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September 7, 2007

Hon. Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Hon. John Conyers, Jr.
Chairman
U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Re: Senate Bill 1638

Dear Chairman Leahy and Chairman Conyers:

The California Academy of Appellate Lawyers is a statewide organization of experienced appellate practitioners. The Academy appears frequently as amicus curiae in federal and state courts and is vitally concerned with the operation of the courts, including the quality of working conditions for the judicial officers who serve at all levels of the judiciary. The Academy urges Congress to enact Senate Bill 1638, in order to address the devastating and escalating problem of inadequate judicial compensation. The increased compensation provided by Senate Bill 1638 is an investment vital to the future of our judiciary.

Currently, federal appellate judges earn $175,100 per year, and district judges earn $165,200. By many standards, that is a substantial salary. But the disparity between the compensation of federal judges, many of whom are among our best and most experienced legal professionals, and that of their peers in private law firms has become so great as to be a major disincentive to many highly competent attorneys who might otherwise consider judicial service.

Judges do not expect to be paid on the same scale as partners in major law firms, and judicial officers have traditionally accepted reduced compensation as part of the sacrifice that is expected in public service. But the erosion of federal judicial compensation has

become dramatic and alarming. As Chief Justice Roberts pointed out in his most recent report on the state of the federal judiciary, "[a]djusted 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% . . . ." John Roberts, U.S. Supreme Ct., 2006 Year-End Report on the Federal Judiciary 3 (2007) (first emphasis added).[1/]

For 24 percent *less* than what they earned over 35 years ago, we ask our judges to play a crucial role in our lives and in the effective functioning of our democracy. They must resolve everything from the right to life to the right to die, and they must resolve these issues in the context of a crushing caseload. For example, with respect to intermediate courts of appeals, the front line of the federal appellate bench, we currently ask 179 active federal appellate judges, *see* 28 U.S.C. § 44, to address over 66,000 filings a year, *see* Roberts, 2006 Report, *supra*, at 9. At the same time, those judges receive an ever-declining salary that is now equal to or below the compensation paid *first-year lawyers* at this country's major law firms. *E.g.*, Zusha Elinson, *O'Melveny, MoFo Hike Salaries, Too*, The Recorder, May 5, 2007 (California firms match New York firms in raising first-year associate salaries to $160,000); *see also* David Lat, Editorial, *The Supreme Court's Bonus Babies*, N.Y. Times, June 18, 2007, at A19 ("Most of [the United States Supreme Court law] clerks will join elite private law firms. [F]irms entice them with signing bonuses that are expected to reach $250,000 this year – paid on top of starting salaries approaching $200,000. Thus some former clerks, in their first year practicing law, will earn twice as much as their former judicial bosses (the chief justice earns $212,000 a year; his colleagues earn $203,000 each).").

1/ Even disregarding the dramatic increase in the compensation of counsel in the private sector and focusing, instead, upon compensation in our academic institutions, the members of the federal judiciary fare badly. "[I]n 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 . . . about *half* . . . what the deans and senior law professors at top schools are paid." Roberts, 2006 Report, *supra*, at 2.

The problem of inadequate judicial pay is not new. The American Bar Association and Federal Bar Association issued reports in 2001 and again in 2003 calling for substantial increases in federal judicial compensation because "the salaries of Federal judges had reached such levels of inadequacy that they threatened to impair the quality and independence of the Third Branch." Am. Bar Ass'n & Fed. Bar Ass'n, Federal Judicial Pay 1 (2003). "The 2003 National Commission on the Public Service . . . called judicial salaries the 'most egregious example' of failed federal compensation policies. . . . " Russel R. Wheeler & Michael S. Greve, Am. Ent. Inst. & The Brookings Instr., *How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries*, Issues In Governance Studies, Apr. 2007, at 1. And this year, Chief Justice Roberts declared that the failure to increase judicial compensation "has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." Roberts, 2006 Report, *supra*, at 1.

One of the biggest contributing factors to the problem of the continuing decline of judicial compensation is "linkage" between congressional and judicial salaries. Am. Bar Ass'n & Fed. Bar Ass'n, Federal Judicial Pay Erosion 4 (2001).[2/] The effect of "linkage" is that judicial salaries may rise only to the extent members of Congress feel comfortable raising their own salaries. However, judicial pay should not be

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2/ "The only explicit statutory mandate to link high-level salaries appears in the 1989 Ethics Reform Act [2 U.S.C. 362(3)(A)], which . . . provided for the annual salary adjustment mechanism now in use, and it told the [Citizens' Commission on Public Service and Compensation] that its pay recommendations 'for a Senator, a Member of the House of Representatives, . . . a judge of a district court . . . , a judge of the . . . Court of International Trade, and each [EL-II] office or position . . . shall be equal"– as they were in 1989. The Act also mandated equal salary recommendations for the Chief Justice, Vice President, [and] Speaker. . . . [T]he linkages in place . . . have been perpetuated by the adjustments provided in most years since [1988] (at least until 2007)." Wheeler & Greve, *supra*, at 3; *see also id.* ("There is no . . . linkage for circuit judges, although Congress in recent years has set their salaries at about 106 percent of district judge salaries.").

at the mercy of congressional sensitivity to public opinion. Linkage perpetuates an egregious disparity between federal judicial compensation and the compensation paid to legal professionals in the private sectors and in sectors of the government not subject to the linkage requirement. "In fact, executive agencies are offering salaries above $165,200 [the salary of a district judge] to significant numbers of individuals who have less responsibility and impact than . . . district judges." Wheeler & Greve, *supra*, at 7. It is not surprising that both the American Enterprise Institute and the Brookings Institution concluded that continuing the practice of linkage will "exacerbat[e] the difficulties of recruiting and retaining a highly-skilled workforce for vital government positions." *Id.* at 10.

Inadequate judicial compensation has proven to be one of the most intractable problems facing the third branch of government.[3/] Senators Leahy, Hatch, Reid, McConnell, Feinstein and Graham took a solid first step toward solving the problem of inadequate judicial compensation on June 15, 2007, when they introduced S.B. 1638, which would immediately increase all federal judicial salaries by 50%. Congress should enact this or similar legislation without delay.

This increase is an essential investment in the future of the judicial branch of government. The return on that investment is not only fair compensation of the highly skilled and experienced people who devote themselves to the generally thankless job of resolving society's disputes, but also an incentive for able attorneys to opt for public service on the bench. This, in turn, would increase the diversity of the bench. *See* Roberts, 2006 Report, *supra*, at 3-4 ("In the Eisenhower Administration,

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3/ But it is by no means the only problem. As Chief Justice Roberts noted a year ago, the federal judiciary is also burdened with exorbitant rent charged by the federal government. The federal judiciary pays its landlord, the General Services Administration ("GSA"), over $926 million in rent per year, even though the actual cost to the GSA to provide space is about half that amount. John Roberts, U.S. Supreme Ct., 2005 Year-End Report on the Federal Judiciary 3 (2006); *see Either Pay Staff or Pay Rent*, The Third Branch (Newsletter of the Federal Courts) July 2005 (the federal judiciary pays 22% of its budget for rent, while executive branch agencies overall, and Congress pay less than 1%; rental payments forced 8% reduction in personnel in the 2004 fiscal year).

roughly 65% [of federal trial judges] 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."). Moreover, the proposed compensation adjustments would increase the tenure of judges on the bench, ensuring that the public and the judicial system will continue to benefit from the wisdom and efficiency that experienced judges bring to their work. Finally, compensation reform would stem the "brain drain" of judicial talent to the siren call of for-profit "private judging." *See id.* at 6 ("In the past six years, 38 judges have left the federal bench, including 17 in the last two years."). With compensation declining and opportunities in the area of private dispute resolution exploding, more and more experienced judges are opting for that remunerative alternative and leaving the bench.

At the time S.B. 1638 was introduced, Senator Leahy astutely summarized the problem:

Our democracy and the rights we enjoy depend on a strong and independent) [sic] judiciary. During the last few years it has been the courts that have acted to protect our liberties and our Constitution. The independence of the judiciary is compromised, however, if judges leave the bench for financial reasons. The quality of the judiciary is threatened if judges' salaries are inadequate to attract and retain our best legal minds. Given the essential role that the judiciary plays in our system of government, we should pass this raise to judicial salaries.

110 Cong. Rec. S7793 (daily ed. June 15, 2007).

The least we as a society can do is compensate judges at a level befitting their professional skill and experience and recognizing the ever more complex demands placed upon them in resolving society's issues.

Very truly yours,
California Academy of Appellate Lawyers

By Charles A. Bird
President

cc: (Via First Class Mail Only)
Senate Judiciary Committee
House Judiciary Committee