of the Administrative Office, pursuant to the direction of the Judicial Conference, to pay the increases in the cost of the premiums imposed after April 24, 1999, for Article III judges. In addition to Article III judges, Congress established similar

authority in 2000 to cover increases in FEGLI premiums for judges of the U.S. Court of Federal Claims, who are appointed for 15-year terms, and, in 2006, for U.S. Tax Court judges, who also are appointed for 15-year terms. Extending these payments to bankruptcy, magistrate, and territorial judges would address an inequity in the costs of FEGLI coverage between them and Article III judges and these other fixed-term judges.

This provision is an important improvement to current law because it provides a positive inducement to keep these judges available in recall status.

SECTIONS 503 AND 504: ASSIGNMENT OF JUDGES AND SENIOR JUDGE PARTICIPATION IN THE SELECTION OF MAGISTRATE JUDGES

Section 503 of S. 378 would create a statutory right for senior district judges to participate in the appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters in their respective district courts. Section 504 would amend the Federal Magistrates Act specifically to confer on senior judges the right to vote on candidates for magistrate judge positions, along with the active district judges of the court.

The Judiciary is deeply grateful to the judges who choose to extend their judicial service beyond retirement by taking senior status. Unquestionably, these judges should be recognized for the significant and valuable work they do in the district courts, on a voluntary basis. The statutes governing court administration, however, place the responsibility for appointments of court officials and other administrative matters on the active district judges of the court and do not appear to give automatic voting rights to senior judges in these matters. Similarly, the Federal Magistrates Act, at Section 631(a) of Title 28, has been construed as giving voting rights

on the selection and appointment of magistrate judges solely to the active judges of the district court. The Judicial Conference has taken the position since 1959 that a district court, for purposes of appointing court officials, should be defined as consisting of only active judges and not senior judges. At its September 2006 session, the Judicial Conference considered the same amendment to the Federal Magistrates Act as that presented in Section 504 of S. 378, and voted to oppose the amendment, noting that the current method of appointing magistrate judges is effective. At the same time, while senior judges do not appear to have a statutory right to vote on these matters, some district courts follow a local custom of allowing senior judges to participate in these decisions. The current arrangement functions effectively and permits local variations that reflect differing conditions around the country. It appears that the proposed changes in the law to create statutory rights for senior judges to participate in court administrative decisions are unnecessary. The Conference opposes Section 504. Other than the magistrate judge provision, the Conference has not yet taken a position on Section 503.

Thank you for this opportunity to testify today on these critically important issues to the Judiciary.

Testimony of Associate Justice Anthony M. Kennedy before the United States Senate Committee on the Judiciary Judicial Security and Independence February 14, 2007

Mr. Chairman and Members of the Senate Committee on the Judiciary.

Thank you for the opportunity to testify today.

The subject of your hearing is "Judicial Security and Independence," matters of interest to all of us who are committed to preserving the Constitution and advancing the Rule of Law. With me today are Judge Brock Hornby of the United States District Court for the District of Maine, and also Chairman of the Judicial Branch Committee of the Judicial Conference of the United States; James Duff, Director of the Administrative Office of the United States Courts; and Jeffrey Minear, Administrative Assistant to the Chief Justice of the United States.

Judge Hornby has submitted a statement on the subject of personal judicial security and financial disclosure. Its conclusions appear to me to be correct, but he is more familiar with the details of your proposed legislation. I am sure he can answer any detailed questions you have.

The subject of judicial independence, and in fact the meaning of that phrase, ought to be addressed from time to time so that we remain conversant with the general principles upon which it rests and to ensure that those principles are implemented in practice.

Introduction

These principles invoke two basic phrases in our civics vocabulary, "Separation of Powers" and "Checks and Balances." We sometimes use these terms as if they were

synonymous and interchangeable. This is accurate in some contexts. In both theory and practice, however, the two principles can operate in different directions, with somewhat different thrusts. The principle of Separation of Powers instructs that each branch of our national government must have prerogatives that permit it to exercise its primary duties in a confident, forthright way, without over-reliance on the other branches. This creates lines of accountability and allows each branch to fulfill its constitutional duties in the most effective and efficient manner. So it is that Congress has the sole power to initiate all legislation, which includes, of course, the power of the purse. The President takes care that the laws are faithfully executed and is vested with the power to pardon. The judiciary has the power and duty to issue judgments that are final. The judiciary, of course, also has life tenure and protection against diminution in salary. These are the dynamics of separation.

Checks and balances, to some extent, have an opposing purpose and work in a different direction. While separation implies independence, checks and balances imply interaction. So it is that both the executive and the judicial branches must ask Congress for the resources necessary to conduct their offices and perform their constitutional duties.

Members of our Court should be guarded and restrained both in the number of our appearances before you and in the matters discussed, in order to ensure that Article III judicial officers do not reach beyond their proper, limited role. When Congress holds hearings to assist in the preparation of its appropriations bills, members of our Court appear with some frequency before the Appropriation Subcommittees of both Houses. Our experience has been that in the hearings of the Appropriation Subcommittees the testimony by members of the judiciary, including members of our Court, has been

a useful part of the interactive dynamic. The questions from Committee members tend to go beyond the limited subject of financial resources. We try not to range too far afield, but we find that our discussions have been instructive for us and, we trust, for the Members of the Committees.

Both here and abroad, students and scholars of constitutional systems inquire about the appearance before Congress by judicial officers on appropriations requests. They are fascinated by it. It is an excellent illustration of the checks-and-balances dynamic. Our request for funds to fulfill our constitutional duty is no formality. The requests and the legal dynamic are real. The process illustrates the tradition arrived at through centuries of mutual respect and cooperation. This tradition requires that the Judiciary be most cautious and circumspect in its appropriations requests. Congress, in turn, shows considerable deference when it assesses our needs. This is a felicitous constitutional tradition.

Mr. Chairman, the request to appear before your Committee gave us initial pause, for our recent custom has been to limit our appearances to those before the Appropriation Subcommittees. We should not put you in an awkward position by frequent appearances, and we think for the most part judicial administration matters should be left to the judges who are members of the Judicial Conference of the United States. Yet because of our respect for you and your Committee, and because of the importance of judicial independence in our own time and in our constitutional history, we decided, after discussion with the Chief Justice and other members of our Court, to accept your invitation. It is an honor to appear before you today.

I

The provision of judicial resources by Congress over the

years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world.

Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects.

Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement.

Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of

freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people.

The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

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As I have tried to convey, separation of powers and checks and balances are not automatic mechanisms. They depend upon a commitment to civility, open communication, and good faith on all sides. Congress has certain functions that cannot be directed or initiated by the other branches; yet those prerogatives must be exercised in good faith if Congress is to preserve the best of our constitutional traditions. You must be diligent to protect the Constitution and to follow its letter and spirit, and, on most matters, no one, save the voters, can call you to account for the manner in which you discharge these serious responsibilities. This reflects, no doubt, the deep and abiding faith our Founders placed in you and in the citizens who send you here.

Please accept my respectful submission that, to keep good faith with our basic charter, you have the unilateral constitutional obligation to act when another branch of government needs your assistance for the proper performance of its duties. It is both necessary and proper,

furthermore, that we as judges should, and indeed must, advise you if we find that a threat to the judiciary as an institution has become so serious and debilitating that urgent relief is necessary. In my view, the present Congressional compensation policy for judicial officers is one of these matters.

Judges in our federal system are committed to the idea and the reality of judicial independence. Some may think the phrase "judicial independence" a bit timeworn. Perhaps there has been some tendency to overuse the term; there may be a temptation to invoke it each time judges disagree with some commonplace legislative proposal affecting the judiciary. If true, that is unfortunate, for judicial independence is a foundation for sustaining the Rule of Law.

Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must. A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to resist improper influence is essential to the Rule of Law as we have come to understand that term.

Judicial independence presumes judicial excellence, and judicial excellence is in danger of erosion. So at this juncture in the history of the relationship between our two branches my conclusion is that we have no choice but to make clear to you the extent of the problem as we see it, with the hope your Committee will help put the problem into proper perspective for your own colleagues and for the nation at large.

It is my duty, then, to tell you, Mr. Chairman, that in more than three decades as a judge, I have not seen my colleagues in the judiciary so dispirited as at the present time. The blunt fact is that the past Congressional policy with respect to judicial salaries has been one of neglect. As a consequence, the nation is in danger of having a

judiciary that is no longer considered one of the leading judiciaries of the world. This is particularly discordant and disheartening, in light of the care and consideration Congress has generally given in respect to other matters of judicial resources and administration.

The current situation, in my submission, is a matter of grave systemic concern. Let me respectfully suggest that it is a matter Congress in the exercise of its own independent authority should address, in order to ensure that the essential role of the judiciary not be weakened or diminished. You are well aware of threats to the judiciary that history has deemed constitutional crises, such as the Court's self-inflicted wound in *Dred Scott* or the ill-conceived 1937 Court-packing proposal. These were constitutional crises in the usual sense of the term. So too, however, there can be systemic injury over time, caused by slow erosion from neglect. My concern, shared by many of my colleagues, is that we are in real danger of losing, through a gradual but steady decline, the highly qualified judiciary on which our Nation relies. Your judiciary, the Nation's judiciary, will be diminished in its stature and its capacity if there is a continued neglect of compensation needs.

The commitment and dedication of our judges have allowed us to maintain a well-functioning system despite a marked increase in workload. In 1975, when I began service on the Court of Appeals for the Ninth Circuit, there were approximately 17,000 appellate cases filed. By 2005, that number had quadrupled to nearly 70,000 cases. The increase in the number of judges has not kept up. In 1975 each three-judge panel heard approximately 500 cases per year; by 2001, the number had risen to over 1,200. Without the dedicated service of our senior judges, who are not obligated to share a full workload but do so anyway, our court dockets could be dangerously congested. It is essential to the integrity of the Article III system that

our senior judges remain committed to serving after active duty and that those now beginning their judicial tenure do so with the expectation that it will be a lifelong commitment.

Despite the increase in workload, the real compensation of federal judges has diminished substantially over the years. Between 1969 and 2006, the real pay of district judges declined by about 25 percent. In the same period, the real pay of the average American worker increased by eighteen percent. The resulting disparity is a forty-three percent disadvantage to the district judges. If judges' salaries had kept pace with the increase in the wages of the average American worker during this time period, the district judge salary would be $261,000. That salary is large compared to the average wages of citizens, but it is still far less than the salary a highly qualified individual in private practice or academia would give up to become a judge.

Since 1993, when the Ethics Reform Act's Employment Cost Index pay adjustment provision ceased operating as Congress intended, the real pay of judges has fallen even faster. Inflation caused a loss of real pay of over twelve percentage points, while the real pay of most federal employees has outpaced inflation by twenty-five percentage points.

Former Federal Reserve Chairman Paul Volcker has advocated raising the salary of federal district judges to remedy this decades-long period of neglect. His proposal would at least restore the judiciary to the position it once had. My concern is that any lesser increase would be counterproductive because it would indicate a Congressional policy to discount the role the federal court system has as an equal and coordinate branch of a constitutional system that must always be committed to excellence.

It is disquieting to hear from judges whose real

compensation has fallen behind. Judges do not expect to become wealthy when they are appointed to the federal bench; they do expect, however, that Congress will protect the integrity of their position and provide a salary commensurate with the duties the office requires. For the judiciary to maintain its high level of expertise and qualifications, Congress needs to restore judicial pay to its historic position vis-à-vis average wages and the wages of the professional and academic community.

A failure to do so would mean that we will be unable to attract district judges who come from the most respected and prestigious segments of the practicing bar. One of the distinguishing marks of the Anglo-American legal tradition is that many of our judges are drawn from the highest ranks of the private bar. This is not the case in many other countries, where young law school graduates join the judicial civil service immediately after they complete their legal educations. Our tradition has been to rely upon a judiciary with substantial experience and demonstrated excellence. Private litigants depend on our judges to process complex legal matters with the skill, insight, and efficiency that come only with years of experience at the highest levels of the profession.

There are two present dangers to our maintaining a judiciary of the highest quality and competence: First, some of the most talented attorneys can no longer be persuaded to come to the bench; second, some of our most talented and experienced judges are electing to leave it. In just the past year, two of the finest federal district judges in California have left for higher-paying jobs elsewhere, one in academia and the other in the state judiciary. The loss of these fine jurists is not an isolated phenomenon. Since January 1, 2006, ten Article III judges have resigned or retired from the federal bench. It is our understanding that seven of these judges sought other employment. In 2005, nine Article III judges resigned or

retired from the bench, which was the largest departure from the federal bench in any one year. Four of those nine judges joined JAMS, a California-based arbitration/mediation service, where they have the potential to earn the equivalent of a district judge's salary in a matter of months. My sense is that this may be just the beginning of a large-scale departure of the finest judges in the federal judiciary. It would be troubling if the best judges were available only to those who could afford private arbitration.

The income of private-sector lawyers has risen to levels that make it unlikely Congress could use earnings of a senior member of the bar as a benchmark for judicial salaries in anything approaching a one-to-one ratio. It has not been our tradition, furthermore, that highly accomplished, private attorneys go to the bench with the expectation of equivalent earnings. Still, outside earning figures are relevant, particularly if we look at earnings for entry-level attorneys, senior associates, and junior and mid-level partners. These persisting differentials create an atmosphere in which it is difficult to attract eminent attorneys to the bench and to convince experienced judges to remain. Something is wrong when a judge's law clerk, just one or two years out of law school, has a salary greater than that of the judge or justice he or she served the year before. These continuing gross disparities are of undoubted relevance. They are a material factor for the attorney who declines a judicial career or the judge who feels forced to leave it behind. The disparities pose a threat to the strength and integrity of the judicial branch.

The intangible rewards of civic service are a valid consideration in fixing salary levels, but here, too, we are at a disadvantage in recruiting and retaining our best judges. As my colleague Justice Breyer says to me, it is one thing to lose a judge to a partnership in a New York law firm but quite another to lose him or her to a non-

profit position with rich intangible rewards plus superior financial incentives. The relevant benchmark here is law school compensation. At major law schools salaries not just of the deans but also of the senior professors are substantially above the salaries of federal district judges. So if a highly qualified attorney wants to serve by teaching young people, the salary differential is itself an incentive to leave. The intangible rewards of judicial service, while of undoubted relevance, do not overcome the present earnings disparity.

For judges to use federal judicial service as a mere stepping-stone to re-entry into the private sector and law firm practice is inconsistent with our judicial tradition. It could undermine faith in the impartiality of our judiciary if the public believes judges are using the federal bench as an opportunity to embellish their resumes for more lucrative opportunities later in their professional careers.

Conclusion

It is both necessary and proper for Americans to repose trust in the dedication and commitment of the judiciary. And Congress should be confident in assuming that federal judges will continue to distinguish themselves and their offices through all their productive years of senior status. History teaches us that federal judges will strive as best they can to keep their dockets current, to stay abreast of the law, and to preserve and transmit our whole legal tradition. Judges, in turn, should have a justified confidence that Congress will maintain adequate compensation. By these same standards it would be quite wrong, in my respectful submission, to presume upon judicial qualities of dedication and commitment to secure passage of other legislation. Our dedicated judges do not expect to receive the same compensation as private-sector lawyers at the top of the profession. They do, however, have the expectation that Congress will treat them fairly,

and on their own merits, so that the judicial office and our absolute commitment to the law are not demeaned by indifference or neglect, whether calculated or benign.

By your asking us to appear here, Mr. Chairman, and by the example of courtesy and respect you and your Committee have always shown to us, we find cause for much re-assurance. Thank you for considering these remarks.

Exhibit 1

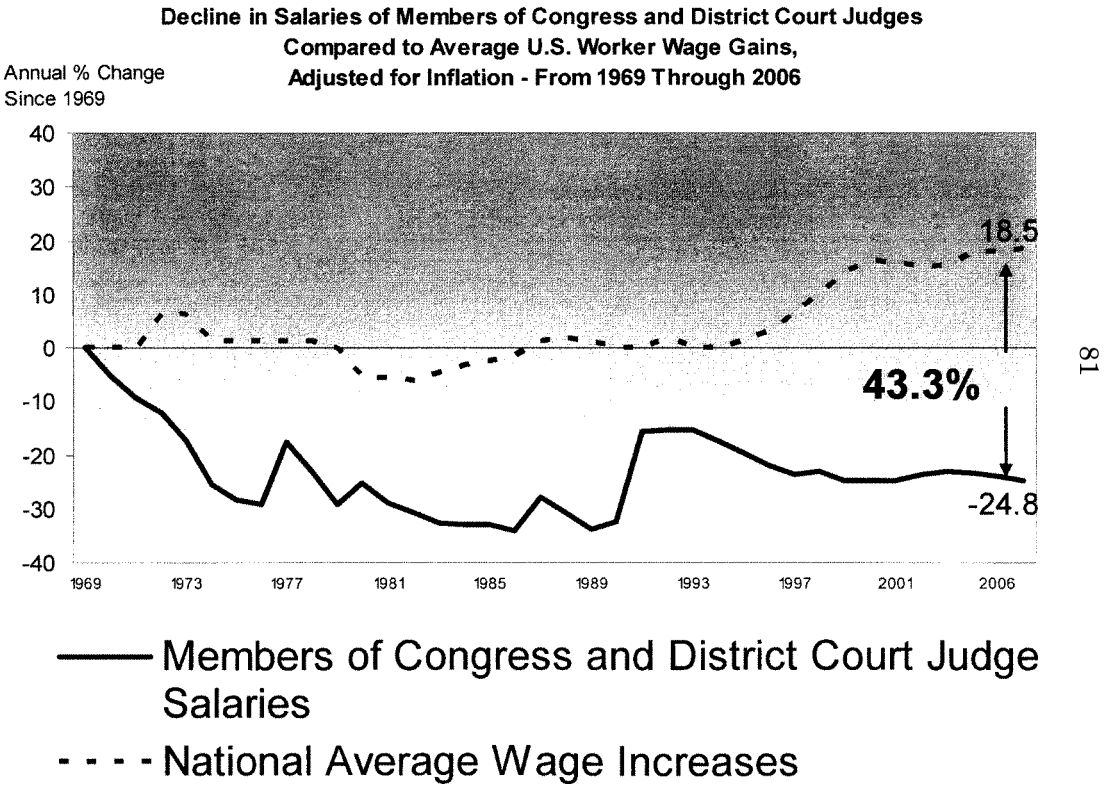
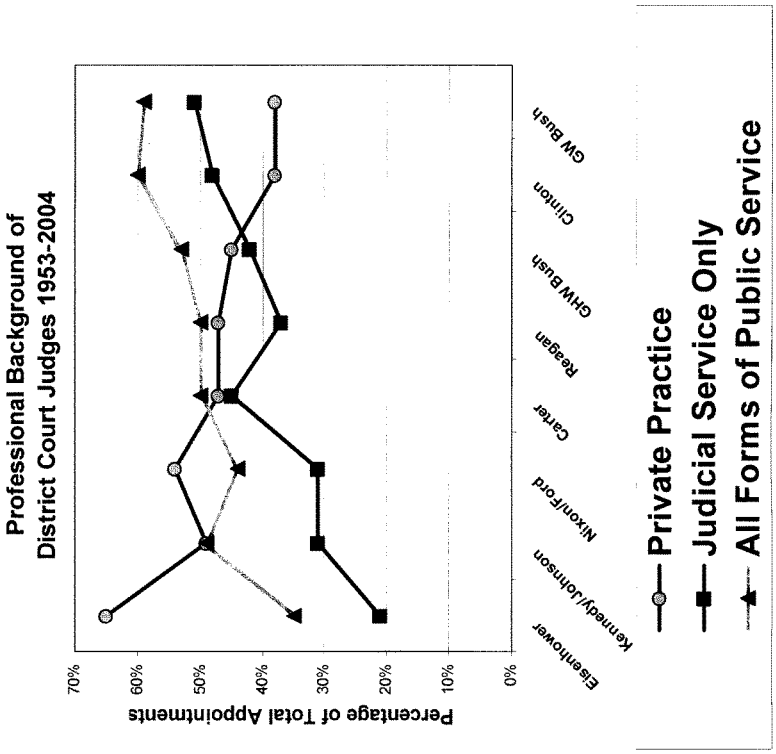

Decline in Salaries of Members of Congress and District Court Judges
Compared to Average U.S. Worker Wage Gains,
Adjusted for Inflation - From 1969 Through 2006
Annual % Change
Since 1969
40
30
20
10
0
-10
-20
-30
-40
1969
1973
1977
1981
1985
1989
1993
1997
2001
2006
18.5
43.3%
-24.8
Members of Congress and District Court Judge Salaries
National Average Wage Increases

Exhibit 2


Professional Background of
District Court Judges 1953-2004
Percentage of Total Appointments
70%
60%
50%
40%
30%
20%
10%
0%
Eisenhower
Kennedy/Johnson
Nixon/Ford
Carter
Reagan
GHW Bush
Clinton
GW Bush
Private Practice
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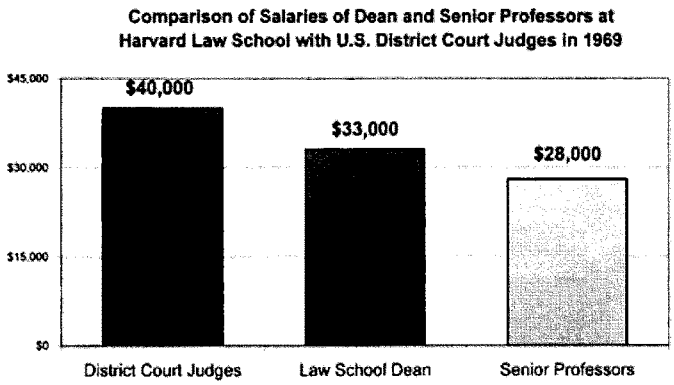
2006 Year-End Report on the Federal Judiciary

Between December 19 and January 8 there are 32 college bowl games—but only one Year-End Report on the Federal Judiciary. I once asked my predecessor, Chief Justice William H. Rehnquist, why he released this annual report on the state of the federal courts on New Year's Day. He explained that it was difficult to get people to focus on the needs of the judiciary and January 1 was historically a slow news day—a day on which the concerns of the courts just might get noticed.

This is my second annual report on the judiciary, and in it I am going to discuss only one issue—in an effort to increase even more the chances that people will take notice. That is important because the issue has been ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.

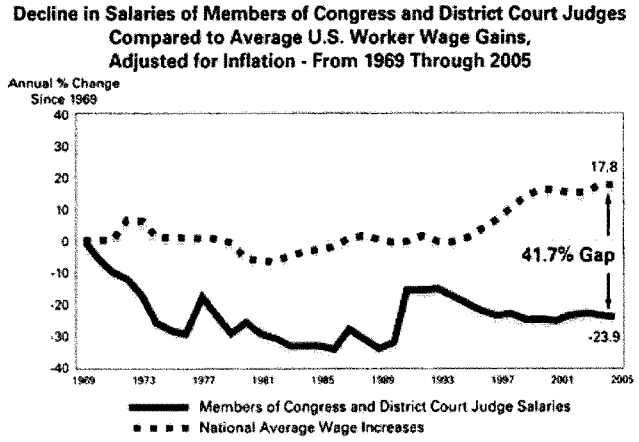
I am talking about the failure to raise judicial pay. This is usually the point at which many will put down the annual report and return to the Rose Bowl, but bear with me long enough to consider just three very revealing

charts prepared by the Administrative Office of the United States Courts. The first shows that, in 1969, federal district judges made 21% *more* than the dean at a top law school and 43% *more* than its senior law professors.



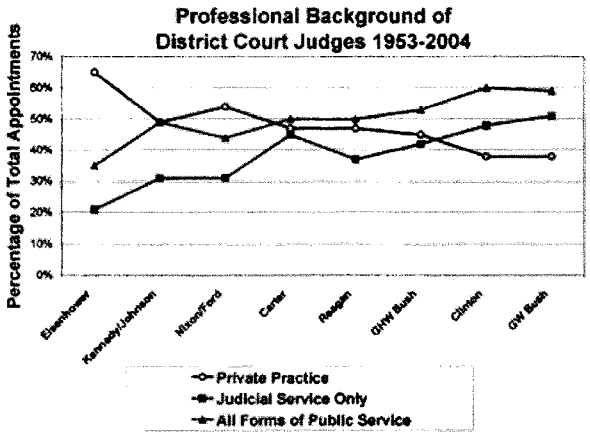
Today, federal district judges are paid substantially less than—about *half*—what the deans and senior law professors at top schools are paid. *See, e.g.*, Report of the National Commission on the Public Service, URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 22-23 (January 2003) (the Volcker Commission Report). (We do not even talk about comparisons with the practicing bar anymore. Beginning lawyers fresh out of law school in some cities will earn more in their *first year* than the most experienced federal district judges before whom those lawyers hope to practice some day.)

The next chart shows how federal judges have fared compared not to those in the legal profession, but to U.S. workers in general. Adjusted for inflation, the average U.S. worker's wages have risen 17.8% in real terms since 1969. Federal judicial pay has *declined* 23.9%—creating a 41.7% gap.



Some of you may be thinking—"So what? We are still able to find lawyers who want to be judges." But look at the next and last chart. An important change is taking place in where judges come from—particularly trial judges. In the Eisenhower Administration, roughly 65% came from the practicing bar, with 35% from the public sector. Today the numbers are about reversed—roughly 60% from the public sector, less than 40% from private practice. It changes the nature of the federal judiciary when judges

are no longer drawn primarily from among the best lawyers in the practicing bar.



This is not the first time this issue has been raised in one of these annual reports. Twenty years ago Chief Justice William H. Rehnquist submitted his first year-end report. He specifically focused on the inadequacy of judicial compensation. He pointed out that Congress had failed, over a period of nearly two decades, to provide judges with salaries commensurate with increases in the cost of living and the importance of their responsibilities. Chief Justice Rehnquist emphasized that, because a capable and qualified federal judiciary is essential to the proper functioning of our system of government, judicial compensation is critically important to the country as a whole. Congress responded to these arguments through the

Ethics Reform Act of 1989, Pub. L. No. 101-94, 103 Stat. 1716 (1989), which provided for a phased-in adjustment that helped to make up for the previous years of salary erosion. However, the mechanisms set up in that Act to prevent future salary erosion have failed, and judicial salaries have continued to fall further and further behind the cost of living.

In the face of continuing congressional inaction to fix these problems, the late Chief returned to this subject again and again in his year-end reports. Sixteen years later, Congress has still not enacted a salary increase, providing instead only occasional and modest cost-of-living adjustments. A bad situation once again has reached the level of a crisis.

As Chief Justice Rehnquist observed, federal judges willingly make a number of sacrifices as a part of judicial life. They accept difficult work, public criticism, even threats to personal safety. Federal judges, who have historically been leaders of the bar before joining the bench, do not expect to receive salaries commensurate with what they could easily earn in private practice. They can rightly expect, however, to be treated more fairly than they have been. Judges, who have the obligation to make decisions without regard to public favor and who must frequently make unpopular decisions, have no constituency in Congress to voice their concerns. They must rely on fact, equity, and reason to speak on their behalf. Those considerations make

clear that the time is ripe for our Nation's judges to receive a substantial salary increase.

Congressional inaction in the face of this situation is grievously unfair. Since Chief Justice Rehnquist first called for a pay raise *twenty years ago*, the decline in real compensation has continued. Judges who willingly make substantial sacrifices in support of public service are being asked to bear unreasonable burdens. In the face of decades of congressional inaction, 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. The numbers are sobering. In the past six years, 38 judges have left the federal bench, including 17 in the last two years. If 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.

Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded. And as Alexander Hamilton explained, "[t]he independence of the judges once destroyed, the constitution is gone, it is a dead letter; it is a vapor which the breath of faction in a moment may

dissipate." *Commercial Advertiser* (Feb. 26, 1802) (reprinted in *The Papers of Alexander Hamilton,* Volume XXV 525 (Columbia University Press 1977).

The American people and their government have a profound stake in the quality of the judiciary. The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge. Our judiciary will not properly serve its constitutional role if it is restricted to (1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase. Do not get me wrong—there are very good judges in both of those categories. But a judiciary drawn more and more from only those categories would not be the sort of judiciary on which we have historically depended to protect the rule of law in this country.

We are at the point where reason commands action. The National Commission on the Public Service described judicial pay as "the most egregious example of the failure of federal compensation policies" and unambiguously recommended, *four years ago*, that Congress enact "an immediate and substantial increase in judicial salaries." Volcker Commission Report 22. The budgetary cost of that action is miniscule in

proportion to its value in preserving the strong and independent judiciary that is vital to our constitutional structure. No doubt a judicial salary increase would be unpopular in some quarters, but Congress—like the courts—must sometimes make decisions that are unpopular in the short term to promote a greater long-term good. Congress has a constitutional responsibility to do so.

I raised the issue of judicial compensation in my first year-end report. Much of what I say in this report is not new. Nevertheless, I have no choice but to highlight this issue because without fair judicial compensation we cannot preserve the quality and independence of our judiciary, which is the model for the world.

As we enter the new year, the federal judiciary remains strong, but it needs the support of the coordinate branches if it is to maintain the strength and independence it must have to fulfill its constitutional role. That is the challenge for the coming year.

I thank the judges and court staff throughout the country for their continued hard work and dedication. I am very grateful for the personal sacrifices they and their families make every day. As Robert Frost reminded us "from the heart," we work as one, whether "together or apart." I extend to all best wishes for a Happy New Year.

Appendix

Workload of the Courts

The Supreme Court of the United States

The total number of cases filed in the Supreme Court increased from 7,496 filings in the 2004 Term to 8,521 filings in the 2005 Term—an increase of 13.7%. The number of cases filed in the Court's *in forma pauperis* docket increased from 5,755 filings in the 2004 Term to 6,846 filings in the 2005 Term—a 19% increase. The number of cases filed in the Court's paid docket decreased from 1,741 filings in the 2004 Term to 1,671 filings in the 2005 Term—a 4% decline. During the 2005 Term, 87 cases were argued and 82 were disposed of in 69 signed opinions, compared to 87 cases argued and 85 disposed of in 74 signed opinions in the 2004 Term. No cases from the 2005 Term were scheduled for reargument in the 2006 Term.

The Federal Courts of Appeals

The number of appeals filed in the regional courts of appeals in fiscal year 2006 declined by 3% from the record level set in fiscal year 2005. The courts of appeals received 66,618 filings. All categories of appeals, except original proceedings, declined. Before 2006, the number of appellate filings had declined only twice since 1959. The past year's decline stemmed from decreases in criminal appeals and federal prisoner petitions following the

filing deadline for cases affected by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), as well as a reduction in appeals from administrative agency decisions involving the Board of Immigration Appeals (BIA).

Nationwide, the number of criminal appeals dropped by 5% to 15,246 filings, after rising by 28% in 2005 in response to the *Booker* decision. Despite that decline, the number of criminal appeals in 2006 surpassed by more than 25% the number of filings in the years before the Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The number of administrative agency appeals fell by 4% to 13,102 because of a reduction in the number of cases that the BIA completed in 2005. Since 2002, the number of BIA appeals has soared by 168%. The number of civil appeals declined by 3% to 31,991 as the statute of limitations expired for the filing of *Booker*-related habeas corpus petitions. The number of prisoner petitions filed by state prisoners rose by 3% to 11,129 filings. The number of original proceedings climbed by 9% to 5,458 filings, as prisoners continued to file second or successive motions seeking permission to file habeas corpus petitions. The courts of appeals continue to receive petitions from the backlog of state prisoners affected by the *Blakely* decision, who must exhaust their state court remedies before seeking relief in federal court.

Despite the year's overall decline, the total number of appeals increased by 16%, or 9,063 filings, from 2002 to 2006.

The Federal District Courts

Over the past five years, the number of civil cases filed in the United States district courts has fallen by 6%, or 15,300 cases. The decline has occurred primarily in cases involving civil rights, personal injury, and Social Security claims.

Nevertheless, the number of civil cases filed in 2006 increased by 2% to a total of 259,541 cases. That growth occurred primarily because of a sharp jump in asbestos-related diversity cases in the Eastern District of Pennsylvania. Excluding those filings, civil cases declined by 4% from 2005 to 2006, as federal question cases involving prisoner petitions and civil rights dropped significantly. The national median time from filing of a civil case to its disposition was 8.3 months, which reflected a decline from the 9.5-month median period in 2005.

The increase in asbestos-related diversity cases in the Eastern District of Pennsylvania resulted in a 29% increase in the national figure for diversity of citizenship cases, totaling 18,179 cases. Cases in which the United States was a plaintiff or defendant declined by 15% to 44,294 cases, while those in which the United States was a defendant fell by 17%. The

latter number declined because federal prisoner petitions decreased by 33% (down by 5,978 cases) as filings returned to levels consistent with the number of petitions filed before the Supreme Court's decision in *Booker*.

The number of criminal cases filed in 2006 decreased by 4% to 66,860 cases and 88,216 defendants. The decline stemmed from shifts in priorities of the United States Department of Justice, which directed more of its resources toward combating terrorism. The number of criminal cases filed in 2006 is similar to the number of cases filed in 2002, when criminal case filings jumped by 7% following the terrorist attacks on September 11, 2001. Although the number of criminal case filings declined in 2006, the median time for case disposition for defendants climbed from 6.8 months in 2005 to 7.1 months in 2006. The median time period, which was 27 days longer than in 2004, reflected an increase in the time that courts needed to process post-*Booker* cases.

The number of drug-related criminal cases decreased by 4% to 17,429 filings. The number of defendants charged with drug crimes fell by 6% to 30,567 individuals. The number of immigration-related criminal cases, which rose to record levels in 2005, declined by 5% to 16,353 cases. The number of defendants charged in those cases decreased by 4% to 17,651 individuals. Most of the decline in immigration-related criminal cases is

attributable to a decline in cases charging offenses involving improper first-time entry. Sex-related criminal cases climbed by 6% to 1,885 filings, and the number of defendants charged in those cases increased by 8% to 1,975 individuals. Criminal cases involving firearms and explosives cases declined by 6% to 8,678 filings, and the number of defendants charged in those cases dropped 5% to 9,800 individuals. For the second consecutive year, the number of criminal cases declined. The number of cases had risen in nine of the previous ten years.

The Bankruptcy Courts

The number of filings in the United States bankruptcy courts fell from 1,782,643 cases in 2005 to 1,112,542 cases in 2006. The past year's number, which reflects the lowest number of bankruptcy cases filed since 1996, was 38% below the record number in 2005, when filings soared as debtors rushed to file before the October 17, 2005, implementation date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The 2005 surge in filings accelerated until the implementation date, and more than half of the total 2006 filings occurred in the first month of the fiscal year. Non-business filings dropped by 38%, and business petitions fell by 20%. Chapter 7 and chapter 13 filings declined by 38% and 36%,

respectively, and chapter 11 filings dropped by 10%. Chapter 12 filings rose by 3%, reflecting 12 more filings than the previous year.

Pretrial Services

The number of defendants activated in pretrial services, including pretrial diversion cases, dropped by nearly 3% from 99,365 cases in 2005 to 96,479 cases in 2006. As a result, the number of pretrial services reports prepared by Pretrial Services officers declined by more than 2%. The number of cases opened in 2006, including pretrial diversion cases, was nearly 6% greater than the 91,314 cases opened in 2002. During that same period, the number of persons interviewed grew by 1% from 63,528 to 64,018 individuals.

Post-Conviction Supervision

The number of persons under post-conviction supervision in 2006 increased by less than 1% to 114,002 individuals. As of September 30, 2006, the number of persons serving terms of supervised release after their release from a correctional institution totaled 85,729 individuals. That number constituted 75% of all persons under post-conviction supervision, compared to 73% in the previous year. Persons on parole declined by nearly 10% from 3,183 individuals in 2005 to 2,876 individuals in 2006. The parole cases accounted for less than 3% of post-conviction cases. Because

of a continuing decline in the imposition of sentences of probation by both district court judges and magistrate judges, the number of persons on probation decreased by 5% to 25,178 individuals. That figure represented 22% of all persons under post-conviction supervision. Proportionately, the number of individuals under post-conviction supervision for a drug-related offense remained unchanged from a year ago at 44%.

From 2002 to 2006, the number of persons under post-conviction supervision grew by 5%, an increase of 5,210 individuals. The number of persons released from correctional institutions who served terms of supervised release increased by 17% over the same time period.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

August 17, 1998

The Honorable Byron R. White
Chairman, Commission on
Structural Alternatives for the
Federal Courts of Appeals
Washington, D. C.

Dear Byron:

In response to your invitation, I am pleased to comment on the question of the geographic boundaries of the United States Court of Appeals for the Ninth Circuit. Based on my observations and perspective as a former judge of that court and as a member of this Court, I submit the reasons for dividing the Ninth Judicial Circuit outweigh the reasons for retaining it as now constituted.

Background

In 1975, the Court of Appeals for the Ninth Circuit, anticipating an increase in its thirteen authorized judgeships, began informal discussions to decide whether to recommend division of the Circuit. There was a difference of opinion; but a majority of the judges, myself among them, concluded the Circuit should maintain its geographic boundaries at least until it could operate for a time with a full complement of judges. We wanted to experiment, to determine the advantages and disadvantages of a large Court of Appeals. So the court did not recommend changes in its geographic jurisdiction. A 1978 statute, Pub.L. 95-486 (92 Stat. 1633), authorized ten new judges for the court. In response, and as permitted by the new statute, the court implemented a limited en banc panel composed of fewer than all the court's judges. Some of us wanted nine judges on the panel, others thirteen. The resulting compromise was eleven.

In part, I think, because some of us did recognize that the large circuit was an experiment, we devoted tremendous time and energy to make it a success. We hoped the opportunity to decide a large number of cases might yield principles of decision which would bring more clarity and cohesion to the law than if the Circuit were smaller. We thought the bar would benefit if nine states were to have a single resolution of any common issue. More ambitious suggestions, such as assigning judges to discrete subject areas for a period of time, were thought problematic and were not pursued.

As the Federal Courts Study Committee observed, the Courts of Appeals have been faced for more than a decade with a "crisis of volume." *Report of the Federal Courts Study Committee* 109 (April 2, 1990). Like all of its sister circuits, the Ninth Circuit confronted the problem by innovations and changes, not the least important of which was the successful use of Bankruptcy Appellate Panels. The Committee was also correct to note, however, that increases in productivity "seem to be approaching their limit." *Ibid.*

Few members of the public, indeed all too few members of the Bar, appreciate the scholarship and dedication of the individual judges on our courts of appeals. I retain the greatest admiration and respect for all of my former colleagues. Since I have left the Court of Appeals, their workload has again increased in dramatic proportions. It is remarkable that they have been able to manage the case load, though it seems to me unfair to ask them to continue to process such a high number of cases per judge. This heavy case load makes it all the more urgent to ensure that the size of the circuit is not an additional and systemic problem.

Reasons for Concern About Present Size

I have not had the opportunity to study all the submissions made to your Commission, but my present view is that the large Circuit has yielded no discernable advantages over smaller ones. From my discussions with the judges of the court and my review of some of the material submitted in support of retaining the Circuit with its present boundaries, what is striking is the relative absence of persuasive, specific justifications for retaining its vast size. A court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion. In my view this burden has not been met. The size of the Ninth Circuit has a number of disadvantages, a few of which I shall mention.

First, a laudable desire to respect the views and prerogatives of other judges on the court tends, I think, to encourage judges to avoid general principles so that other members of the court can write on the same subject. The result is a certain lack of clarity and cohesion in the case law of the Circuit.

Second, there is an unacceptable risk of intra-circuit conflicts, or, at the least, unnecessary ambiguities. A large number of dispositions tends to make it difficult for judges to keep abreast of the jurisprudence of the court. Soon after the 10 judges were added in 1978, not to mention the five additional judges in 1984, see Pub.L. 98-353 (98 Stat. 346), I found I could not read all of the published dispositions of my own court. This in turn causes inadvertent intra-circuit conflicts. Further, even when judges in good faith attempt to follow stare decisis, a certain potential for

error exists. The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the probability of an intra-circuit conflict in the former to be far more than three times as great as in the latter. The number of en banc decisions should be correspondingly higher, yet the Ninth Circuit, which is the largest circuit by far, does not use its en banc process more often than other circuits. In some years the Ninth Circuit has had fewer en banc hearings than other circuits even in terms of absolute numbers. True, en banc hearings are such a small percentage of the total number of dispositions system-wide that no clear comparative pattern of utilization emerges, even on a ten-year study. It is quite apparent, however, that the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions "of exceptional importance." Fed. R. App. Proc. 35(a). Uncertainty and lack of cohesion in the law are antithetical to the ends of our judicial system.

A decision in an en banc case, as a general rule, requires more time, more deliberation, and more writing than go into the ordinary three-judge panel opinion. The result, however, is beneficial. Products of en banc consideration, majority opinions and separate writings, reflect extra efforts invested in the process and represent appellate judging in one of its most instructive forms. En banc opinions assist other courts, including the Supreme Court, in resolving difficult legal issues. And where circuit precedent has been "overtaken by the tide" of authority from other Courts of Appeals, *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F. 2d 871, 876 (CADC 1992) (en banc), rehearing en banc allows a circuit the opportunity to assess the soundness of its earlier views and, if need be, to put its house in order before the Supreme Court must do so. If the Ninth Circuit were divided, then the necessity for more en banc hearings, and the harm from the failure to use the device often enough, would be reduced.

Third, even if the Court of Appeals does have a consistent internal law in a number of subject areas, its size prevents the multiple panel opinions that sometimes produce inter-circuit conflicts. In other words, if the Ninth Circuit were to be divided into two or more circuits, then we would be more likely to have the benefit of more than one panel opinion on a given issue and would have the advantage of the views of more judges. While intra-circuit conflicts or ambiguities and the instability they create are harmful to the system, inter-circuit conflicts, where there is reasoned and deliberate disagreement, are instructive to the system as a whole and in particular to the Supreme Court.

Fourth, although I deplore the tendency to increase the number of Article III judges and to expand the jurisdiction of the federal courts, past experience would seem to show that, even if federal jurisdiction is not increased, a certain number of additional judges will be needed in the future. The Commission's report will be

influential in considering the size of the Circuit not just at present but for perhaps two decades. The Commission, therefore, may wish to consider what recommendation it would make if the Ninth Circuit were to have 40 or more judges. The likelihood of the addition of some judges is a further reason to divide the Circuit now, so that the problems I note are not exacerbated.

Fifth, the recruitment of judges is a relevant consideration. A talented lawyer or jurist who contemplates the prospect of service on a court which should be designed to offer the benefits and rewards of a collegial relationship might well hesitate before agreeing to serve on a court where some 3000 different combinations of judges will make up the panels, and where he or she will be the junior judge on a court of 28 active judges, in addition to valued senior members.

This brings me to a sixth observation about the Ninth Circuit even in its present size. Our constitutional tradition has been one of broad community participation in the judicial selection process. When a court is seen as an integral part of a community, then persons and groups from the community as a whole, and not just the bar, can insist that the political branches consider nominees who are distinguished by their fairness, detachment, and impartiality. The sense of shared identity and responsibility dissipates, however, when a circuit is so large that the makeup of a panel is a luck-of-the-draw proposition, with a strong likelihood of drawing judges having no previous attachment to the affected community. In these circumstances there is less incentive for groups other than political ones to become involved in the judicial appointment process. If the selection and nomination process is accessible and meaningful only to those with partisan interests, there will be a tendency to give less consideration to those qualities of judicial temperament and demeanor that are essential to a fine judiciary. I am concerned, then, that in the future the large size of the Circuit will have an adverse effect on the judicial selection process. Justice must detached but should not be remote; judges must be impartial but ought not to be faceless. When an appellate court becomes as large as the Ninth Circuit, there is a greater risk that unfortunate influences will predominate in the appointment process. Special interests work best when simple lines of responsibility are blurred.

This is related to my seventh concern, which is that the present size of the Ninth Circuit is not sensitive to the vital necessity of preserving the values of federalism. As noted by the Judicial Conference's most recent study of the federal courts, those values are reflected in our long tradition of appointing judges to serve a specific region. *See* Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 43 (December 1995). For this reason, and because of the undesirability of any of the contemplated structural alternatives for the federal appellate system, *see Report of the Federal Courts Study Committee* 116-124 (April 2, 1990), our present system should be preserved and strengthened. The legal communities and other constituencies in the separate states ought to have a real

interest in the judges of their respective circuits, and the judges, conversely, ought to have historic and professional ties to the regions they serve. The experiment accepted in 1978 represents a notable departure from the design which has served us so well. What began as an experiment should not become the status quo when it has not yielded real success. In my view the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one.

Possible Ways to Divide the Circuit

It is one thing to identify a problem, another to solve it. How to split the Ninth Circuit is a difficult, sensitive question. In an attempt to offer some assistance, I make these brief observations.

The States of Alaska, Washington, Oregon, Idaho and Montana have a community of interest and a geography that justify assigning them to their own circuit. There is no reason to hold these Northwest states hostage to the difficulty of determining a proper circuit for California, Arizona, Hawaii, and Nevada. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.

The problem with the remaining states, of course, is the vast population of the State of California. California's population today is the rough equivalent of the entire population of the United States at the time of the Civil War. The problem, however, suggests its own solution. Serious consideration should be given to assigning California to two different circuits. The Districts of Northern and Eastern California could be in one circuit, with, say, Hawaii and Nevada. The Districts of Central and Southern California could form another, with Arizona, Guam, and Saipan. These are just illustrative possibilities, for I have not studied projected case loads or population figures.

The described alignment would give Senators from California a special interest in two circuits, not just one. The attendant advantages of manageable size and sensible administration, however, seem to me to overcome that objection, if indeed it be one. If California were not divided, moreover, the number of judges required for California alone would constitute a circuit so large that the deficiencies already present in the Ninth Circuit might persist.

If California were assigned to two circuits, it would, of course, be imperative to ensure prompt resolution of any conflict between these circuits with respect to issues affecting California. I have seen no proposal for an inter-circuit en banc procedure that makes sense or is fair to the bar and litigants of the State. To take just one example, a bill in the House of Representatives in the 103d Congress provided that, in the event of a conflict between the two circuits, the "California"

judges from each Circuit would constitute an inter-circuit en banc. *See* H. R. 3055, 103d Cong. §3 (1993). This is contrary to our tradition and to sound judicial principles. After being appointed some judges find it necessary or convenient either to move to California or to move away from it, depending on their individual situations. Does mere residence while serving on the court determine who is a "California" judge? In addition, an inter-circuit en banc should bind both circuits, but it would be inappropriate and destructive of collegiality to require "non-California" judges to be bound by their "California" colleagues on important questions of law. Yet this would be the necessary result, for even if the cases prompting an inter-circuit en banc arose from California, the en banc decision would bind both circuits in cases arising from all other states.

At one time, I thought the absence of a fair and workable proposal for an inter-circuit en banc mechanism was an all but insurmountable objection to allowing two circuits to operate within a single state. I have begun to think this is not an obstacle. The judicial system could function well without an inter-circuit en banc, leaving to the Supreme Court the responsibility to resolve any inconsistent decisions affecting the single state. After all, the government of the United States functions well despite the possibility of having to litigate a question in multiple circuits and the concomitant possibility of conflicting decisions in those courts. Furthermore, duplicative litigation and potential conflict between two circuits in the same state would hardly be unfamiliar to California, which like every state already faces the possibility of litigating the same question in both state and federal court. Where such litigation results in a conflict between a state's highest court and a federal court in that state on a question of federal law, our Court resolves the conflict. *See, e.g., South Dakota* v. *Yankton Sioux Tribe*, __ U. S. __, 118 S. Ct. 789 (1998) (conflict between the Supreme Court of South Dakota and the Eighth Circuit). No one has suggested that such conflicts are the result of some serious dysfunction of judicial structures. If duplicative litigation, in practice, should result in an excessive burden on the State of California, the statutes and rules governing transfer and consolidation of cases could no doubt be adapted to mitigate the problem. Thus, although not insensitive to the potential burden to California of having to defend its laws in two different circuits, I believe the advantages attendant to California in having concise, orderly, predictable case law in two circuits would outweigh the temporary problems of a few conflicting decisions, decisions which can have prompt resolution in this Court. The advantages to all of the other states of the present Ninth Circuit have been enumerated.

Conclusion

My present view is that if the Ninth Circuit were divided, the new alignment could better serve the orderly and efficient administration of justice. My further conclusion is that the State of California could be assigned to two different circuits and the Supreme Court could act with the necessary speed and determination to

resolve any conflicts that create difficulty or uncertainty in administering and enforcing the laws and policies of that State.

I extend to you and your Commission my greetings and special thanks for undertaking this study, which will be of vital importance to the federal courts and to our judges, who remain devoted to preserving the integrity of the justice system.

Sincerely,

STATEMENT OF SENATOR EDWARD M. KENNEDY
"JUDICIAL SECURITY AND INDEPENDENCE" HEARING

February 14, 2007

It's a special honor and privilege to have Justice Kennedy with us as we consider the security needs of our judicial system.

All of us who care about the rule of law and our federal system agree that Congress has a responsibility to do all it can to protect our judges and courts from the appalling violence and threat of violence we have seen in recent years. We cannot have a truly independent judiciary unless it is free from the danger of retaliation.

The men and women who serve our judiciary strive to be fair and independent, but their indispensable public service is undermined when they are subject to intimidation. Attacks on judges and their staffs in recent years have made

judiciary will have a needed role in meeting their security needs. The Marshals Service will receive additional funds to make it possible to meet its key responsibilities, such as assessing threats in a timely way. It will be able to collect and share intelligence on threats among districts and representatives of the FBI, and achieve needed staffing levels.

The legislation punishes those who intrude into the personal lives of the judiciary on their families. It punishes those who attempt to humiliate judges or their families by recording a false lien against real or personal property, or who post personal information about public officials or their families with the intent to harm them.

We cannot allow threats and acts of violence to undermine our courts. Our freedoms as a democracy are dependent on protecting our judiciary and ensuring their independence and fairness. As George Washington said,

Statement
United States Senate Committee on the Judiciary
Judicial Security and Independence
February 14, 2007

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee
Hearing on "Judicial Security and Independence"
February 14, 2007

It is with great pleasure that we welcome to the Committee today the Honorable Anthony Kennedy, Associate Justice of the United States Supreme Court, to discuss issues of judicial security and independence.

In today's society, our independent Judiciary faces many and varied types of threats. We have witnessed judges' physical security being threatened and their institutional security and independence under rhetorical attack by some affiliated with the political branches. There are also more subtle threats. As the Chief Justice recently re-emphasized, there is pervasive uncertainty about the Judiciary's financial security and ability to function as an efficient and effective arbiter of justice because of stagnant salaries year after year. It is my hope that working together we can make real progress on these important issues. We need to do our part to ensure that the dedicated women and men of our judiciary have the resources, security, and independence necessary to fulfill their crucial responsibilities. Our independent Judiciary is the envy of the world, and we must take care to protect it.

In this Congress, we have, again, taken up the matter of court security by reintroducing legislation that, I believe, should have been enacted last year. The Court Security Improvement Act of 2007 (S.378) is a bipartisan measure I introduced along with Senator Specter, the Majority Leader, Senator Durbin and other Members of this Committee. House Judiciary Chairman Conyers introduced an identical measure in the House with bipartisan support. Our bicameral, bipartisan introduction should have sent the signal that we intend finally to complete action on our work and increase legal protections for the Judiciary and their families. I have included the bill on the Committee's markup agenda tomorrow.

Our efforts gained increased urgency after the tragedy that befell Judge Joan Lefkow of Chicago. She is the federal judge whose mother and husband were murdered in their home two years ago. Her courageous testimony in our hearing on judicial security in May 2005 is something none of us will forget. The shooting last summer of a State judge in Nevada provided another terrible reminder of the vulnerable position of our Nation's state and federal judges. We cannot tolerate or excuse violence against judges, and no one should seek to minimize its corrosive damage to our system. Congress should rise to the occasion without further delay or distraction and enact the Court Security Improvement Act.

These protections are crucial to the preservation of the independence of our federal Judiciary so that it can continue to serve as a bulwark protecting individual rights and liberty. Our Nation's founders knew that without an independent Judiciary to protect individual rights from the political branches of government, those rights and privileges would not be preserved. The courts are the ultimate check and

balance in our system of government in times of heated political rhetoric.

In recent years, Justice Sandra Day O'Connor has spoken out against the attacks on the Judiciary and the need to reinforce its security and independence. She continues to lend her voice to this important topic even after stepping down from the bench.

It is most unfortunate that some in this country have chosen to use dangerous and irresponsible rhetoric when talking about judges. We have seen federal judges compared to the Ku Klux Klan, called "the focus of evil," and in one unbelievable instance referred to as a "more serious than a few bearded terrorists who fly into buildings." A prominent television evangelist even proclaimed the federal judiciary "the worst threat America has faced in 400 years – worse than Nazi Germany, Japan and the Civil War." Perhaps most regrettably, we have seen some in Congress threaten the mass impeachments of judges with whom they disagree and even suggest that violence against judges has been brought on by their own rulings.

This high-pitched rhetoric should stop, for the sake of our judges and the independence of the Judiciary. Judicial fairness and independence are essential if we are to maintain our freedoms. Our independent Judiciary is a model for the rest of the world and a great source of our national strength and resilience. During the last few years it has been the courts that have acted to protect our liberties and our Constitution. We ought to be protecting them, physically and institutionally.

We owe them our gratitude and, in my view, we owe them more. We can demonstrate our respect and appreciation for our Judiciary by making appropriate adjustments to their pay. One of the first bills that we passed in this Senate this year was a bill to authorize cost-of-living adjustments for the salaries of United States judges. The Ranking Member, Senators Feinstein and Cornyn joined me in cosponsoring this bill. This is a step I supported taking — and that we should have taken -- in the last Congress. I am glad that we were able to resolve the previous problems and move forward in a unanimous and bipartisan way this year. I hope that the House of Representatives will join us in making this cost-of-living adjustment a reality.

Of course, that legislation is but a modest step toward addressing the issues raised by Chief Justice Roberts in his recent "Year End Report on the Federal Judiciary." I have commended the Chief Justice for speaking out on behalf of the Judiciary and for seeking to strengthen the independence of the judicial branch. I commend Justice Kennedy for doing so today in the interests of preserving the judicial independence that is so critical for preserving our system of government.

I intend to do what I can to convince Congress to fairly evaluate this issue. Justice Kennedy's testimony today, like the Chief Justice's year end report, provides important considerations. I urge Congress and the President to consider a broader judicial compensation measure this year.

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