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From the Los Angeles Times

A raise that's hard to justify

Federal judges exhibit no link between performance and pay.

By Scott Baker

January 4, 2008

On Jan. 1, Chief Justice John G. Roberts Jr. again urged Congress to raise judicial salaries. Low judicial pay is causing a constitutional crisis, he says. It means we cannot attract good judges or keep the good judges we have. This sentiment is echoed by other justices, leading members of the bar, law school deans and the American Bar Assn. And some members of Congress are listening. The House Judiciary Committee overwhelmingly approved a bill to increase federal judges' salaries, and the full House will take up the bill soon.

Before Congress gives some of the highest-paid members of the federal government a raise, however, it should study and weigh the evidence. And currently, there is virtually no evidence that higher pay means better judges or that lower pay means lousy judges. In fact, the available evidence shows no correlation between judicial performance and judicial pay.

There are three main arguments in support of raising judicial salaries. The first -- that our federal judges will leave the bench for the more lucrative private sector if we do not raise their pay -- is easily addressed. In the last seven years, only 15 out of 810 active judges have left the bench before qualifying for retirement, according to the Federal Judicial Center. If anything, the problem is not too much turnover, but too little.

The second argument is that our best-paid, and presumably most-talented, lawyers would make good judges, and these attorneys won't join the bench because it costs them too much. Partners at some law firms earn more than \$1 million a year. A federal judgeship pays less than \$200,000. Only by raising judicial salaries, the argument goes, will we have a prayer of enticing any of these lawyers to become judges.

But who says the best-paid lawyers would make the best judges? And even if they did, who says that society as a whole would be better off if they switched roles? That is like saying the highest-paid baseball players would make the best umpires, and baseball would be more enjoyable if Alex Rodriguez traded his bat for an umpire's mask.

Different jobs require different skills and temperaments. A talented trial lawyer should zealously represent his clients, know how to value a case and when and under what circumstances to settle it, and be able to push or pull the law's direction, as necessary, through creative arguments and advocacy.

A good judge, on the other hand, serves the law. She is independent and not partisan. She should speedily and consistently explain her reasoning in the form of written opinions. And she should have the respect of, and be cited by, her peers. Applying these criteria for judicial performance, the research shows that paying judges more will not necessarily lead to better judges.

The Boston University Law Review will soon publish a study in which I estimated how much money a number of federal circuit judges gave up to become a judge. Some judges gave up a fortune; others gave up little. Regardless, the evidence shows that the financial sacrifice a nominee made to become a judge had no effect on his or her judicial performance. It did not affect how they voted in controversial cases, how fast they rendered decisions or whether those decisions were cited by other judges.

A study by law professors Stephen Choi, Eric Posner and Mitu Gulati that focused on state Supreme Court justices reached a similar conclusion. Salary levels had no effect on their independence, the number of opinions they wrote or the strength of those opinions.

Finally, the specter is raised that, without higher salaries, all our federal judges will come to the bench from lower-paying government or public-interest legal jobs, and we will lose the perspective of lawyers from the private sector. Roberts correctly notes that the composition of the federal judiciary has moved in this direction. However, the two studies discussed here found little evidence that judges who come directly from the private sector acted differently from those judges coming from government ranks. Other studies have found some differences, but the evidence is mixed.

In a time of strained budgets, both Democrats and Republicans need to make hard choices on spending priorities. Federal judges earn six figures. Why choose to pay judges more -- as opposed to equally deserving, lesser-paid federal employees such as park rangers, members of the military or FBI agents -- if it ultimately makes no difference to how well the judges perform their jobs?

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