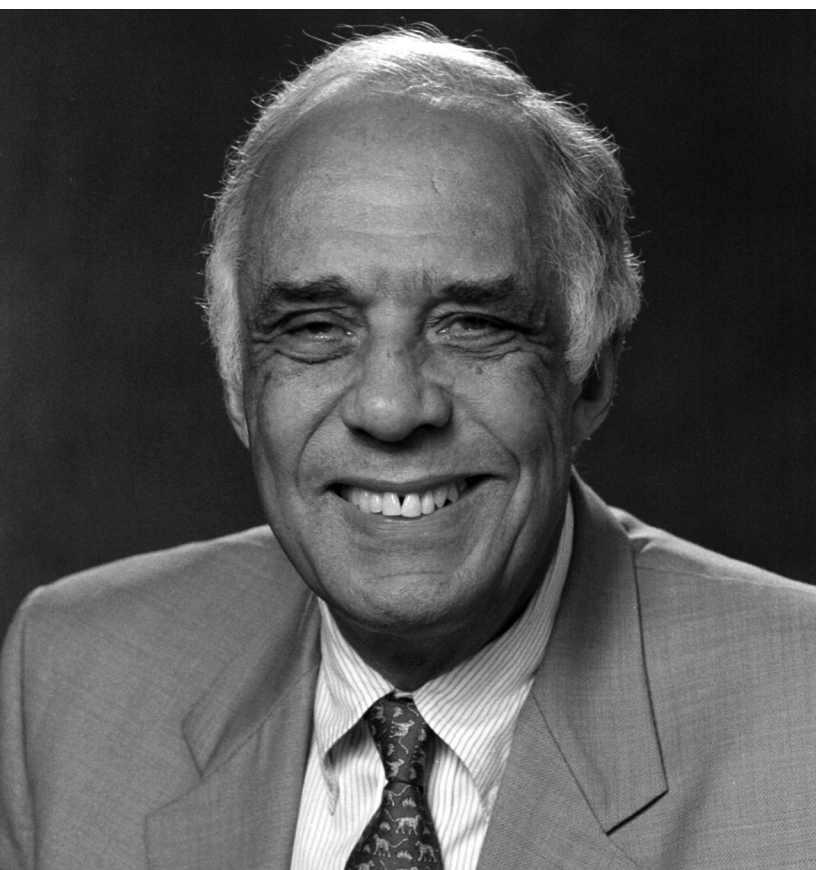


# JUDICIAL PAY AND THE DIVERSITY OF THE FEDERAL BENCH

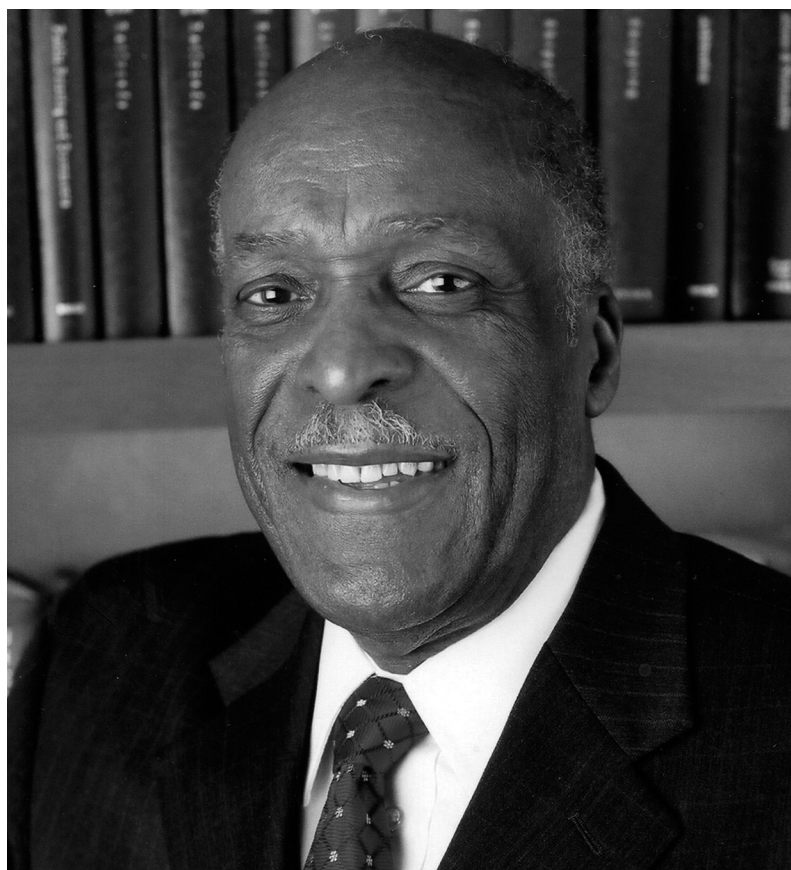
By Archons Robert M. Duncan, Lambda Boulé, Columbus, Ohio, and Nathaniel R. Jones, Alpha Delta Boulé, Cincinnati, Ohio, former federal judges

The late judge Irving Kaufman of New York, who sat on the U.S. Court of Appeals for the Second Circuit, once wrote that judges have a duty to speak on matters that affect the judicial system because the public interest cannot be served by silence: “Silence is not always golden.”



Archon Robert M. Duncan

Our agreement with that view prompts us—two former federal judges who are deeply concerned about the possible consequences if Congress does not increase the compensation for current judges—to offer this perspective to our fellow Archons. In the interest of full disclosure, we hasten to add that our status as former judges [Editor’s note: Archon Duncan is retired from the U.S. District Court for the Southern



Archon Nathaniel R. Jones

District of Ohio; Archon Jones, also retired, sat on the U.S. Court of Appeals for the Sixth Circuit.] would not be affected by any increase in judges’ salaries. Thus, our concerns flow strictly from what we, as African Americans who are former jurists, can foresee happening to the federal judiciary as a whole, as well as to racial minorities who rely so heavily on the judicial system for a vindication of their constitutional rights.

Archons of Sigma Pi Phi Fraternity were among the first to diversify the federal bench. The late judge William Henry Hastie, who was appointed in 1949 by President Harry Truman to the U.S. Court of Appeals for the Third Circuit in Philadelphia, was the first lifetime, or Article III, African American judge named to a federal court. That was monumental.

For African Americans, the road to seats on the federal bench—there have been 151 black federal judges—has been bumpy and uneven, to say the least. But the immense power wielded by these judges, and their ability to interact with white colleagues as equals, has been overwhelmingly beneficial to the struggle for equal rights. Retired Supreme Court Justice Sandra Day O'Connor made the point most dramatically in commenting on how much she learned from her association with Justice Thurgood Marshall, who left the court in 1991. Without question, Justice O'Connor's opinion upholding affirmative action in the 2003 University of Michigan case *Grutter v. Bollinger* was influenced by Justice Marshall.

In 1961, President John F. Kennedy appointed Judge Wade Hampton McCree, Jr., and Judge James Benton Parsons to the federal bench—the first African American lifetime judges since Judge Hastie. In doing so, he placed in the hands of black jurists more power than ever before. Federal judges

“Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence of judges . . . will be seriously eroded.”

sitting on district courts and courts of appeal, in addition to making decisions in important cases, exercise the power of judicial appointment over a number of judgeships, including bankruptcy judges and U.S. magistrate judges.

Because of this appointment power, the increasing number of African Americans with lifetime appointments has contributed to the burgeoning ranks of black bankruptcy and magistrate judges. Robert Duncan, a coauthor of this piece, while serving as a judge on the U.S. District Court for the Southern District of Ohio, appointed one of the country's earliest black bankruptcy judges, Grady L. Pettigrew, Jr. And the Honorable Jeffery P. Hopkins, an Archon in Alpha Delta Boulé, Cincinnati, is now president of the National Conference of Bankruptcy Judges.

Archons may ask what this has to do with the issue of judicial pay. African American lawyers are much sought after by law firms, corporations and prestigious law schools for teaching positions. These lawyers have financial obligations that range from educating their children to supporting philanthropic causes. When the compensation of judges shrinks in relation to their earning potential in other areas of the law, the allure of the bench diminishes. The two of us left the bench voluntarily; we could still be serving if we had chosen to do so. Yet the financial rewards that accrued to us after we left eclipsed what we would have earned had we remained.

Without question, lawyers have long coveted federal judgeships. Indeed, the prestige and power are what con-

tributed to the barriers faced by black lawyers. Once diversity came, black Americans acquired a deeper knowledge of the power of those positions. It was the independence of judges that made possible the overturning of segregation laws. Such awesome realities present compelling reasons that Congress must keep judicial compensation competitive within the legal profession to ensure that federal judgeships remain attractive to black lawyers. Chief Justice John Roberts has declared that “Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence of judges . . . will be seriously eroded.”

When black judges leave the courts, or when highly qualified black lawyers choose options other than the bench, the racial diversity of the courts is reduced and society loses. What is of particular concern to us is how the loss of diversity can affect the way in which justice is dispensed. Judges bring to the court their life experiences and perspectives. This reality can have a significant bearing on the way cases are handled.

Increasingly, judges decide cases through a procedure known as summary judgment, which removes juries from the equation. This process is how cases involving claims of racial discrimination in jobs, voting rights, reapportionment, housing, public accommodations and use of force by law-enforcement officials are handled. The two of us dealt with these issues as trial and appellate judges.

Marc Galanter, a law professor at the University of Wisconsin, has reported, “Summary judgments are being asked for in about 17 percent of cases and granted in about 9 percent.” University of Cincinnati Law School professor Suja A. Thomas wrote in the *Virginia Law Review* that when judges rule on summary judgments, they are deciding “genuine issues” and “material facts,” as well as what a “reasonable jury” would decide. A judge's life experiences play a large part in determining who wins and who loses. If the bench is stacked with jurists whose experiences have not included exposure to the issues that racial minorities face, then it is less likely that they will understand cases that involve race.

It is therefore critical that judicial pay be increased to retain those minority judges who currently occupy the federal bench and to attract gifted young lawyers of minority backgrounds. The process would be made easier if Congress uncoupled its compensation from that of judges. That way, members of Congress would be free to act on the question of judicial pay without being concerned about constituent wrath.

The ranks of the Boulé have been and are filled by esteemed lawyers who graced the federal bench. Yet we need more William H. Hasties, Clifford Greens, A. Leon Higginbothams, Damon J. Keiths and Robert L. Carters. The best way to ensure that we get them is to support the effort to raise judicial salaries to a respectable level.

As two former federal judges, we know whereof we speak. Ω