

Testimony of
The Honorable Anthony M. Kennedy

February 14, 2007

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

II

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 illconceived 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.