

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BARBARA J. HOUSER,
DAVID S. KENNEDY,
ELIZABETH L. PERRIS,
EUGENE R. WEDOFF,
CHARLES G. CASE II,
DAVID W. HOUSTON III,
A. THOMAS SMALL,
PHILIP H. BRANDT,
JAMES M. MARLAR,
ROBERT D. MARTIN, and
ROGER DREHER, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 13-607C
Judge Bruggink

FIRST AMENDED CLASS ACTION COMPLAINT

This action is brought by current and former federal bankruptcy judges and the surviving spouse and estate executor of a deceased bankruptcy judge to enforce their right to receive the full amount of compensation owed to them under federal law. Bankruptcy judges are entitled by statute to an annual salary equal to 92% of a district court judge's salary. 28 U.S.C. § 153(a). District court judges' salaries, in turn, are protected by the Compensation Clause of Article III of the U.S. Constitution, which provides that judicial compensation "shall not be diminished during their Continuance in office."

The en banc U.S. Court of Appeals for the Federal Circuit has held that Congress violated the Compensation Clause by denying cost-of-living adjustments to the salaries of federal judges, as provided for by the Ethics Reform Act of 1989, in fiscal years 1995,

1996, 1997, and 1999. *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013). The Court has further held that Congress lacked the statutory authority to deny cost-of-living adjustments to the salaries of federal judges in fiscal years 2007 and 2010. As a consequence, bankruptcy judges are entitled to receive 92% of the properly calculated salaries for district court judges—taking into account the unlawfully denied adjustments—as mandated by 28 U.S.C. § 153(a).

THE PARTIES

1. Plaintiff Barbara J. Houser is a judge of the U.S. Bankruptcy Court for the Northern District of Texas. She entered service on January 20, 2000, and was reappointed to a 14-year term on May 16, 2013, effective January 20, 2014. She has served as Chief Judge of the court since 2005, and has been a member of the Judicial Conference Committee on the Administration of the Bankruptcy System since 2011. Judge Houser is a former President of the National Conference of Bankruptcy Judges.

2. Plaintiff David S. Kennedy is a judge of the U.S. Bankruptcy Court for the Western District of Tennessee. He entered service on November 25, 1980, and was reappointed to 14-year terms on October 1, 1986 and October 1, 2000. He has served as Chief Judge of the court since 1988. Judge Kennedy is a former Chair of the Bankruptcy Judges Advisory Group to the Administrative Office of the U.S. Courts, was the bankruptcy judge representative to the Judicial Conference of the United States from 2008 to 2009, and is currently a member of the National Conference of Bankruptcy Judges.

3. Plaintiff Elizabeth L. Perris is a judge of the U.S. Bankruptcy Court for the District of Oregon. She entered service on April 1, 1984, and was reappointed to 14-year terms on April 1, 1988 and April 1, 2002. She served as Chief Judge of the court from

2005 to 2010. Judge Perris has also twice served on the U.S. Bankruptcy Appellate Panel for the Ninth Circuit—first from 1988 to 1993, and then again from 1998 to 2005. She has been a member of the Judicial Conference Advisory Committee on Bankruptcy Rules since 2007 and is currently a member of the National Conference of Bankruptcy Judges.

4. Plaintiff Eugene R. Wedoff is a judge of the U.S. Bankruptcy Court for the Northern District of Illinois. He entered service on September 16, 1987, and was reappointed to a new 14-year term on September 16, 2001. He served as Chief Judge of the court from 2002 to 2007. Judge Wedoff is Chair of the Judicial Conference Advisory Committee on Bankruptcy Rules and will serve as President of the National Conference of Bankruptcy Judges in 2013.

5. Plaintiff Charles G. Case II is a former judge of the U.S. Bankruptcy Court for the District of Arizona. He entered service on January 5, 1994, and was reappointed to a new 14-year term on January 5, 2008. He retired on January 17, 2013. Judge Case is a former Chair of the Ninth Circuit Judicial Conference and a former President of the National Conference of Bankruptcy Judges.

6. Plaintiff David W. Houston III is a former judge of the U.S. Bankruptcy Court for the Northern District of Mississippi. He entered service on July 18, 1983, and was reappointed to 14-year terms on December 28, 1984 and December 28, 1998. He retired on January 15, 2013. Judge Houston served as Chief Judge of the court from 2006 until his retirement. He served on the Board of Directors of the American Bankruptcy Institute from 1996 to 2006 and is a former President of the National Conference of Bankruptcy Judges.

7. Plaintiff A. Thomas Small is a former judge of the U.S. Bankruptcy Court for the Eastern District of North Carolina. He entered service on December 14, 1982,

and was reappointed to 14-year terms on September 26, 1986 and September 26, 2000. He retired on September 1, 2009, and was recalled on July 1, 2013. Judge Small served as Chief Judge of the court from 1992 to 1999 and from 2006 to 2007. He served as Chair of the Judicial Conference Advisory Committee on Bankruptcy Rules from 2000 to 2004, was the bankruptcy judge representative to the Judicial Conference of the United States from 2004 to 2007, and is a former President of the National Conference of Bankruptcy Judges.

8. Plaintiff Philip H. Brandt is a judge of the U.S. Bankruptcy Court for the Western District of Washington. He entered service on October 11, 1991, and was reappointed to a new 14-year term on October 11, 2005. Judge Brandt served as Chief Judge of the court from 2001 to 2005. He served on the U.S. Bankruptcy Appellate Panel for the Ninth Circuit from 1998 to 2007, including as its Chief Judge from 2005 to 2007, and was a member of the Bankruptcy Judges Advisory Group to the Administrative Office of the U.S. Courts from 2008 to 2011. Judge Brandt retired on January 5, 2010, was recalled on that date, and continues to serve the bankruptcy courts of the Ninth Circuit in recall status. He is currently a member of the National Conference of Bankruptcy Judges.

9. Plaintiff James M. Marlar is a judge of the U.S. Bankruptcy Court for the District of Arizona. He entered service on December 29, 1993, and was reappointed to a new 14-year term on December 29, 2007. Judge Marlar served as Chief Judge of the court from 2009 until his retirement on January 31, 2013. He served on the U.S. Bankruptcy Appellate Panel for the Ninth Circuit from 1999 to 2006. He has since been recalled and is currently serving the bankruptcy courts of the Ninth Circuit in recall status. He is a member of the National Conference of Bankruptcy Judges.

10. Plaintiff Robert D. Martin is a judge of the U.S. Bankruptcy Court for the Western District of Wisconsin. He entered service on June 1, 1978, and was reappointed to 14-year terms on June 1, 1988 and November 19, 2001. Judge Martin retired from office on October 6, 2009, was recalled on October 7, 2009, and continues to serve the bankruptcy courts in recall status. He is a former President and current member of the National Conference of Bankruptcy Judges.

11. Roger Dreher is the surviving spouse of Nancy C. Dreher, a former judge of the U.S. Bankruptcy Court for the District of Minnesota, and the executor of her estate. Judge Dreher entered service on January 25, 1988, and was reappointed to a 14-year term on January 25, 2002. She served as Chief Judge of the court from 2007 to 2011. Judge Dreher served on the U.S. Bankruptcy Appellate Panel for the Eighth Circuit from 1996 to 2005, as the sole bankruptcy representative on the Judicial Resources Committee from 1997 to 2003, and on the Board of the National Conference of Bankruptcy Judges. She was enrolled in the Judicial Survivors' Annuities System and the Federal Employees' Group Life Insurance (FEGLI) Program, and died on November 23, 2012. Mr. Dreher was the beneficiary of Judge Dreher's FEGLI policy.

12. Defendant United States of America employs or employed the plaintiffs (or in the case of plaintiff Dreher, his spouse) and is responsible for paying their salaries and annuities.

JURISDICTION AND VENUE

13. This Court has subject-matter jurisdiction under the Tucker Act. 28 U.S.C. § 1491(a)(1).

14. Venue in this Court is also proper under the Tucker Act.

FACTUAL BACKGROUND

Bankruptcy Judge Compensation

15. Article III's Compensation Clause provides that "Judges, both of the supreme and inferior Courts," shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. Although this clause does not apply to bankruptcy judges, they are entitled by statute to receive "a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States." 28 U.S.C. § 153(a) (as amended by Pub. L. No. 100-202, § 101(a) [tit. IV, § 408(a)], 101 Stat. 1329, 1329-27 (1987)). Because of this explicit statutory linkage, when Congress increases the salaries of district court judges, it does so for bankruptcy judges as well.

16. In addition to receiving an annual salary while in office, bankruptcy judges receive retirement benefits that are tied directly to their salaries—regardless of their particular retirement plan. Judges enrolled in the Judicial Retirement System (JRS) who have served a minimum of 14 years (the length of one term) and who are at least 65 years old are eligible to retire from the bench and receive a lifetime annuity equal to their salary at the time of retirement. 28 U.S.C. § 377(a). A judge enrolled in JRS who has served a minimum of 8 years (but less than 14) and who is at least 65 years old may retire and receive a smaller annuity that is also based on the judge's salary at the time of retirement. A JRS annuity is subject to an annual cost-of-living adjustment, although the total annuity "may not exceed the salary then payable for the position from which the judge ... retired." *Id.* § 377(e). Judges enrolled in the Federal Employees' Retirement System (FERS), 5 U.S.C. §§ 8401-8480, or the Civil Service Retirement System (CSRS), *id.* §§ 8331-8351, similarly receive an annuity upon retirement that is based on their

“average pay,” defined as “the largest annual rate resulting from averaging [the judge’s] rates of basic pay in effect over any 3 consecutive years of creditable service.” *Id.* § 8401(3) (FERS); *id.* § 8331(4) (CSRS). Judges enrolled in FERS may also receive salary-based contributions to an individual savings account prior to retirement under the Thrift Savings Plan. *See id.* §§ 8431-8440f.

17. Retired bankruptcy judges may also return to the bench and serve as recalled judges. 28 U.S.C. § 155(b). A recalled bankruptcy judge’s compensation is based on the salary of an active bankruptcy judge. *See id.* § 375 (recalled judge receives his or her usual retirement annuity, plus a supplemental payment “equal to the difference between that annuity and the current salary of the office”); Regulations of the Judicial Conference of the United States Governing the Extended Recall Service of Retired Bankruptcy Judges (Sept. 1999), *reprinted in* Office of Judges Programs, *Retirement Benefits for Bankruptcy Judges and Magistrate Judges*, App. F, § 3 (May 2000); Regulations of the Judicial Conference of the United States Governing the Ad Hoc Recall of Retired Bankruptcy Judges (Sept. 1999), *reprinted in* Office of Judges Programs, *Retirement Benefits for Bankruptcy Judges and Magistrate Judges*, App. D, § 2 (May 2000). A recalled judge who later returns to retirement receives upon leaving office a recalculated annuity that is “equal to the salary [then] in effect” for bankruptcy judges. 28 U.S.C. § 375(c).

18. A separate annuity may be provided to the surviving spouse and dependent children of a deceased bankruptcy judge, depending on whether the judge had enrolled in a voluntary program known as the Judicial Survivors’ Annuities System (JSAS), which Congress made available to bankruptcy judges in 1988. 28 U.S.C. § 376(h); *see* Retirement and Survivors’ Annuities for Bankruptcy Judges and Magistrates Act of 1988, Pub. L. No. 100-659, 102 Stat. 3910 (codified at 28 U.S.C. § 376(a)(1)(F)). The total

amount of this annuity is based on a number of factors, including the deceased judge's "average annual salary." 28 U.S.C. § 376(l).

19. The beneficiary of a deceased judge's life-insurance policy under the Federal Employees' Group Life Insurance Act is similarly entitled to receive benefits based on the judge's salary. *See* 5 U.S.C. §§ 8701(c), 8704(a), 8714b. The government must provide coverage to participating judges based on each judge's salary. *See id.* § 8702(a).

The Ethics Reform Act of 1989

20. The Ethics Reform Act of 1989 overhauled compensation for Article III judges in two relevant and complementary respects. Pub. L. No. 101-194, 103 Stat. 1716 (1989). First, the Act limited a federal judge's ability to earn outside income and receive honoraria. Second, in exchange for that limitation, the Act provided for automatic annual cost-of-living adjustments to protect judicial income from inflation and preserve a judge's real salary over time.

21. Although bankruptcy judges are not directly subject to the 1989 Act's salary adjustments, they benefit from them by virtue of 28 U.S.C. § 153(a), which, as mentioned above, sets bankruptcy judge salaries "equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to section 135." Section 135 in turn provides that district court judges' salaries shall be "adjusted by section 461 of this title"—the section that applies the salary adjustments provided for by the 1989 Act. 28 U.S.C. § 135.

22. The 1989 Act established judicial salary adjustments in express and unambiguous terms. Under the Act, whenever a cost-of-living adjustment takes effect for General Schedule (GS) employees (meaning, for federal civil servants), judicial salaries

“shall be adjusted by an amount” based on “the most recent percentage change in the [Employment Cost Index],” or ECI, “as determined under section 704(a)(1).” 28 U.S.C. § 461(a)(1) (emphasis added). The ECI is a measure of private sector salaries published quarterly by the Bureau of Labor Statistics, and section 704(a)(1) calculates each annual judicial salary adjustment by first determining the percentage change in the ECI over the previous year, and then subtracting 0.5% from that amount. Pub. L. No. 101-194, § 704(a)(1)(B), 103 Stat. at 1769. The resulting figure becomes the final adjustment rate so long as it falls within a specific range—between 0% and 5%—and does not exceed the annual salary percentage increase, if any, provided to GS employees. 28 U.S.C. § 461(a)(2).

23. Once calculated, the rate increase is multiplied by a judge’s existing salary and rounded to the nearest \$100 to determine the total salary adjustment for that year. *Id.* The judge’s salary is then increased by that amount.

24. The only prerequisite to this otherwise self-executing system for maintaining judicial pay is that GS employees must receive a salary adjustment under 5 U.S.C. § 5303. That statute makes annual GS salary adjustments automatic unless the President determines that they would be “inappropriate” because of a “national emergency or serious economic conditions affecting the general welfare.” *Id.* § 5303(b)(1). Short of this presidential declaration, GS employees are entitled to receive annual cost-of-living salary adjustments. And, under the 1989 Act, so too are federal judges.

25. The 1989 Act took effect on January 1, 1990, and for each of the first three fiscal years thereafter (1991, 1992, and 1993) judicial salaries were adjusted as required by the Act. Bankruptcy judges’ salaries were likewise increased in accordance with 28 U.S.C. § 153(a). For fiscal year 1994, the President denied GS employees (and by

extension, all federal judges) a salary adjustment because he determined that “serious economic conditions”—namely, a large federal budget deficit—made providing pay adjustments inappropriate.

26. For each of the next three fiscal years (1995, 1996, and 1997), however, the judicial salary adjustments mandated by the 1989 Act did not take effect, even though the salaries of GS employees were adjusted. In each of these years, Congress inserted language in appropriations legislation stating that the salaries of federal judges would not be adjusted. *See* Pub. L. No. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (Sept. 30, 1994) (FY 1995); Pub. L. No. 104-52, § 633, 109 Stat. 468, 507 (Nov. 19, 1995) (FY 1996); Pub. L. No. 104-208, § 637, 110 Stat. 3009, 3009-364 (Sept. 30, 1996) (FY 1997). As a consequence, bankruptcy judges also did not receive an adjustment to their salaries.

27. Although the judicial salary adjustments dictated by the 1989 Act took effect for the fiscal year 1998, Congress once again blocked those adjustments for fiscal year 1999, meaning that bankruptcy judges too were denied a pay adjustment. *See* Pub. L. No. 105-277, § 621, 112 Stat. 2681, 2681-518 (Oct. 21, 1998) (FY 1999). The judicial salary adjustments dictated by the 1989 Act took effect in fiscal years 2000 and 2001. Bankruptcy judges’ salaries were increased accordingly.

28. In 2001, Congress enacted legislation amending section 140 of Public Law 97-92. Originally enacted on December 15, 1981, section 140 blocks judicial salary adjustments “except as may be specifically authorized by Act of Congress hereafter enacted.” Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1981) (codified at 28 U.S.C. § 461 note). Section 140 expired in 1982, but the 2001 amendment revived it by adding a sentence to the section stating that it would be effective in fiscal year 1981 and each fiscal year thereafter. Pub. L. No. 107-77, tit. VI, § 625, 115 Stat. 748, 803 (Nov. 28, 2001).

The 2001 amendment did not alter section 140's exception for specific congressional authorization "hereafter enacted."

29. After the 2001 amendment, the federal government interpreted section 140 as effectively nullifying the system for providing judicial salary adjustments established by the 1989 Act. On the government's interpretation, salary adjustments do not take effect unless Congress enacts additional legislation expressly allowing a scheduled adjustment to take effect in a given year.

30. Federal judges received the salary adjustments promised by the 1989 Act for fiscal years 2002, 2003, 2004, 2005, 2006, 2008, and 2009. For each of those years, Congress enacted legislation specifically approving those adjustments. *See* Pub. L. No. 107-77, tit. III, § 305, 115 Stat. 748, 783 (FY 2002); Pub. L. No. 108-6, § 1, 117 Stat. 10 (FY 2003); Pub. L. No. 108-167, § 1, 117 Stat. 2031 (FY 2004); Pub. L. No. 108-491, § 1, 118 Stat. 3973 (FY 2005); Pub. L. No. 108-447, Div. B, tit. III, § 306, 118 Stat. 2809, 2895 (FY 2005); Pub. L. No. 109-115, Div. A, tit. IV, § 405, 119 Stat. 2396, 2470 (FY 2006); Pub. L. No. 110-161, Div. D, tit. III, § 305, 121 Stat. 1844, 1989 (FY 2008); Pub. L. No. 111-8, Div. D, tit. III, § 310, 123 Stat. 524, 649 (FY 2009). Bankruptcy judges received a corresponding increase in compensation for each of those years as a consequence of their salaries being linked to those of district court judges.

31. For fiscal years 2007 and 2010, however, Congress failed to enact legislation approving the adjustments provided for by the 1989 Act. Because of the government's interpretation of section 140 and its 2001 amendment, federal judges received no salary adjustments in those years.

32. The salary adjustments provided for in fiscal years 1998, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2008, and 2009 were calculated by reference to base compensation that did not include the salary adjustments withheld in prior fiscal years.

The *Beer* Decision

33. In 2009, seven Article III judges sued the United States, claiming that the Compensation Clause prohibited Congress from withholding the salary adjustments provided for by the 1989 Act. The judges contended that an unlawful diminution in compensation resulted both from the withholding of salary adjustments in 2007 and 2010, and from the calculation of adjustments in other years by reference to base compensation that did not include the amounts unlawfully withheld in 1995, 1996, 1997, and 1999. *Beer v. United States*, 696 F.3d 1174, 1178-79 (Fed. Cir. 2012) (en banc).

34. The Court of Federal Claims dismissed the complaint, and a panel of the Federal Circuit affirmed. The U.S. Supreme Court vacated the judgment and remanded the case. On remand, a Federal Circuit panel again affirmed the dismissal, but the en banc court reversed. *Id.* at 1179.

35. The en banc court held that the 1989 Act created a firm judicial expectation of receiving annual cost-of-living adjustments protected by the Compensation Clause. As the court recognized, “[t]he 1989 Act promised, in precise and definite terms, salary maintenance in exchange for prohibitions on a judge’s ability to earn outside income.” *Id.* at 1184. The court held that this promise—which is reflected in the Act’s “clear formula for calculation and implementation of those maintaining adjustments”—entitled federal judges “to expect that their real salary [would] not diminish due to inflation or the action or inaction of the other branches of Government,” and in doing so “triggered the expectations-related protections of the Compensation Clause for all sitting

judges.” *Id.* at 1184-85. The court concluded that, “[b]y enacting blocking legislation in 1995, 1996, 1997, and 1999, Congress broke [its prior] commitment and effected a diminution in judicial compensation.” *Id.* at 1185.

36. Apart from the Compensation Clause question, the en banc court further held that the federal judges should have received the 1989 Act’s adjustments in 2007 and 2010 because “Congress had no statutory authority to deny them.” *Id.* The court determined that the government had “withheld [the adjustments] from judges in 2007 and 2010 solely because [it] misinterpreted section 140 as requiring a separate and additional authorizing enactment to put those adjustments into effect.” *Id.* at 1186. As the court interpreted section 140, the statute did not nullify the 1989 Act’s regime for providing automatic salary adjustments because section 140, which was enacted in 1981, “bars judicial salary increases unless (1) ‘specifically authorized by Act of Congress’ and (2) ‘hereafter enacted’”—two criteria that the court found the 1989 Act satisfies. *Id.* at 1185. The court therefore held that the 1989 Act’s adjustments went into effect regardless of Congress’s failure to pass additional authorizing legislation. *Id.* at 1186.

37. On January 3, 2013, the government filed a petition for a writ of certiorari in the U.S. Supreme Court. The Court denied the petition on April 22, 2013. The Court of Federal Claims issued a final order on June 11, 2013, and entered judgment in favor of the plaintiffs the next day.

The Injuries to the Plaintiffs

38. The plaintiffs’ injuries in this case stem from the government’s unlawful denials of salary adjustments to district court judges. Those denials caused the government to improperly calculate (1) the salaries for active bankruptcy judges, (2) the annuities for retired bankruptcy judges, (3) the supplemental compensation for recalled

bankruptcy judges, (4) the annuities for surviving spouses and dependent children of deceased bankruptcy judges enrolled in JSAS, (5) the life-insurance coverage provided to participating judges and the insurance payouts to their beneficiaries upon the judges' death, and (6) contributions to thrift savings accounts.

39. The injuries suffered by the active-judge plaintiffs arise out of their statutory right to receive 92% of a district court judge's salary. *See* 28 U.S.C. §153(a). By unlawfully denying the salary adjustments required by the 1989 Act in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010, the government failed to pay district court judges their full compensation. But for those denials, the base salary for district court judges would have been increased in each of those years, and each subsequent salary adjustment would have been calculated with reference to a higher base compensation. Because the government calculated bankruptcy judges' salaries based on the unlawfully low salaries paid to district court judges, the government also failed to pay bankruptcy judges their full compensation. Under Federal Circuit precedent, every unlawful deprivation of judicial compensation gives rise to a new injury and claim. *See, e.g., Beer*, 696 F.3d at 1186-87; *Hatter v. United States*, 203 F.3d 795, 797-800 (Fed. Cir. 2000) (en banc), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 557 (2001).

40. The retired-judge plaintiffs have been injured because their annuities initially are tied to the salaries they received as active judges. *See, e.g.,* 28 U.S.C. § 377(a). Had those salaries been properly calculated, the retired judges would receive higher annuities than they are currently being paid and would have received higher annuities in the past.

41. The recalled-judge plaintiffs have been injured because their compensation is tied directly to the salary of an active bankruptcy judge. *See, e.g.,* 28

U.S.C. § 375(c). Had the salaries of active bankruptcy judges been properly calculated, the recalled judges would receive higher compensation than they currently receive and would have received higher compensation in the past.

42. The surviving spouses and dependent children of bankruptcy judges have been injured because they receive an annuity that is based in part on the “average annual salary” of the deceased judge. 28 U.S.C. § 376(h) & (l). Had that average annual salary been properly calculated, the survivors would receive a higher annuity than they currently receive and would have received a larger annuity in the past.

43. The FEGLI beneficiaries of deceased bankruptcy judges have been injured because they received insurance payouts that were based on the judges’ improperly calculated salaries. *See* 5 U.S.C. §§ 8701(c), 8704(a), 8714b. Had those salaries been properly calculated, the FEGLI beneficiaries would have received larger payouts.

CLASS ACTION ALLEGATIONS

44. This action should be certified as a class action under Rule 23(b)(2) and/or (b)(3) of the Rules of the United States Court of Federal Claims.

45. The plaintiffs bring this class action on behalf of themselves and all persons (1) who are currently serving as United States bankruptcy judges (excluding the plaintiff in *Cornish v. United States* (U.S. Court of Federal Claims, Case No. 12-CV-861)), or (2) who served as bankruptcy judges at any point from 1995 until the present and have received compensation (including a salary or annuity) from the federal government for that service at any point during the six years prior to the filing of this lawsuit, or (3) who are the surviving spouses or dependent children of deceased bankruptcy judges who served at any point from 1995 until the present and were enrolled in JSAS, and who have received an annuity under JSAS at any point during the six years prior to the filing of this lawsuit, or

(4) who are the beneficiaries of deceased bankruptcy judges who served at any point during the six years prior to the filing of this lawsuit and were enrolled in the FEGLI program, or (5) who are the executors of estates of the persons described above.

46. **Rule 23(a)(1) – Numerosity.** Members of the class are so numerous that joinder is impracticable. The plaintiffs believe that there are more than 500 class members. Their names and addresses are possessed by the defendant.

47. **Rule 23(a)(2) – Commonality.** The questions of law and fact common to the members of the class include but are not limited to the following:

- Whether the government’s denials of judicial salary adjustments in 1995, 1996, 1997, 1999, 2007, and 2010 unlawfully reduced the compensation of Article III judges;
- Whether the government’s denials of judicial salary adjustments in 2007 and 2010 lacked statutory authority;
- Whether the government failed to compensate the class members at an amount equal to 92% of a district court judge’s properly calculated salary, in violation of 28 U.S.C. § 153(a);
- Whether, if the class members are entitled to receive higher salaries, they are also entitled to receive higher annuities based on those salaries;
- Whether, if the class members are entitled to receive higher salaries, they are also entitled to receive higher supplemental payments based on those salaries;
- Whether the class members are entitled to back pay for salary underpayments;
- Whether the class members are entitled to back pay for annuity underpayments.

48. **Rule 23(a)(3) – Typicality.** The named plaintiffs’ claims are typical of the claims of each class member because the named plaintiffs, like every class member, did not receive the full amount of compensation due to them as a result of the government’s unlawful withholding of salary adjustments to district court judges and setting of base compensation without regard to those salary adjustments.

49. **Rule 23(a)(4) – Adequacy.** The named plaintiffs are adequate class representatives because their interests do not conflict with the interests of the class members they seek to represent, they have retained counsel who are competent and experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The named plaintiffs and their counsel will fairly and adequately protect the class members’ interests.

50. **Rule 23(b)(2) – Generally Applicable Government Action.** The government has acted on grounds generally applicable to the class because it pays all bankruptcy judges a uniform annual salary, and it pays annuities and supplemental payments based on that uniform salary.

51. **Rule 23(b)(3) – Predominance and Superiority.** The questions of law or fact common to class members, some of which are set forth in paragraph 45, predominate over questions affecting individual members. The primary question affecting individual class members is the calculation of damages—a mechanical determination that depends almost entirely on the individual class members’ dates of service. Once the government’s liability has been adjudicated, the claims of all class members can be determined by the Court and administered efficiently in a manner that is far less erroneous, burdensome, and expensive than if it were attempted through filing, discovery, and trial of all individual cases. In addition, a class action is superior to other available

methods for the fair and efficient adjudication of this controversy for the following reasons:

- Individual damages to many class members may be less than, or not substantially more than, the amount of individual litigation expenses, making the expense of non-class litigation prohibitive or impractical for class members;
- No reason suggests that class members otherwise have an interest in individually controlling the prosecution of separate actions;
- The plaintiffs know of no difficulty to be encountered in the management of this case as a class action;
- The prosecution of separate actions by individual class members would create a risk of inconsistent and varying adjudications, whereas a class action will assure uniformity of decisions among class members;
- Certifying this case as a class action will serve the overall interests of justice by providing the most efficient and cost-effective method of resolving the lawsuit without duplicative litigation, while allaying statute of limitations or other concerns.

CLAIM FOR RELIEF

Violations of 28 U.S.C. §§ 153(a), 375(c), 376, & 377; 5 U.S.C. §§ 8331-8351, 8401-8480; 8701-8716

52. The plaintiffs have been unlawfully denied the compensation due them under 28 U.S.C. §§ 153(a), 375(c), 376, 377; 5 U.S.C. §§ 8331-8351, 8401-8480; and/or 5 U.S.C. §§ 8701-8716, based on the government's unlawful withholding of the judicial salary adjustments provided for by the 1989 Act.

53. As a remedy for these statutory violations, the plaintiffs are entitled to back pay and declaratory relief.

REQUEST FOR RELIEF

The plaintiffs request that the Court:

a. Certify this action as a class action under Rule 23(b)(2) and/or (b)(3) of the Rules of the United States Court of Federal Claims;

b. Declare that the United States has violated 28 U.S.C. §§ 153(a), 375(c), 376, 377; 5 U.S.C. §§ 8331-8351, 8401-8480; and 5 U.S.C. §§ 8701-8716 by withholding the salary adjustments provided for under the 1989 Act in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010;

c. Direct the Administrative Office of the United States Courts to reflect in the plaintiff's pay records the withheld salary adjustments provided for under the 1989 Act in fiscal years 1995, 1996, 1997, 1999, 2007, and 2010.

d. Award the plaintiffs back pay for the salary owed but not paid to them during the six years preceding the filing of this lawsuit, which equals the sum of (1) 92% of the salary that district court judges were entitled to receive for each fiscal year during that period, as calculated to reflect the unlawfully withheld salary adjustments—and by reference to the base salary that each plaintiff would have received in each year but for those unlawful denials—minus (2) the total amount of the salaries actually paid to each plaintiff during that period;

e. Award the plaintiffs back pay for the annuities, retirement benefits, and/or FEGLI benefits owed but not paid to them during the six years preceding the filing of the lawsuit, including adjustment of thrift savings accounts;

f. Award the plaintiffs back pay for the supplemental payments owed but not paid to them during the six years preceding the filing of this lawsuit;

g. Award the plaintiffs their costs, expenses, and attorney fees under 28 U.S.C. § 2412 and/or a common fund; and

h. Grant the plaintiffs all other proper relief.

November 1, 2013

Respectfully submitted,

/s/ Deepak Gupta

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