Office of the Attorney General
Washington, D. C. 20530

October 29, 2013

The Honorable John Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Beer, et al. v. United States, No. 09-37 (CFC); Gettleman v. United States, No. 11-464 (CFC)

Dear Mr. Speaker:

In accordance with 28 U.S.C. § 530D, I write to inform you that the Department of Justice has decided not to appeal the decisions of the Court of Federal Claims in the above-captioned cases. A copy of those decisions, as well as a copy of a prior decision of the en banc Court of Appeals for the Federal Circuit in *Beer*, is enclosed.

The Ethics Reform Act of 1989 (1989 Act), Pub. L. No. 101-194, 103 Stat. 1716, specifies an economic formula for annual cost-of-living increases to federal judges' salaries. 1989 Act § 704(a)(2)(A), 103 Stat. 1769. The increases are contingent upon increases to the salaries of General Schedule federal employees, and are linked to increases in the salaries of Members of Congress and high-level Executive Branch officials. 1989 Act § 704(a)(2)(A), 103 Stat. 1769 (amending 28 U.S.C. 461(a) (1988)).

Although General Schedule rates of pay increased in 1995, 1996, 1997, and 1999, Congress passed statutes before the start of each of those years specifying that the corresponding judicial-pay increases should not take effect. Act of Sept. 30, 1994, Pub. L. No. 103-329, § 630, 108 Stat. 2424; Act of Nov. 19, 1995, Pub. L. No. 104-52, § 633, 109 Stat. 507; Act of Sept. 30, 1996, Pub. L. No. 104-208, § 637, 110 Stat. 3009-364; Act of Oct. 21, 1998, Pub. L. No. 105-277, § 621, 112 Stat. 2681-518. Plaintiffs in these cases are eight federal judges who filed suit in the Court of Federal Claims seeking back pay, on the theory (*inter alia*) that those four statutes violated the Compensation Clause, which states that judges' salaries "shall not be diminished during their Continuance in Office." U.S. Const., Art. III § 1.

The Department argued that the challenged statutes were constitutional under the Supreme Court's decision in *United States* v. *Will*, 449 U.S. 200 (1980), which upheld two statutes that had canceled judicial-pay increases under a predecessor to the 1989 Act. In *Will*, the Court framed the question before it as "when, if ever, does the Compensation Clause prohibit the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted?" *Id.* at 221. The Court answered that question by holding that a promised salary increase "vests," and "the protection of the Clause [is] first invoked," not "when the formula is *enacted*," *ibid.*, but "only when [the salary increase] takes effect as part of the compensation due and payable to Article III judges," *id.* at 229.

In *Beer*, the en banc Federal Circuit rejected the Department's argument by a vote of 10-2. *Beer* v. *United States*, 696 F.3d 1174 (2012). The majority concluded that the Compensation Clause protects judges' "reasonable expectations" of salary increases and that the 1989 Act had created such an expectation. *Id.* at 1184-1185. The majority distinguished the Supreme Court's decision in *Will* on the ground that the statutory scheme at issue there was more "discretionary" with respect to pay increases than the formula in the 1989 Act. *Id.* at 1183. Two judges dissented, arguing that *Will* controlled the case and that the majority's distinction of it was flawed. *Id.* at 1187-1192.

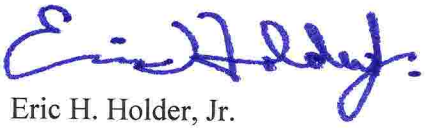
The Department petitioned the Supreme Court for a writ of certiorari. See Pet. for Cert., *United States* v. *Beer*, 131 S. Ct. 1997 (2013) (No. 12-801). The petition acknowledged that the case was in an interlocutory posture, because the Court of Federal Claims had not yet calculated the correct amount of back pay and entered a final judgment. *Id.* at 30-31. The petition argued, however, that the Federal Circuit's distinction of *Will* was erroneous; that Supreme Court review of the constitutionality of the challenged statutes was necessary; and that the interlocutory posture of the case did not provide reason to deny review because further proceedings in the Court of Federal Claims would "have no effect on the purely legal questions presented" for the Court's review. *Id.* at 31; see *id.* at 15-20, 26-31. The Supreme Court denied certiorari without published dissent. See 131 S. Ct. at 1997.

On remand, the Court of Federal Claims calculated the amount of back pay owed to the plaintiffs in these cases and entered final judgment. The Department has filed notices of appeal from those final judgments, but has determined not to pursue an appeal. Although the Department could again argue to the Federal Circuit and then to the Supreme Court that the challenged statutes are constitutional under *Will*, a large majority of judges on the Federal Circuit has already rejected that argument, and the Supreme Court previously denied certiorari.

The only meaningful development since the prior denial of certiorari is that the Court of Federal Claims has now entered final judgments specifying the amounts of back pay to which various plaintiffs are entitled. Our earlier petition argued, however, that the then-interlocutory posture of the case was irrelevant to the suitability of the questions presented for immediate Supreme Court review. And the Supreme Court in denying certiorari gave no indication that the absence of a final judgment affected the Court's decision.

The time within which to file an opening brief in the court of appeals is currently set to expire on November 7, 2013. Please do not hesitate to contact me if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General

Enclosures