

# CRS Report for Congress

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## Judicial Salary-Setting Policy

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### Summary

Since January 1993, there have been five adjustments in federal judicial pay. On February 13, 2003, the President signed P.L. 108-6 (H.R. 16), which permits the January 2003 3.1% pay adjustment to go into effect under the Ethics Reform Act of 1989, as amended. Executive Order 13291, March 21, 2003, promulgates the pay rates retroactive to January 1. The Chief Justice has called for changes in pay setting for the judiciary. This report discusses the current pay situation for federal judges and provides some historical context. The report will be updated as events dictate.

## Judicial Pay - Current Governing Provisions

### The Constitution

Article III, Section 1 of the U.S. Constitution prohibits the reduction of compensation for federal judges. Although not all judges in the federal system are considered Article III judges, the salary rates for the judiciary are linked by statute. Bankruptcy judges and magistrates, for example, whose salaries equal 92% of those for judges of the U.S. district courts, are affected by changes in Article III salaries.

### Ethics Reform Act of 1989

Under the provisions of the Act, three factors drive the amount and timing of the annual adjustment.<sup>1</sup>

**The ECI.** The initial determination of the rate of adjustment is based on the percentage of change in the December-to-December private industry wages and salaries element of the Employment Cost Index (ECI) developed and promulgated by the Bureau of Labor Statistics. That rate of change is published at the end of January. Once the rate

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<sup>1</sup> P.L. 101-194, Sec.704; Nov. 30, 1989; 5 U.S.C. 5318 note and 28 U.S.C. 461.

of change is identified, it is then reduced by 0.5, and the ensuing rate is the rate of adjustment for judges, Members of Congress, and the Executive Schedule. For example, the rate of change in this element of the ECI from December 2000 to December 2001 was 3.8%. Reducing that by 0.5 resulted in a 3.3% projected rate of adjustment for 2003.

**GS Rate Limitation.** 28 U.S.C. 461(a) and other relevant provisions of law were amended by P.L. 103-356 (Title I, Section 101(4), October 13, 1994) to provide that the rate of adjustment for judicial, congressional and executive officials cannot exceed the rate of adjustment for the General Schedule (GS) under the provisions of 5 U.S.C. 5303. Therefore, if the ECI rate, as adjusted, were scheduled to exceed the General Schedule rate, the officials' rate of adjustment would be reduced to the GS rate.<sup>2</sup> The linkage of rates of adjustment applies only on the basis of the national annual GS adjustment and is not affected by locality adjustments. For January 2003, the GS basic pay was adjusted at a rate of 3.1%, thus reducing the payable federal officials' rate from the projected 3.3%. Judicial salaries were not affected by the additional 1% increase in GS locality pay under Executive Order 13291, signed March 21, 2003.

**Effective Date.** The Ethics Reform Act provides that federal officials' annual salary adjustments are to be effective on the same date as those for the General Schedule under 5 U.S.C. 5303. If, through either presidential or congressional action, there is no national GS pay adjustment, there will be no pay adjustment for federal officials. This situation occurred in January 1994 when it was determined that there would be locality pay adjustments under 5 U.S.C. 5304, but not a national adjustment under 5 U.S.C. 5303.

## **Public Law 97-92, Section 140**

Approved December 15, 1981, Section 140 of P.L. 97-92 provides that the obligation or expenditure of funds to increase the salary of Article III judges is prohibited without a specific congressional authorization.<sup>3</sup> This provision has been applied only with regard to the so-called automatic annual pay adjustments. It was not applied to the implementation of recommendations pursuant to the quadrennial Commission on Executive, Legislative, and Judicial Salaries (2 U.S.C. 351). Since 1981, the judges' salaries have been adjusted at the same rate as those for Members of Congress. Section 625 of P.L. 107-77 (November 28, 2001) makes permanent P.L. 97-92, Section 140.

## **108<sup>th</sup> Congress Legislation**

The January 2003 3.1% adjustment in judicial salaries had not been authorized when the 107<sup>th</sup> Congress adjourned. On February 13, 2003, the President signed P.L. 108-6 (H.R. 16), which permits the January 2003 3.1% pay adjustment to go into effect under the Ethics Reform Act of 1989, as amended. Executive Order 13291, March 21, 2003, promulgates the pay rates retroactive to January 1.

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<sup>2</sup> In the interest of space and simplicity, the phrase "federal officials" or the word "officials" refers to judges, Members of Congress, and positions on the Executive Schedule collectively.

<sup>3</sup> A continuing resolution enacted to provide funding for FY1982, P.L. 97-92, Sec. 140; Dec. 15, 1981; 95 Stat. 1182, at 1200. The provisions were extended to Sept. 30, 1982 under P.L. 97-161; Mar. 31, 1982; 96 Stat. 22.

## Effects of Recent Litigation

On July 15, 1999, U.S. District Judge John Garrett Penn ordered that all previously-denied pay adjustments, since 1993, be reinstated for Article III judges. The court determined that the provisions of P.L. 97-92, Section 140, were not permanent law and had, in fact, expired September 30, 1982. The Court also held that the Ethics Reform Act, in establishing the mechanism for the pay adjustment, had, in fact, vested ensuing pay adjustments for the judges. Therefore, if the General Schedule received a pay adjustment under the provisions of 5 U.S.C. 5303, the judges were entitled to a pay adjustment as provided under 28 U.S.C. 461. Hence, such a pay adjustment denied to the judges effectively reduced their salaries and would be unconstitutional. Judge Penn ordered that the 1995, 1996, 1997, and all subsequent (i.e., 1999) pay adjustments be paid to the judges and that there be a recalculation of all attendant benefits. The United States Court of Appeals for the Federal Circuit ruled, on appeal, to reverse the lower court decision.<sup>4</sup> A petition for certiorari was denied by the U.S. Supreme Court March 4, 2002.<sup>5</sup>

There are two impressions left by the lower court opinion which might be clarified. The opinion indicates that the limitations on judicial pay adjustments are based on the effective dates of General Schedule pay adjustments under the Federal Pay Comparability Act of 1970, codified at 5 U.S.C. 5305-5306. Although correct at the time the Ethics Reform Act was enacted, the current reference would be the Federal Employees Pay Comparability Act of 1990 (FEPCA),<sup>6</sup> 5 U.S.C. 5303, the adjustment of the national pay schedule. The second clarification relates to limitations on the rate for a judicial pay adjustment. The opinion (in Section III, \*6, end of second paragraph) states that the “Ethics Reform Act set a cap on the amount of any cost-of-living adjustment for judges; no increase can exceed five percent.” Although that is correct, it is not the only rate cap imposed by statute. A subsequent amendment provides that the rate of adjustment for judges and other federal officials could not exceed that provided to the General Schedule under 5 U.S.C. 5303.<sup>7</sup> Hence the January 2003 3.1% limited rate.

## Chief Justice’s Position on Salary Policy

On January 1, 2002, the Chief Justice of the United States submitted his *2001 Year-End Report on the Federal Judiciary*. Making no specific recommendation, he asks Congress to raise judicial salaries. In his previous report, he requested a 9.6% increase and that Congress separate judicial pay from pay for non-career public servants, make the adjustments in judicial pay automatic, and revive the quadrennial pay review mechanism. He made a similar request in testimony before the National Commission on the Public

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<sup>4</sup> *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001).

<sup>5</sup> *Williams v. United States*, 152 L. Ed. 2d 153, 122 S. Ct. 1221 (S. Ct. 2002).

<sup>6</sup> P.L. 101-509, Sec. 529; Nov. 5, 1990; 104 Stat. 1389, at 1427.

<sup>7</sup> 28 U.S.C. 461, amended by P.L. 103-356 (Title I, Sec. 101(4)); Oct. 13, 1994; 108 Stat. 3411.

Service in July 2002.<sup>8</sup> The commission subsequently recommended that Congress no longer link judicial and executive salaries to the congressional.<sup>9</sup>

## Political Linkages

Members of Congress, for a variety of reasons, have determined that it would not be appropriate to give themselves and other federal officials, including judges, pay raises on an annual basis. Therefore, they have, four times since 1994, denied the pay raise through legislative vehicles, most commonly the Treasury, Postal Service, Executive Office of the President and General Government Appropriations legislation.

Some argue that no federal officials should be receiving pay increases. The FY2000 Treasury and General Government appropriation, P.L. 106-58, increased the President's salary, effective January 2001. Concern was expressed that the increase would open the opportunity to increase the salaries of other officials. Members of Congress are criticized whenever they allow a pay increase for themselves. Although rarely stated directly, it is commonly understood that, if the linkage with the executive and judicial salaries were broken, it would be even more difficult for Members to provide themselves with a stand-alone pay increase.<sup>10</sup>

## Salary Parity

Currently, salaries of district court judges, Members of Congress, and Level II of the Executive Schedule are in parity. Prior to litigation,<sup>11</sup> Members' and court of appeals judges' salaries had been in parity. Retroactive payments to the judges moved their salaries ahead and, subsequently, the current rate linkages were established.

**Table 1. Salary Parity, Members of Congress and Judges  
Selected Years, 1974 to 2003**

	1974	1977	1981 <sup>a</sup>	1987	2003
Members of Congress	\$42,500	\$57,500	\$60,663	\$89,500	\$154,700
Judges, U.S. Courts	\$42,500	\$57,500	\$65,000	\$95,000	\$164,000
Judges, U.S. District	\$40,000	\$54,500	\$61,500	\$89,500	\$154,700

a. Salary rates do not reflect retroactive payments to judges pursuant to litigation.

<sup>8</sup> All three statements can be found at [<http://www.supremecourtus.gov>] "public information."

<sup>9</sup> National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century*, Report of the Commission (Washington: Brookings Institution, 2003).

<sup>10</sup> See CRS Report RS20388, *Salary Linkage: Members of Congress and Other Federal Officials*, by Sharon S. Gressle. Linkage and parity are discussed.

<sup>11</sup> *United States v. Will*, 449 U.S. 200 (1980).

The language of Section 701(i) of the Ethics Reform Act clearly indicates that it was the intention of Congress to maintain parity at various levels for officials in the three branches of government. One of the purposes in denying all federal officials salary increases, and allowing them across the board when they have granted increases, was to maintain this parity. The district court opinion does not appear to address that statutory intent.

**Table 2** provides a projection of what the judicial salaries would have been in 2003 if the 1995, 1996, 1997, and 1999 adjustments (with General Schedule limitations) were applied. Those rates are compounded, and include the 1998, 2000, 2001, 2002, and 2003 adjustments, which did go into effect. Costs of the retroactive salary and benefit payments have not been calculated. All of the Article III judges would be paid at rates above the salaries for Members of Congress and at a rate equal to, or above, all but the highest executive branch officials. The lowest Article III salary, U.S. district judges, would be just under the current rate for members of the President's Cabinet (\$171,900, January 2003). The Vice President and the Speaker of the House of Representatives, who are now paid in parity with the Chief Justice, would be receiving salaries less than those of the Associate Justices of the Supreme Court.

**Table 2. Projected Judicial Salaries, Including Denied Increases Since 1994 - 2003**

Position <sup>a</sup>	Salary Jan. 1994	2003 Salary	2003 Projected Salary
Chief Justice of the United States	\$171,500	\$198,600	\$217,900
Associate Justices of the Supreme Court	\$164,100	\$190,100	\$208,400
Judges, U.S. Courts of Appeal (Judges, Court of Military Appeals)	\$141,700	\$164,000	\$180,000
Judges, U.S. District Courts (Judges, U.S. Court of Federal Claims, Court of International Trade, U.S. Tax Court )	\$133,600	\$154,700	\$169,800
Bankruptcy Judges	\$122,900	\$142,324	\$156,200

a. The judicial positions shown in parentheses are those linked to Article III judges through statutory provision. Bankruptcy judges are paid at a rate of 92% of district court judges' salaries.

## Rates of Adjustment

Salaries of federal officials, including federal judges, can be set directly through statute or through a statutory mechanism intended to adjust the salaries against a specified index. The Ethics Reform Act of 1989 both set the salaries which were to go into effect in January 1991 and established the mechanism under which the Employment Cost Index would be the measure for annual adjustments, limited by the rates and effective dates of the General Schedule under 5 U.S.C. 5303. **Table 3** shows the rates of adjustment, for both federal officials and the General Schedule, since 1992. (The 1990 and 1991 rates of adjustment were established by statute.)

**Table 3. Rates of Salary Adjustment, 1992-2003 — Federal Officials<sup>a</sup> and General Schedule**

Effective Date: Jan. 1	Federal Officials' Rates of Adjustment			General Schedule (GS) Rates of Adjustment: National (5 U.S.C. 5303) and Locality (5 U.S.C. 5304)			
	Projected Based on ECI	Projected - Limited by GS <sup>b</sup>	Actual	Projected Based on ECI	Actual National	Average Locality	Net Actual % Average <sup>c</sup>
1992	3.5%	—	3.5%	4.2%	4.2%	n.a.	4.2%
1993	3.2%	—	3.2%	3.7%	3.7%	n.a.	3.7%
1994	2.1%	0.0%	0.0%	2.2%	0.0%	3.95%	3.95%
1995	2.6%	2.0%	0.0%	2.6%	2.0%	0.6%	2.6%
1996	2.3%	2.0%	0.0%	2.4%	2.0%	0.4%	2.4%
1997	2.3%	2.3%	0.0%	2.3%	2.3%	0.7%	3.0%
1998	2.9%	2.3%	2.3%	2.8%	2.3%	0.5%	2.8%
1999	3.4%	3.1%	0.0%	3.1%	3.1%	0.5%	3.6%
2000	3.4%	—	3.4%	3.8%	3.8%	1.0%	4.8%
2001	3.0%	2.7%	2.7%	2.7%	2.7%	1.0%	3.7%
2002	3.4%	—	3.4%	3.6%	3.6%	1.0%	4.6%
2003	3.3%	3.1%	3.1%	3.1%	3.1%	1.0%	4.1%

- a. The term “federal officials” refers to federal judges, Members of Congress, and positions on the Executive Schedule. In most instances, other salaries linked by statute to the Executive Schedule or judges have been similarly adjusted. On February 13, 2003, the President signed P.L. 108-6 (H.R. 16), which permits the January 2003 3.1% pay adjustment to go into effect under the Ethics Reform Act of 1989, as amended. Executive Order 13291, March 21, 2003, promulgates the pay rates retroactive to January 1.
- b. The projected rates are limited by the Employment Cost Index (ECI) or by the General Schedule (GS) national adjustment, whichever is lower.
- c. The net increases in the locality pay areas reflect calculation based on a formula which takes into account the current base and locality pay as well as the base rate of adjustment and the locality-based payment projected. For 2003, the net increases in the 32 localities ranged from 4.03% to 4.87%. The averages include all General Schedule salaries, such as special rates, overseas staff, law enforcement schedules, and others in addition to those affected by locality rates.