

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 UNITED STATES, :

4 Appellant, :

5 v. :

6 HUBERT L. WILL ET AL., :

7 Appellees. :
8 -----:

: No. 79-983

: &

: No. 79-1689

9 Washington, D.C.

10 Tuesday, October 14, 1980

11 The above-entitled matter came on for oral argument
12 at 10:04 o'clock a.m.

13 BEFORE:

- 14 HON. WARREN E. BURGER, Chief Justice of the United States
- 15 HON. WILLIAM J. BRENNAN, JR., Associate Justice
- 16 HON. POTTER STEWART, Associate Justice
- 17 HON. BYRON R. WHITE, Associate Justice
- 18 HON. THURGOOD MARSHALL, Associate Justice
- 19 HON. HARRY A. BLACKMUN, Associate Justice
- 20 HON. LEWIS F. POWELL, JR., Associate Justice
- 21 HON. WILLIAM H. REHNQUIST, Associate Justice
- 22 HON. JOHN PAUL STEVENS, Associate Justice

23 APPEARANCES:

24 KENNETH S. GELLER, ESQ., Acting Solicitor General,
25 Department of Justice, Washington, D.C. 20530;
on behalf of the Petitioner.

KEVIN M. FORDE, ESQ., 111 West Washington St., Chicago,
Illinois 60602; on behalf of the Appellees.

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1 were instead only appropriations measures that refused to pro-
2 vide the money for salary increases required by law. The
3 Government in these appeals has challenged each of these hold-
4 ings.

5 Before setting forth the facts that led to these law-
6 suits I think it would be helpful to begin by briefly explain-
7 ing the somewhat complicated mechanism by which the pay of
8 federal judges is determined. For the first 180 years of our
9 Nation's history, judicial salaries were fixed by Congress
10 essentially on an ad hoc basis. During this period Congress
11 raised the salaries of Supreme Court Justices on 12 occasions
12 and raised the salaries of lower court judges on nine occa-
13 sions. Congress finally changed this system in 1967 by passing
14 the Federal Salary Act. Under this Act the salaries of federal
15 judges as well as the Vice President, Members of Congress,
16 Cabinet officers, and selected other high level officials are
17 reviewed by a blue ribbon commission every four years to
18 determine appropriate pay levels.

19 This commission reports its findings to the President
20 who must submit to Congress in his next budget message recom-
21 mendations for the exact rate of pay for these officials, and
22 then within 60 days both Houses of Congress must vote on the
23 President's recommendations. The first federal salary act
24 review took place in fiscal year 1969 and the review process
25 has occurred every four years since then. In fact, just last

1 week the membership of the fiscal 1981 review commission was
2 announced and that commission is scheduled to make its report
3 to the President on increases in judicial and other salaries
4 by the end of this calendar year.

5 Now, the Federal Salary Act contains no mechanism for
6 annual adjustments of salaries of the officials covered by that
7 Act. Rather, the only means specified in the Salary Act for
8 modifying such salaries is the quadrennial review process. In
9 an attempt to remedy this problem Congress in 1975 passed the
10 Executive Salary Cost-of-Living Adjustment Act. This Act
11 applies, by and large, to the officials covered by the
12 Federal Salary Act, including federal judges.

13 Now, under the Adjustment Act judicial salaries are
14 subject to an annual increase equal to the annual percentage
15 cost-of-living increase given to civil service employees in
16 that year, pursuant to yet another statute, the Federal Pay
17 Comparability Act of 1970. Under the Comparability Act the
18 President each year must designate a pay agent to compare civil
19 service salaries with the rates of pay for the same levels of
20 work in private industry. Following the study the pay agent
21 submits his report to the President along with a recommendation
22 of appropriate adjustments in civil service rates of pay.

23 After considering this report the President has two
24 options. First, he can inform Congress that he agrees with and
25 adopts the agent's recommendation, in which event the

1 recommended cost-of-living increase automatically goes into
2 effect as of the first pay period after October 1st of that
3 year. On the other hand, if because of a national emergency
4 or economic conditions affecting the general welfare the
5 President believes that the pay agent's recommendations are
6 too high, the President may reject the pay agent's recommenda-
7 tion and submit an alternative pay raise plan to Congress.
8 If neither House of Congress disapproves the President's
9 alternative plan, it goes into effect on the first pay period
10 after October 1st. However, if the House or the Senate disap-
11 proves the President's alternative plan within 30 days, then the
12 original recommendation of the pay agent goes into effect for
13 civil service employees.

14 QUESTION: And that can be downward as well as
15 upward?

16 MR. GELLER: The President's recommendation could
17 conceivably be downwards, and generally it is downwards rather
18 than upward.

19 Now, as I mentioned earlier, the Adjustment Act ties
20 the cost-of-living increases of high-ranking federal officials
21 including federal judges to the average cost-of-living increase
22 given to civil servants under the Comparability Act. In addi-
23 tion the Adjustment Act specifies the effective date of any
24 such adjustment for judges as of October 1st of each year.

25 So, to summarize, judicial pay is determined by

1 reference to three separate statutes. There is the Federal
2 Salary Act which sets a base pay for judges with a review of
3 that base every four years. And then there's the Adjustment
4 Act which provides that judges may get an annual cost-of-living
5 increase measured by the cost-of-living increase given to
6 civil service employees under the Comparability Act, and the
7 Adjustment Act increase goes into effect -- if there is one --
8 on October 1st of the year.

9 Now, the first year the Adjustment Act was in effect
10 was 1975, and in October, 1975, civil service salaries were in-
11 creased by an average of five percent pursuant to the Compara-
12 bility Act. And as a result, federal judges and other offi-
13 cials covered by the Adjustment Act received a like increase.

14 The events that led to these lawsuits began in the
15 fall of 1976. In October, 1976, the salaries of civil service
16 employees were increased by an average of 4.8 percent under
17 the Comparability Act. On September 22, 1976, however, the
18 House and Senate passed a bill which was signed by the
19 President on October 1st providing that none of the funds
20 appropriated in any statute could be used to pay the salary
21 of any official covered by the Adjustment Act at a rate that
22 exceeded the salary in effect for that official on September
23 30th, 1976.

24 In other words, this statute which we've referred to
25 in this litigation as the 1976 Pay Act prevented the 1976

1 Adjustment Act increases from taking effect for federal judges
2 and a number of other high level officials.

3 QUESTION: Mr. Geller, what was the basis of the
4 District Court's jurisdiction?

5 MR. GELLER: The Tucker Act.

6 QUESTION: Would the Government be in a better posi-
7 tion here if the Tucker Act had been repealed or never been
8 enacted?

9 MR. GELLER: Well, there would be some question whe-
10 ther judges would have a right to sue because they're claiming
11 under the Compensation Clause of the Constitution. Just like,
12 for example, the Just Compensation Clause in the Fifth
13 Amendment might well require that Congress provide some judi-
14 cial remedy, but it's certainly not an issue in this case.
15 We have not challenged the District Court's jurisdiction.
16 It clearly falls under 28 U.S.C. 1346(a)(2).

17 Now, in each of the next three years after 1976
18 Congress passed a separate pay act to limit or eliminate the
19 anticipated Adjustment Act increase for that year. In July
20 1977 Congress passed the 1977 Pay Act which provided that the
21 cost-of-living increases that would have become effective in
22 October, 1977, "shall not take effect."

23 The reason Congress did this was because in March
24 of 1977 the officials covered by the Adjustment Act had
25 received their quadrennial salary increase pursuant to the

1 Salary Act. Federal judges, for example, had gotten a pay
2 raise of almost 30 percent under the Salary Act in March, 1977,
3 and there was substantial sentiment in Congress that high-
4 ranking federal officials should not get two pay increases in
5 the course of a single year.

6 QUESTION: Now, this deals with the 4.8 that might
7 otherwise have become effective on October 1 -- what? -- 1976?

8 MR. GELLER: Well, actually, I was just referring to
9 the 1977 legislation which wiped out --

10 QUESTION: Well, the 29-whatever-that-percentage-was,
11 that became effective when? March of '77?

12 MR. GELLER: That became -- March of '77, that's
13 right. Now in October of 1977 civil service employees got a
14 7.2 percent increase under the Comparability Act.

15 QUESTION: Well, do we have any case here that in-
16 volves the 4.8-whatever-that-percentage-was, effective in
17 October of '76, or is that --

18 MR. GELLER: Yes, that is in this case. That is
19 Count 1 of the Will I.

20 QUESTION: And you just said that the increase in
21 29-whatever-it-was that became effective in March of '77 --

22 MR. GELLER: Right.

23 QUESTION: -- what bearing did that have on the 4.8?

24 MR. GELLER: That set a new base salary level for
25 judges.

1 QUESTION: And in doing that did Congress supersede
2 whatever the increase was, the 4.8?

3 MR. GELLER: Well, no. The only bearing that the
4 4.8 percent has in this litigation now is, if appellees are
5 correct that Congress could not wipe out the 4.8 percent,
6 then the judges would be entitled to back pay for the period
7 from October 1, 1976.

8 QUESTION: What you're saying is, Congress meant to
9 eliminate that 4.8 in light of the 29 that became effective in
10 March, '77?

11 MR. GELLER: Well, what Congress meant to eliminate
12 in light of the 30 percent increase judges got was the 7.2 per-
13 cent salary increase --

14 QUESTION: That's what I'm trying to get to.

15 MR. GELLER: Yes.

16 QUESTION: And it had no bearing on the 4.8?

17 MR. GELLER: Only in the sense that the base salary
18 had been paid.

19 QUESTION: No, what I'm trying to get at is, did
20 Congress say anything in respect to the 29-point -- that it was to
21 supersede any of the 4.8?

22 MR. GELLER: No.

23 QUESTION: All right.

24 MR. GELLER: But there are a number of statements in
25 the legislative history that talk about superseding the

1 7.2 percent that was going to become effective in October of
2 '77 because it would have been two salary increases in one
3 year.

4 QUESTION: Well, then, you don't think, then, that
5 that quadrennial increase was effective to wipe out any en-
6 titlement to any prior cost-of-living increases?

7 MR. GELLER: Well, it only became effective in
8 March, 1977. What it does wipe out is any claim that judges
9 have to a new base salary level based on the 4.8 percent, but
10 what it doesn't wipe out is back pay for the period October 1,
11 1976, to March, 1977.

12 QUESTION: If they were entitled to it?

13 MR. GELLER: If they were entitled to it. That's
14 what I'm saying.

15 QUESTION: I see. Well, so your answer to my ques-
16 tion is, for the future, it does take the place of any
17 future entitlement to the 4.8 after October 1? ~~the one?~~

18 MR. GELLER: That's right. As far as base salary
19 levels are concerned --

20 QUESTION: I got it. Thank you.

21 MR. GELLER: -- the only relevance it has to this
22 lawsuit is the back pay issue.

23 QUESTION: So it did effect a permanent disentitle-
24 ment to the 4.8 percent?

25 MR. GELLER: As a continuing matter.

1 QUESTION: Yes, all right; fine.

2 QUESTION: Mr. Geller, let me get this clear. You
3 did just say that the 4.8, in any event, in light of the 29
4 percent that became effective in March, '77, limited the 4.8
5 to the period from October 1, '76, to March, '77?

6 MR. GELLER: That's right. That is the relevance in
7 this lawsuit. It's simply a matter of back pay, it's not a
8 question of increasing base salary levels because that was
9 accomplished in March, 1977, with the Salary Act increase.

10 QUESTION: Well, your brief doesn't make this clear,
11 but it's -- but that's wholly consistent with your position,
12 I must say.

13 MR. GELLER: Just as if the current salary, the cur-
14 rent quadrennial review process that's now beginning will set
15 a new salary level for judges, presumably, unless the President
16 or Congress doesn't go along with the recommendations. It will
17 set a new salary level for judges as of March or April, 1981,
18 and therefore all of these prior pay acts will be relevant only
19 in terms of back pay and not in terms of setting a new salary
20 level for judges --

21 QUESTION: Provided that the new level is higher than
22 the percentages involved?

23 MR. GELLER: Providing that it is, yes.

24 QUESTION: If it's not, of course, then the issue
25 will remain.

1 MR. GELLER: That's right.

2 QUESTION: All right. Yet -- Mr. Geller, in review-
3 ing the fairly complicated statutory system under which judi-
4 cial salaries are determined, did you mention the basic stat-
5 ute, 28 U.S.C. Section 135?

6 MR. GELLER: Well, that just sets the base salary
7 for district judges. There's a separate statute that sets the
8 salary for each level of the Federal judiciary, Section
9 135 is for district judges, and what it
10 does is, it has two components. It says a base salary, plus,
11 you know, the Adjustment Act increase the base salaries, the
12 salary --

13 QUESTION: "As adjusted, each judge" -- and this is
14 the district judge -- "shall receive a salary at an annual
15 rate determined under the Federal Salary Act, as adjusted by
16 the Executive Salary Cost-of-Living Adjustment Act."

17 MR. GELLER: Right. As I said, there are two com-
18 ponents to judicial salary. One is --

19 QUESTION: That is the statutory salary that a judge
20 receives.

21 MR. GELLER: Well, that is the statute that sets
22 forth the components of a judge's salary and it refers to other
23 statutes. It refers to the Federal Salary Act and it refers to
24 the Adjustment Act.

25 QUESTION: It says, "Each judge shall receive"

1 that salary. You didn't mention that, did you?

2 MR. GELLER: Well, I don't even mention that
3 because there's a separate statute for each branch of the
4 federal judiciary, and all it does is relate how all the
5 other statutes work.

6 QUESTION: Well, that's all it does, but it does do
7 that.

8 MR. GELLER: Yes. Well, there is a separate statute
9 in that event for each judge.

10 QUESTION: That language is mandatory, is it not?

11 MR. GELLER: That is the salary that a district judge
12 gets as provided in Section 135.

13 QUESTION: And then there's a separate statute for
14 circuit judges and --

15 MR. GELLER: Circuit judges, Supreme Court Justices,
16 and for other parts of the federal judiciary.

17 QUESTION: But each one is similar, or is it?

18 MR. GELLER: That's right. The language is similar.
19 Well, just to finish up the statement of facts, in September
20 of 1978 Congress eliminated a 5.5 percent pay raise for Adjust-
21 ment Act employees that would have gone into effect on
22 October 1st of that year. And last year, on October 12, 1979,
23 Congress reduced the Adjustment Act increase for fiscal year
24 1980 from 12.9 percent to 5.5 percent.

25 QUESTION: Mr. Geller, for a moment, on the

1 September 30, '78, statute, is that the only one of these
2 statutes in which Congress expressly limited the effect of the
3 statute to the then, to the year involved?

4 MR. GELLER: No --

5 QUESTION: It says, "No part of the fund appropriated
6 hereby shall be used to pay salaries for this period -- ."
7 Is that language repeated in the other statutes or is it -- ?

8 MR. GELLER: Yes. Except for the -- it's repeated
9 in all of the statutes except in the 1977 statute which is not
10 part of an appropriations act at all and simply says that the
11 October, 1977, Adjustment Act increases shall not take effect.

12 QUESTION: Each of the Acts by its terms applies
13 only to one year.

14 MR. GELLER: That's right. That's right.

15 QUESTION: Now, is that the Act that was signed by
16 the President late in the afternoon of October 1?

17 MR. GELLER: No, I'm just talking about the 1979.

18 QUESTION: I know that. I thought you mentioned
19 also the '77?

20 MR. GELLER: No, the '76 Act was signed on October 1st.

21 QUESTION: And was signed but -- sometime later in
22 the day of October 1st?

23 MR. GELLER: Well, sometime on October 1st. I don't
24 know what time of day it was signed.

25 QUESTION: But it was substantially after midnight,

1 or one minute after --

2 MR. GELLER: I assume that it was not signed
3 substantially after --

4 QUESTION: And that presents a question about your --

5 MR. GELLER: There is a question --

6 QUESTION: Under the diminution clause in there.

7 MR. GELLER: That's correct. There is a question
8 which I would hope to get to a little bit later of what the
9 effect is of the bills that took the -- the Act that took
10 effect on October 1st?

11 QUESTION: Well, Mr. Geller, as part of the facts --
12 I take it this is part of the facts -- on October 1, 1979, the
13 Government seems to agree, at least in its brief, that the
14 October 1 increase did go into effect --

15 MR. GELLER: Yes.

16 QUESTION: -- along with the increase that had been
17 suspended for the prior year.

18 MR. GELLER: That's right.

19 QUESTION: So that it's for a total of 12.9 percent --

20 MR. GELLER: 12.9 percent.

21 QUESTION: -- did go into effect?

22 MR. GELLER: Yes. And there's no question in this
23 case about the judges' entitlement to the 12.9 percent for the
24 12 days.

25 QUESTION: Or for any other part of the Executive

1 Branch or not?

2 MR. GELLER: Or for any other part of the Executive
3 Branch although, just to complicate matters further for offi-
4 cials other than judges, salary doesn't take effect on October
5 1st but on the first pay period after October 1st. So that --

6 QUESTION: I see; I see. I understand.

7 MR. GELLER: Appellees representing the classes of
8 federal judges affected by these pay acts brought these actions
9 under the Tucker Act in February, 1978, and October, 1979.
10 The first suit which we've referred to as Will I challenged
11 the 1976 and 1977 Pay Acts as reducing judicial compensation in
12 violation of the Compensation Clause.

13 In the second suit, which has been referred to as
14 Will II, presented the identical challenge to the 1978 and
15 1979 Pay Acts. The District Court agreed with appellees and
16 declared all four statutes unconstitutional.

17 According to the District Court, once the Adjustment
18 Act became law in 1975, then the right to an annual cost of
19 living increase measured by the average cost-of-living adjust-
20 ment given to civil servants under the Comparability Act
21 became part of the judges' compensation which may never there-
22 after be diminished or eliminated.

23 In addition, as I noted earlier, the district judge
24 also concluded as an alternative holding that the Pay Acts were
25 merely appropriations measures that refused to fund but did not

1 wipe out the Adjustment Act increases for each of the four
2 years in question.

3 The United States believes that each of these hold-
4 ings is incorrect but before I discuss what we view as the
5 errors in the District Court's opinion, there are two proce-
6 dural matters that the Court has directed the parties to ad-
7 dress.

8 The first is the question of jurisdiction. The Court
9 postponed consideration of the question of jurisdiction until
10 the hearing on the merits, but we don't think there's any ques-
11 tion that this Court has appellate jurisdiction under 28 U.S.C.
12 1252. The District Court held unconstitutional several Acts of
13 Congress in a civil action to which the United States is a
14 party. Hence, a direct appeal lies to this Court under Section
15 1252.

16 QUESTION: Well, did the District court have juris-
17 diction?

18 MR. GELLER: It had jurisdiction under the Tucker Act.

19 QUESTION: Even if the judge was disqualified?

20 MR. GELLER: Well, I'm now going to get to the ques-
21 tion of his qualifications.

22 QUESTION: But let's assume he was, though.

23 MR. GELLER: Assuming he was disqualified, we don't
24 view the question of disqualification as jurisdictional in
25 nature. The District Court clearly had jurisdiction under

1 the Tucker Act.

2 QUESTION: In which event we would have appellate
3 jurisdiction?

4 MR. GELLER: Exactly.

5 QUESTION: Even if we were disqualified?

6 MR. GELLER: That is our view. We don't view the
7 recusal statute as being jurisdictional in nature. The court
8 clearly has jurisdiction, although there may be a separate
9 question as to which judge of that court should hear the case.

10 Now, as I said, a somewhat related question concerns
11 the disqualification of the members of this Court and the Dis-
12 trict Court. These cases obviously directly involve the pay
13 of federal judges. Moreover, each of the Justices of this
14 Court is a member of the plaintiff classes certified by the
15 district judge in Will I and Will II, and the District Judge
16 was himself a member of the certified class in Will II.

17 Therefore, we believe it's clear that the members of
18 this Court and the District Judge technically have a disquali-
19 fying interest within the meaning of the judicial recusal
20 statute, 28 U.S.C. 455. Nonetheless, all the parties and
21 amici agree that this is an appropriate instance for invoking
22 the so-called rule of necessity. Every currently sitting
23 federal judge, whether or not a class member, has a direct and
24 immediate financial interest in the outcome of these cases
25 and would therefore seem to be equally disqualified under

1 28 U.S.C. 455(b)(4). In the

2 In these circumstances we believe the Court as it did
3 a half-century ago in the income tax cases can and should decide
4 these appeals.

5 QUESTION: If you were drawing a disqualification
6 statute for judges, wouldn't this be one of the very first
7 things that you would consider, a case in which they were pass-
8 ing on their own salaries?

9 MR. GELLER: Yes, and it is, I think clearly within
10 the judicial recusal statute that -- this situation. Not only
11 do the Justices of this Court have a financial interest in the
12 outcome of these cases, but by virtue of the District Judge's
13 certification of the classes, each member of this Court is a
14 party to the litigation, which is a separate disqualifying
15 factor under the statute.

16 We don't think there's any dispute among the parties
17 or amici that the judges of this Court technically are disqual-
18 ified. We think, however, it's a clear case for invocation of
19 the rule of necessity.

20 QUESTION: Mr. Geller, would you tell me your under-
21 standing of, if you had to state the rule, what is the rule of
22 necessity?

23 MR. GELLER: My understanding is that when every
24 judge is disqualified from hearing a case, then no judge is
25 disqualified simply by virtue of the disqualifying factor.

1 I should add the obvious that if any Justice feels that he
2 can't personally sit on this case because he cannot be impar-
3 tial, then that Justice individually should make the decision
4 to disqualify himself. But we don't think that the Justices of
5 this Court are disqualified simply because they fall within one
6 of the disqualifying factors --

7 QUESTION: And this is not a matter of statutory
8 construction, is it?

9 MR. GELLER: Well, I suppose there would be a sepa-
10 rate question presented --

11 QUESTION: Does it appear that Congress ever ad-
12 dressed this question when they drafted that 455?

13 MR. GELLER: There is precious little discussion in
14 the history of it.

15 QUESTION: And certainly, on the face of it, it's
16 flat and mandatory that --

17 MR. GELLER: We think it would have been quite
18 remarkable that Congress would have intended to abrogate the
19 rule of necessity without saying so.

20 QUESTION: Then you are suggesting we read in the
21 rule of necessity?

22 MR. GELLER: Yes. We think that it survives.

23 QUESTION: Imply it or what?

24 MR. GELLER: Well, there were previous judicial
25 recusal statutes before Section 455 and the rule of necessity

1 was applied to them. We don't think there's anything in the
2 legislative history or the language of --

3 QUESTION: Well, I gather you are saying then that
4 this is a statutory construction question?

5 MR. GELLER: I think it is a common law rule which
6 Congress has not abrogated.

7 QUESTION: And so we should say, except where the
8 rule of necessity applies?

9 MR. GELLER: Yes.

10 QUESTION: And add it on to the statute?

11 MR. GELLER: Excuse me. Again?

12 QUESTION: We should add on to the statute an excep-
13 tion?

14 MR. GELLER: I think it's a well recognized exception
15 that was read into all the previous judicial recusal statutes,
16 and, yes, I think the Court should do the same here.

17 QUESTION: If all the members of this Court were dis-
18 qualified under 455, what would be the consequence in terms of
19 the judgments that you're asking to be reviewed? Would they
20 stand?

21 MR. GELLER: It would depend, Mr. Chief Justice, on
22 why the Court decided that the members of this Court were dis-
23 qualified. If the Court were to decide that the rule of neces-
24 sity has been abrogated and that every federal judge now on the
25 bench is equally disqualified and that no one can hear

1 this case, then we think that the appropriate disposition would
2 be for this Court to vacate the judgment of the District Court
3 who was also equally disqualified.

4 QUESTION: Well, if we're disqualified to sit, how
5 can we decide anything?

6 MR. GELLER: Well, I think under the same rationale
7 that allows this Court to determine whether it has jurisdiction
8 or even in cases where the Court clearly doesn't have juris-
9 diction because the issue is moot. For example, the Court
10 sometimes sends the case back to have the judgment vacated even
11 though technically the Court doesn't have jurisdiction.

12 Now, however, I should add that --

13 QUESTION: You told us at the outset that this is not
14 a matter of jurisdiction, I thought?

15 MR. GELLER: That's correct, and why I think I'm
16 consistent in saying that the Court would have the power to
17 send the case back to the District Court with instructions to
18 vacate that judgment. It seems to us that if every judge is
19 disqualified there's no reason to leave that judgment out-
20 standing.

21 However, there's another possibility here which I
22 should mention, and that is, the Members of this Court may
23 feel that they are disqualified because they are parties to
24 this litigation. Now, not every federal judge now on the
25 bench is a party to this litigation.

1 A judge who was appointed after October 12, 1979,
2 would not be a member of any of the certified classes. Now,
3 28 U.S.C. 2109 allows this Court in a case in which there is
4 no quorum, because more than four Justices are disqualified,
5 to remit the case to the appropriate circuit to be heard by a
6 panel of that circuit, and finally determined. So if this
7 Court decides that the rule of necessity does apply but
8 that the Justices of this Court have a special disqualification
9 because they're members of a class, then I suppose the appro-
10 priate disposition would be to send the case back to the 7th
11 Circuit to be heard by a three-judge panel composed of judges
12 who were appointed after October 12, 1979. But nobody has
13 suggested that.

14 QUESTION: But they would still have a stake in the
15 case.

16 MR. GELLER: They would still have a stake in the
17 case but they wouldn't have this additional disqualification.

18 QUESTION: They wouldn't be parties.

19 MR. GELLER: That's right.

20 QUESTION: They wouldn't be a party.

21 QUESTION: Well, it doesn't matter, does it, if they
22 have a stake in the case, I thought 455 was mandatory disqualifi-
23 cation?

24 MR. GELLER: That is our position, Mr. Justice
25 Brennan. That's why we think this Court should decide

1 the case. But the Members of this Court have two disqualifi-
2 cations; there are members of the federal judiciary now who
3 only have one disqualification. If that is deemed relevant by
4 this Court, then there is the option of sending it back to the
5 7th Circuit.

6 I'd like to turn, then, to the statutory basis for
7 the District Court's holding. The court's statutory determina-
8 tion is extremely important for two reasons. First, if this
9 Court agrees with the District Court that the appellees had a
10 statutory right to their cost-of-living increases over the past
11 four years, then there will be no need to reach the constitu-
12 tional issues raised by the Pay Acts.

13 Second, the district judge's statutory holding af-
14 fects a great many federal employees other than judges. If
15 the District Court is correct as a matter of statutory con-
16 struction, then not only judges but about 2,000 other federal
17 employees covered by the Adjustment Act would have gotten
18 salary raises in each of the last four years. And, in addi-
19 tion, some 20,000 civil servants whose pay is subject to a
20 statutory ceiling pegged to the lowest executive schedule
21 salary level would also be entitled to receive back pay, be-
22 cause the ceiling would have been raised in each of the last
23 four years. These combined pay increases would total several
24 hundred million dollars.

25 In light of these two important considerations,

1 the District Court's treatment of the statutory issue is some-
2 what remarkable. The issue is discussed in a single paragraph
3 at the very end of its opinion in Will I. The court merely
4 states that none of the Pay Acts contains any language indi-
5 cating that it was intended to be anything more than an appro-
6 priation statute. But the 1977 Pay Act, at least, was not an
7 appropriation statute at all, and while the other three Pay
8 Acts were part of appropriations bills, this Court has made
9 clear on several occasions that Congress if it wants to can
10 suspend or repeal substantive legislation in an appropriations
11 act.

12 QUESTION: Mr. Geller, you know, it's a small point,
13 but your opponents take issue with your use of the term
14 "Pay Act." Is that a term that you just coined for purposes
15 of litigation or does it have any history beyond that?

16 MR. GELLER: It is a term that was coined for the
17 purpose of litigation but not -- it's a convenient short-
18 hand. Each of these acts has a very long name.

19 QUESTION: Right. I understand.

20 MR. GELLER: We didn't do it for any tactical liti-
21 gation purpose, but it is something that we have been using
22 since the --

23 QUESTION: That's not a term Congress uses?

24 MR. GELLER: Not a term, although I think in some of
25 those later statutes the term did start to work its way into

1 the legislative history, but it's not a term in the statute
2 itself.

3 Anyway, as the Court said in Belknap, the whole ques-
4 tion depends on the intention of Congress as to whether an
5 appropriation statute was intended to amend or repeal substan-
6 tive legislation. Now, the District Court's decision does not
7 discuss the language, the legislative history, or the purpose
8 of any of the Pay Acts. We have in our brief set forth this
9 legislative history in exhaustive detail, and I don't think it
10 would serve any purpose for me to repeat any of that history
11 here, but I doubt that anyone can read the statements of the
12 Members of the House and the Senate, statement after statement
13 and Pay Act after Pay Act, without concluding that Congress un-
14 questionably intended to prohibit the Adjustment Act increases
15 from going into effect. There are repeated references to a pay
16 freeze or --

17 QUESTION: For that year --

18 MR. GELLER: For that year; that's right.

19 QUESTION: -- to which it was addressed.

20 MR. GELLER: To which it was addressed; that's
21 correct. There are repeated references to a pay freeze, or to
22 a pay cap, or to a desire to supersede or rescind the cost of
23 living increases for the year in question. There's virtually
24 no evidence in the legislative record to the contrary. In
25 fact, because the whole purpose of the Pay Acts was to hold

1 down the pay of high-ranking federal officials, largely as an
2 anti-inflation measure, it would have defeated Congress's express
3 objectives if the Pay Acts had simply been limitations on
4 expenditures. What this would have meant is that Congress in
5 four consecutive years merely wanted to withhold funds neces-
6 sary to meet the Government's acknowledged obligations under the
7 Adjustment Act, but to leave those substantive obligations
8 intact, knowing full well that those obligations could be
9 enforced in Court.

10 Neither the district judge nor appellees have offered
11 any plausible explanation why Congress would repeatedly have
12 engaged in such a senseless and futile exercise.

13 Now, if this Court agrees that the Pay Acts were in-
14 tended to be substantive legislation, then the question remains
15 whether that legislation is constitutional. The Compensation
16 Clause analysis essentially involves two separate inquiries.
17 First, were judicial salaries diminished in the constitutional
18 sense by the Pay Acts? And second, if a diminishment occurred,
19 was it the sort of reduction prohibited by Article III?

20 It's the Government's position that the 1976, 1977,
21 and 1978 Pay Acts did not diminish appellees' compensation be-
22 cause at the time these statutes were enacted, the annual
23 cost-of-living adjustments allowed by the Adjustment Act had
24 not yet gone into effect.

25 QUESTION: Do I take it that you have implicitly

1 conceded that the 1979 legislation did reduce the --

2 MR. GELLER: Oh, yes; we've said that in the brief,
3 that it's a reduction in compensation there although there's
4 still --

5 QUESTION: There's no question that it did.

6 MR. GELLER: -- a second question as to whether it's
7 constitutional.

8 QUESTION: Well, Mr. Geller, whatever the -- is it
9 1977, the one that was not signed until late in the day --

10 MR. GELLER: 1976.

11 QUESTION: '76?

12 MR. GELLER: Yes.

13 QUESTION: What about that? Was that in effect at
14 midnight of October 1?

15 MR. GELLER: The cases in this Court hold that the
16 general rule in construing legislation is that the courts
17 will not inquire into the time of day that the bill was signed,
18 that it will be presumed to take effect as of the first moment
19 of the day. Now, appellees correctly point out that there is
20 an exception to this rule; where substantial justice so re-
21 quires, the courts will inquire into the fractions of the day.

22 QUESTION: That's the Louisville case?

23 MR. GELLER: That is one of the many cases --

24 QUESTION: And how do you respond to that one?

25 MR. GELLER: That's right, Mr. Justice Blackmun.

1 We don't think that this is a case in which substantial justice
2 requires the Court to inquire into the time of day that the
3 Act was passed. It's clear that Congress intended to pass the
4 1976 Pay Act before October 1st. It passed both Houses of
5 Congress on September 22. The President didn't sign it until
6 October 1st only because no one really thought it was crucial
7 that he do so.

8 QUESTION: When you speak of whether justice requires
9 it -- was that the term?

10 MR. GELLER: "Substantial justice."

11 QUESTION: "Substantial justice." -- do you take into
12 account the equities of the situation?

13 MR. GELLER: I think that's what the Court should
14 take into account. We think that appellees' hypertechnical
15 argument here does not entitle them to use of this exception
16 to substantial justice.

17 QUESTION: Well, would the Court then be permitted to
18 take into account that a United States district judge's salary
19 today is less than half by far of the purchasing power in
20 terms of 1969 dollars? Is that the kind of inequity?

21 MR. GELLER: I don't think so, Mr. Chief Justice.

22 QUESTION: Well, what kind?

23 MR. GELLER: We're not talking here about the base
24 salaries that judges are entitled to.

25 QUESTION: No, but, you speak of equities. What --

1 I'm puzzled as to what kind of equities you have in mind if
2 that isn't one of them.

3 MR. GELLER: Well, what I'm talking about, if the
4 Court decides that the Congress can supersede Adjustment
5 Act increases if it acts before those increases go into effect,
6 and if it decides that those increases go into effect on
7 October 1 of each year as the statute so requires, then it
8 would seem to us not to require resort to the exception to the
9 general rule in order to save the 1976 pay increases to
10 judges.

11 QUESTION: Mr. Geller, is it not true that the gene-
12 ral rule and its exception deal with how you construe what
13 Congress intended to do. It's a construction of the statute
14 rather than its effect? And it's no question here, they
15 intended that the statute would be effective as of 12:01 a.m.

16 MR. GELLER: There's no question about it.

17 QUESTION: And the question is, whether the increase
18 in salary having been in effect for several hours, does Arti-
19 cle III of the Constitution prevent the President and the
20 Congress from then rescinding that, what had become effective?
21 And it is true that, say, 9 o'clock in the morning there was
22 a different salary rate in effect, wasn't there?

23 MR. GELLER: In some metaphysical sense.

24 QUESTION: At 9 o'clock in the morning, if you were
25 then asked what the salary was, you would have to have said,

1 as of this moment the 4.8 percent has gone into effect,
2 wouldn't you?

3 MR. GELLER: I think that's true, and at 5 o'clock --

4 QUESTION: And so even if, later on, unambiguously,
5 Congress said, we intend to cut it back as of 12:01 a.m., then
6 the question is, can they do that constitutionally? None of
7 the cases you've cited deal with a question remotely like this,
8 do they?

9 MR. GELLER: Well, they deal with questions --

10 QUESTION: Of what the intent of the statute was.

11 MR. GELLER: It was important to determine when an
12 Act took effect. The Court has said that the test is that it
13 takes effect as of the first moment of the day unless substan-
14 tial justice --

15 QUESTION: Purely as a matter of statutory construc-
16 tion, isn't that correct?

17 MR. GELLER: Well, some of those cases, I believe,
18 did involve constitutional questions.

19 QUESTION: Which one? Which one?

20 MR. GELLER: I would have to, while my opponent is
21 speaking give you the names, but they involve questions where
22 penalties were imposed by statutes --

23 QUESTION: Well, the ones cited in the footnote to
24 your brief all dealt with the question of statutory construc-
25 tion. Maybe there others that haven't come to our attention.

1 QUESTION: Mr. Geller, it isn't in the record, of
2 course, but didn't exactly the same thing happen two weeks ago?

3 MR. GELLER: The 1980 Pay Act was passed on October
4 1st, that's correct. Well, that's after --

5 QUESTION: Was it passed or signed, or both?

6 MR. GELLER: It was both.

7 QUESTION: But that's not true of the '76?

8 MR. GELLER: That's right. The '76 Pay Act was
9 passed well before October 1st.

10 QUESTION: If the established rule was, as you argue,
11 that an act is effective on the day it's signed, but retroac-
12 tive to the previous midnight, I suppose the President might
13 have thought October 1 was the last day he could sign it.

14 MR. GELLER: I think that that's correct. I think
15 the President this year, and Congress this year, could have
16 thought they could act until October 1, based on the position
17 that Government was taking in these cases.

18 Appellees contend that --

19 QUESTION: Of course, on that point, they also
20 thought in '79 that they could wait 12 days, didn't they?

21 MR. GELLER: No, I don't think that there's any
22 question; certainly there's no question --

23 QUESTION: You think they deliberately acted in an
24 unconstitutional manner?

25 MR. GELLER: No, I don't think that they intended

1 that the 1979 Pay Act apply to the period between October 1
2 and October 11.

3 QUESTION: Well, what about the provision of the
4 statute, if anyone takes the 12.9 percent, there's a waiver of
5 anything -- if he takes 5.5 percent, there's a waiver of that
6 right?

7 MR. GELLER: That was meant to imply, I think,
8 prospectively.

9 QUESTION: Does it say so?

10 MR. GELLER: Well, there are -- it is not easy to
11 understand what Congress thought it was doing in the 1979 Pay
12 Act by adding in this waiver language, there's not much legis-
13 lative history either, but there are certain statements on the
14 floor by Representative Whitten in which, what he says is,
15 we intend the 1979 Pay Act, like the previous three Pay Acts,
16 to apply substantively. However, there is some question in
17 light of Judge Roszkowski's decision in the Will litigation
18 as to whether we can do that. I don't think there should have
19 been any question on the part of Congress, but Representative
20 Whitten says there may be some question as to whether we can
21 act substantively in an appropriations measure. And therefore,
22 let's accomplish that purpose essentially by means of a settle-
23 ment. Anyone who after today takes the 5.5 percent will be
24 waiving his right to the 12.9 percent. But I don't think there
25 is any talk about the period retroactively.

1 QUESTION: If he took the 5.5 percent sometime later,
2 would he retain or give up the right to 12.9 percent for the
3 12 days when it was in effect?

4 MR. GELLER: Well, we have taken the position that
5 it's not clear from the legislative history. We have always
6 taken the position that appellees have the right --

7 QUESTION: Yes, but these appellees -- none of these
8 appellees took the 5.5 percent. I wonder what would the
9 Government's position be with respect to the consequences
10 of taking the 5.5 percent with respect to the right to the
11 12.9 percent for 12 days?

12 MR. GELLER: For the 12 days, they would not be
13 waiving their right to the 12.9 percent by taking 5.5 percent.
14 There's no question in this litigation as to the salary level
15 for that 11 days, for appellees. It's 12.9 percent above the
16 previous base salary.

17 I do want to discuss the constitutional point a
18 little bit more but I notice that I'm almost out of time and
19 I do want to save some time for rebuttal, so unless the Court
20 has any questions I'd like to reserve the balance of my time.

21 QUESTION: But your basic constitutional argument is
22 that Congress has the power to lower the salaries of federal
23 judges along with the salaries of other government officials
24 as long as you can't characterize the reduction as discrimi-
25 natory and as aimed at judges in a way that might threaten

1 their independence.

2 MR. GELLER: That is our argument, if the Court
3 agrees that the --

4 QUESTION: If we agree with you otherwise, we then
5 must face the constitutional issue for the --

6 MR. GELLER: Well, if the Court agrees that in '76,
7 '77, and '78 Congress acted to withdraw the Adjustment Act
8 increases before they went into effect and that that is not a
9 diminution, then you don't have to reach --

10 QUESTION: I understand that, but if we agree with
11 you?

12 MR. GELLER: No. If you agree with my opponents,
13 that --

14 QUESTION: No, if I agree with you, with the
15 Government, as to the effect of all the Acts, just the way
16 you argue, then we must face the constitutional issue on
17 reduction.

18 MR. GELLER: Only on the '79 Act. Only as to the
19 '79 Act, if you agree with our opponents --

20 QUESTION: I understand that. I understand that we
21 must -- for whatever we face it, we have to face it.

22 MR. GELLER: As to the '79 Act at least, that's
23 correct.

24 QUESTION: Well, and then, you've decided it.

25 MR. GELLER: And our position is, as you correctly

1 stated, Justice White, that the correct test, the test that
2 this Court, I think, set forth in O'Malley against Woodrough,
3 is whether the statute is meant to discriminate against
4 Article III judges or to undermine their independence.

5 QUESTION: And you say that if it is not, the Act
6 is constitutional?

7 MR. GELLER: Does not violate the Compensation
8 Clause in the --

9 QUESTION: And you think that that's the power
10 Congress was asserting? On October 12, after the pay increases
11 had gone into effect --

12 MR. GELLER: We think that --

13 QUESTION: -- they thought they had reduced the
14 salaries, at that time?

15 MR. GELLER: They clearly thought they were reducing
16 salaries prospectively, and we think that that was constitu-
17 tional.

18 QUESTION: Well, there's a statutory question there,
19 isn't there? That's the issue?

20 MR. GELLER: Well, there's a statutory question as to
21 whether the '79 Act applies to the judges at all.

22 QUESTION: You say it's there, but that's an issue in
23 this case. That's right.

24 MR. GELLER: That's correct.

25 QUESTION: That's right.

1 QUESTION: Now, on the constitutional argument, those
2 of us who don't agree with you as to when the '76 increase
3 became effective and think it did become effective at midnight,
4 we also --

5 MR. GELLER: Then you have --

6 QUESTION: -- have to raise the same constitutional
7 question as we have for '79.

8 MR. GELLER: That is correct. In '76 and '79, at the
9 very least. Thank you.

10 MR. CHIEF JUSTICE BURGER: Mr. Forde.

11 ORAL ARGUMENT BY KEVIN M. FORDE

12 ON BEHALF OF THE APPELLEES

13 MR. FORDE: Your Honors, may it please the Court:
14 There won't be divided argument. We appreciate the
15 order the Court entered, graciously granting that permission but
16 we have concluded that the comments can be made accurately --
17 accurately and appropriately by counsel. The point we --

18 QUESTION: I'm having a little difficulty hearing
19 you.

20 MR. FORDE: I'm sorry, Justice Brennan.

21 The point that we desire to make and the explanation
22 that we think we owe the American people if not the Court in
23 an unusual case like this, a case brought by judges in federal
24 courts, is that it's their duty to bring such a case. This
25 Court has said so in the O'Donoghue decisions and in other

1 cases. The American Bar Association canons of ethics impose
2 such a duty upon the judiciary, and --

3 QUESTION: What canon of ethics imposes a duty on
4 the judiciary to file a suit urging other judges to raise their
5 salary?

6 MR. FORDE: Canon 1 of the American Bar Association
7 Canons of Judicial Ethics says it's the responsibility of a
8 judge to preserve the independence of the judiciary. This case
9 involves the independence of the judiciary.

10 I think that -- and this raises exactly the point
11 that we attempt to make. While it's a case that does involve
12 judges' pay, judges like Judges Campbell and Will, for example,
13 would not have filed a lawsuit in a federal court for the
14 comparatively few dollars that are involved in this case. But
15 it in their opinion presents an issue of critical constitu-
16 tional moment that must be decided by this Court, because they
17 believe that if Congress can do this -- at the time they filed
18 the suit it was only two years. They feared they would attempt
19 to do it again, and in fact their fears have been proven by
20 history. Now they've done it five years in a row.

21 They feared that ultimately the Solicitor General
22 or the Department of Justice may take some position, for exam-
23 ple, that Congress can do whatever they want to judges'
24 salaries so long as they treat others the same way. And such,
25 other, such argument, that seems to be completely in

1 contradiction to Article III.

2 QUESTION: Yet the Disqualification Act requires
3 a judge to disqualify himself if he owns one share of stock in
4 a corporation that is litigated before the Court.

5 MR. FORDE: That's correct. There's an exception
6 to the disqualification statute in the rule of necessity.
7 The rule of necessity -- we agree fully with the Solicitor
8 General on this point -- the rule of necessity has been in
9 effect as long as know it. We've cited cases in this Court in
10 these appeals. We've cited cases and referred the Court to the
11 briefs in the Atkins case. And as long as federal courts have
12 been sitting, there has been a rule of necessity. There is
13 no indication in the legislative history of this disqualifica-
14 tion statute or any other disqualification statute, that
15 Congress intended to change that.

16 And, in fact, there is testimony in legislative
17 history before the Congress in adopting this disqualification
18 statute that they intended to preserve the rule of necessity.
19 So there is no question but that any judge, including the
20 judges of this Court, are disqualified in this appeal or that
21 the district judge or any other district or circuit judge is
22 disqualified from hearing these cases.

23 QUESTION: Now, and what is the rule of necessity?
24 Briefly, it is that if every judge is disqualified, then
25 nobody is disqualified.

1 MR. FORDE: If every judge is disqualified, then
2 nobody is disqualified.

3 QUESTION: It wouldn't apply, for example, if four
4 members of this Court were for some reason or another disquali-
5 fied but five were not?

6 MR. FORDE: It wouldn't apply.

7 QUESTION: This Court couldn't act because there
8 wouldn't be a quorum, but it wouldn't be applicable there,
9 would it?

10 MR. FORDE: I don't know; that's an interesting
11 question. I don't know the answer to it.

12 QUESTION: Well, your rule, as I've phrased it, would
13 not be applicable, which is that the rule of necessity is appli-
14 cable only if all judges are disqualified.

15 MR. FORDE: I think there is an instance, Justice
16 Stewart, where, if my recollection is correct, Chief Justice
17 Stone invoked the rule by implication, at least, because the
18 Court couldn't get a quorum. And I think the Government cited
19 it either in this case or the Atkins. So I would read the
20 rule of necessity as applying if it's necessary to get a
21 quorum.

22 QUESTION: But in any event, in this case, every
23 federal judge is for one reason or two reasons disqualified?

24 MR. FORDE: There's no question about that. And there
25 is no other place -- wherever the case would be sent, there is

1 no judge, even if he's appointed tomorrow, who wouldn't have
2 an interest in the outcome of this case.

3 QUESTION: Right.

4 QUESTION: Yes, but the language in Evans v. Gore,
5 which is relied on in the Court of Claims opinion and so forth,
6 was rendered at a time when the disqualification statute didn't
7 apply to Supreme Court Justices, so it was really dicta, wasn't
8 it?

9 MR. FORDE: Well, it might have been dicta but it's
10 sound law. The rule of necessity has been applied since 1300
11 or 1400. And I think what the Evans Court was saying is
12 just what the long established law is. If you want to treat it
13 as dicta, then today is the time to decide that issue, which
14 has to be decided, and I submit has to be decided the way both
15 we and the Solicitor General suggest it must be decided.

16 The result is chaos. The contrary would be chaos.
17 The contrary would mean that if Congress passed a statute
18 tomorrow saying that all judges of this Court have to resign
19 in five years, there's no one who could challenge it.

20 QUESTION: Well, the other result is not particu-
21 larly appealing either, is it?

22 MR. FORDE: Oh, it's not appealing, but when you
23 look at the alternative it's not that difficult, in my judg-
24 ment. The point I was starting to make is, we feel we owe
25 an explanation to the American people as to why federal judges

1 sue in federal courts. The fact of the matter is they have to
2 because there's no other place to go and they had an oath, we
3 felt, part of their oath of office, to bring the case.
4 Judge Roszkowski had an oath of office to decide the case, and
5 I think you're in the same boat.

6 QUESTION: Do you think you could have brought this
7 case and had a judgment if you'd have sued Mr. Foley, the head
8 of the Administrative Office? Would there have been a case or
9 controversy between this class of judges and Mr. Foley? Could
10 you have proceeded on that basis rather than against the
11 United States?

12 MR. FORDE: We thought not, Your Honor.

13 QUESTION: Why not?

14 MR. FORDE: We thought --

15 QUESTION: I know you decided not to, but I'm -- for
16 what --

17 MR. FORDE: We thought not, because we thought that
18 we were suing under the Tucker Act and that says you sue the
19 United States --

20 QUESTION: I didn't ask -- this isn't what I asked
21 you.

22 MR. FORDE: Well, let me get --

23 QUESTION: Could you have sued Mr. Foley and stayed
24 in court on it?

25 MR. FORDE: It wouldn't have -- if your question
suggests --

1 QUESTION: I want to know whether you could have ob-
2 tained in a suit against him a declaration of unconstitution-
3 ality or constitutionality of these statutes, or have the
4 statutes construed? After all, Mr. Foley turned around and
5 brought a suit himself.

6 MR. FORDE: I don't know the answer, Justice White.
7 I know this --

8 QUESTION: Well, what if the answer was, yes?

9 MR. FORDE: You're addressing it to solve the case
10 disqualification question?

11 QUESTION: Yes, I am.

12 MR. FORDE: It would have no effect on that.

13 QUESTION: I'm addressing the rule of necessity.

14 MR. FORDE: It would have had no effect on it because
15 if we sued Mr. Foley instead of the United States, a federal
16 judge having an interest in the case would have to decide it.
17 It doesn't make any difference who the parties are. The fact
18 of the matter is --

19 QUESTION: Why would a federal judge have to decide
20 it?

21 MR. FORDE: Because it's a case brought in, it has
22 to be brought in the federal courts.

23 QUESTION: Why?

24 MR. FORDE: I don't know of any other forum to
25 raise the constitutional question.

1 QUESTION: Why not? I mean, state courts hear
2 federal question cases all the time.

3 MR. FORDE: We know of no jurisdictional basis for
4 bringing this case in a state court.

5 QUESTION: Well, couldn't the Circuit Court of Cook
6 County have adjudicated this case?

7 MR. FORDE: No.

8 QUESTION: Why not?

9 MR. FORDE: You can't sue the United States in the
10 Circuit Court of Cook County.

11 QUESTION: I'm asking, suing Mr. Foley?

12 MR. FORDE: I don't know if we could have gotten the
13 relief against Mr. Foley.

14 QUESTION: Well, how can you say then that the rule
15 of necessity applies if there were some judges in the United
16 States who could hear the case?

17 MR. FORDE: I think we could --

18 QUESTION: After all, it's been argued, and certainly
19 some state courts have entertained 1983 suits.

20 MR. FORDE: This isn't a 1983 case.

21 QUESTION: I know it is not a 1983 case but I'm
22 just suggesting to you that state courts decide federal ques-
23 tions all the time.

24 MR. FORDE: I know of no basis upon which we could
25 have obtained the relief that we sought in this case in any

1 state courts.

2 QUESTION: Well, what are you saying? That you
3 couldn't get personal jurisdiction over Mr. Foley?

4 MR. FORDE: That may have been a problem. I simply
5 don't know of any basis upon which we could sue him.
6 I think also the point is that suits against officials are
7 deemed suits against the United States.

8 QUESTION: Well, in any event, in this case there's
9 no question about the fact that in this case, which is the
10 case you did bring, every federal judge in the United States
11 has got a financial interest.

12 MR. FORDE: That's right. I believe, then, I've
13 made the point why we felt this case had to be brought, why
14 the plaintiffs felt this case had to be brought.

15 I'd like next to address the arguments that are
16 raised. The most important point, I think, that has to be
17 discussed is the contention of the Solicitor General and
18 the Department of Justice in these cases that a judge cannot
19 prove a violation of Article III, Section 1, without showing,
20 proving discrimination. I guess this takes us to to where
21 the statutes are, what the Constitution provides.

22 The Constitution provides, in very unequivocal
23 terms, that a judge is to receive a compensation which shall
24 not be diminished. Mr. Geller opened his comments by saying
25 that these were complex statutes. These are about as simple

1 and unequivocal as statutes as appear on the books. Not a one
2 of them exceeds more than a few lines that are relevant here.
3 Section 135 provides a salary for a district judge. The lan-
4 guage of the other statutes for other judges are in the same
5 language. 135

6 One-thirty-five provides that a district judge shall
7 receive a salary at a rate determined under the Salary Act,
8 as has been discussed, as adjusted by the Adjustment Act.

9 The Salary Act, of course, is the provision for the quadrennial
10 raises on those few occasions that Congress permits them to go
11 ahead. And I might add that the system has now been changed
12 so that it requires an affirmative vote in both houses before
13 a raise can go into effect under the Salary Act.

14 But the Adjustment Act, which is the principal act
15 at issue here, provides in very unequivocal terms -- and the
16 relevant portions are again about two lines long -- it provides
17 that for each fiscal year judges' salaries shall be adjusted
18 in an amount equal to the percentage adjustment granted
19 general schedule employees. Incidentally, none of the statutes
20 that have been referred to that are intended to prevent that
21 adjustment, including the one adopted in July, 1977, ever men-
22 tion any intent to repeal or modify or amend the rights under
23 the Adjustment Act.

24 The Adjustment Act applies to all executive level
25 employees except with respect to judges. That section says,

1 it can never be downward. There was a question earlier about
2 whether the adjustment under the Comparability Act can be a
3 downward adjustment --

4 QUESTION: It can, as to other employees.

5 MR. FORDE: As to other employees, there can be a
6 downward adjustment. As to judges, there never can be.

7 Until these cases were brought and until this recent
8 history by Congress, the Compensation Clause has always been
9 honored by Congress. Even in the Great Depression when the
10 salaries of other federal employees were reduced and reduced
11 and reduced for good reason, Congress never tampered with
12 judges' pay.

13 Now, there were income tax cases. Atkins involved
14 a question of whether judges who were suffering from inflation
15 were entitled to an increase because they weren't receiving
16 compensation, in real dollars, the same as prior years.
17 But when it come to the basic salary statutes, 28 U.S.C. 135
18 and the prior statutes like that, Congress never made any
19 attempt to tamper with those statutes.

20 The only thing that came anywhere near it was the
21 Booth case, which we decided, and that was -- and there they
22 attempted to cut the pay of a retired judge. And the Depart-
23 ment of Justice said, in that case, a retired judge is not an
24 Article III judge. This Court, the Supreme Court, the Court at
25 that time, decided that he was an Article III judge.

1 The Solicitor General in that case said, if he is an
2 Article III judge, we concede that his compensation may not be
3 cut -- even in this time of depression.

4 QUESTION: When you say compensation, then, you're
5 talking about United States dollars, in effect?

6 MR. FORDE: No, in this case we are talking about
7 the salaries set by the salary acts, the Salary Act, the
8 Adjustment Act, and 28 U.S.C. Section 135 for judges. That is
9 a judge's pay, and it is our position that that may not be re-
10 duced.

11 QUESTION: Okay, but what if the Congress decided
12 that the Court would only be allocated one car, instead of two
13 or three or whatever it has, next year. And --

14 MR. FORDE: Or parking space?

15 QUESTION: Or parking space. Would that be called
16 diminution of compensation?

17 MR. FORDE: I don't know. There are a number of
18 things like that you could explore. I don't know how far com-
19 pensation goes. I know it includes at least this much, the
20 salary of a judge as provided by the Salary Act and Adjustment
21 Act and 28 U.S.C. 135. How much farther it goes isn't before
22 the Court today.

23 But it's certainly our reading of the word compensa-
24 tion, as an academic inquiry, would indicate, me to believe,
25 that it's much broader than just that.

1 QUESTION: Under the Comparability Act, though, the
2 report is to the President and then the President makes a
3 recommendation to Congress?

4 MR. FORDE: That's right.

5 QUESTION: And then either house of Congress can dis-
6 approve it?

7 MR. FORDE: They can, but the result of their disap-
8 proval --

9 QUESTION: -- Is it goes back to the President.

10 MR. FORDE: Is, it goes back to the President or,
11 automatically, accepts the report of the President's agent.
12 They get a -- the general schedule employees --

13 QUESTION: You mean Congress -- under the terms of
14 the Comparability Act, you are asserting Congress has no power
15 to keep a recommended increase from going into effect?

16 MR. FORDE: That's right. They can reject the
17 President's, but the effect of their rejection of the President
18 would be to put into effect the higher recommendation of the
19 President's agent. In other words, like this year, the Presi-
20 dent's agent said that the appropriate adjustment for federal
21 employees would be 13-some percent, as I recall. "This year,"
22 I'm referring to October of 1980.

23 QUESTION: Well, what if the President doesn't take
24 the recommendation of his agent?

25 MR. FORDE: He didn't. He said, 9.1.

1 QUESTION: All right. And so say he -- say, say
2 the agent recommends 13 percent, the President comes in with
3 ten.

4 MR. FORDE: Yes.

5 QUESTION: Congress rejects it. The Government's
6 brief says, "In that event the President must again consider
7 the report of his agent and adjust the rates of pay in accor-
8 dance with the principles of comparability."

9 MR. FORDE: Yes. What they're saying is --

10 QUESTION: All right, suppose he does, and the
11 Congress rejects it again?

12 MR. FORDE: I don't know. I don't think they get
13 two turns. My understanding of the way that Act works -- for
14 example, this year, Justice White, they recommended 13 percent,
15 the President recommended nine. If either house of Congress
16 rejected it within 30 days, the net effect would be the 13
17 percent would have gone into effect.

18 QUESTION: Well, that just can't be, can it?

19 MR. FORDE: I think that's the statute.

20 In discussing the discrimination argument, we left
21 off on the discussion of the Booth case. The Government is ar-
22 guing here essentially that judges have an equal protection
23 claim and all I can say on that point is, if you read the
24 debates, there is absolutely no question that the framers of
25 the Constitution were saying that a judge's pay may not

1 be reduced. The language of Hamilton that his circumstance
2 should never be less, there just are reams of history on the
3 point, and they all seem to be clearly talking about you can
4 never cut a judge's pay. If they meant that you could never
5 cut a judge's pay, or that you could cut a judge's pay so long
6 as you also cut the pay of congressmen and ambassadors, then
7 they wouldn't have included in the language that they did.
8 In fact they specifically considered those points.

9 In Article I they provided that Congress can set its
10 pay and the pay of other federal employees any way it wants,
11 upward or downward. And Article II, it says with respect to
12 the President, you cannot cut his pay. Article III, with
13 respect to the judiciary, the other great branch of government,
14 you cannot cut their pay. So the Constitution is exactly the
15 opposite of the argument that you'd have to prove discrimina-
16 tion.

17 I think the point ought to be made, too, in this
18 case we can't prove discrimination. We have worked on these
19 issues for years. I can't imagine a case where you can prove
20 discrimination. And the history -- or, the congressional
21 motivation -- the history of the Compensation Clause is that
22 Congress, or that the framers wanted to remove even the threat
23 of such a confrontation where judges would be --

24 QUESTION: One reason, perhaps, for not being able to
25 prove discrimination is that there isn't any.

1 MR. FORDE: There isn't any? I don't know if there
2 is or there isn't, Justice White. I know that --

3 QUESTION: I know but one reason why you might not
4 be able to prove it is that there isn't any.

5 MR. FORDE: I don't know if there is or there isn't
6 but we can't prove it.

7 QUESTION: Well, that's one of the -- nevertheless,
8 it's one of the reasons. Suppose that the Government -- sup-
9 pose Congress reduced the salaries of every government employee
10 in the United States, including judges. Now, it may be you
11 couldn't prove discrimination because there just --

12 MR. FORDE: Well, that's right.

13 QUESTION: It'd be impossible. There isn't any.

14 MR. FORDE: In the Depression there was no question
15 that even when they attempted to do it with Judge Booth, there
16 wasn't any discrimination, there was no malice. They wanted
17 to cut federal employees' salaries to save money. There was
18 no question of discrimination.

19 QUESTION: Well, I was a law clerk in 1933. Four
20 months after I started my salary was reduced and my judge
21 whose salary was not affected never let me forget it. And I
22 thought it was discriminatory.

23 MR. FORDE: I'd point out that the concerns raised
24 by the friends of the court briefs, including that of the
25 American Bar Association, which describes the argument of the

1 Solicitor General here as a novel concept, without support in
2 history or authority which would completely undermine the
3 Compensation Clause. But, in effect, with respect to the
4 discrimination argument, if the Court agrees with us that it is
5 not a necessary element to prove discrimination and that in
6 fact the Compensation Clause means exactly what it says, then
7 we believe the Court must affirm two counts of the judgments
8 below, without further discussion.

9 Those are the events of October 12, 1979, and also
10 October 1, 1976. We can juggle back and forth about the
11 occurrence on October 1, 1976, the relation-back theory. There
12 is no question about it. When a judge went to work on October
13 1, 1976, a district judge who was making --

14 QUESTION: Would you agree, though, that the judges'
15 recovery is limited to the period October 1, '76, to March
16 '77, when the --

17 MR. FORDE: Yes. Yes, it is. Sure, because his
18 salary went from \$42,000 to \$44,000 on October 1, 1976,
19 a district judge. And then, on March 1, 1977, it went to
20 \$54,500, as I recall. So that eliminated that. The claim
21 ends March 1.

22 QUESTION: After March '77?

23 MR. FORDE: Yes. The claim ends at that time.

24 The result of the Court's decision, we also agree
25 with the Solicitor General that the result of the Court's

1 decision on the October 1, 1976, will necessarily govern the
2 ultimate disposition of the case, which hasn't been filed,
3 but October 1, 1980, the circumstances are identical.

4 QUESTION: Haven't we enough without that?

5 MR. FORDE: I hope so, Your Honor. I certainly hope
6 so. With respect to the other two counts, the question that
7 is before the Court, the constitutional question, is when does
8 the right to this adjustment mature? We submit, very respect-
9 fully, that it matured on the effective date of the Adjustment
10 Act. The statute -- getting back to one of the first points
11 made -- the statute is clear and unequivocal. It says that
12 the salary shall, he shall receive a salary as adjusted by the
13 Adjustment Act. In the O'Donoghue, the O'Donoghue decision
14 which we've cited in our briefs and it's discussed in both
15 briefs, the Supreme Court stated that it condemned as in viola-
16 tion of Article III "all which by their necessary operation
17 and effect withhold or take from the judge a part of that
18 which has been promised by law for his services."

19 Now, we think that any judge ascending to the bench,
20 any person ascending to the bench, any judge sitting on the
21 bench reading the Salary Act and the Adjustment Act and
22 28 U.S.C. 135 would take those to mean that those are a part
23 of what has been promised by law for his services.

24 QUESTION: Mr. Forde, if you take the view that the
25 right granted by the Adjustment Act to a future adjustment

1 upward in salary is compensation within the meaning of the
2 Compensation Clause, does it follow that Congress would not
3 have the power to repeal the adjustment?

4 MR. FORDE: No. I submit, Justice Stevens, they
5 could repeal the Adjustment Act, but they would have to make a
6 one-line amendment to the Comparability Act and say, "and
7 judges too." Judges have been promised, under the Adjustment
8 Act, the same cost of living adjustment granted clerk-typists
9 and others covered by the General Schedules. And as long as
10 clerk-typists and other employees under the General Schedule
11 receive a cost-of-living adjustment, judges are entitled to a
12 cost-of-living adjustment.

13 QUESTION: That is, pursuant to the Adjustment Act?

14 MR. FORDE: Pursuant to the Adjustment Act.

15 QUESTION: But then, I'm not quite clear on how they
16 could constitutionally repeal the Adjustment Act. In fact, I
17 thought in the footnote it says they could repeal the Compara-
18 bility Act but could not repeal the Adjustment Act.

19 MR. FORDE: Oh, no, our theory in this case, as we
20 read that statute, the Adjustment Act says a judge shall re-
21 ceive an adjustment in the same amount --

22 QUESTION: I understand.

23 MR. FORDE: -- as the General Schedule. So long as
24 there is an adjustment for the General Schedule, there must be
25 an adjustment --

1 QUESTION: If the Adjustment Act is in effect. But
2 I'm asking you, consistently with the Constitution, could
3 Congress repeat the Adjustment Act? The Government says --

4 MR. FORDE: No.

5 QUESTION: You say, no?

6 MR. FORDE: No.

7 QUESTION: Could Congress repeal the Tucker Act?

8 MR. FORDE: Certainly.

9 QUESTION: Then, don't you run into a real political--

10 MR. FORDE: No.

11 QUESTION: -- or a constitutional collision between
12 the diminution provisions of Article III and the provision of
13 Article I that no money shall be drawn from the Treasury save
14 by appropriation by Congress?

15 MR. FORDE: I don't know the answer to that. I know
16 that it has to be in a forum for a claim like this.--

17 QUESTION: Why does there have to be a forum for
18 every conceivable claim?

19 MR. FORDE: Well, I don't think that the Founders of
20 the Constitution would have wasted all that time putting toge-
21 ther something, the Compensation Clause and Article III, which
22 was intended to have three branches of government, of equal
23 power and standing, if one branch could do nothing about en-
24 forcing it. It just doesn't make sense.

25 QUESTION: Well, Hamilton in Federalist 78 refers to

1 the judiciary as the weakest branch, because it has neither the
2 power of the purse nor the sword.

3 QUESTION: Well, you would be satisfied, I suppose,
4 without having a suit for the money, do you think that you
5 would win enough if you had a judgment of unconstitutionality?

6 MR. FORDE: Yes. Very much so. It's much more im-
7 portant to have that determination.

8 QUESTION: And you'd have no objection if after the
9 case is decided Congress passed another statute and said, we
10 will not appropriate any funds to pay the judgment under the
11 Will litigation.

12 MR. FORDE: I didn't say I wouldn't have any objec-
13 tion. I said I would go home happy if this Court ruled from
14 the Bench today that as a matter of constitutional right you're
15 entitled to an adjustment.

16 QUESTION: Would you still be happy if Congress
17 passed the statute I just suggested? Would they have consti-
18 tutional power to do that?

19 MR. FORDE: Let me put it this way. Let me -- I
20 don't know, but let me put it this way. If there were an offer
21 to compromise this case on that basis, that we would give up
22 the claim for back pay in return for an acknowledgement by
23 the Solicitor General of our constitutional right. I am sure
24 I would have no problem selling that proposition on my clients.

25 QUESTION: Well, I'm not really discussing

1 settlement, I'm discussing the question whether in the last
2 analysis your argument is sound, that the framers of the
3 Constitution did not in fact give the ultimate power of the
4 purse to Congress, and if Congress wanted to act, say at
5 that Congress firmly believes that your opponent's constitu-
6 tional argument is correct, what would prevent Congress from
7 saying, well, we're just not going to appropriate the money to
8 pay that judgment, because the judgment is not in accordance
9 with our views of the Constitution?

10 MR. FORDE: Well, when they gave Congress the power
11 of the purse, they put some strings on the purse. There's
12 some limitations.

13 QUESTION: Yes, but one of the limitations is not
14 the power in judges to write checks.

15 MR. FORDE: Well, but it's clear, if you read the
16 Federalist, it's clear that they said, Congress -- this is
17 their comments on what they wrote, "Congress has the duty to
18 provide for judges' compensation at stated times and they can
19 never make his circumstance for the worse." Now, those are
20 limitations on Congress.

21 QUESTION: The same as the Condemnation Clause.
22 The same as the Condemnation Clause -- the Federal Government
23 couldn't appropriate property and then have Congress say,
24 well, we think that the court that held the owner of that
25 property was entitled to just compensation was simply mistaken.

1 We're not going to appropriate any money.

2 MR. FORDE: That's right.

3 QUESTION: But the solution there would be that the
4 property would go back to the owner, the original owner, would
5 it not?

6 MR. FORDE: I don't know the remedy there, or the
7 remedy here, but I know what the result has to be.

8 QUESTION: The person in the condemnation case --
9 I'll put it as a question -- could he go out and levy on the
10 White House or execute his judgment? I wouldn't think so,
11 would you?

12 MR. FORDE: I don't think so, no, sir.

13 QUESTION: So, the taking would be declared by the
14 court to be void at some point if Congress didn't pay the
15 constitutionally required compensation. Is that not the
16 solution?

17 MR. FORDE: I don't think we're going to have any of
18 those problems in this case. The judgments are affirmed.
19 I fully believe they're going to be honored.

20 QUESTION: Following up my brother Stevens' earlier
21 question to you about whether or not in your submission Congress
22 could repeal the Adjustment Act, let me ask you this question.
23 Could Congress now amend 28 U.S.C. 135 and say that the salary
24 of district judges shall be \$55,000 per annum, which would not
25 be a reduction or \$65,000 per annum, to sweep away any ques-
tions? Just amend the present 28 U.S.C. 135 to so provide.

1 MR. FORDE: I believe not, Your Honor.

2 I believe there's -- the right to a cost-
3 of-living adjustment is a component of a judge's
4 salary, and so long as there are adjustments, compara-
5 bility adjustments for General Schedule employees then
6 judges have a right to that cost-of-living adjustment.
7 Now there are ways they could resolve the problem
8 by giving a higher rate and say anyone who accepts
9 it waives any claims under the Adjustment Act or
10 something like that. That's in fact how they resolved
11 one of the state court cases that -- I think it
12 was the Delaware cases --

13 QUESTION: Waiver.

14 MR. FORDE: This was a waiver -- right. They gave
15 a higher rate than the court had ordered adjusted and then
16 they said, anyone who accepts this --

17 QUESTION: Anybody who takes that rate waives any
18 claim under the Constitution.

19 MR. FORDE: -- waives any future claims. And of
20 course, anyone not on the bench never had a claim, so that's
21 how they resolved this dilemma. There are many ways to
22 resolve the mechanics.

23 QUESTION: But in answer to my question, your
24 answer is, no?

25 MR. FORDE: My answer is, no.

1 The Government's -- I'd like to make one or two more
2 points on the Government's concept that the right to an adjust-
3 ment doesn't vest until October 1 of each year -- or, exact,
4 until October 2 of each year, as I read them now, because it
5 can relate back to the day before.

6 The term vesting I don't think belongs in this case.
7 We're not talking about construing a will or of an employment
8 contract. We're talking about a language that is adopted by
9 the framers of the Constitution for the purpose of removing
10 even a threat of an attack on judicial independence, and all
11 other cases of this Court and everything in the literature says
12 that this clause is to be read very broadly with those objec-
13 tives in mind, and not strictly, as you might strictly construe
14 a will or an employment contract.

15 But even as an employment contract there aren't too
16 many labor leaders that would buy the Government's argument
17 that you don't have a right to a cost-of-living adjustment
18 which they negotiated until January 1 or the first day of the
19 fiscal year. Those employees feel that they have a right --

20 QUESTION: I wonder if the analogy is perfect,
21 because even if one assumes that there is a statutory right to
22 an adjustment, which might be described as an increase, it seems
23 to me it does not necessarily follow, although it might, that
24 that right is an ingredient of compensation within the meaning
25 of the Constitution. See, there are two things you have to

1 convince us of. One, that there's a statutory right. And,
2 secondly, that that right is part of compensation within the
3 meaning of the Constitution. See, it could well be that the
4 labor union person has a right to an adjustment in his compen-
5 sation as a matter of contracts, but it wouldn't necessarily
6 follow that that right is part of the compensation covered
7 by Article III.

8 MR. FORDE: But here I think it's clear both places.
9 You have to have a statutory right --

10 QUESTION: Is that right -- is it perfectly clear
11 that assuming such right exists as a statutory matter, that
12 that's compensation?

13 MR. FORDE: Yes; oh, I think so. I think that's a
14 component of --

15 QUESTION: Or is it a right to have your compensa-
16 tion changed in the future, which would be conceptually
17 quite different?

18 MR. FORDE: No, I think that is a component of a
19 judge's salary and the Supreme Court of California agreed, and
20 the Supreme Court of Delaware agreed with that rationale.
21 So, I don't think that in our opinion that it's even debatable
22 that it's not a component of a judge's salary.

23 And I might go back to the decision of the Supreme
24 Court in the O'Donoghue case, where they said that they con-
25 demned in violation of Article III "all which by their

1 necessary operation in effect withhold or take from a judge
2 a part of what he has been promised for his services."

3 I think a judge going on the bench today reads the
4 Adjustment Act and thinks that that is something that he has
5 been promised for his services.

6 QUESTION: Well, I'm not saying it didn't -- Congress
7 could promise a lot of things and they might default on their
8 promises but it doesn't necessarily follow that every promise
9 they make to judges is "compensation" within the meaning of
10 the Constitution. There is no question they made a promise
11 and they've not fulfilled their promise. But I don't think it
12 follows that, it doesn't necessarily follow -- it may -- it
13 doesn't necessarily follow that what they promised was com-
14 pensation.

15 MR. FORDE: Well, I think --

16 QUESTION: That is the promise itself was compensa-
17 tion.

18 MR. FORDE: I understand your question perfectly and
19 I think the answer, Justice Stevens, is anything that they
20 promise with respect to pay is a part of compensation.

21 QUESTION: It's really not any different from a stat-
22 ute that simply said, the salary of a district judge shall be
23 \$55,000 a year. That's a promise; it's no more and no less.

24 MR. FORDE: That's a promise.

25 QUESTION: It's a promise that you'll receive at

1 least that for the rest of your judicial career.

2 MR. FORDE: That's right. In fact, to take up on
3 what Justice Stewart just said, I'll give you an example from
4 the government's brief, Justice Stevens. At first we quibbled
5 about the formula problem in this case, in the lower court and
6 in the opening briefs here. In other words, we thought that
7 the Government's problem with the concept of a future promise
8 was that, well, we don't know exactly what it is yet, because
9 we don't know what the formula is going to be.

10 In their reply brief they concede that it's got
11 nothing to do with formulas. Their problem is that it's a
12 promise for the future. And so, for example, they said,
13 if the Congress passed the law and the President signed the
14 law providing that judges are to receive a \$9,000 increase
15 payable \$3,000 March 1, 1981; \$3,000 March 1, 1982; \$3,000
16 March 1, 1984, that notes that is not an enforceable promise
17 under the compensation clause until that March 1 date.

18 Now this is directly applicable to what the President
19 attempted to do back in 1975, I think, when President Nixon
20 said he'd go along with the 25 percent recommendation of his
21 commission but he was going to make it payable in three install-
22 ments. A lot of judges resigned because Congress vetoed that
23 recommendation. If they stayed, relying on the fact that
24 this year, this year, and this year they would get a reason-
25 able compensation, it would take a while. I think that the

1 promise talked about in the O'Donoghue case has been vio-
2 lated and the Constitution has been violated.

3 QUESTION: Well, if you're stressing a reliance
4 element, certainly the Court of Claims rationale might be
5 expanded to say that a judge who goes on the bench expects that
6 Congress will increase his salary as inflation increases, and
7 yet you don't take that broad a position, do you?

8 MR. FORDE: We don't take that broad a position in
9 this case. In this case, what we're saying is what is
10 promised by statute directly relating to judges' pay. Now,
11 the Court of Claims reasoning, to put it in another context,
12 you might say, if the price of oil goes up higher and a judge
13 has trouble buying gasoline or inflation goes on and on, that
14 a judge does not have an enforceable promise that his pay will
15 be increased.

16 But we're saying that a judge has an enforceable
17 promise under the Compensation Clause when the statute says,
18 he shall receive a salary, as adjusted. That's all we're
19 saying in this case. We're talking about real pay acts here,
20 not potential pay. We're talking about what the statutes pro-
21 vide for judges' compensation and salary.

22 In the remaining few minutes I'd like to make some
23 comment on the statutory arguments.

24 Although we pointed out in our brief and I want to
25 make it as clear as I can that we think it's imperative that

1 the Court reach the constitutional questions in this case even
2 if it could resolve the case on statutory grounds, because we
3 think this kind of confrontation should come to an end and the
4 one way to bring it to a swift end is to have once and for all
5 a judicial determination on what is included in a judge's
6 compensation under the statutes that we presently have in
7 effect.

8 QUESTION: Mr. Forde, could I go back? You agreed
9 that, when Mr. Justice Brennan asked you, that the quadrennial
10 adjustment in 1977 took care of the four~~th~~ the '76 increase
11 prospectively?

12 MR. FORDE: Would you say that again, Justice White,
13 the years? Because I'm sometimes in quadrennial and at times --

14 QUESTION: The quadrennial increase took place --

15 MR. FORDE: Okay.

16 QUESTION: -- in '77, didn't it?

17 MR. FORDE: The quadrennial increase went into
18 effect in March, 1977.

19 QUESTION: And you agree that that took care of the
20 '76 increase prospectively?

21 MR. FORDE: That's right.

22 QUESTION: Yes. But you do not agree that that also
23 disentitled the judges to the '77 increase? The comparability--
24 the cost of living increase.

25 MR. FORDE: Oh, no. It had nothing to do with the --

1 QUESTION: The Government argues, apparently, that
2 the Pay Act of '77 took care of both increases.

3 MR. FORDE: I don't think that that's what he argued.
4 The --

5 QUESTION: What does he say? There was a scheduled
6 cost-of-living increase to go into effect on October 1, '77.
7 cost-of-living increase to go into effect on October 1, '77.

7 MR. FORDE: That's right.

8 QUESTION: What kept it from going into effect?

9 MR. FORDE: On July 12, 1977, the Congress adopted a
10 statute that says, adjust, that says pay increases that would
11 otherwise go into effect this year shall not take effect.

12 QUESTION: Okay. So that is different from the
13 quadrennial increases?

14 MR. FORDE: Oh, you're right.

15 QUESTION: Exactly. All right; thank you.

16 MR. FORDE: The quadrennial increases had nothing to
17 do with these adjustments. And with respect to that Act, I
18 think that Mr. Geller stated that it specifically said, in-
19 creases under the Adjustment Act shall not go into effect.
20 It did not. It did not refer to the Adjustment Act at all, as
21 I recall, and in fact, in none of the four years did any of
22 the statutes which purported to withhold these limitations did,
23 not a one of them ever mentioned the Adjustment Act, not a one
24 of them ever stated anything about specifically repealing the
25 Adjustment Act or any other of the Pay Acts that we have been

1 discussing here this morning.

2 QUESTION: Mr. Forde, just to understand your statu-
3 tory theory, if you prevail on what the Government refers to as
4 the 1977 Pay Act, that would mean that the quadrennial adjust-
5 ment for '77 was then increased by 7.1 percent, effective
6 October 1, 1977. And that increased amount would then be the
7 base as to which the 12-point-something percent for the next
8 two years applies?

9 MR. FORDE: That's right.

10 QUESTION: So that it's necessary if we go through
11 -- if you win on all the statutory arguments, that you build
12 that 7.7 percent into the salary which is later increased.

13 MR. FORDE: That's right. We did that in an appendix
14 to our brief, too. At the very last page we set out a copy of
15 a memorandum from the Administrative Office making this compu-
16 tation.

17 QUESTION: And that statutory argument would make the
18 increases up, well, not only to judges but to everybody else
19 covered?

20 MR. FORDE: Everybody covered by the Executive
21 Schedule. That's right, Your Honor.

22 With respect to the statutory arguments -- and so
23 long as the Act of July 12, 1977, is being discussed, I have
24 to acknowledge that that Act comes much closer to substantive
25 legislation than the others. In the other years in question --

1 QUESTION: That is the '76 Act? The one that was
2 not an appropriations act?

3 MR. FORDE: That's right. The Act of July 12, 1977,
4 was not an appropriations act. The other three were
5 appropriations acts, two of them the Legislative Branch
6 appropriations act, the third one this joint resolution of a
7 year ago. If you read the legislative history, as Mr. Geller
8 suggests, you'll find a lot of discussion about what they
9 intended to do. Nobody said word one about repealing the
10 Adjustment Act. All they were concerned about was taking
11 additional compensation.

12 After the actions of Congress in each of those years,
13 in all three of the years -- not '77, the President issued an
14 executive order saying the rates of pay for judges and
15 others -- Congressmen and others, are -- and if you read those
16 executive orders, we cited two in our briefs, there is a third
17 one for the third year, he shows the pay as adjusted. And
18 then he has a footnote saying, funds are not available.

19 So he did not think in those years that Congress was
20 enacting substantive legislation. The Comptroller General
21 didn't think that Congress was enacting substantive legisla-
22 tion. Before they did it the first time the chairman of the
23 committee asked for an opinion by the Comptroller General and
24 the Comptroller General said, if you do it this way, you will
25 not be affecting the statutory rates of pay, you will only be
withholding funds. You will not be eliminating the obligation

1 of the United States to pay the salary. You just will not have
2 funds available to pay them at this time.

3 After having before them -- after -- the Comptroller
4 General's opinion, they did it by just limiting the funds.
5 And nobody in the record said, we disagree with the opinion.
6 In other words, the Solicitor says, well, the Congress obvious-
7 ly disagreed with the Comptroller General's opinion in that
8 regard, but nobody said they did.

9 The Office of Personnel Management issued a memoran-
10 dum last year saying, in their opinion the limitations did not
11 eliminate the statutory obligation of the United States to
12 pay the adjusted salary. The statute books -- if you look in
13 the statute books, I believe it's 5 U.S.C. 5332 -- list judges'
14 pay and Congressmen and others as adjusted. Then there's a
15 footnote, funds not available to pay.

16 You pick up the handbook, West Publishing Company
17 handbook that's on the desk of every district judge in the
18 country, if he opens up to 28 U.S. 135 today, he'll see in
19 there a footnote as to judges' salary, and the footnote says
20 that his pay is something substantially more than he's re-
21 ceiving, I forget the exact amount that's in the current issue
22 of West's. And then a footnote, funds not available to pay.

23 So, if the congressional history is so clear that they
24 were enacting substantive legislation, a lot of people
25 don't realize it.

1 My time is up. I thank Your Honors for the time
2 and the courtesy this morning. We urge that the Court would
3 affirm on both appeals on both statutory and constitutional
4 grounds. Thank you very much.

5 MR. CHIEF JUSTICE BURGER: Mr. Geller, do you have
6 anything further?

7 MR. GELLER: Just a few things, Mr. Chief Justice.

8 ORAL ARGUMENT OF KENNETH S. GELLER

9 ON BEHALF OF THE APPELLANT -- REBUTTAL

10 MR. GELLER: First, let me begin by correcting a
11 misstatement which Mr. Forde just made.

12 Three of the four Pay Acts expressly refer to the
13 Adjustment Act. The citations are in Footnote 3 of our reply
14 brief. Second, although there was some equivocation in his
15 answers, I think that the salient point of the appellees'
16 argument was the answer that Mr. Forde gave to Justice Stevens'
17 question, yes, if their argument is accepted, then Congress
18 could not repeal the Adjustment Act at all. Although, I might
19 add, they do concede, as I think they have to, that Congress
20 could repeal either on a one year basis or permanently the
21 Comparability Act, which would leave judges in exactly the same
22 position as these Pay Acts have left them. I think that shows
23 the technical nature of the arguments that appellees are making
24 here today.

25 QUESTION: Well, it's not entirely technical.

1 It says if you're going to give raises to others, you've got
2 to give them to judges too, whereas your view would allow them
3 just to take it out for judges and leave everybody else get a
4 raise.

5 MR. GELLER: No, our view is that they could refuse
6 to give it to anyone under the Adjustment Act. We don't say
7 that the judges don't --

8 QUESTION: Under your view, they could raise the
9 salaries of all government personnel except judges, under the
10 Comparability Act and the Adjustment Act.

11 MR. GELLER: Well, clearly they could raise up all
12 the salaries under the Comparability Act and do as they've
13 done over the last four years and say, no one under the
14 Adjustment Act can get any raises. Now, the question is not
15 raised in this case and it would be a much more difficult
16 question, if Congress singled out judges in the Pay Acts.

17 QUESTION: Under your view -- now, let's get this
18 clear -- under your view, as I understand it, Congress clearly
19 could say, henceforth the Adjustment Act shall apply to all
20 federal employees except judges.

21 MR. GELLER: Well, let's not --

22 QUESTION: Isn't that correct?

23 MR. GELLER: Well, yes, but let me, let's not confuse
24 two things. First, there's a question as to whether there's a
25 diminution at all. We take the position --

1 QUESTION: Well, I understand. You say that would
2 not be a diminution.

3 MR. GELLER: Right. So long as Congress acts --

4 QUESTION: Article III doesn't apply; therefore,
5 they can do it.

6 MR. GELLER: Exactly; that's right. But once, of
7 course, if the Court disagrees with that argument and finds
8 that the salaries have been increased, then we don't contend
9 that Congress can discriminate against judges in reducing
10 salaries.

11 QUESTION: I understand. But your basic position is
12 that they could modify the legislation to say, all federal
13 personnel except judges shall get the benefit of the Adjustment
14 Act. That's --

15 MR. GELLER: If they act --

16 QUESTION: That's almost a *fortiori* from your
17 position.

18 MR. GELLER: Yes; if they act before the Adjustment
19 Act increases go into effect, we claim there hasn't been a dimi-
20 nution in compensation.

21 QUESTION: What if there never had been a Federal
22 Salary Act and it was simply set the way it had been 50 years
23 ago; Congress enacted a law saying the salary of a judge shall
24 be such and such, and in a particular year Congress increased
25 its own salary five-fold but left the judges exactly where

1 they were, it didn't reduce them at all? Any problem?

2 MR. GELLER: No question that that would not violate
3 the Compensation Clause. In fact, as the Court knows, origin-
4 ally the Compensation Clause prevented increases as well as
5 decreases in judicial compensation.

6 QUESTION: No, no, not originally, the Compensation
7 Clause didn't. That was a proposal.

8 MR. GELLER: Originally the draft, proposed draft of
9 the Compensation Clause. That's correct. And over the objec-
10 tions of people such as James Madison the prohibition on
11 increases was taken out. It was left to Congress to decide
12 whether --

13 QUESTION: Well, that was never in the Constitution.

14 MR. GELLER: Whether or not to increase judicial
15 salaries is a question that the framers explicitly decided to
16 leave to Congress. Now, the Adjustment Act, we submit, creates
17 a useful system whereby judges may get an automatic cost-of-
18 living increase every year. But there's no indication that in
19 passing the statute Congress intended to surrender its ultimate
20 authority granted by the framers of the Constitution to raise
21 or to refuse to raise salaries of all federal officials in-
22 cluding federal judges.

23 Indeed, we think the fact that the Congress that
24 passed the Adjustment Act was the very same Congress that less
25 than a year later passed the 1976 Pay Act, so I don't think

1 that they thought that by trying to search for a better mecha-
2 nism to deal with judicial pay they were freezing into the
3 Constitution this Adjustment Act procedure and binding all
4 future Congresses never to be able to refuse to allow increases
5 to go into effect.

6 May I just --

7 MR. CHIEF JUSTICE BURGER: Briefly.

8 MR. GELLER: -- make one additional point? The
9 analogy that you raised, Mr. Justice Stewart, I don't think is
10 accurate, where Congress says judges shall get \$65,000, because
11 those salaries will have gone into effect. We don't take
12 the position that it's not a diminution once they've gone into
13 effect. I think the proper analogy would be if Congress today
14 were to say, in the year 2000 judges shall get \$100,000 a year.
15 The question is if, in 1990, Congress were to repeal that
16 statute, is that a diminution of compensation? And we say the
17 answer is, no. Thank you.

18 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

19 The case is submitted.

20 (Whereupon, at 11:34 o'clock a.m., the case in the
21 above-entitled matter was submitted.)
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CERTIFICATE

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No. 79-983 & No. 79-1689

United States

v

Hubert L. Will, et al

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