No. 12-801

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PETER H. BEER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Compensation Clause prohibited Congress from disallowing certain annual increases in judicial salary contemplated by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, when the statutes disallowing those increases were enacted into law before the increases were scheduled to take effect.

2. Whether, under the Act of Nov. 28, 2001, Pub. L. No. 107-77, § 625, 115 Stat. 803, amending Pub. L. 97-92, § 140, 95 Stat. 1200, Congress's failure in 2007 and 2010 to pass specific legislation authorizing judicial salary increases prevented increases for those years from taking effect.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Respondents are Peter H. Beer, Terry J. Hatter, Jr., Richard A. Paez, Laurence H. Silberman, A. Wallace Tashima, and U.W. Clemon.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-66a) is reported at 696 F.3d 1174. The most recent panel opinion (App., *infra*, 71a-91a) is reported at 671 F.3d 1299. The opinion of the Court of Federal Claims granting the government's motion to dismiss (App., *infra*, 111a-113a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the appendix to this petition. App., *infra*, 127a-135a.

STATEMENT

1. a. The salaries of federal judges are determined according to "an interlocking network of statutes." *United States* v. *Will*, 449 U.S. 200, 202 (1980); see *id.* at 203-204. Both before and after *Will*, annual increases in judicial salaries have been linked to increases in the salaries of Members of Congress and high-level Executive Branch officials, and those increases have in turn been contingent upon increases to the salaries of General Schedule federal employees.

In the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 225, 81 Stat. 642, Congress established base salaries for federal judges and other high-level officials. *Will*, 449 U.S. at 203. In the Executive Salary Cost-of-Living Adjustment Act (Adjustment Act), Pub. L. No. 94-82, § 202, 89 Stat. 419 (1975), Congress enacted a formula for making annual cost-of-living increases to those salaries. *Will*, 449 U.S. at 203-204. The Adjustment Act provided for increases in years in which similar adjustments were made in the General Schedule pay rates for other federal employees pursuant to the Federal Pay Comparability Act of 1970 (Comparability Act), Pub. L. No. 91-656, § 3, 84 Stat. 1946 (5 U.S.C. 5301 et seq.). *Will*, 449 U.S. at 203.

Under the Comparability Act in its original form, a presidential agent made annual recommendations for increases in federal salaries under the General Schedule to bring those salaries in line with prevailing salaries in the private sector. 5 U.S.C. 5301-5306 (1976 & Supp. V

1981). Each year, the agent recommended an appropriate increase, based on his comparison of General Schedule salaries to data on private-sector salaries compiled by the Bureau of Labor Statistics. *Will*, 449 U.S. at 203-204. That recommendation was reviewed by the Advisory Committee on Federal Pay, which made its own recommendation. *Id.* at 204. The President was then required either to adjust General Schedule salaries in accordance with the recommendations, or, if he believed that "economic conditions or conditions of national emergency ma[d]e the planned adjustment inappropriate," to submit to Congress an alternative plan that would govern in the absence of congressional intervention. *Ibid.* In either event, any salary increases would take effect on October 1, the beginning of the federal fiscal year. *Ibid.* The Adjustment Act provided that the salary increases made under the Comparability Act would also apply to the salaries of federal judges and other high-level officials, and that their salary increases would also take effect on October 1. *Id.* at 204-205.

b. This Court's unanimous decision in *Will* addressed a constitutional challenge to four Acts of Congress that had blocked judicial salary increases scheduled to take effect under the Adjustment Act in certain fiscal years in the late 1970s. See 449 U.S. at 202, 205-209. For two of those years (the fiscal years beginning on October 1, 1976, and October 1, 1979), the blocking legislation was signed into law on or after the October 1 effective date of the scheduled salary increases. *Id.* at 205, 208. For the other two years (the fiscal years beginning on October 1, 1977, and October 1, 1978), Congress enacted, and the President signed, the blocking legislation before the October 1 effective date. *Id.* at 206-207. The plaintiffs in *Will* contended that all four blocking statutes violated

the Compensation Clause of Article III, Section 1, of the Constitution, which provides that Article III judges "shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III, § 1; see *Will*, 449 U.S. at 202. The Court struck down two of the statutes and upheld the other two. *Id.* at 224-230.

The two blocking statutes the Court found unconstitutional were the ones signed into law on or after the effective date of the pay increases they sought to prevent. With respect to the first of those statutes, the Court explained that, by the time it was signed into law by the President "during the business day of October 1, 1976, * * * the 4.8% increase under the Adjustment Act already had taken effect, since it was operative with the start of the month—and the new fiscal year—at the beginning of the day." *Will*, 449 U.S. at 224-225. The Court concluded that the blocking statute violated the Compensation Clause because it "purported to repeal a salary increase already in force. Thus it 'diminished' the compensation of federal judges." *Id.* at 225; see *id.* at 226. The Court relied on that same reasoning to invalidate a statute signed into law on October 12, 1979, which had attempted to block a pay increase that had taken effect on October 1, 1979. *Id.* at 208, 229-230.

The two blocking statutes that the Court upheld in *Will* were the ones signed into law before the effective date of the pay increases they sought to prevent. See 449 U.S. at 226-229. The Court explained that those statutes had been "passed before the Adjustment Act increases * * * had become a part of the compensation due Article III judges." *Id.* at 228. Thus, the blocking statutes' "departure from the Adjustment Act policy in no sense diminished the compensation Article III

judges were receiving; it refused only to apply a previously enacted formula." *Ibid.* The Court rejected the plaintiff judges' argument that, "by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, * * * Congress made the annual adjustment, from that moment on, a part of judges' compensation for constitutional purposes." *Id.* at 226-227 (citation omitted). Instead, the Court held, "Congress may, before the effective date of a salary increase, rescind such an increase scheduled to take effect at a later date." *Id.* at 226.

c. After the decision in *Will*, Congress enacted a law designed to prevent judicial-pay increases from "automatically tak[ing] effect" by "prohibiting [such] increases until they were specifically authorized by Congress." 127 Cong. Rec. 28,439 (1981) (statement of Sen. Dole); see H.R.J. Res. 370, Pub. L. No. 97-92, § 140, 95 Stat. 1200 (1981) (Section 140). As originally enacted, Section 140 provided in relevant part:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted. * * * [N]othing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.

d. Several years later, Congress enacted the Ethics Reform Act of 1989 (1989 Act), Pub. L. No. 101-194, 103 Stat. 1716. The 1989 Act made three relevant sets of changes to judicial pay. First, it restored certain previously withheld salary increases, stating that the increases were "authorized" for "purposes of section 140 of Public Law 97-92." § 702(c), 103 Stat. 1768; see § 702(a), 103 Stat. 1767. Second, it limited outside income and honoraria for judges and other high-level government officials, but increased the base salaries of those officers by approximately 25%. § 601, 103 Stat. 1760; § 703, 103 Stat. 1768. Third, it changed the Adjustment Act's formula for calculating annual salary increases for federal judges and other high-level federal officials, providing that such increases would thereafter be calculated by subtracting half a percentage point from the percentage change in the Employment Cost Index (ECI), "a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics." 135 Cong. Rec. 30,753 (1989); see 1989 Act § 704(a)(2)(A), 103 Stat. 1769.

Although the 1989 Act modified the formula for calculating the amount of an annual increase, it did not uncouple increases to judicial salaries from increases to the salaries of other federal workers. As under the prior system, the 1989 Act authorized an annual adjustment to judges' salaries only if General Schedule federal employees also received an adjustment for the same year. 1989 Act § 704(a)(2)(A), 103 Stat. 1769 (amending 28 U.S.C. 461(a) (1988)). Shortly after it enacted the 1989 Act, Congress determined that the ECI would also be used to calculate annual adjustments to the salaries of General Schedule employees. Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509,

§ 529, 104 Stat. 1430 (enacting new 5 U.S.C. 5303). It also determined that salary adjustments would occur on January 1, not October 1. *Ibid.*

e. In the decade following those legislative revisions, Congress permitted salary increases for federal judges and other high-level officials to take effect in certain years, but disallowed such increases in other years. See Congressional Research Serv., *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries* 1-3 (2008). In 1991, 1992, 1993, 1998, and 2000, Congress authorized judicial salary increases pursuant to Section 140. See Act of Nov. 5, 1990, Pub. L. No. 101-520, § 321, 104 Stat. 2285; Act of Oct. 28, 1991, Pub. L. No. 102-140, § 305, 105 Stat. 810; Act of Oct. 6, 1992, Pub. L. No. 102-395, § 304, 106 Stat. 1859; Act of Nov. 26, 1997, Pub. L. No. 105-119, § 306, 111 Stat. 2493; Act of Nov. 29, 1999, Pub. L. No. 106-113, § 304, 113 Stat. 1501A-36. But while General Schedule rates of pay increased pursuant to the Comparability Act in 1995, 1996, 1997, and 1999, Congress enacted a law, before January 1 of each year, preventing a corresponding increase for federal judges and other high-level officials. See 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.

f. In response to Congress's legislation blocking some of the salary increases contemplated by the 1989 Act, twenty federal judges—in *Williams* v. *United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), rev'd, 240 F.3d 1019 (Fed. Cir. 2001), cert. denied, 535 U.S. 911 (2002)—brought a class-action lawsuit on behalf of themselves

and similarly situated Article III judges. Those plaintiffs argued that such congressional action violated the Compensation Clause because the 1989 Act gave them a vested right to receive increases in any year in which General Schedule employees received an increase. *Id.* at 53. The government responded that the 1989 Act could not give judges a statutory right to automatic salary increases because Section 140 required affirmative congressional legislation to increase judicial salaries. *Id.* at 61. The government also argued that, under this Court's decision in *Will*, the Compensation Clause does not prohibit Congress from disallowing a scheduled salary increase if the supervening law is enacted before the date on which the increase is scheduled to take effect. *Id.* at 59-60.

The plaintiffs prevailed in district court, but the United States Court of Appeals for the Federal Circuit reversed (with one judge dissenting). *Williams*, 240 F.3d 1019. The court of appeals agreed with the plaintiffs that Section 140 did not prevent the 1989 Act from giving judges a statutory right to receive future salary increases. *Id.* at 1026-1027. It reasoned that Section 140 had expired at the end of the 1981 fiscal year and that, in any event, the 1989 Act qualified as an "Act of Congress hereafter enacted" that itself expressly authorized the relevant future salary increases for purposes of Section 140. *Id.* at 1027 (quoting Section 140); see *id.* at 1026-1027. The court of appeals concluded, however, that *Will* foreclosed the plaintiffs' Compensation Clause claims. *Id.* at 1027-1040. The court explained that the statutory scheme at issue in *Will* was "strikingly similar" to the one the plaintiffs had challenged, *id.* at 1027; that *Will* had "unanimously created a clear and simple rule for determining whether the repeal of a

statutorily-mandated judicial pay increase runs afoul of Article III," a rule that "turns on the *timing* of the repeal action," *id.* at 1029; and that, under this rule, "Congress retains constitutional authority to set the compensation of federal judges, even if the exercise of that authority involves the repeal of previously enacted laws that would produce compensation increases at specific future dates," so long as the supervening legislation is enacted into law before the "future pay increase" becomes "due and payable to federal judges," *id.* at 1039. This Court denied a petition for a writ of certiorari, with Justice Breyer, joined by Justices Scalia and Kennedy, dissenting. 535 U.S. 911 (2002).

g. After the Federal Circuit rendered its decision in *Williams*, Congress amended Section 140 to provide that Section 140's limitations upon judicial salary increases "shall apply to fiscal year 1981 and each fiscal year thereafter." Act of Nov. 28, 2001, Pub. L. No. 107-77, § 625, 115 Stat. 803. For most years since 2001, Congress has specifically approved salary increases for federal judges. See App., *infra*, 7a. For 2007 and 2010, however, Congress did not enact authorizing legislation. *Ibid.*

2. Respondents are six current or former Article III judges. App., *infra*, 7a. In 2009, they brought suit against the United States in the Court of Federal Claims (CFC). *Id.* at 114a-126a. Respondents alleged that the 1989 Act had given them "a vested interest in the promised salary adjustments within the meaning of the Compensation Clause," and that Congress had violated the Compensation Clause "by enacting legislation denying [the] promised adjustments in 1995, 1996, 1997, and 1999, and then enacting legislation denying [the] promised adjustments in any future year (such as 2007)

when those adjustments are not affirmatively approved by Congress." *Id.* at 123a-124a. Respondents sought back pay and declaratory relief, including a declaration that the Compensation Clause precludes Congress from withholding salary adjustments contemplated by the 1989 Act. *Id.* at 125a-126a.

The CFC dismissed the suit on the ground that it "cannot be distinguished from *Williams*." App., *infra*, 113a. The court of appeals summarily affirmed, noting that "[t]he parties agree, and we must also agree, that *Williams* controls the disposition of this matter." *Id.* at 109a. Respondents subsequently filed a petition for a writ of certiorari. See *id.* at 94a. This Court granted the petition, vacated the court of appeals' decision, and remanded with instructions that the court of appeals decide an issue preserved by the government but not addressed by the lower courts—namely, whether respondents' membership in the class certified in *Williams* precluded them from relitigating the issues decided in that case. *Id.* at 94a-95a. Justices Breyer and Scalia stated that they would have granted the petition and set the case for argument. *Ibid.*

3. On remand, the original panel issued a new opinion. App., *infra*, 71a-91a. The panel concluded that respondents' suit was not barred by issue preclusion, see *id.* at 80a-90a, but it again affirmed the suit's dismissal on the ground that *Williams* foreclosed respondents' arguments as a matter of circuit precedent, *id.* at 90a. The court of appeals subsequently granted rehearing en banc, *id.* at 67a-70a, overruled *Williams* in part, and reinstated respondents' suit. *Id.* at 1a-66a.

a. The court of appeals concluded that the four blocking statutes passed by Congress in the 1990s violated the Compensation Clause. App., *infra*, 10a-21a. The

court took the view that the Compensation Clause "protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level." *Id.* at 19a. The court concluded that the 1989 Act had "set a clear formula" for making annual cost-of-living adjustments to judicial salaries, and that "all sitting federal judges are entitled to expect that their real salary will not diminish due to inflation or the action or inaction of the other branches of Government." *Id.* at 19a-20a.

The court of appeals acknowledged this Court's conclusion in *Will* that "Congress could block COLAs [cost-of-living adjustments] due to judges so long as the blocking legislation took effect in the fiscal year prior to the year in which the increase would have become payable." App., *infra*, 12a (citing *Will*, 449 U.S. at 228-229). The court also quoted *Will*'s statement that "a salary increase 'vests' . . . only when it takes effect as part of the compensation due and payable to Article III judges," *ibid.* (quoting *Will*, 449 U.S. at 229), and it recognized that the "vesting rules considered in *Will* are not expressly limited to the" statutory scheme as it existed when *Will* was decided, *id.* at 16a.

The court of appeals nevertheless held that *Will* did not control the Compensation Clause analysis under the 1989 Act. App., *infra*, 12a-17a. Notwithstanding *Will*'s description of salary increases under the Adjustment Act as "'automatic,'" *id.* at 16a (quoting *Will*, 449 U.S. 203, 223-224), the court of appeals determined that those adjustments were in fact "uncertain" and "discretionary." *Id.* at 17a. It therefore reasoned that the Court in *Will* had been given "no occasion" to consider how the Compensation Clause might apply to a statute like the 1989 Act, which the court of appeals described as a "self-

executing, non-discretionary adjustment for inflation." *Id.* at 16a.

The court of appeals also determined, as a matter of statutory interpretation, that respondents were entitled to salary adjustments for 2007 and 2010, notwithstanding that "Congress did not explicitly authorize judicial compensation adjustments" in those years. App., *infra*, 21a-24a. The court recognized that Section 140 "bars judicial salary increases unless (1) 'specifically authorized by Act of Congress' and (2) 'hereinafter enacted.'" *Id.* at 23a. It concluded, however, that the 1989 Act both "specifically authorized" the 2007 and 2010 increases and was "hereinafter enacted," because it was passed after Section 140's original 1981 enactment date. *Id.* at 23a (quoting Section 140). In the court's view, the 2001 amendment to Section 140 "did not change [Section 140's] substantive scope" so as to require affirmative authorizing legislation for judicial salary increases from that date forward. *Id.* at 22a-24a. The court of appeals held instead that the 2001 amendment had simply "expunged this court's holding in *Williams* that Section 140 expired in 1982." *Id.* at 24a.

Finally, the court of appeals concluded that the six-year statute of limitations applicable to suits in the CFC, 28 U.S.C. 2501, did not bar respondents' challenge to the 1990s blocking legislation. App, *infra*, 24a-25a. The court explained that respondents had "continuing claims" because their base salaries during the six years before their complaint was filed would have been higher if those salaries had incorporated increases originally contemplated to take effect in the 1990s. *Ibid.* The court accordingly remanded for a calculation of damages, as measured by the additional amount respondents would have earned since January 13, 2003, if all the 1989

Act's contemplated increases had taken effect. *Id.* at 25a.

b. Judge O'Malley, joined by two other judges, filed a concurring opinion. That concurrence expressed the views that (1) if this Court's decision in *Will* were controlling in this case, then *Will* was wrongly decided; and (2) Section 140 unconstitutionally discriminates against judges and violates separation-of-powers principles. App, *infra*, 37a-65a.

c. Judge Wallach filed a concurring opinion "to clarify" that the majority's decision "does not mean that any particular federal judge other than [respondents] will necessarily accept accrued back pay." App., *infra*, 66a.

d. Judge Dyk, joined by Judge Bryson, dissented. App., *infra*, 26a-36a. Judge Dyk found this Court's decision in *Will* to be "squarely on point" and controlling in this case. *Id.* at 27a. He saw "no meaningful difference" between the Adjustment Act and the 1989 Act, *id.* at 32a-33a, and described the majority's distinction as "baffling." *Id.* at 33a. He further explained that "[e]ven if the two statutory schemes were meaningfully different, * * * that would be quite beside the point," because any such difference would not "authorize[] this court to disregard *Will*'s clear vesting rule." *Id.* at 34a.

Judge Dyk explained that *Will* "made clear that a future salary increase only becomes protected by the Compensation Clause when it becomes 'due and payable'; an increase which is merely anticipated or expected has not vested, and is not protected." App., *infra*, 28a. He observed that "[t]he majority attempts to redefine the constitutional test as turning not on 'vesting,' but on 'reasonable expectations,' a concept that appears nowhere in the *Will* opinion." *Id.* at 29a. Judge Dyk also cautioned that "a Court of Appeals must not 'confuse the

factual contours of Supreme Court precedent for its unmistakable holding' in an effort to reach a 'novel interpretation' of that precedent." *Id.* at 35a (quoting *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-535 (1983) (per curiam)) (brackets omitted).

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in this case struck down four Acts of Congress (the blocking statutes from 1995, 1996, 1997, and 1999) and interpreted a fifth (the 2001 amendment to Section 140) essentially to be a nullity. Although, as Judge Dyk's dissent noted, the court of appeals' result may have "much to recommend it as a matter of justice to the nation's underpaid Article III judges," App., *infra*, 26a, that result cannot be squared with the clear rule announced in *United States* v. *Will*, 449 U.S. 200 (1980), or with standard principles of statutory construction. The Federal Circuit's decision invites every sitting Article III judge (along with numerous other federal officials whose salaries are linked to judicial salaries) to sue the United States for damages, and many have already done so.

This Court should grant certiorari and correct the Federal Circuit's errors. As respondents themselves have recognized, this case presents issues of exceptional importance. The rule announced in *Will* was an integral part of the constitutional landscape when Congress enacted the 1989 Act. In assessing the potential consequences of that legislation, and in determining whether its passage was fiscally prudent, Congress was entitled to rely on this Court's clear holding that future judicial salary increases could be prevented from taking effect if Congress timely determined that blocking legislation was appropriate. The decision below, however, treats

the 1989 Act as an irrevocable commitment to give annual pay increases to sitting federal judges in perpetuity, regardless of budgetary constraints and regardless of whether other high-ranking government officials receive corresponding increases.

A. The Court Of Appeals' Decision Erroneously Struck Down Four Acts Of Congress That Are Constitutional Under This Court's Decision In *United States* v. *Will*

1. In *Will*, this 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?" 449 U.S. at 221. The Court stated that the case required it to "decide when a salary increase authorized by Congress under such a formula 'vests'—*i.e.*, becomes irreversible under the Compensation Clause." *Ibid.* 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.

That rule follows from the text of the Compensation Clause. The Compensation Clause states that Article III judges "shall, at stated Times, *receive* for their Services a Compensation, which shall not be *diminished* during their Continuance in Office." U.S. Const. Art. III, § 1 (emphasis added). A judge's compensation is not "diminished" unless it is reduced from the compensation that the judge previously "receive[d]." Thus, as this Court concluded in *Will*, even if one Act of Congress adopts a formula providing for judges to receive salary increases in the future, the passage of another Act of Congress to disallow those salary increases before they

take effect does not "diminish[]" judges' compensation within the meaning of the Clause. See 449 U.S. at 228.

As the Court recognized, "the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." *Will*, 449 U.S. at 227. Although the Clause "embodies a clear rule prohibiting decreases," the Constitution "delegate[s] to Congress the discretion to fix salaries and of necessity place[s] faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand." *Ibid.*

Accordingly, when Congress passes a law "based on this delegated power to fix and, periodically, increase judicial compensation," it "d[oes] not thereby alter the *compensation* of judges," but instead "only the *formula* for determining that compensation." *Will*, 449 U.S. at 227. Congress retains the authority to later "abandon th[e] formula" by passing blocking legislation "before the * * * increases ha[ve] taken effect—before they ha[ve] become a part of the compensation due Article III judges." *Id.* at 227-228. Such a "departure from the [previous] policy in no sense diminishe[s] the compensation Article III judges were receiving; it refuse[s] only to apply a previously enacted formula." *Id.* at 228. "To say that Congress could not alter a method of calculating salaries before it was executed," the Court explained, "would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress." *Ibid.*

2. The four blocking statutes that Congress passed in the 1990s are constitutional under the rule applied in *Will*. All four Acts became law before the contemplated

annual salary increases under the 1989 Act had taken effect. App., *infra*, 4a-5a. The blocking laws thus fall squarely within *Will*'s rule that Congress may "refuse[] * * * to apply a previously enacted formula" for increasing judicial salaries, so long as those increases have not yet "taken effect" and become part of the "compensation due Article III judges." 449 U.S. at 228. Indeed, Members of the Congress that enacted the 1989 Act could, and presumably did, appropriately rely on *Will* to conclude that the increases contemplated in the Act would remain subject to congressional disallowance or modification until those increases actually became effective.

In holding that the salary increases contemplated in the 1989 Act were instead permanent and irrevocable, the court of appeals distinguished *Will* by contrasting what it described as the "precise and definite" formula of the 1989 Act with the purportedly "uncertain" and "discretionary" adjustment provisions the Court considered in *Will*. App., *infra*, at 17a. The court of appeals' analysis is flawed in at least four important respects.

First, the Court in *Will* did not suggest that its decision was based in any way on the "discretionary" character of the then-applicable statutory scheme. To the contrary, the Court described the scheduled salary adjustments as "tak[ing] effect automatically pursuant to a formula previously enacted." 449 U.S. at 221. In holding that Congress's disallowance of the scheduled salary increases was valid for two of the fiscal years at issue, and invalid for the other two, the Court focused solely on the dates on which the four blocking statutes were enacted. *Id.* at 224-230. And the Court squarely held "that a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the

compensation due and payable to Article III judges." *Id.* at 229. Nothing in *Will* suggests that a scheduled judicial salary increase can "vest" (*i.e.*, become constitutionally irrevocable) at some earlier date if the applicable statutory scheme is sufficiently "non-discretionary," App., *infra*, 16a.[1]

Second, the 1989 Act and the statutory scheme at issue in *Will* are far more similar than the court of appeals was willing to acknowledge. Under both schemes, federal judges are entitled to a salary increase in any year in which General Schedule salaries are increased, and the judicial salary increase takes effect automatically unless Congress intervenes. See pp. 2-3, 6-7, *supra*. Both schemes also contemplate annual increases in General Schedule salaries. The statute at issue in *Will* directed the President to increase General Schedule

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[1] The court of appeals stated that "the Compensation Clause protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level." App., *infra*, 19a. By "maintenance of that compensation level," the court appears to have meant maintenance of a particular *inflation-adjusted* salary through (if necessary) increases in dollar amounts to counteract increases in the cost of living. See *ibid.* (stating that judges' "expectancy interest does not encompass increases in future salary but contemplates maintenance of that real salary level"); *id.* at 20a (stating that 1989 Act "promised protection against diminishment in real pay"). As *Will* makes clear, however, and as the court of appeals itself recognized, "the Compensation Clause does not require periodic increases in judicial salaries to offset inflation or any other economic forces." *Id.* at 20a. Indeed, the Court in *Will* framed the question presented as involving Congress's authority to "repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges." 449 U.S. at 202. Thus, while the judicial salary increases contemplated by the 1989 Act were intended to counteract inflation, that fact does not distinguish this case from *Will*.

salaries to promote comparability with private-sector salaries unless he "consider[ed] it inappropriate" "because of national emergency or economic conditions affecting the general welfare." 5 U.S.C. 5305(c)(2) (1976). Similarly under the current system, the President is required to increase General Schedule salaries unless he "consider[s] the pay adjustment * * * to be inappropriate" "because of national emergency or serious economic conditions affecting the general welfare." 5 U.S.C. 5303(b)(1).

Third, the en banc court's analysis fails to account for the *Will* Court's rejection of the plaintiffs' challenge with respect to the third of the four years at issue in that case. As Judge Dyk explained in dissent, "if the test were 'reasonable expectations,' then the key question would not be how the statutory scheme initially determined a COLA, but whether the amount of the COLA had become 'precise and definite' at the time the blocking statute thwarted the judges' expectations." App., *infra*, 31a. In the third of the four years at issue in *Will*, the President approved a 5.5% salary increase on August 31; notified Congress of that planned increase; and possessed no further discretion to change the amount or to stop the increase from occurring. *Id.* at 31a-32a (Dyk, J., dissenting); see *Will*, 449 U.S. at 207-208. The salary increase that Congress blocked for that year was accordingly "just as 'precise and definite'" as any salary increases Congress scheduled under the 1989 Act. App., *infra*, 32a (Dyk, J., dissenting). This Court nevertheless held that blocking legislation passed on September 30—the day before the scheduled increase would have taken effect—was constitutional. *Will*, 449 U.S. at 207-208, 229.

Fourth, under the 1989 Act itself, annual judicial salary increases take effect only if General Schedule salaries are adjusted. See 1989 Act § 704(a)(2)(A), 103 Stat. 1769 (currently codified at 28 U.S.C. 461(a)). Congress's enactment of a law blocking General Schedule increases therefore would block judicial salary increases as well. The possibility that judicial salary increases could be blocked in that (undoubtedly constitutional) manner further undermines the court of appeals' conclusion that the mere enactment of the 1989 Act gave federal judges a constitutional entitlement to the annual adjustments at issue in this case.[2]

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[2] In contrasting the "mechanical implementation of COLAs" under the 1989 Act with the "discretionary" character of the 1975 Act, the court of appeals principally focused not on the statutory provisions that governed whether judicial salaries would be increased *at all*, but on the statutory procedures for determining the precise *amount* of any salary increase. See App., *infra* 12a-14a. But even under the 1989 Act, it is impossible to "predict" (*id.* at 13a) the precise amount of most future salary increases because those increases depend on future economic conditions that are not themselves ascertainable *ex ante*. Equally misplaced is the court of appeals' focus (*id.*, at 14a-16a) on the provision of the 1989 Act that limited federal judges' outside income. In the court of appeals' view, Congress intended the Act's future salary increases to be irrevocable in order to make up for the reduction in outside earning power. That is a dubious hypothesis, given that (1) Congress also awarded judges an immediate 25% salary increase; and (2) the provisions adjusting outside income and salaries also applied to certain non-judicial government officials whose future salary increases Congress unquestionably retained authority to modify. See 1989 Act §§ 601, 702-704, 103 Stat. 1760, 1767-1769; App., *infra*, 34a n.7 (Dyk, J., dissenting).

B. As Amended In 2001, Section 140 Required Affirmative Congressional Authorization For Any Subsequent Judicial Salary Increases

The court of appeals compounded its constitutional error by committing a further error of statutory interpretation. In 2001, while the petition for a writ of certiorari in *Williams* v. *United States*, 240 F.3d 1019 (Fed. Cir. 2001), cert. denied, 535 U.S. 911 (2002), was pending before this Court, Congress amended the governing statutory scheme to provide that no judicial salary increase would take effect without specific statutory authorization. The Federal Circuit held that the 2001 amendment was effectively superseded by the 1989 Act's scheme of automatic salary increases, thereby depriving the 2001 amendment of any meaningful practical effect. Regardless of how the Compensation Clause issue in this case is decided, the court of appeals' statutory holding will significantly undermine Congress's effort to achieve the policy objectives reflected in the 2001 amendment.

1. As enacted in 1981, Section 140 provided that "none of the funds appropriated by * * * any * * * Act shall be obligated or expended to increase * * * any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted." In introducing that legislation, Senator Dole stated that it would "put an end to the automatic, backdoor pay raises for Federal judges." 127 Cong. Rec. 28,439 (1981) (statement of Sen. Dole). He described the preexisting system, in which the President's pay-increase recommendations would "automatically take effect" unless expressly disapproved, as a "major problem" that had left "the country * * * saddled with judicial salary increases that Con-

gress did not intend to authorize." *Ibid.* Although Senator Dole did not "oppose pay increases for Federal judges or Members of Congress," he believed that "we have to bring some semblance of reason to the entire system." *Ibid.* He understood that, under *Will*, "the new rates vest" at the start of the fiscal year, and a "failure by Congress to move quickly enough, even though a delay of only a few minutes, can have harmful consequences for congressional budget plans." *Ibid.* He explained that Section 140 "would remedy this siutation by prohibiting judicial pay increases unless they were specifically authorized by Congress." *Ibid.*

In *Williams*, the Federal Circuit concluded that Section 140 was no longer in force, and that the future pay increases contemplated in the 1989 Act would take effect automatically absent timely blocking legislation. It first expressed the view that Section 140 had "by its own terms * * * expired as of September 30, 1982." *Williams*, 240 F.3d at 1026-1027. In so holding, the court disagreed with the determination of the Comptroller General of the United States, who, "in a series of letters and decisions since 1982, ha[d] taken the position that Section 140 is permanent legislation." *Id.* at 1026; see *id.* at 1026-1027 (citing Comptroller General opinions). As the Comptroller General reasoned, Section 140's "hereafter" language indicates future effect, and if Section 140 were not originally intended as permanent legislation, "the section would have [had] no legal effect since it would have been enacted to prevent increases during a period when no [judicial pay] increases were authorized to be made." *Federal Judges—Applicability of October 1982 Pay Increase*, 62 Comp. Gen. 54, 56-57 (1982).

The court in *Williams* further held that, even if Section 140 had not expired in 1982, it would have been superseded by the 1989 Act. 240 F.3d at 1027. The court explained that "Section 140, by its own terms, yields to inconsistent provisions of later-enacted laws. Here, clearly, the 1989 Act was enacted after Section 140, and the 1989 Act, by providing a specific process by which federal judges are to become eligible for COLAs, is inconsistent with the general ban on pay increases established by Section 140." *Ibid.*

2. While the certiorari petition in *Williams* was pending, Congress amended Section 140 to provide that its affirmative-authorization requirement "shall apply to fiscal year 1981 and each fiscal year thereafter." Act of Nov. 28, 2001, Pub. L. No. 107-77, § 625, 115 Stat. 803. Accordingly, the government again relied on Section 140 in this case to argue that Congress, by failing to specifically authorize pay increases for federal judges in 2007 and 2010, had prevented those annual increases from taking effect. The court of appeals disagreed. App., *infra*, 21a-24a. It acknowledged that the 2001 amendment had "erased Section 140's expiration date, making permanent whatever effect the provision had when originally enacted." *Id.* at 23a-24a. But it adhered to the alternative conclusion in *Williams* that, for purposes of Section 140, the 1989 Act was a statute "hereafter enacted" that specifically authorized annual judicial-salary increases in perpetuity. *Ibid.* The court further held that, because "[t]he 2001 amendment makes no reference to its own November 28, 2001, enactment date," but rather "reiterates the 1981 baseline found elsewhere in the original Section 140," the 1989 Act continues to govern potential increases in judicial salaries. *Id.* at 23a.

That conclusion is incorrect. Congress's evident intent in enacting the 2001 amendment was to ensure, to the maximum extent possible, that judicial salary increases would take effect only with express congressional authorization. As respondents' own complaint in this case explained, the 2001 legislation "automatically block[ed] any future salary adjustments for federal judges unless specifically approved by Act of Congress. In essence, Congress thereby attempted to undo the system established by the 1989 Act, which had tied judicial salary adjustments to the virtually automatic GS employee salary adjustments." App., *infra*, 120a (citation omitted).

Depending on the way in which the Compensation Clause issue in this case is ultimately resolved, Congress's decision to give the 2001 amendment retroactive effect (by announcing a rule applicable "to fiscal year 1981 and each fiscal year thereafter") may have exceeded Congress's authority under the Constitution. The court of appeals' decision, however, effectively nullifies the amendment even with respect to post-2001 fiscal years, and even with respect to individual judges who took office after the amendment was enacted (and who could therefore have no constitutionally protected expectation of receiving automatic salary increases pursuant to the 1989 Act). The Federal Circuit's construction accordingly violates the traditional presumption that, "when Congress acts to amend a statute, * * * it intends its amendment to have real and substantial effect." *Pierce Cnty.* v. *Guillen*, 537 U.S. 129, 145 (2003) (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)) (brackets omitted).

3. If this Court grants certiorari to review the Federal Circuit's Compensation Clause holding, it should

review the court of appeals' construction of the 2001 amendment to Section 140 as well, since the interpretation of that amendment will have substantial practical importance regardless of how the constitutional issue is decided. For fiscal years 2007 and 2010, Congress neither affirmatively authorized judicial salary increases nor affirmatively blocked the increases that, in the court of appeals' view, were scheduled to take effect automatically under the 1989 Act. If this Court agrees with the government's understanding of the Compensation Clause, then Congress had the *power* in 2001 to make future judicial salary increases contingent on affirmative statutory authorization. But if the Court leaves intact the court of appeals' holding that the 2001 amendment failed to put such a regime into effect, then sitting judges would still be entitled under the 1989 Act to salary increases for 2007 and 2010, even if the Court reverses the Federal Circuit's disposition of the constitutional question.

If the Court grants certiorari and affirms the Federal Circuit's Compensation Clause analysis, the 2001 amendment's affirmative-authorization requirement could not constitutionally be applied to judges who took office before the amendment was enacted, since (under that hypothetical constitutional holding) those judges would have a continuing entitlement to yearly salary increases pursuant to the 1989 Act. The affirmative-authorization requirement would still be constitutional, however, as applied to judges who took office after the 2001 amendment was enacted. Such judges could not plausibly allege that their legitimate expectations had been disappointed, or that their compensation had been "diminished." Because the Federal Circuit's nullification of the 2001 amendment will have significant con-

tinuing practical consequences, regardless of the Court's analysis of respondents' constitutional claims, the Court should grant review on the statutory question as well.

C. The Questions Presented Are Of Exceptional Importance

The court of appeals' decision frustrates the manifest intent of Congress; strikes down four separate statutes; effectively nullifies a fifth statute; disregards this Court's decision in *Will*; significantly alters the relationship between Congress and the Judiciary; and imposes a continuing burden on the federal fisc that Congress neither contemplated nor approved. This Court's review is manifestly necessary.

1. The decision below provides a basis for every current or former federal judge (active or senior) to bring suit against the United States. See Federal Judicial Ctr., *How the Federal Courts are Organized*, http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument (last visited Jan. 2, 2013) (noting a total of 866 Article III judgeships). Under the court of appeals' "continuing claims" theory, even judges who took the bench after the years in which Congress blocked judicial salary increases can claim that their salaries for the past six years, and into the future, should be adjusted to the level they would have reached had those increases gone into effect. App., *infra*, 25a-26a. Indeed, the universe of potential plaintiffs goes well beyond Article III judges to include the numerous federal officials (such as bankruptcy judges) whose salaries are set by statute as a function of the salaries paid to Article III judges. See 10 U.S.C. 942(d) (Court of Appeals for the Armed Forces judges); 26 U.S.C. 7443(c)(1) (Tax Court judges); 28

U.S.C. 153(a) (bankruptcy judges); 28 U.S.C. 172(b) (CFC judges); 38 U.S.C. 7253(e) (Court of Appeals of Veterans Claims judges); 48 U.S.C. 1424b(a), 1614(a), 1821(b)(1) (territorial district-court judges); D.C. Code §§ 11-703(b), 11-904(b) (2001) (District of Columbia judges); see also 28 U.S.C. 634(a) (permitting Judicial Conference to set magistrate judges' salaries up to 92% of a district judge's).

Since any such suits for damages against the United States would fall within the Federal Circuit's appellate jurisdiction (see 28 U.S.C. 1295(a)(2)-(3), 1346(a)(2), 1491(a)(1)), no meaningful circuit conflict could develop. In any event, this Court has often reviewed lower-court decisions holding that a federal statute is unconstitutional, even in the absence of a circuit conflict. See, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 130 S. Ct. 1577 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *NEA* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's recognition that determining the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

2. Under the court of appeals' decision, all current members of the federal judiciary are constitutionally entitled to the annual salary increases contemplated in the 1989 Act, at least in any year that General Schedule salaries are increased pursuant to 5 U.S.C. 5303, for as long as they remain on the bench. Congress could re-

peal the 1989 Act's salary increases for *future* federal judges (*i.e.*, those who have not yet taken office when a new compensation scheme is enacted into law). That course, however, would have the undesirable effect of abandoning Congress's longstanding practice of paying all federal judges of a certain type equally, regardless of length of service. See, *e.g.*, United States Courts, *Salaries of Federal Judges, Associate Justices, and Chief Justice Since 1968*, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf (last visited Dec. 18, 2012).

As this Court observed in *Will*, "[t]o say that the Congress could not alter a method of calculating salaries before it [is] executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress." 449 U.S. at 228. In addition to interfering with Congress's control over federal funds, a decision "command[ing] Congress to carry out an announced future intent" deprives the current Congress of its usual freedom to alter or undo what a prior Congress has done. *Ibid.* As a general rule, "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey* v. *United States*, 132 S. Ct. 2321, 2331 (2012).

To be sure, the Compensation Clause limits Congress's usual authority. Once a particular salary increase has become part of an Article III judge's compensation, no future Congress can take that increase away for as long as the judge remains on the bench. But

precisely because the Compensation Clause limits what are otherwise core congressional prerogatives, it is important that Congress be given clear warning as to the point at which a judicial pay increase will become irrevocable. It is even more important that, once the Court has announced a clear rule defining the point at which action by one Congress will bind its successors, that rule should be respected in future cases.

When it enacted the 1989 Act, Congress had clear assurance from this Court's decision in *Will* that future Congresses could still control, on a year-by-year basis, whether the projected increases would actually take effect. By the same token, even if judges' "reasonable expectations" were germane to the constitutional analysis, that decision put all present and future judges (including respondents) on clear notice that they have no constitutional entitlement to a salary increase until that increase actually becomes effective. The court of appeals' departure from the *ratio decidendi* of *Will* accordingly upsets, rather than fulfills, reasonable expectations, by giving the 1989 Act a more far-reaching and immutable effect than either the enacting Congress or then-sitting federal judges would have anticipated.

3. Three Justices previously expressed the view that the Compensation Clause issue in this case is "an important one" that should be addressed by this Court. *Williams* v. *United States*, 535 U.S. 911, 922 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari); see App., *infra*, 94a-95a (votes of Justices Scalia and Breyer to grant certiorari at prior stage of this case). Respondents previously sought this Court's review of the original panel decision in this case, stating that the case presents "issues of manifest importance * * * to the entire judicial sys-

tem" and to Congress as well. Cert. Reply Br. 1, 3-4, *Beer* v. *United States*, 131 S. Ct. 2865 (2011) (No. 09-1395) (09-1395 Cert. Reply Br.); see Int'l Municipal Lawyers Ass'n Amicus Br., *Beer*, *supra* (No. 09-1395); Fed. Judges Ass'n Amicus Br. *Beer*, *supra* (No. 09-1395); Am. Bar Ass'n Amicus Br. *Beer*, *supra* (No. 09-1395); Bar Ass'ns Amicus Br. *Beer*, *supra* (No. 09-1395).

The government, in its previous petition-stage briefing, "d[id] not deny the importance" of the constitutional question, but instead focused on the correctness of the result that the court of appeals originally reached. 09-1395 Cert. Reply Br. 1; see U.S. Br. in Opp., *Beer*, *supra* (No. 09-1395) (09-1395 Opp.). The reasons that the government advanced for denying review at that time no longer apply. The Federal Circuit's decision is no longer consistent with *Will*. Compare 09-1395 Opp. 18-23, with App., *infra*, 10a-21a. The possibility that issue-preclusion principles would bar respondents' suit has been rejected by the Federal Circuit. Compare 09-1395 Opp. 13-18, with App., *infra*, 10a, 80a-90a. The Federal Circuit has also now foreclosed the possibility that Section 140 could diminish the constitutional question's prospective significance by giving Congress a mechanism to control pay raises for judges appointed after 2001. Compare 09-1395 Opp. 24-25, with App., *infra*, 21a-24a. Most significantly, whereas respondents previously sought (and the government opposed) review of a panel decision that had *upheld* the four challenged blocking statutes against respondents' Compensation Clause challenge, the government now seeks review of the en banc decision that held those four Acts of Congress to be unconstitutional.

4. This Court's review is warranted immediately. Although this case has not yet reached final judgment,

all that remains is the calculation of the amount of damages respondents are entitled to recover. That calculation—which may involve a lengthy process of determining how much, for example, each respondent would have paid in federal taxes on the additional amounts in each of the last six years—will have no effect on the purely legal questions presented for this Court's review. In the meantime, additional federal judges and others are already filing follow-on lawsuits seeking their own monetary recoveries against the United States. See *Gettleman* v. *United States*, No. 11-464C (Fed. Cl. July 18, 2011); *Barker* v. *United States*, No. 12-826C (Fed. Cl. Nov. 30, 2012) (class-action complaint); *Cornish* v. *United States*, No. 12-861C (Fed. Cl. Dec. 11, 2012) (complaint filed by bankruptcy judge); *Trager* v. *United States*, No. 12-866C (Fed. Cl. Dec. 12, 2012) (complaint filed by estate of deceased judge). Further delay would also substantially prejudice Congress, which could be forced to make appropriations for additional periods without definitive resolution from this Court on the questions presented. The importance of those questions, and sound principles of judicial administration, counsel in favor of granting certiorari now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5012

PETER H. BEER, TERRY J. HATTER, JR., RICHARD A. PAEZ, LAURENCE H. SILBERMAN, A. WALLACE TASHIMA AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Oct. 5, 2012

Appeal from the United States Court of Federal Claims in No. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

Before: RADER, *Chief Judge*, NEWMAN, MAYER[1], LOURIE, BRYSON, LINN, DYK, PROST, MOORE, O'MALLEY, REYNA, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* RADER, in which *Circuit Judges* NEWMAN, MAYER, LOURIE, LINN, PROST, MOORE, O'MALLEY, REYNA and WALLACH join.

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[1] Judge Mayer participated in the decision on panel rehearing.

Dissenting opinion filed by *Circuit Judge* DYK, in which *Circuit Judge* BRYSON joins.

Concurring opinion filed by *Circuit Judge* O'MALLEY, in which *Circuit Judges* MAYER and LINN join.

Concurring opinion filed by *Circuit Judge* WALLACH.

RADER, *Chief Judge*.

The Constitution erects our government on three foundational corner stones—one of which is an independent judiciary. The foundation of that judicial independence is, in turn, a constitutional protection for judicial compensation. The framers of the Constitution protected judicial compensation from political processes because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, the Constitution provides that "Compensation" for federal judges "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 ("Compensation Clause").

This case presents this court with two issues involving judicial independence and constitutional compensation protections—one old and one new. First, the old question: does the Compensation Clause of Article III of the Constitution prohibit Congress from withholding the cost of living adjustments for Article III judges provided for in the Ethics Reform Act of 1989 ("1989 Act")? To answer this question, this court revisits the Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (1980). Over a decade ago

in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001) (filed with dissenting opinion by Plager, J.), a divided panel of this court found that *Will* applied to the 1989 Act and concluded that Congress could withdraw the promised 1989 cost of living adjustments. This court en banc now overrules *Williams* and instead determines that the 1989 Act triggered the Compensation Clause's basic expectations and protections. In the unique context of the 1989 Act, the Constitution prevents Congress from abrogating that statute's precise and definite commitment to automatic yearly cost of living adjustments for sitting members of the judiciary.

The new issue involves pure statutory interpretation, namely, whether the 2001 amendment to Section 140 of Pub. L. No. 97-92 overrides the provisions of the 1989 Act. This court concludes the 1989 Act was enacted after Section 140, and as such, the 1989 Act's automatic cost of living adjustments control.

I.

The 1989 Act overhauled compensation and ethics rules for all three branches of government. With respect to the judiciary, it contained two reciprocal provisions. On the one hand, the 1989 Act limited a federal judge's ability to earn outside income and restricted the receipt of honoraria. On the other hand, the 1989 Act provided for self-executing and nondiscretionary cost of living adjustments ("COLA") to protect and maintain a judge's real salary.

The 1989 Act provides that whenever a COLA for General Schedule federal employees takes effect under

5 U.S.C. § 5303, the salary of judges "shall be adjusted" based on "the most recent percentage change in the [Employment Cost Index] . . . as determined under section 704(a)(1) of the Ethics Reform Act of 1989." Pub. L. No. 101-194, § 704(a)(2)(A), 103 Stat. 1716, 1769 (Nov. 30, 1989). The Employment Cost Index ("ECI") is an index of wages and salaries for private industry workers published quarterly by the Bureau of Labor Statistics. Section 704(a)(1) of the 1989 Act calculates COLAs by first determining the percent change in the ECI over the previous year. *Id.* at § 704(a)(1)(B). Next, the statutory formula reduces the ECI percentage change by "one-half of 1 percent . . . rounded to the nearest one-tenth of 1 percent." *Id.* However, no percentage change determined under Section 704(a)(1) shall be "less than zero" or "greater than 5 percent." *Id.*

While the 1989 Act states that judicial salary maintenance would only occur in concert with COLAs for General Schedule federal employees under 5 U.S.C. § 5303, these General Schedule COLAs are automatic, i.e., they do not require any further congressional action. *See* 5 U.S.C. § 5303(a). The only limitation on General Schedule COLAs is a presidential declaration of a "national emergency or serious economic conditions affecting the general welfare" making pay adjustments "inappropriate." 5 U.S.C. § 5303(b).

Notwithstanding the precise, automatic formula in the 1989 Act, the Legislative branch withheld from the Judicial branch those promised salary adjustments in fiscal years 1995, 1996, 1997, and 1999. During these

years, General Schedule federal employees received the adjustments under Section 5303(a), but Congress blocked the adjustments for federal judges. *See* Pub. L. No. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (Sept. 30, 1994) (FY 1995); Pub. L. No. 104-52, § 633, 109 Stat. 468, 507 (Nov. 19, 1995) (FY 1996); Pub. L. No. 104-208, § 637, 110 Stat. 3009, 3009-364 (Sept. 30, 1996) (FY 1997); Pub. L. No. 105-277, § 621, 112 Stat. 2681, 2681-518 (Oct. 21, 1998) (FY 1999).

In response to these missed adjustments, several federal judges filed a class action alleging these acts diminished their compensation in violation of Article III. After certifying a class of all federal judges serving at the time (including appellants) and without providing notice or opt-out rights, the district court held that Congress violated the Compensation Clause by blocking the salary adjustments. *See Beer v. United States*, 671 F.3d 1299, 1308-09 (Fed. Cir. 2012); *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999).

On appeal, this court reversed the district court's judgment. *See Williams*, 240 F.3d at 1019. This court opined that the Supreme Court's decision in *Will* foreclosed the judges' claim as a matter of law. *Id.* at 1033, 1035, 1040. According to this court, *Will* ruled that promised future salary adjustments do not qualify as "Compensation" protected under the Constitution until they are "due and payable." *Id.* at 1032 (quoting *Will*, 440 U.S. at 228). Thus, Congress enjoyed full discretion to revoke any future judicial COLAs previously established by law, no matter how precise or definite, as long as the adjustments had not yet taken

effect. *Id.* at 1039. This court declined to hear the case en banc over the dissent of three judges. *See* 264 F.3d 1089, 1090-93 (Fed. Cir. 2001) (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* at 1093-94 (Newman, J., joined by Mayer, C.J. and Rader, J.). The Supreme Court denied certiorari over the dissent of three Justices. *See* 535 U.S. 911 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari).

Following this court's decision in *Williams*, Congress amended a 1981 appropriations rider commonly known as Section 140. Section 140 originally read:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress *hereafter enacted*: Provided, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.

Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1981) (codified at 28 U.S.C. § 461 note) (emphasis added). While Section 140 originally expired in 1982, *see Williams*, 240 F.3d at 1026-27, it was revived by a 2001 amendment that added: "This section shall apply to fiscal year 1981 and each fiscal year thereafter." Pub.

L. No. 107-77, § 625, 115 Stat. 748, 803 (Nov. 28, 2001).

Following the Section 140 amendment, Congress enacted legislation specifically allowing federal judges to receive the salary adjustments mandated by the 1989 Act in fiscal years 2002, 2003, 2004, 2005, 2006, 2008, and 2009. *See* Barbara L. Schwemle, Congressional Research Service, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries* 2-4 (Feb. 9, 2011). For fiscal years 2007 and 2010, all General Schedule and Executive level federal employees received COLAs under 5 U.S.C. § 5303(a), but federal judges received no adjustments. Congress did not affirmatively authorize judicial COLAs in those years and took the position that, because of the requirements of Section 140, judicial COLAs could not be funded."

The current case results from the combination of the blocking legislation of the 1990s and the amendment to Section 140. Appellants are six current and former Article III judges, all of whom entered into federal judicial service before 2001. In January 2009, they filed a complaint in the United States Court of Federal Claims claiming that Congress violated the Compensation Clause by withholding the salary adjustments established by the 1989 Act. They claimed a deficit resulted not only from the withholding of COLAs in 2007 and 2010, but also the calculation of adjustments due in other years by reference to base compensation that did not include the amounts withheld in 1995, 1996, 1997, and 1999. For relief, they sought back pay for the additional amounts they al-

legedly should have received during the period covered by the applicable six-year statute of limitations.

The Court of Federal Claims dismissed the complaint based on the *Williams* precedent. On appeal, this court summarily affirmed the judgment, stating that "*Williams* controls the disposition of this matter." *Beer v. United States*, 361 F. App'x. 150, 151-52 (Fed. Cir. 2010).

The Supreme Court granted the subsequent petition for certiorari, vacated the judgment, remanded the case for "consideration of the question of preclusion," and stated that "further proceedings . . . are for the Court of Appeals to determine." *Beer v. United States*, 131 S. Ct. 2865 (2011). Specifically, in opposing the petition for certiorari, the Government had argued that Appellants could not litigate anew the issue resolved in *Williams* because they had been absent members of the class action in *Williams*.

Upon remand, this court unanimously concluded that Appellants were not precluded from bringing their Compensation Clause claims in the present case. *Beer v. United States*, 671 F.3d 1299, 1309 (Fed. Cir. 2012). The district court in *Williams* had not provided Appellants with notice of the class certification. Thus they were not bound by the result of that earlier litigation. *See id.* at 1305-09. This court nonetheless continued to feel constrained by the ultimate conclusion in *Williams* and affirmed the Court of Federal Claims' dismissal of the complaint. *Id.* at 1309. Subsequently, this court granted Appellants' petition for rehearing en banc. 468 F. App'x 995 (Fed. Cir. 2012).

II.

This court has jurisdiction over the Court of Federal Claims' dismissal of the Appellants' complaint under 28 U.S.C. § 1295(a)(3). This court reviews the decision to dismiss the complaint without deference. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1328 (Fed. Cir. 2012); *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002).

This court en banc now turns its attention to two preliminary issues before addressing the merits of the appeal. First, judicial review of laws affecting judicial compensation is not done lightly as these cases implicate a conflict of interest. *Will*, 449 U.S. at 211-17. After all, judges should disqualify themselves when their impartiality might reasonably be questioned or when they have a potential financial stake in the outcome of a decision. *See* 28 U.S.C. § 455(a). In *Will*, the Supreme Court applied the time-honored "Rule of Necessity" because if every potentially conflicted judge were disqualified, then plaintiffs would be left without a tribunal to address their claims. *See Will*, 449 U.S. at 213-17. The Rule of Necessity states that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but *must* do so if the case cannot be heard otherwise." *Id.* at 213 (quoting F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929)) (emphasis added). This court relies on the Supreme Court's complete analysis of the Rule of Necessity and concludes that this en banc court may, indeed must, hear the case. *See id.* at 211-18.

On the other preliminary procedural question, this court deliberately limits the questions under review. To be specific, this court en banc does not overrule the *Williams* panel's analysis of Section 140. *See* 240 F.3d at 1026-27. Furthermore, it does not overrule the *Beer* panel's analysis of preclusion. *See* 671 F.3d 1299. This court adopts the prior panel's analysis of the preclusion issue *in toto*. Now the court en banc proceeds to the old and new questions previously set forth.

III.

At the outset, this court must honor and address the Supreme Court's decision in *Will*. As the *Williams* panel correctly noted, if *Will* resolves the validity of Congress' decision to block the COLAs promised in the 1989 Act, then any remedy for salary diminution in this case lies not in this court but in the Supreme Court. *See Williams*, 240 F.3d at 1035. However, if *Will* is inapplicable to the statutory scheme at play in this case, then this court has an obligation to resolve the issue.

United States v. Will, *supra*, tested the validity of congressional blocking acts preventing COLAs provided for under the 1975 Adjustment Act ("1975 Act"). The 1975 Act purported to protect judicial salaries with adjustments calculated under an opaque and indefinite process. Section 5305, as in effect in 1975, directed the President to "carry out the policy stated in section 5301" when giving COLAs to General Schedule federal employees. 5 U.S.C. § 5305(a) (1976). Section 5301 in turn articulated a four-fold policy for setting federal pay: (1) equal pay for equal

work; (2) pay distinction based on work and performance distinctions; (3) comparable pay with private sector jobs for comparable work; and (4) interrelated statutory pay levels. 5 U.S.C. § 5301(a) (1976).

In furtherance of this policy, the President appointed an agent to prepare an annual report on federal salaries. 5 U.S.C. § 5305(a)(1) (1976). This annual report relied on statistics from the Bureau of Labor Statistics on private sector pay, views of the "Federal Employees Pay Council" about the comparability of private and public sector pay systems, and the views of employee organizations not represented in the Council. 5 U.S.C. § 5305(a)(1) (1976). This report did not and could not mandate the award of COLAs.

The President also received a report from "The Advisory Committee on Federal Pay." 5 U.S.C. § 5305(a)(2) (1976). This committee reviewed the report issued by the President's agent under section 5305(a)(1) and considered further views and recommendations provided by "employee organizations, the President's agent, other officials of the Government of the United States, and such experts as it may consult." 5 U.S.C. § 5306(a)-(b) (1976).

Based on these reports, the President could provide COLAs to General Schedule federal employees. 5 U.S.C. § 5305(a)(2). If the President decided to recommend an adjustment, he would transmit to Congress the overall adjustment percentage. 5 U.S.C. § 5305(a)(3). Any judicial COLAs were pegged to the "overall percentage" in the President's report to Congress under section 5305. 28 U.S.C. § 461 (1976).

Despite the 1975 Act, Congress allowed several COLAs for General Schedule federal employees but denied the increases to judges and other senior officials. The Supreme Court discussed the details of the legislation that blocked these increases. *See Will*, 449 U.S. at 205-09. In 1978, a group of federal judges filed suit alleging this blocking legislation was an unconstitutional diminution in salary contrary to Article III. Once the case made its way to the Supreme Court, the Court considered "when, if ever, . . . the Compensation Clause prohibit[s] the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted." *Id.* at 221. The Court concluded that Congress could block COLAs due to judges so long as the blocking legislation took effect in the fiscal year prior to the year in which the increase would have become payable. *Id.* at 228-29. According to the Court, "a salary increase 'vests' . . . only when it takes effect as part of the compensation due and payable to Article III judges." *Id.* at 229.

The 1989 Act, informed by the failures of the 1975 Act's procedure, adopted a different purpose, used a different structure, and created different expectations than the 1975 Act. The 1975 Act "involved a set of interlocking statutes which, in respect to future cost-of-living adjustments, were neither definite nor precise." *Williams*, 535 U.S. at 917 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). Instead of being tied to the percent change in a known, published metric of inflation such as the Employment Cost Index, the adjustments under the 1975 Act depended on the discretionary decisions of the Presi-

dent's agent and the Advisory Committee on Federal Pay. Furthermore, the President was not obligated to award adjustments to General Schedule employees on a specific timeline or even pursuant to the suggestions from the agent and the committee. Rather, he only did so if it furthered the policies underpinning federal pay articulated in 5 U.S.C. § 5301. Thus, the method for calculating COLAs under the 1975 Act was "imprecise as to amount and uncertain as to effect." *Id.*

By contrast, the 1989 Act promised a mechanical implementation of COLAs for judges under the following equation:

$$Adjustment\ Year\ N = \left(\frac{(ECI\ Year\ N_{-1}) - (ECI\ Year\ N_{-2})}{ECI\ Year\ N_{-2}}\right) \text{x}(100)\text{x}(0.995)$$

See Pub. L. No. 101-194, § 704(a)(1)(B), 103 Stat. 1716, 1769 (Nov. 30, 1989). The Act contained only two limits: a presidential prohibition (due to national emergency or extreme economic circumstances) and a ceiling (of no more than five percent). *Id.*

In essence, the statutes reviewed in *Will* required judicial divination to predict a COLA and prevented the creation of firm expectations that judges would in fact receive any inflation-compensating adjustment. In that context, as the Supreme Court noted, no adjustment vested until formally enacted and received. However, the statutes reviewed in *Williams* and in this case provide COLAs according to a mechanical, automatic process that creates expectation and reliance when read in light of the Compensation Clause. Indeed a prospective judicial nominee in 1989 might well have decided to forego a lucrative legal career,

based, in part, on the promise that the new adjustment scheme would preserve the real value of judicial compensation.

Aside from their respective differences in methods for calculating COLAs, the 1989 Act's overall scope and legislative history distinguishes it from the statutory scheme addressed in *Will*. In fact, the automaticity of the 1989 Act's COLAs takes on heightened significance in light of the broader statutory scheme because the 1989 Act also banned judges from earning outside income and honoraria. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("The meaning of statutory language, plain or not, depends on its context."). In sum, the salary protections in the 1989 Act are only part of a comprehensive codification of ethical rules, Pub. L. No. 101-194 §§ 301-03, financial reporting requirements, *id.* at § 202, work rules for senior judges, *id.* at § 705, and—perhaps most important—prohibitions on outside income and honoraria, *id.* at § 601.

Of the 935 active and senior judges in 1987, four hundred reported earning outside income from teaching law, speaking fees, and other sources. 135 Cong. Rec. S29,693 (daily ed. Nov. 17, 1989). More than half reported extra earnings from $16,624 to $39,500. *Id.* The Report by The Bipartisan Task Force on Ethics, which became the basis for the Ethics Reform Act of 1989, noted that the repeated failure to provide recommended salary increases for judges and other executive employees meant increased reliance on "earning honoraria as a supplement to their official salaries." 135 Cong. Rec. H30,744 (daily ed. Nov. 21, 1989) (Task Force Report). During consideration of the 1989 Act,

Congress acknowledged that denying access to outside income would amount to a "pay cut." 135 Cong. Rec. S29,662 (daily ed. Nov. 17, 1989) (statement of Sen. Dole that removing outside income is a "pay cut"); *see also* 135 Cong. Rec. H29,488 (daily ed. Nov. 16, 1989) (statement of Rep. Fazio), H29,492 (daily ed. Nov. 16, 1989) (statement of Rep. Ford). In that context, reliance on the 1989 Act's compensation maintenance formula took on added significance. *See* 135 Cong. Rec. H29,503 (daily ed. Nov. 16, 1989) (statement of Rep. Wolpe) ("[The] pay adjustment provision [is] tied directly to the elimination of all honoraria or speaking fees."). Indeed, the Task Force Report emphasized that the restrictions and limitations on outside earned income, honoraria, and employment made by the Act are conditional on the enactment of the increased pay provisions. 135 Cong. Rec. H30,745 (daily ed. Nov. 21, 1989) (Task Force Report).

The dependable COLA system became "a final important part" of the package designed to remove salaries "from their current vulnerability for political demagoguery." 135 Cong. Rec. H29,483 (Nov. 16, 1989) (statement of Rep. Fazio); H30,753 (Nov. 21, 1989) (Task Force Report). In sum, the 1989 Act reduced judges' income by banning outside income but promised in exchange automatic maintenance of compensation—a classic legislative *quid pro quo*. 135 Cong. Rec. H29,484 (Nov. 16, 1989) (statement of Rep. Martin stating that the Ethics Reform Act of 1989 is a comprehensive and interrelated package); *cf.* 135 Cong. Rec. H29,499 (Nov. 16, 1989) (statement of Rep. Crane objecting to the interrelated nature of the

package and advocating separate bills for ethics and pay).

Thus, the 1989 statutory scheme was a precise legislative bargain which gave judges "an employment expectation" at a certain salary level. *Cf. United States v. Hatter*, 532 U.S. 557, 585 (2001) (Scalia, J., concurring in part and dissenting in part) (arguing that the repeal of judges' exception from Medicare tax constituted a diminishment in compensation because judges had an expectation of an exemption from this tax). Moreover, the 1989 Act COLA provisions were not an increase in judicial pay. If so, the connection with the vesting rule for pay increases articulated in *Will* might be a closer issue. Rather, the statute ensured that real judicial salary would not be reduced in the face of the elimination of outside income and the operation of inflation. *See Williams*, 535 U.S. at 916 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari).

The vesting rules considered in *Will* are not expressly limited to the 1975 Act. However, the Supreme Court had no occasion to draw a distinction between a discretionary COLA scheme and a self-executing, non-discretionary adjustment for inflation coupled with a reduction in judicial compensation via elimination of outside income. For this reason, therefore, this court must examine further the actual differences in the two statutory schemes.

The Supreme Court described the adjustments under the 1975 Act as "automatic." *See Will*, 449 U.S. at 203, 223-24. An examination of the 1975 Act, however, shows that the adjustments at issue in *Will* were

automatically operative only "*once the Executive had determined the amount*." *Id.* at 203 (emphasis added). The ways that the Executive determined the amounts under the 1975 Act and the 1989 Act are very different. The former was an uncertain, discretionary process. The latter is precise and definite.

While the Supreme Court described the COLAs in *Will* as "automatic," the only aspect that was truly automatic was the link between judicial and General Schedule employee salaries. Whether General Schedule employees (and judges) would receive COLAs in any given year or whether those COLAs would maintain earning levels was anything but certain under the 1975 Act. Consequently, the only line the Supreme Court could draw in *Will* was between before and after the COLAs at issue were funded. The 1989 Act's scheme presents a much different landscape than the Court confronted in *Will*. For these reasons, *Will* does not foreclose the relief that the judges seek.

Although this court determines that *Williams* incorrectly applied *Will* and other aspects of the law, this determination does not end the inquiry. The court must now examine whether Congress' decisions to deny the promised COLAs actually violated the Compensation Clause in Article III of the Constitution.

The Compensation Clause has two basic purposes. First, it promotes judicial independence by protecting judges from diminishment in their salary by the other branches of Government. The founders of this nation understood the connections amongst protections for Life, Liberty, and the Pursuit of Happiness, protec-

tions for judicial independence, and protections for judicial compensation. Listed among the colonists' grievances with the English Crown was that the King "ha[d] made Judges dependent on his Will alone for the Tenure of their Offices, and the amount and payment of their salaries." Decl. of Independence para. 11 (U.S. 1776). As explained in The Federalist Papers, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79, p. 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

During the Constitutional Convention in 1787, the inspired draftsmen set out to protect against abuses such as those enumerated in the Declaration of Independence. James Madison of Virginia proposed prohibiting both enhancement and reduction of salary lest judges defer unduly to Congress when that body considered pay increases. *Will*, 449 U.S. at 219-20. Madison urged that variations in the value of money could be "guarded against. by taking for a standard wheat or some other thing of permanent value." *Id.* at 220 (quoting 2 M. Farrand, The Records of the Federal Convention of 1787, p. 45 (1911)). The Convention rejected Madison's proposal because any commodity chosen as a standard for judicial compensation could also lose value due to inflationary forces, i.e., the value of wheat could also fluctuate. *Id.* Thus, the Compensation Clause did not tie judicial salaries to any commodity. The framers instead acknowledged that "fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [for judges] in the Constitution inadmis-

sible." The Federalist No. 79, *supra*. The Convention adopted the clause in its current form while voicing, at length, concerns to protect judicial compensation against economic fluctuation and reprisal.

The Compensation Clause, as well as promoting judicial independence, "ensures a prospective judge that, in abandoning private practice—more often than not more lucrative than the bench—the compensation of the new post will not diminish." *Will*, 449 U.S. at 221. This expectancy interest attracts able lawyers to the bench and enhances the quality of justice. *Id.* This expectancy interest does not encompass increases in future salary but contemplates maintenance of that real salary level. *Williams*, 535 U.S. at 916 (Breyer, J. joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari); The Federalist No. 79, *supra*, (noting that an Article III judge is assured "of the ground upon which he stands" and that he should "never be deterred from his duty by the apprehension of being placed in a less eligible situation").

The dual purpose of the Compensation Clause protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level. *See Williams*, 535 U.S. at 916 (Breyer, J. joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). The 1989 Act promised, in precise and definite terms, salary maintenance in exchange for prohibitions on a judge's ability to earn outside income. The 1989 Act set a clear formula for calculation and implementation of those maintaining adjustments. Thus, all sitting federal judges are entitled to expect that their real

salary will not diminish due to inflation or the action or inaction of the other branches of Government. The judicial officer should enjoy the freedom to render decisions—sometimes unpopular decisions—without fear that his or her livelihood will be subject to political forces or reprisal from other branches of government.

Prospective judges should likewise enjoy the same expectation of independence and protection. A lawyer making a decision to leave private practice to accept a nomination to the federal bench should be entitled to rely on the promise in the Constitution and the 1989 Act that the real value of judicial pay will not be diminished. *Will*, 449 U.S. at 220-21; *cf. United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (recognizing that government promises may give rise to reasonable expectations).

To be sure, the Compensation Clause does not require periodic increases in judicial salaries to offset inflation or any other economic forces. As noted before, the Constitutional Convention did not tie judicial salaries to a commodity or other standard of measurement. *Will*, 449 U.S. at 220. However, when Congress promised protection against diminishment in real pay in a definite manner and prohibited judges from earning outside income and honoraria to supplement their compensation, that Act triggered the expectation-related protections of the Compensation Clause for all sitting judges. A later Congress could not renege on that commitment without diminishing judicial compensation. That those compensation adjustments would happen in the future does not elimi-

nate the reasonableness of the expectations created by the protections in the 1989 Act. Expectancy is, by its very nature, concerned with future events.

Congress committed to providing sitting and prospective judges with annual COLAs in exchange for limiting their ability to seek outside income and to offset the effects of inflation. This decision furthered the Founders' intention of protecting judges against future changes in the economy. Instead of fixing compensation relative to a commodity subject to inflationary pressure, Congress pegged the adjustment to a known measure of change to the economy as a whole, thus protecting the real salary of judges from both inflation and from fickle political will. By enacting blocking legislation in 1995, 1996, 1997, and 1999, Congress broke this commitment and effected a diminution in judicial compensation.

Congress is not precluded from amending the 1989 Act. Congress may set up a scheme promising judges a certain pay scale or yearly cost of living increases. However, the Constitution limits those changes. If a future Congress wishes to undo those promises, it may, but only prospectively. Any restructuring of compensation maintenance promises cannot affect currently-sitting Article III judges.

IV.

Turning now to the second question, this court determines that the 2001 amendment to Section 140 of Pub. L. 97-92 has no effect on the compensation due to judges. Unlike the preceding discussion of the Compensation Clause, this is a question of statutory inter-

pretation. Without a statutory basis for withholding the COLAs, federal judges should have received the adjustments in 2007 and 2010. These adjustments are payable to the judges regardless of constitutional protections. Congress simply had no statutory authority to deny them.

As noted above, Section 140 was part of an appropriations bill passed in 1981. It barred judges from receiving additional compensation except as Congress specifically authorized in legislation postdating Section 140. *See* Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981). The appropriations act containing Section 140 expired by its terms on September 30, 1982. *See Williams*, 240 F.3d at 1026. Thus, the rule that judicial pay adjustments had to be "specifically authorized by Act of Congress hereafter enacted" expired in 1982.

Of course, in 2001, Congress amended Section 140, purporting to apply it "to fiscal year 1981 and each fiscal year thereafter." Pub. L. No. 107-77, Title VI, § 625, 115 Stat. 748, 803 (2001). Notably, Congress chose 1981 as the effective date for this extension of Section 140. As shown above, Congress did not explicitly authorize judicial compensation adjustments in 2007 and 2010. If Section 140 applied to bar those 2007 and 2010 adjustments, the absence of that additional Act of Congress would block—solely on the basis of this statute—any adjustments in those years.

Section 140, however, by its own terms, did not block the 2007 and 2010 adjustments. Section 140 is straight-forward: it bars judicial salary increases unless (1) "specifically authorized by Act of Congress"

and (2) "hereafter enacted." Pub. L. No. 97-92, § 140. The 1989 Act's precise and definite promise of COLAs clearly satisfies the first requirement to avoid a Section 140 bar. *Williams*, 240 F.3d at 1027. The 1989 Act "specifically authorized" the 2007 and 2010 adjustments which occurred under its precise terms.

Section 140 was enacted in 1981 and the 1989 Act occurred eight years later. Thus, the 1989 Act was "hereafter enacted" within Section 140's meaning. When Congress amended Section 140 in 2001, it did not wipe the slate clean and set a new benchmark for the "hereafter enacted" requirement. The 2001 amendment makes no reference to its own November 28, 2001, enactment date. Instead, the amendment reiterates the 1981 baseline found elsewhere in the original Section 140, making the provision applicable to "'fiscal year 1981 and each fiscal year thereafter.'" Pub. L. No. 107-77. An amendment referring only to fiscal year 1981 cannot redefine "hereafter" to refer to an entirely different date two decades later. Thus, the "hereafter enacted" requirement remained unchanged setting the "hereafter enacted" trigger date as 1981. In other words, Congress amended the existing Section 140 in 2001, but Section 140 remained a part of the Public Law 97-92 enacted in 1981.

Furthermore, the amendment did not change Section 140's enactment date. Indeed the Government agreed at oral argument before this court en banc that the 2001 amendment did not change the "hereafter enacted" clause of Section 140. The 2001 amendment merely erased Section 140's expiration date, making permanent whatever effect the provision had when

originally enacted. Congress thus expunged this court's holding in *Williams* that Section 140 expired in 1982. The 2001 amendment, however, did not change Section 140's substantive scope.

The 1989 Act's precise, automatic COLAs satisfy the requirements of Section 140 because it was enacted after Section 140. The Government withheld COLAs from judges in 2007 and 2010 solely because the government misinterpreted Section 140 as requiring a separate and additional authorizing enactment to put those adjustments into effect. By its own terms, Section 140 did not require that further authorizing legislation because it permitted COLAs under the "hereafter enacted" 1989 Act.

V.

In this case, Congress' acts in 1995, 1996, 1997, and 1999 constitute unconstitutional diminishments of judicial compensation. Additionally, statutorily promised cost of living adjustments were withheld in 2007 and 2010 based on an erroneous statutory interpretation. Appellants' motion to amend their complaint to include a challenge to the 2010 withholdings is granted. *See Mills v. Maine*, 118 F.3d 37, 53 (1st Cir. 1997) ("[A]ppellate courts have authority to allow amendments to complaints because '[t]here is in the nature of appellate jurisdiction, nothing which forbids the granting of amendments.'") (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 (1989) (alterations omitted)).

The statute of limitations does not bar these claims because, as established in *Friedman v. United States*,

159 Ct. Cl. 1, 7 (1962) and *Hatter v. United States*, 203 F.3d 795, 799-800 (Fed. Cir. 2000), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 557 (2001), the claims are "continuing claims." As relief, appellants are entitled to monetary damages for the diminished amounts they would have been paid if Congress had not withheld the salary adjustments mandated by the Act. On remand, the Court of Federal Claims shall calculate these damages as the additional compensation to which appellants were entitled since January 13, 2003—the maximum period for which they can seek relief under the applicable statute of limitations. In making this calculation, the Court of Federal Claims shall incorporate the base salary increases which should have occurred in prior years had all the adjustments mandated by the 1989 Act had actually been made. *See Hatter*, 203 F.3d 795 (applying the "continuing claim" doctrine to calculating wrongful withholding of judicial pay).

VI.

This court has an "obligation of zealous preservation of the fundamentals of the nation. The question is not how much strain the system can tolerate; our obligation is to deter potential inroads at their inception, for history shows the vulnerability of democratic institutions." *Beer v. United States*, 592 F.3d 1326, 1329 (Fed. Cir. 2010) (Newman, J., dissenting from the denial of petition for hearing en banc). The judiciary, weakest of the three branches of government, must protect its independence and not place its will within the reach of political whim. The precise and definite promise of COLAs in the 1989 Act triggered the

expectation-related protections of the Compensation Clause. As such, Congress could not block these adjustments once promised. The Court of Federal Claims' dismissal of Appellants' complaint is hereby reversed, and the case is remanded for further consideration in accordance with this opinion.

OVERRULED-IN-PART, VACATED-IN-PART, AND REMANDED

* * * * *

DYK, *Circuit Judge*, with whom BRYSON, *Circuit Judge*, joins, dissenting.

The majority opinion brings to mind an exchange between Learned Hand and Justice Holmes. Judge Hand enjoined Justice Holmes to "[d]o justice" on the bench, but the Justice demurred: "That is not my job. My job is to play the game according to the rules." Learned Hand, A Personal Confession, in *The Spirit of Liberty* 302, 306-07 (Irving Dilliard ed., 3d ed. 1960). If the Supreme Court must play by the rules, that duty must be doubly binding on subordinate federal courts. Fidelity to this principle mandates adherence to the Supreme Court's opinion in *United States v. Will*, 449 U.S. 200 (1980).

I

While the majority's approach has much to recommend it as a matter of justice to the nation's underpaid Article III judges, it has nothing to recommend it in terms of the rules governing adjudication. "The criterion of constitutionality is not whether we believe the law to be for the public good," *Adkins v. Children's*

Hosp., 261 U.S. 525, 570 (1923) (Holmes, J., dissenting), but whether the law comports with the Supreme Court's authoritative construction of the Constitution. Here, the issue is the scope of the Supreme Court's 1980 decision in *Will*. *Will*'s holding is squarely on point. The Supreme Court's framing of the issue was unmistakably clear: "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?" 449 U.S. at 221. The answer was that a future salary increase "becomes irreversible under the Compensation Clause" when it "vests," *id.*, and that it "'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges," *id.* at 228-29. The Court's opinion in *Will* is unambiguous that the Court adopted what it has characterized as a "categorical" rule. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-40 (1995).

The Court in *Will* explained that for two of the years,

> the statute was passed before the Adjustment Act increases had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula.
>
> A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and

> respect the limits on its own authority and the boundaries of the authority delegated to the other branches. To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress. We therefore conclude that a salary increase "vests" for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges.

449 U.S. at 228-29 (footnotes omitted).

Under *Will*'s bright-line vesting rule, Congress was free to "abandon" a statutory formula and revoke a planned cost-of-living adjustment ("COLA"), as long as the revoking legislation was enacted into law before the COLA "took effect," that is, became "due and payable" (i.e., before October 1, the first day of the next fiscal year). *Id.* at 227-29. In *Will* Years 1 and 4, Congress missed that deadline, and the Court held that the belated withdrawal of judges' COLAs violated the Compensation Clause. *Id.* at 226, 230. But in *Will* Years 2 and 3, COLA-blocking statutes signed before October 1 were upheld, even though one of those statutes eliminated the promised COLA just a day before it would have taken effect. *Id.* at 229.

Will thus made clear that a future salary increase only becomes protected by the Compensation Clause when it becomes "due and payable"; an increase which is merely anticipated or expected has not vested, and is not protected. By declining to follow *Will*'s clear

vesting rule here, the majority also rejects the carefully crafted panel opinion in *Williams v. United States*, 240 F.3d 1019, 1039 (Fed. Cir. 2001), *reh'g denied*, 240 F.3d 1366 (Fed. Cir. 2001) (en banc), whose view of *Will* was supported at the time by a clear majority of the en banc court. *See Williams*, 240 F.3d at 1366 (eight judges concurring in the denial of rehearing en banc because "we are duty-bound to enforce [*Will*'s] rule. If we have incorrectly read the *Will* opinion, the Supreme Court will have the opportunity to correct the error.").

II

The majority attempts to redefine the constitutional test as turning not on "vesting," but on "reasonable expectations," a concept that appears nowhere in the *Will* opinion. To justify this shift, the majority seeks to distinguish *Will* on its facts, namely on the dubious ground that the "automatic" salary adjustment scheme in *Will* was different from the "automatic" salary adjustment scheme in place in *Williams* and here. But even if factual differences were pertinent (which, as we discuss below, could not support a departure from *Will*'s holding), there is no material difference between the statutes in *Will* and those in the *Williams* years (1995, 1996, 1997, and 1999). The *Will* statutes and the *Williams* statutes were not different insofar as they tied judicial compensation to General Schedule ("GS") compensation, nor were they materially different as far as the definiteness of the GS COLA was concerned. Contrary to the majority's suggestion, under both schemes, the COLA was "required" unless the President altered the COLA in response to "national

emergency" or "economic conditions." *Compare* 5 U.S.C. § 5305(c)(1) (1976) *with* 5 U.S.C. at § 5303(b)(1) (2006). As the House Report to the 1990 Act stated, "[t]he President would have discretion [under the 1990 Comparability Act] to alter this adjustment. . . . This discretion is substantially similar to current law," i.e., the 1975 Act. H.R. Rep. No. 101-906, at 88 (1990).[1] And under both statutory schemes, the GS COLA, once established, would "take effect automatically." *Will*, 449 U.S. at 221.[2] Thus, the statutory schemes appear "strikingly similar" for all practical purposes. *Williams*, 240 F.3d at 1027.

Nevertheless, the majority asserts that the expectation of a COLA created by the *Williams* statutes was significantly more "precise and definite," Majority Op. 16, because under *Will*'s more complex scheme, there was greater discretion over the COLA—an assertion which is accurate only insofar as the President's agent and Advisory Committee had greater discretion in setting the *initial amount* of the GS COLA. Under each

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[1] Plainly Congress saw the references in the 1975 Act to "economic conditions" and in the 1990 Act to "serious economic conditions" as functionally the same, since the President's discretion was to remain "substantially similar" under the 1990 Act as before.

[2] Judge O'Malley's concurrence misreads the dissent in suggesting that we view the COLAs in *Will* as "automatic" only because "the statutory scheme had run its course" in the disputed years. Concur. Op. 4.

statutory scheme, the President's discretion was the same.[3]

But whatever the discretion, if the test were "reasonable expectations," then the key question would not be how the statutory scheme initially determined a COLA, but whether the amount of the COLA had become "precise and definite" at the time the blocking statute thwarted the judges' expectations. In this respect, *Will* cannot be distinguished from *Williams*. For *Will* Year 3, no "judicial divination," Majority Op. 13, would have been required: a GS COLA of 5.5% had already been specified in the President's Alternative Plan, 14 Weekly Comp. Pres. Docs. 1480 (Aug. 31, 1978), which was adopted and transmitted to Congress by the President a month before the Year 3 blocking statute was enacted. *Will*, 449 U.S. at 229. The President had no further discretion to change the amount of the COLA. As the majority notes, "once the Executive had determined the amount," the ad-

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[3] *Will*'s statutory scheme

> required the President to appoint an adjustment agent [who] was to compare salaries in the civil service with those in the private sector and then recommend an adjustment to an Advisory Committee. Subsequently, the Committee would make its own recommendation to the President, accepting, rejecting, or modifying the agent's recommendation as the Committee thought desirable. The President would have to accept the Committee's recommendation—unless he determined that national emergency or special economic conditions warranted its rejection.

Williams v. United States, 535 U.S. 911, 917 (2002) (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting).

justments in *Will* were automatically operative. Majority Op. 16 (quoting *Will*, 449 U.S. at 203) (internal quotation marks omitted). In the *Williams* years, at the time the blocking statutes were enacted, the prospective amount of the GS COLA could be calculated based on the Employment Cost Index figures released by the Bureau of Labor Statistics, although the President generally did not announce a final amount until after the blocking statutes were enacted.[4] Thus, the COLA in *Will* Year 3 was just as "precise and definite" as the COLAs in the *Williams* years.

Of course, the COLAs remained uncertain in another respect: in both *Will* and *Williams*, the presumptive GS COLA could still be overridden by Congressional action, and in fact it was overridden for one of the *Williams* years.[5] Again, there is no meaningful

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[4] For all the *Williams* years, GS salary adjustment tables were promulgated by Executive Order in the preceding December. Exec. Order 12944, 60 Fed. Reg. 309 (Dec. 28, 1994); Exec. Order 12984, 61 Fed. Reg. 237 (Dec. 28, 1995); Exec. Order No. 13033, 61 Fed. Reg. 68987 (Dec. 27, 1996); Exec. Order No. 13106, 63 Fed. Reg. 68151 (Dec. 7, 1998). In each year, the judges' COLAs had been blocked several weeks to months earlier. *See* Pub. L. 103-329, Title VI, § 630(a)(2), 108 Stat. 2382, 2424 (1994); Pub. L. 104-52, Title VI, § 633, 109 Stat. 468, 507 (1995); Pub. L. 104-208, Title VI, § 637, 110 Stat. 3009-364 (1996); Pub. L. 105-277, Title VI, § 621, 112 Stat. 2681-518 (1998). For one of the *Williams* years, 1996, the President transmitted an Alternative Plan to Congress setting a 2% GS COLA before the blocking statute was passed. 31 Weekly Comp. Pres. Docs. 1466, 1466-67 (1995).

[5] For 1995, Congress reduced the GS COLA to 2%. Pub. L. 103-329, Title VI, § 630(a)(1), 108 Stat. 2382, 2424 (1994). The projected GS COLA had been 2.6%. *See* Sharon S. Gressle, Cong.

difference between the situations in *Will* and *Williams*.[6] To summarize: in both *Will* Year 3 and in each of the *Williams* years, at the time the judges' COLA was blocked, the amount of the GS COLA had been established, the President retained no discretion to change the GS COLA, and the COLA would have taken effect automatically, absent Congressional intervention. The Supreme Court upheld the blocking statute in *Will* Year 3. 449 U.S. at 229. Yet the majority maintains that the blocking statutes in *Williams* offend the Constitution. This distinction is baffling.

Finally, the majority here suggests that *Will* is distinguishable because the statutes here (unlike the statutes in *Will*) imposed limits on the judges' outside income, without "an increase in judicial pay." Majority Op. 15. But the majority can hardly make a credible claim that judges' outside compensation is protected by the Compensation Clause, and it follows that the reduction of outside compensation cannot create a

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Research Serv., Order No. RS20278, Judicial Salary-Setting Policy 6 (March 6, 2003).

[6] Under the *Will* scheme, in addition to enacting separate legislation, Congress could have disapproved the Alternative Plan by a one-house legislative veto. *Will*, 449 U.S. at 204. But a legislative veto would not have zeroed out the GS COLA; it would have reinstated the amount recommended to the President, *id.*, which was *higher* than the President's figure in *Will* Year 3. *See* 14 Weekly Comp. Pres. Docs. 1480 (Aug. 31, 1978). It is unclear how Congressional action to *increase* the GS COLA could have made the judges' expectations of a COLA in *Will* Year 3 less "precise and definite." The legislative veto was held unconstitutional after *Will* and before the *Williams* years. *INS v. Chadha*, 462 U.S. 919 (1983).

Compensation Clause issue where none would otherwise exist.[7]

III

Even if the two statutory schemes were meaningfully different, and the *Williams* scheme created "reasonable judicial expectation[s] of future compensation" that did not exist in *Will*, Appellants' Br. 29-31, that would be quite beside the point. Neither counsel for the appellants nor the majority is able to explain how that difference authorizes this court to disregard *Will*'s clear vesting rule. The majority concedes that "the vesting rules considered in *Will* are not expressly limited to the 1975 Act." Majority Op. 16. There is no basis for concluding that a "reasonable expectations" test has supplanted the *Will* vesting rule as the governing test. Certainly no decision of the Supreme Court has shifted the governing principle from vesting to reasonable expectations. There is not even a claim that subsequent decisions of the Court have somehow "undermine[d] the reasoning" of *Will*. *United States v. Hatter*, 532 U.S. 557, 571 (2001) (quoting *Will*, 449 U.S. at 227 n.31) (internal quotation marks omitted). And even if *Will* had been undermined, it would not be *this* court's prerogative to overrule it. *See id.* at 567 (noting that because *Evans* had been undermined but not yet "expressly overrule[d]," the Federal Circuit "was correct in applying *Evans*" and thereby "invit-[ing] us to reconsider" it).

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[7] In fact, the 1989 Act did increase judicial pay by 25%, thus offsetting the limitations on outside income. Pub. L. 101-194 § 703(a)(3), 103 Stat. 1716, 1768 (1989).

So too our job is to follow the holding of *Will*, not to confine it to its facts. Numerous Supreme Court decisions, and our own decisions, have made this clear. As the Supreme Court held in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, a Court of Appeals must not "confus[e] the factual contours of [Supreme Court precedent] for its unmistakable holding" in an effort to reach a "novel interpretation" of that precedent. 460 U.S. 533, 534-35 (1983) (per curiam). *See also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam) (a state court "misread[] and disregard[ed] the precedents of this Court" when it held the Federal Arbitration Act's scope to be "more limited than mandated by this Court's previous cases"); *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1347 (Fed. Cir. 2010) (en banc) ("As a subordinate federal court, we may not so easily dismiss [the Supreme Court's] statements as dicta but are bound to follow them.").

The fact that three Justices of the Court, dissenting from a denial of certiorari, opined that *Will* might be distinguished from *Williams* is not authoritative. *See Williams*, 535 U.S. at 917 (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting). A dissent from a denial of certiorari cannot "destroy[] the precedential effect" of a prior opinion. *Teague v. Lane*, 489 U.S. 288, 296 (1989). This court has recognized that neither the agreement of three dissenting Justices, nor the approval of their reasoning by concurring Justices in later cases, can "transform a dissent into controlling law." *Prometheus Labs., Inc. v. Mayo Collaborative Servs.*, 628 F.3d 1347, 1356 n.2 (Fed. Cir. 2010), *rev'd*

on other grounds, *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 132 S. Ct. 1289 (2012).

In short, neither the dissent from denial of certiorari in *Williams* nor the Supreme Court's remand in this case can be read as an invitation for this court to perform reconstructive surgery on *Will*. The Supreme Court may distinguish its own opinions by limiting them to their facts, *see, e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221, 2242 n.13 (2012), or choose to overrule them, *see, e.g.*, *Hatter*, 532 U.S. at 567, but that is not an option for this court. We respectfully dissent.[8]

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[8] Appellants also argue that the 2007 and 2010 COLAs were improperly withheld because no blocking legislation was enacted in those years, and Section 140, as amended in 2001, was either inapplicable or unconstitutionally discriminated against federal judges under the Supreme Court's decision in *Hatter*. While we agree that this issue is not resolved by *Will*, these statutory and constitutional arguments were not properly raised below, and we decline to address them here.

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O'MALLEY, *Circuit Judge*, with whom MAYER and LINN, *Circuit Judges*, join, concurring.

I join the majority, both in the judgment it reaches and in its reasoning. I write separately to address two issues.

First, I write to explain why I believe that, if *United States v. Will*, 449 U.S. 200 (1980), must be read as broadly as the dissent and the *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001) majority believes it must, then *Will* was wrong and the Supreme Court should say so. Second, I write because I believe that, whatever its current statutory reach, Section 140 is unconstitutional and Congress can no longer rely on it to stagnate judicial compensation.

I

I first turn to *Will*. I agree with the majority that *Will* did not reach the issue presented here and, thus, does not dictate the result we may reach today. The position taken by the dissent, and by the *Williams* majority before it, is not without some force, however. One cannot deny that the adjudicatory principles upon which they rely are important ones, even if the majority concludes they are not determinative here. If the dissent is correct that we are forced to glean sweeping Compensation Clause principles from *Will* governing all forms of statutory enactments designed to increase judicial pay, we must also be forced to conclude that *Will*'s analysis is flawed, both jurisprudentially and constitutionally.

A. Jurisprudentially

I find several aspects of the *Will* decision problematic. First, a close look at the facts and reasoning in *Will* reveals its internal inconsistency; neither its analysis nor its ultimate conclusion matches the facts presented. Specifically, while the Court in *Will* initially characterized the statutory scheme at issue there as "automatic," 449 U.S. at 223, it later justified its Compensation Clause holding by characterizing congressional action blocking salary increases under the scheme as merely modifying "the formula" by which "future" increases were to be calculated. *Id.* at 227-28. Next, if the language employed in *Will* is meant to set down a "vesting" principle applicable in all Compensation Clause challenges, I believe the Court both: (1) violated the long-standing principle that courts are to decide only the cases before them and must only reach constitutional issues if and to the extent necessary; and (2) landed upon a holding that, taken to its logical extreme, creates absurd results.

1. Use of the Term "Automatic"

As the majority notes, the statutory scheme at issue in *Will*—the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94-82, 89 Stat. 419 (Aug. 9, 1975) ("the Adjustment Act")—was a complex scheme, fraught with discretion and uncertainty. Despite this, *Will* characterized the Adjustment Act as a pay adjustment scheme which contemplated "automatic" pay increases. At issue in *Will* was the constitutionality of Congress's decision to enact statutes preventing high-level Executive, Legislative, and Judicial officials,

including Article III judges, from receiving COLAs in four consecutive years where General Schedule federal employees received increases. The Court noted that these blocking statutes were designed to "stop or to reduce previously authorized cost-of-living increases initially intended to be *automatically* operative" under the Adjustment Act. *Will*, 449 U.S. at 203 (emphasis added). The Court then phrased the question presented in *Will* 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 (emphasis added).

As the majority notes, it is hard to understand the Court's use of the term automatic in the context of the Adjustment Act. Normally, to say something is "automatic" is to say it occurs involuntarily or without further debate. *See* Oxford English Dictionary def. A(1); A(7)(a) (3d ed. June 2011; online version June 2012); *see also* American Heritage Dictionary 121 (5th ed. 2011) (def. 2a: defining "automatic" as "[a]cting or done without volition or conscious control; involuntary"). Nothing about the judicial salary adjustments at issue in *Will* was "automatic," however.

To the contrary, the adjustments at issue in *Will* were based on civil service salary adjustments that were entirely discretionary. As explained by the majority, whether federal employees would receive a COLA, and in what amount, depended on the initial recommendations of an adjustment agent which were then subject to review by an Advisory Committee, the

President, and Congress. This procedure hardly can be described as one that occurs involuntarily. In addition, the statutes setting forth future COLAs were "neither definite nor precise," and nothing provided that adjustments would be calculated "in a mechanical way." *Williams v. United States*, 535 U.S. 911, 917 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). Because the statutory scheme under the Adjustment Act "was imprecise as to amount and uncertain as to effect," the Court's characterization of the increases under the Adjustment Act as "automatic" is difficult to follow. *See id.*

The dissent explains the Court's mischaracterization of the Adjustment Act's pay scheme by noting that, for the years in question in *Will*, the statutory scheme had run its course and resulted in a recommended salary increase by the time Congress acted to block those increases. This, the dissent seems to suggest, explains why the Supreme Court used the term "automatic" to describe what was before it. While that argument has a certain logic to it, it does not explain why the Court's constitutional analysis focused on the *absence* of a guarantee under the Adjustment Act.

According to the Supreme Court, the Adjustment Act did not "alter the *compensation* of judges; it modified only the *formula* for determining that compensation." *Will*, 449 U.S. at 227 (emphases in original). And, the Court said that the blocking statutes merely represented a decision to "abandon" that "formula."

It then admonished that, "[t]o say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced *future intent* as to a decision the Constitution vests exclusively in the Congress." *Id.* at 228 (emphasis added). It was on this reasoning that the Court concluded that a salary increase does not "vest" for Compensation Clause purposes until it becomes part of a judge's compensation that is due and payable and that Congress had not violated the Compensation Clause when it did not allow certain increases under the Adjustment Act to "vest."

Thus, the Court explained its Compensation Clause decision in *Will* by saying it was only dealing with a formula regarding an expressed "future intent" to provide increases; the Court did not say at that point that it was addressing increases that had already been decided upon. More importantly, it did not say it was addressing definite increases that had been promised by operation of law; in explaining its assessment of the Act vis-à-vis the Compensation Clause, the Court spoke of the scheme under the Adjustment Act as one that promised no more than potential adjustments. And, in discussing the concept of vesting, the Court seemed to back away from the notion that it was dealing with anything one could consider "automatic" in the common sense of that word. How can an increase occur "automatically" if a right to it had not yet "vested"?

While I understand why the dissent believes we must assume the Supreme Court meant what it said when it described the Adjustment Act increases as "automatic" ones, that assumption would mean that the Court's description of the facts presented had little correlation with its reasoning for why those facts did not run afoul of the Compensation Clause.

2. Constitutional Avoidance

Next, if we read *Will* as broadly as *Williams* did, and the dissent now does, we must assume that, in *Will*, the Supreme Court violated its own well-established principle of constitutional avoidance. The Supreme Court has long-recognized that "[j]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 917-18 (2010) (Roberts, C.J., concurring) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). The Court's standard practice, therefore, has been to "refrain from addressing constitutional questions except when necessary to rule on particular claims before [it]." *Id.* at 918 (citing *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). In furtherance of this practice, it has long been the rule that courts should "not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander*, 297 U.S. at 347 (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigra-*

tion, 113 U.S. 33, 39 (1885)); *see also United States v. Raines*, 362 U.S. 17, 21 (1960) (same).

Applying this principle in *Citizens United*, Chief Justice Roberts explained that the Court's "standard practice of avoiding broad constitutional questions except when necessary" gives rise to an "order of operations," whereby the Court considers the narrowest claim first before proceeding, if necessary, to any broader claims. 130 S. Ct. at 918. Only if there is no valid narrow constitutional ground available, should the court resolve any broader constitutional question. *See id.*

If we assume that *Will* is to be read so broadly as to control the result under the very different set of facts presented here, we must also assume the Court spoke to a question not before it. The constitutional question properly raised in *Will* was whether, under the specific statutory scheme set out in the Adjustment Act, the four blocking statutes at issue diminished judicial pay in violation of the Compensation Clause. A fair reading of *Will* based on "the precise facts to which it [was] applied," requires limiting the holding to the statutory scheme that was before the Court. *See Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (citation omitted); *see also Raines*, 362 U.S. at 21. If *Will* is read to address a question broader than that presented—one that would govern a host of different congressional efforts to protect judicial pay from diminution in value—then we must conclude that, in *Will*, the Supreme Court ignored its own governing jurisprudential principles.

In its briefing, the government concedes that there was a narrower approach the Court could have taken. Specifically, the government argues that, "even if the Supreme Court in *Will* could have based its decision upon the 'discretionary' character of the then-applicable statutory scheme, the Court did not decide the case upon that ground. The Court drew no such distinction." Appellee's Br. 26-27. If the government is right on this point, it is the very reason why *Will* was wrong to make the pronouncements upon which the government now relies. If the Court in *Will* consciously chose not to draw a distinction between a discretionary COLA scheme and a self-executing, non- discretionary one, it: (1) formulated a rule of constitutional law broader than required by the facts presented; and (2) ignored the fundamental precept that judges decide only the cases before them. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007) ("Relying on the provision of the Constitution that limits our role to resolving the 'Cases' and 'Controversies' before us, we decide only the case at hand.")

3. Absurd Results

Finally, the definition of "vesting" *Williams* gleaned from *Will* cannot be right. If it were: (1) Congress could do away with judicial retirement benefits for all sitting judges; (2) it would be inconsistent with the way the concept of vesting has been applied to similar pay increases for Members of Congress; and (3) it would run afoul of the common law understanding of the way in which future interests

"vest" for all other purposes. It necessarily would lead to absurd results.

First, if the definition of "vesting" *Williams* felt bound to under *Will* is correct, then Congress could eliminate judicial retirement pay for all sitting Article III judges without violating the Compensation Clause. By statute, Article III judges can retire with full pay once they reach a certain combination of age plus years of judicial service. *See* 28 U.S.C. § 371. Under this system, the Supreme Court has said that the right to receive retirement pay "d[oes] not vest until retirement" and the "system provide[s] nothing for a judge who le[aves] office before age 65." *United States v. Hatter*, 532 U.S. 557, 575 (2001). In other words, the Supreme Court has specifically held that retirement benefits do not vest until a judge retires and certain prerequisites are met.

In *Will*, the Court concluded that vesting occurs when a salary increase "takes effect as part of the compensation due and payable to Article III judges." 449 U.S. at 229. As such, for those years where the COLAs at issue in *Will* had not yet become "due and payable," the Court held that the blocking statutes did not violate the Compensation Clause's prohibition against diminishing judicial pay. *See id.* If we accept *Will*'s holding that Congress can abolish judicial salary adjustments at any time before they take effect, it logically follows that Congress would also be free to abolish judicial retirement pay at any time. The practical consequences of *Will* would place judicial retirement benefits at risk, despite the fact that the Su-

preme Court itself previously has characterized such benefits as "compensation" under Article III. *See Hatter*, 532 U.S. at 574 ("the noncontributory pension salary benefits [are] themselves part of the judge's compensation").

Second, *Will*'s definition of vesting conflicts with the way in which that concept has been applied in the context of the Twenty-Seventh Amendment. In *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), the court addressed whether the 1989 Act (which also applies to Members of Congress) was inconsistent with the Twenty-Seventh Amendment which provides that: "No law, varying the compensation for services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened." *Id.* at 159. The court held that the phrase "shall take effect" in the Amendment referred to the date the Ethics Reform Act first became operative—*i.e.*, 1991—rather than any earlier or later point in time. *See id.* at 161-62. Because the COLA provision of the Ethics Reform Act took effect in January 1991, after an intervening election in 1990, that provision did not violate the Twenty-Seventh Amendment. *Id.* at 162. The court also held that: (1) Congress is free to specify a formula for future and continuing salary increases; and (2) the COLAs under the 1989 Act were designated to occur automatically each year after 1991, with no additional law necessary. *Id.* at 162-63. All yearly COLAs beyond 1990 thus became operative and

"vested" for Members of Congress when the law was first effective in 1991.[1]

In *Williams*, the appellee-judges relied on the holding in *Boehner* to contend that the COLA increases for judicial officers took effect, or vested, when the law was effective, not when the yearly COLAs became *due and payable*. *Williams*, 240 F.3d at 1036. This court recognized the holding in *Boehner*, but distinguished it on grounds that it dealt with a different question limited to Members of Congress. Specifically, the court found that *Boehner* "has no relevance . . . to the question of whether the judicial pay aspects of the 1989 Act could, consistent with Article III, be revised or abrogated by later Acts of Congress." *Id.* at 1037. That question, the *Williams* court held, was already answered in the affirmative in *Will*'s holding that "vesting, for federal judges under Article III, occurs only when compensation begins to accrue to the judges, not when a particular adjustment formula is enacted." *Id.* at 1036-37. By simply relying on *Will* to distinguish *Boehner*, the court in *Williams* avoided the more difficult task of trying to reconcile two contradictory approaches to what vesting means under the Constitution.

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[1] In the alternative, the appellant in *Boehner* argued that, if the court found the COLA provision vested and constitutional, then a later-enacted statute that cancelled a planned COLA absent an intervening election violated the Twenty-Seventh Amendment. 30 F.3d at 162. Although the answer to that question would be of interest to us now, the court declined to address it. *See id.* at 162-63.

We are now faced with two distinct definitions of the constitutionally effective date of congressionally enacted COLAs. While *Will* provides that, for Article III purposes, a COLA is effective when it becomes "due and payable," regardless of when the law establishing that COLA was enacted or when it took effect, *Boehner* states that, for Article I and the Twenty-Seventh Amendment, a COLA vests when the law is first effective, even if not due and payable for years to come. Common sense and basic principles of interpretation counsel against drawing this distinction.

While it is certainly true that the operative date of congressionally designated salary increases is not prescribed in the Constitution, both the Compensation Clause and the Twenty-Seventh Amendment address the Framers' concerns with in-term salary changes for the respective branches of government—one with decreases in-term and the other with increases in-term. I see no reason why the concept of vesting should be employed in a way to expand Congress's ability to *decrease* judicial salaries under the Compensation Clause and be reframed under the Twenty-Seventh Amendment so as to expand Congress's ability to *increase* its own.

Finally, the vesting rule articulated in *Will* is an outlier. As this court in *Williams* correctly noted, "[t]ypically, 'vesting' of future interests only requires two components: an identification of the future owner, and certainty that the property would transfer." 240 F.3d at 1032 (citing 2 Blackstone Commentaries 168; Simes & Smith, *The Law of Future Interests*,

§ 65, pp. 54-55 (2nd ed. 1956)). This view of vesting of future interests is "more consistent with black-letter [law]." *See id.* at 1038. The Supreme Court, nevertheless, "departed from traditional vesting rules" for future interests and announced a peculiar "actual possession" rule for Article III. *Id.* at 1032. *Will* ignored the standard rule for vesting of future interests and created a unique rule solely for judicial compensation. *See id.* at 1038. Despite recognition of its illogic, the *Williams* panel felt compelled to reject the use of traditional vesting rules for Compensation Clause purposes because it found those rules to be "simply contrary to the rule established by the Supreme Court in *Will*." *Id.* at 1033.[2]

If we are to believe that *Will* advanced such an extreme vesting rule—one applicable only to the Compensation Clause—then the Court should reexamine that rule and correct its mistake. Had the Supreme Court in *Will* applied the generally-accepted rule for

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[2] Indeed, despite awareness of *Will*, various state courts interpreting analogous provisions of their own constitutions have held that the failure to provide statutorily promised COLAs unconstitutionally diminishes judicial compensation. *See e.g., Jorgensen v. Blagojevich*, 811 N.E.2d 652, 664 (Ill. 2004) (noting that the standards for conferring and calculating COLAs, which "were formulated following the United States Supreme Court's decision in *Will*, expressly provided that COLAs were to be given on July 1, 1991, and on July 1 of each year thereafter and that such COLAs were to be considered a component of salary fully vested at the time the Compensation Review Board's report became law"). *Will*'s "vesting" rule for Compensation Clause challenges—if that is really what it is—stands alone.

vesting of future interests to the Adjustment Act, the same one the *Boehner* court applied to congressional pay increases, then a COLA whose formula was codified by law would vest, at an absolute minimum, once the amount of the COLA was established for a particular year. This approach is grounded in "sound equitable principle[s]" and, as we recognized in *Williams*, has deep common-law roots. *See id.* at 1032-33.

For the reasons explained in further detail below, as the majority has noted, a more reasonable, consistent, and logical definition of "vesting" under Article III should be governed by the "reasonable expectations" of sitting judicial officers. Put simply, if we are to read *Will* as broadly as *Williams* did, and the dissent now does, the Court should revisit *Will*'s unique vesting rule.

B. Constitutionally

If *Will* truly established an "actual possession" vesting rule for Compensation Clause purposes, that holding seems indefensible under the Constitution. The Framers formulated the Compensation Clause for the express purpose of maintaining judicial independence, in part by providing judges with reasonable expectations about their pay and the inability of Congress to reduce it. As interpreted in *Williams*, the *Will* rule defeats the Framers' intent and threatens the governmental structure around which the Constitution was formulated.

1. Historical Perspective and the Framers' Intent

The Compensation Clause "has its roots in the long-standing Anglo-American tradition of an independent Judiciary." *Will*, 449 U.S. at 217. As the Supreme Court has recognized, the "colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting the Declaration of Independence, para. 11). Against this backdrop, the Framers designed Article III to protect the public "from a repeat of those abuses." *Id.* By giving judges life tenure and preventing the other branches from reducing judicial compensation, the Framers sought to "preserve the integrity of judicial decision-making." *Id.*

As the majority notes, in Federalist 79, Alexander Hamilton emphasized the importance of protecting judicial compensation. Specifically, he argued that, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79 at 385 (Alexander Hamilton) (Lawrence Goldman ed., 2008). Hamilton observed that, "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will*." *Id.* at 386 (emphasis in original). For this reason, the legislative branch must not "change the condition[s] of the [judiciary] for the worse" so that "[a] man may then be

sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." *Id.*

Hamilton's concerns, and those of many other Framers, were not merely academic. Indeed, throughout the former colonies, legislatures took retributive actions against judges with whom they disagreed, including attempts to remove judges who declared particular laws unconstitutional and to call judges before the legislature to answer for specific rulings. *See* Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, *in* 1 History of the Supreme Court of the United States, 133-42 (Paul A. Freund ed., 1971). These events further supported the founders' desire to insulate judges from the influence and control of the other branches of government.

The Supreme Court has recognized that the primary purpose of the prohibition against reducing judicial salaries is "not to benefit the judges, but . . . to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution." *Evans v. Gore*, 253 U.S. 245, 253 (1920), *overruled on other grounds by Hatter*, 532 U.S. at 571. The Compensation Clause should be "construed, not as a private grant, but as a limitation imposed in the public interest." *Id.* It is the public that benefits from a strong, independent judiciary that is free to issue decisions without fear of repercussion.

The Framers' desire to insulate judicial pay from the political process was the subject of much debate

and angst. While, given the long tenure judges would be asked to serve, there was no doubt some provision should be made for salary increases, the Framers also feared that, if salary decisions were left entirely to Congress, the judiciary might be forced to curry favor with Congress to secure reasonable compensation increases. *See* Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 Case W. Res. L. Rev. 965, 972 (2006). To address this concern, James Madison suggested indexing judicial pay to the price of wheat or another stable value. The Framers rejected that idea, however, for fear fluctuations in commodity prices, like inflation, might leave judges undercompensated. *See* 2 *The Records of the Federal Convention of 1787* 44-45 (Max Farrand ed., 1911).

Thus, while the Framers foresaw a need for in-term increases in judicial salaries and were concerned with leaving the task of providing those increases to Congress, they saw no alternative; no self-executing system they could devise seemed adequate to ensure that, given the dual effects of inflation and rising standards of living, judges would not be left undercompensated. So trust Congress they did, leaving to it the responsibility to guard against real decreases in judicial salary by future legislative enactments.

In sum, the Framers intended to provide judges reasonable expectations about their pay. The Framers, to be sure, did not contemplate that a judges' reasonable expectation would mean that he or she would become wealthy by taking the bench, or that Congress

necessarily would increase judicial salaries. They believed, however, that Congress would assess fairly and periodically the need for increases in judicial compensation, would provide increases when appropriate, and that, once it did so, judicial officers thereafter could rely on the fact that Congress could not take such increases away.

2. The Expectations Approach in Practice

Courts have long-endorsed this expectations-based approach to the Compensation Clause. Indeed, as Justice Breyer has noted, protecting "a judge's reasonable expectations" is the "basic purposive focus" of the Compensation Clause. *Williams*, 535 U.S. at 916 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). Likewise, Justice Scalia has argued that, when Congress takes away a previously-established component of the federal judicial "employment package," it reduces compensation and thereby thwarts judicial expectations. *See Hatter*, 532 U.S. at 585 (Scalia, J., dissenting) (arguing that repeal of federal judges' exemption from the Medicare tax was a reduction of compensation because those judges "had an employment expectation of a preferential exemption from taxation"). Consistent with this expectations-related focus, the Supreme Court has held that the Compensation Clause forbids laws "which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services." *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933) (quoting *Evans v. Gore*, 253 U.S. 245, 254 (1920)).

Other courts likewise have emphasized judicial expectations in their approach to the Compensation Clause. For example, in the early nineteenth century, the Circuit Court for the District of Columbia held that, "if [a judge's] compensation has once been fixed by law, a subsequent law for diminishing that compensation . . . cannot affect [a sitting judge]." *United States v. More*, 7 U.S. (3 Cranch) 159, 160 n.2 (1805), *writ of error dism'd for want of jurisdiction*. In *More*, Congress had enacted and later abolished a system of fees for compensating justices of the peace in the District of Columbia. *Id.* One of the justices of the peace continued to charge fees under the abolished structure, and the government brought an indictment against him. *Id.* On appeal, the Circuit Court held that: (1) the compensation of justices of the peace was subject to the Compensation Clause; and (2) where a fee structure is set by law, a later-enacted statute diminishing or abolishing that structure violated the Constitution. *Id.* at 161. Because sitting justices had an expectation that they would receive compensation consistent with the then-existing fee structure, Congress could not take that structure away.

In *Will*, the Supreme Court discarded the long-standing expectations-based approach to the Compensation Clause in favor of its "due and payable" vesting rule, without clear explanation for doing so. In a terse footnote, the Court distinguished *More*. *See Will*, 449 U.S. at 228, n.32. Specifically, the Court claimed that, in *More*, "the fee system was already in place as part of the justices' compensation when Con-

gress repealed it" whereas "the increase [via the Adjustment Act] in Year 2 had not yet become part of the compensation of Article III judges" when it was repealed. *Id.* Careful consideration of the facts in *More* reveal that this is a distinction without a difference. The justices under the fee system in *More* were not entitled to compensation until they actually rendered services. *See More*, 7 U.S. at 160 n.2 ("This compensation is given in the form of fees, payable when the services are rendered."). At all times, the justices knew the precise amount they *could* charge for a particular service, but they never knew how much their total compensation would be, for example, in a particular week. In other words, the fee system in *More* merely set out a structure for calculating the compensation, which was not "due and payable"—to use the Court's terminology in *Will*—until the justices performed the affirmative act of rendering services.

The Adjustment Act formula was no different. In the same way that the justices under the fee system in *More* did not know how much they would work in a particular year, under the Adjustment Act, Article III judges did not know how much their salary would increase in a particular year, if at all. But they did know that, once the formula was enacted for the year, it became part of the compensation due. For example, looking at Year 3 in *Will*, if we accept the dissent's proposition that the COLA of 5.5% became automatic once the President's alternative plan was adopted and transmitted to Congress—which was one month before the Year 3 blocking statute was enacted—then there is

no doubt that, as was the case in *More*, the COLA "was already in place as part of the [judges'] compensation when Congress repealed it." *See Will*, 449 U.S. at 228, n.32 (citing *More*, 3 Cranch at 161). In the same way that Congress was prohibited from abolishing the fee structure in *More* because it was part of the justices' compensation, so too should Congress have been prohibited from blocking the COLA for Year 3 in *Will*.

Given these similarities, *Will's* dismissal of *More* is unconvincing. The two opinions are irreconcilable. Either *Will* is incorrect, or the Court should have said that *More* was wrong. The Supreme Court should return to the well-established expectations-based approach to the Compensation Clause.

3. The Consequences of Abandoning the Expectations Approach

Assuming *Will*'s vesting rule allows Congress to bar "automatic" COLAs promised by definitive and precise legislative enactment, that rule is contrary to the constitutional balance the Framers carefully calibrated—one which, of necessity, delegated control over judicial salaries to the legislature, but did so in a way to guard against congressional retribution for unpopular judicial decisions. So understood, *Will*'s vesting rule puts at risk the principles the Framers struggled so hard to foster; it threatens to make the judiciary beholden to Congress in ways which undermine its independence. The Supreme Court should rethink such a rule. *See e.g., Mistretta v. United States*, 488 U.S. 361, 383 (1989) (encouraging vigilance against a "provision of law" that "impermissibly threatens the institutional

integrity of the Judicial Branch") (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

The Framers' concerns were prescient. Statistics demonstrate that the erosion of judicial pay "has reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." Chief Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, 39 The Third Branch 1, 1 (2007). Not only is this not the world the Framers contemplated, it is approaching one they most feared. As Hamilton explained, if judicial independence is "destroyed, the constitution is gone, it is a dead letter; it is vapor which the breath of faction in a moment may dissipate." *Commercial Advertiser* (Feb. 26, 1802) (reprinted in *The Papers of Alexander Hamilton*, Volume XXV 525 (Columbia University Press 1977)).

III

I finally turn to Section 140 of Pub. L. No. 97-92, 95 Stat. 1183, 1200 (1981), and its role in our assessment of the legality of the congressional action challenged here. I agree with the majority that the existence of Section 140 does not change the conclusion that the failure to provide COLAs mandated by the 1989 Act is unconstitutional, whether the withholding occurred before or after Congress amended that section in 2001. As the majority explains, by its own terms, Section 140 is not applicable to the salary adjustments contemplated by the 1989 Act. If it were, however, as the

government contends it is, we could not enforce it because Section 140 is unconstitutional.

Section 140 provides as follows:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted. . . .

Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1981). Section 140 was a rider to a Joint Resolution providing continuing appropriations for fiscal year 1982. In *Williams*, we held that the government could not rely on Section 140 as justification for the blocking statutes passed in 1995, 1996, 1997, and 1999 because Section 140 expired by its own terms on September 30, 1982. *Williams*, 240 F.3d at 1026 (citing Pub. L. No. 97-161, 96 Stat. 22 (1982) (extending life of provisions from March 31, 1982 to September 30, 1982); Pub. L. No. 97-92, § 102(c), 95 Stat. 1183 (1981)).

After *Williams*, Congress enacted legislation that amended Section 140 to provide that it "shall apply to fiscal year 1981 and each fiscal year thereafter." Act of Nov. 28, 2001, Pub. L. No. 107-77, § 625, 115 Stat. 803 ("2001 amendment"). Today, the majority assumes that the 2001 amendment supersedes *Williams*'s holding that Section 140 expired, but agrees with the alternative holding in *Williams* that, even if

not expired, the 1989 Act provides the additional authorization required by Section 140.

Were the majority's conclusion on that point not correct, then we would be forced to conclude that Section 140 violates the Compensation Clause, both because it singles out Article III judges for disadvantageous treatment and because it violates the principle of separation of powers.

A. Section 140's Discriminatory Effect

The Supreme Court has held that a law violates the Compensation Clause when it "effectively single[s] out . . . federal judges for unfavorable treatment" in their compensation. *Hatter*, 532 U.S. at 559. In *Hatter*, the Court struck down a statutory scheme that required sitting federal judges to pay into the Social Security system while other high-level government officials potentially were exempt from making such payments. *Id.* at 564, 572-73. In finding the denial of the exemption to judges unconstitutional, the Court explained that the "practical upshot" of the statutory scheme was to disadvantage judges relative to "nearly every current federal employee." *Id.* at 573.[3]

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[3] Justice Scalia did not join in this portion of the Court's opinion, concurring on grounds that the Compensation Clause was violated because the congressional action violated the judicial officers' reasonable expectations about their future income package. *Hatter*, 532 U.S. at 586 (Scalia, J., concurring in part and dissenting in part) ("I disagree with the Court's grounding of this holding on the discriminatory manner in which the extension occurred."). The

Section 140 is no different. It only overrides the automatic annual COLAs promised in the 1989 Act for judicial officers. All other federal employees—including high ranking Executive Branch appointees and Members of Congress—remain entitled to those "automatic" adjustments. Only judicial officers are beholden to Congress for an additional affirmative legislative enactment before they may receive the 1989 Act's COLAs. Thus, post-2001, Section 140 turns the 1989 Act into a law that provides a financial benefit to all federal employees other than judges and puts the judiciary in the position of annually needing to "curry favor" with the legislature for compensation increases, just as the Framers feared. That clearly violates the Compensation Clause. *See Hatter*, 532 U.S. at 576; *Williams*, 535 U.S. at 911 (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari) ("[Section 140] refers specifically to federal judges, and it imposes a special legislative burden upon their salaries alone. The singling out of judges must throw the constitutionality of the provision into doubt.") (citing *Hatter*, 532 U.S. at 564)). "Judges 'should be removed from the most distant apprehension of being affected in their judicial character and capacity, by anything, except their own behavior and its consequences.'" *Hatter*, 532 U.S. at 577 (quoting James Wilson, Lectures on Law (1791), in 1 Works of James Wilson 364 (J. Andrews ed. 1896)).

"discrimination" theory, however, received the votes of a majority of the Justices and, therefore, is binding precedent.

The fear of disadvantageous treatment of judges under Section 140, as amended, is not hypothetical. Until recently, annual adjustments for federal judges remained in step with those for Executive Branch appointees and Members of Congress. When those groups received automatic adjustments under the 1989 Act, Congress also enacted the necessary special legislation to authorize an adjustment for judges. In fiscal year 2007, however, both General Schedule employees and Executive Branch appointees received an automatic adjustment under the 1989 Act, but Congress did not enact special legislation to adjust judicial salaries. The same thing happened in fiscal year 2010. Thus, the link between judicial salary adjustments and those for Executive Branch appointees was severed such that all nonelected federal employees other than Article III judges received COLAs in those years.[4] This is the very sort of individualized treatment of the judiciary that the Supreme Court has characterized as a "disguised legislative effort to influence the judicial will." *See Hatter*, 532 U.S. at 571. Little could be more inconsistent with the Framers' purpose and construct under the Compensation Clause.

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[4] Members of Congress did not receive salary adjustments in 2007 or 2010 because they affirmatively chose to opt out of their right to receive them under the 1989 Act. That choice was theirs, however, and not one otherwise mandated by preexisting legislation.

B. Section 140 and the Separation of Powers

Section 140 separately poses a separation of powers problem because it conditions the award of COLAs to judges on the receipt of salary adjustments by Members of Congress. The government argues that, in enacting the 1989 Act, "Congress made clear its intent to maintain a system of salary parity among Federal judges, members of Congress, and high-level Executive branch officers." Appellee's Br. 17 (citing Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989, 135 Cong. Rec. 30,756 (Nov. 21, 1989)). As noted above, any "parity" objective vis-à-vis Executive Branch officers has been abandoned. And, it is precisely because Congress has continued to use Section 140 to force a parity between judicial salaries and its own that Section 140 violates the principle of separation of powers.

The concern with the independence of the judiciary is one which flows directly from the tripartite form of government on which the Constitution is structured. In establishing the system of divided powers in the Constitution, the Framers believed it was essential that "the judiciary remain[] truly distinct from both the legislature and the executive." *Stern*, 131 S. Ct. at 2608 (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton)). Accordingly, as the Supreme Court has noted, the Framers built into the Constitution "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Mistretta*, 488 U.S. at 382 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

Although the three branches "are not hermetically sealed from one another," Article III was designed to impose certain "basic limitations that the other branches may not transgress." *Stern*, 131 S. Ct. at 2609 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

As noted earlier, the compromise the Framers struck under the Compensation Clause was one which would entrust to Congress the power *and* obligation to ensure reasonable salary adjustments for the judiciary over time. This was a compromise born of necessity, however; this mechanism for judicial salary adjustments was not meant to tie those adjustments to legislative salary changes, or to make them dependent on prevailing political winds. The Framers certainly did not mean to use the Compensation Clause to blur the lines between the legislative and judicial branches. That is precisely what Section 140 does, however.

Congress has used Section 140 to link judicial pay to its own, affirmatively authorizing judicial compensation increases there under only in years where Congress finds it politically palatable to allow increases in its own. By using Section 140 in this way, Congress has ignored its constitutional duty to assess independently the adequacy of judicial compensation. And, it has ignored the obligation entrusted to it by the Framers to jealously guard the independence of the judiciary. "[W]hether the Judiciary is entitled to a compensation increase must be based upon an objective assessment of the Judiciary's needs if it is to retain its functional and structural independence." *Maron v.*

Silver, 925 N.E.2d 899, 914 (N.Y. 2010) (finding link between legislative and judicial pay increases unconstitutional under New York state constitution).

Because Section 140 skirts Congress's obligations under the Compensation Clause and undermines the independence of the judiciary, it is unconstitutional. The Supreme Court repeatedly has made clear that it is the laws that "threaten[] the institutional integrity of the Judicial Branch" that violate the principle of separation of powers. *Mistretta*, 488 U.S. at 383 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). Under these well-established guideposts, Section 140 must fail.

IV

I agree with the majority that the failure to provide COLAs promised by the 1989 Act to the judiciary violates the Compensation Clause. I also agree that *Will* does not dictate a contrary result. "General propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). The general concepts espoused in *Will* simply do not address the very concrete and different set of facts before us. If the Supreme Court concludes *Will* must be read as broadly as this Court felt forced to read it in *Williams*, however, *Will* must be overruled. To the extent Section 140 plays any role in the Court's analysis of the issues presented here, moreover, the Supreme Court should address its constitutionality and put its use to rest.

* * * * *

WALLACH, *Circuit Judge*, concurring.

I concur in the results, and in the reasoning of the decision, including the necessity of making this important determination that Congress may not exceed constitutional bounds in its relationship with the judiciary. I write separately only to clarify that this decision does not mean that any particular federal judge other than plaintiffs will necessarily accept accrued back pay.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5012

PETER H. BEER, TERRY J. HATTER, JR., RICHARD A. PAEZ, LAURENCE H. SILBERMAN, A. WALLACE TASHIMA AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

May 18, 2012

ORDER

Appeal from the United States Court of Federal Claims in case no. 09-CV-037. Senior Judge Robert H. Hodges, Jr.

Before: RADER, *Chief Judge*, NEWMAN, MAYER[*] LOURIE, BRYSON, LINN, DYK, PROST, MOORE, O'MALLEY, REYNA, and WALLACH, *Circuit Judges*.

PER CURIAM.

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[*] Judge Mayer participated in the decision on panel rehearing.

A petition for rehearing en banc was filed by Plaintiffs-Appellants and a response thereto was invited by the court and filed by Defendant-Appellee.

The petition for rehearing was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc, response, and briefs amici curiae were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. A poll was requested, taken, and the court has decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition of Plaintiffs-Appellants for panel rehearing is denied.

(2) The petition of Plaintiffs-Appellants for rehearing en banc is granted.

(3) The court's opinion of February 17, 2012 is vacated in part, and the appeal is reinstated.

(4) The parties are requested to file new briefs addressing the following issues:

a. Does the Compensation Clause of Article III of the Constitution prohibit Congress from withholding the periodic salary adjustments for Article III judges provided for in the Ethics Reform Act of 1989?

b. For purposes of the Compensation Clause, is there any difference between years 1995, 1996, 1997,

and 1999, before the 2001 amendment to section 140 of Pub. L. 97-92, and the years thereafter?

c. The court will entertain any arguments the parties regard as important to the issues raised in the petition. However, the court does not wish to entertain briefing on the issue of preclusion, which the en banc court regards as having been resolved by the panel decision of February 17, 2012.

(5) This appeal will be heard en banc on the basis of additional briefing ordered herein and oral argument. An original and thirty copies of en banc briefs shall be filed, and two copies of each en banc brief shall be served on opposing counsel. Plaintiffs-Appellants' en banc brief is due 45 days from the date of this order. The en banc response brief is due within 30 days of service of the Plaintiffs-Appellants' en banc brief, and the reply brief within 15 days of service of the response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(6) Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without consent and leave of court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(7) Oral argument will be held at a time and date to be announced later.

FOR THE COURT

May 18, 2012 /s/ JAN HORBALY
Date JAN HORBALY
Clerk

cc: Christopher Landau, Esq.
Brian M. Simkin, Esq.
Erin M. Dunston, Esq.
Lawrence M. Friedman, Esq.
Jeffrey A. Lamken, Esq.
Aaron M. Panner, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5012

PETER H. BEER, TERRY J. HATTER, JR., RICHARD A. PAEZ, LAURENCE H. SILBERMAN, A. ALLACE TASHIMA AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Feb. 17, 2012

ORDER

Appeal from the United States Court of Federal Claims in case no. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

Before: BRYSON, MAYER, and DYK, *Circuit Judges*.

Order for the court filed by *Circuit Judge* DYK. Concurrence filed by *Circuit Judge* MAYER.

DYK, *Circuit Judge*.

This case returns to us on remand from the Supreme Court. The Court ordered us to determine "the question of preclusion." *Beer v. United States*,

131 S. Ct. 2865, 2865 (2011). We hold that the plaintiffs' claims are not precluded by our prior decision in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002). But, as *Williams* remains binding precedent on this panel, we again affirm the judgment of the Court of Federal Claims granting summary judgment in favor of the government.

BACKGROUND

This case involves the question of whether various congressional enactments violate the Compensation Clause by reducing the compensation of Article III federal judges. The Ethics Reform Act of 1989 ("the ERA"), Pub. L. No. 101-194, 103 Stat. 1716, put in place a system whereby federal judges were to receive yearly cost-of-living salary adjustments ("COLAs"). Under the ERA, once a determination was made by Congress that COLAs would be given to federal employees on the General Schedule for a given year, COLAs would also be granted to federal judges, "effective at the beginning of the first applicable pay period" for the COLAs on the General Schedule, 28 U.S.C. § 461(a)(1), and up to a maximum of five percent each year, ERA § 704(a)(1)(B).

Prior to the calendar years 1995, 1996, 1997, and 1999, in which COLAs were provided to General Schedule employees, Congress passed separate legislation that blocked the payment of COLAs to federal

judges.[1] *See* Treasury, Postal Service and General Government Appropriations Act of 1995 § 630(a), 108 Stat. at 2424 (blocking 1995 COLA); Treasury, Postal Service and General Government Appropriations Act of 1996, Pub. L. No. 104-52, § 633, 109 Stat. 468, 507 (1995) (blocking 1996 COLA); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 637, 110 Stat. 3009, 3009-364 (1996) (blocking 1997 COLA); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 621, 112 Stat. 2681, 2681-518 (1998) (blocking 1999 COLA). Each of those blocking acts became law prior to first day of the year that the blocking became effective, i.e., before the first day when federal judges would have received the adjustment to their salaries.

In 1997, a group of Article III federal judges filed a class action complaint in the United States District Court for the District of Columbia, alleging that the blocking legislation for the years 1995, 1996, and 1997, violated the Compensation Clause by diminishing their

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[1] For example, the blocking legislation for 1995 provided: "(a)(1) The adjustment in rates of basic pay for the statutory pay systems that takes effect in fiscal year 1995 under section 5303 of title 5, United States Code, shall be an increase of 2 percent. (2) For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems." Treasury, Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, § 630(a), 108 Stat. 2382, 2424 (1994).

compensation. Jurisdiction was predicated on the Little Tucker Act, 28 U.S.C. § 1346, and, after an amendment to the complaint, on the district court's general federal question jurisdiction, 28 U.S.C. § 1331. The plaintiffs' requested relief was framed as declaratory relief, asking the court, for example, to "declare" that the blocking legislation was "unconstitutional and void," and to "declare" that the plaintiffs were "entitled to damages in an amount to be determined by the Court." Complaint at 18, *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999) (No. 97-CV-3106).

Federal Rule of Civil Procedure 23 provides for two types of class actions that could potentially be certified in the circumstances of the *Williams* case—a Rule 23(b)(2) class action or a Rule 23(b)(3) class action. A Rule 23(b)(2) class action involves requests for "injunctive relief or corresponding declaratory relief" and does not in terms require notice to the class. *See* Fed. R. Civ. P. 23(c)(2)(A). It also does not require opt-out procedures. A Rule 23(b)(3) class action typically involves claims for past damages and requires notice and opt-out procedures. *See* Fed. R. Civ. P. 23(c)(2)(B). The district court in *Williams* certified the class under Rule 23(b)(2), with the class including "[a]ll persons who served as Judges of the United States pursuant to Article III of the Constitution" at any time during the years 1995, 1996, and 1997. Class Certification Order at 2, *Williams*, 48 F. Supp. 2d 52 (No. 97-CV-3106). According to the minimum requirements for Rule 23(b)(2) classes, the court did not provide the absent class members with

notice or an opportunity to opt out of the litigation. *See id.*

On July 15, 1999, the district court in *Williams* held that the blocking statutes for the years 1995, 1996, and 1997, violated the Compensation Clause. 48 F. Supp. 2d at 65. Thus the class was declared to be "entitled to cost-of-living adjustments for 1995, 1996 and 1997, together with all other benefits which should have accrued to them based upon those adjustments." *Id.* In another class action filed in the same district court by the same *Williams* plaintiffs, the district court considered the blocking legislation for 1999. The district court ordered that "the plaintiffs and the members of their class shall receive . . . cost-of-living adjustment[s], pursuant to the Ethics Reform Act of 1989, for fiscal year 1999, together with all other benefits which should have accrued to them based upon those adjustments." Order, *Williams v. United States*, No. 99-CV-1982, slip op. at 1-2 (D.D.C. Dec. 29, 1999). In a later filed opinion, the district court explained that, similar to its holding in *Williams*, 48 F. Supp. 2d 52, with respect to the 1995, 1996, and 1997 blocking statutes, the blocking statute for 1999 also violated the Compensation Clause. Memorandum, *Williams v. United States*, No. 99-CV-1982, slip op. at 4 (D.D.C. Jan. 13, 2000). We consolidated these two class actions on appeal, *see Williams v. United States*, 240 F.3d at 1025 n.1, and they are collectively referred to as the "*Williams* litigation."

On appeal, this court held that "the district court possessed Little Tucker Act jurisdiction," "at least as

to the Judges' prayer for relief for the 1995 year, since each individual judge would receive less than $10,000 for the unpaid COLA for that year." *Williams*, 240 F.3d at 1025. With respect to the merits of the case, we held that the blocking legislation at least for 1995, preventing COLAs established in the ERA from taking effect (before those COLAs "vested"), was not unconstitutional. *Id.* at 1032, 1039-40. In this respect, we held that the result was dictated by the Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (1980). One judge dissented. On February 16, 2001, the same day that a panel of this court decided *Williams*, the court declined to hear the case en banc, with three judges dissenting. *Williams v. United States*, 264 F.3d 1089 (Fed. Cir. 2001). Subsequently, the Supreme Court denied the plaintiffs' petition for certiorari, with three Justices dissenting. *Williams v. United States*, 535 U.S. 911 (2002).

On November 28, 2001, Congress enacted further legislation affecting judicial pay. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 625, 115 Stat. 748, 803 (2001) (the "2001 legislation"). Instead of proceeding in a piecemeal fashion to block the COLAs, the 2001 legislation broadly provided:

> [N]one of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase . . . any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of

> Congress hereafter enacted. . . . This section shall apply to fiscal year 1981 and each fiscal year thereafter.

Act of Dec. 15, 1981, Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200, *amended by* § 625, 115 Stat. at 803. For fiscal year 2007, Congress enacted legislation providing COLAs for federal employees on the General Schedule, but did not enact legislation providing COLAs for federal judges, and accordingly, federal judges received no COLA for that year. Article III judges were granted COLAs in years 2002, 2003, 2004, 2005, 2006, and 2008, but these adjustments did not reflect the disputed 1995, 1996, 1997, and 1999 COLAs.

On January 16, 2009, the plaintiffs, all members of the certified class in *Williams*, but not named plaintiffs in the *Williams* litigation, filed the present suit in the Court of Federal Claims under the Tucker Act, seeking back pay for the failure to receive COLAs in 1995, 1996, 1997, 1999, and 2007, as well as declaratory relief that Congress may not in the future withhold COLAs as provided by the ERA. The plaintiffs pointed out that, not only did each denial of COLAs impact judicial salaries for that year, but it also affected the base salaries from which COLAs were or were not granted in subsequent years.

The government moved for summary judgment on the ground that, as a matter of stare decisis, the suit was barred by our *Williams* decision, and on the alternative ground that, *inter alia*, the suit was barred by "res judicata" because of the earlier *Williams* judgment. *See* Order, *Beer v. United States*, No. 09-37C,

slip op. at 1 (Fed. Cl. Oct. 16, 2009). Although the preclusion issue was designated by the government as an issue of "res judicata" at the Court of Federal Claims, it was more properly termed a question of collateral estoppel or issue preclusion.[2] While the claims in the present matter overlap with those in *Williams*, they are not identical, though the constitutional issues are identical.

The Court of Federal Claims did not reach the issue preclusion question. Instead, the court found that an analysis of the "complex legal and constitutional issues" presented by the preclusion argument was not "an effective use of judicial resources" given the parties' agreement that the court "must dismiss plaintiffs' Complaint in light of the *Williams* precedent." Order, *Beer*, No. 09-CV-37, slip op. at 2. On October 16, 2009, the Court of Federal Claims dismissed the complaint, solely on the ground that the precedent set by "*Williams* forecloses [the] court's ability to grant plaintiffs the relief they seek." *Id.* (internal quotation marks omitted).

The plaintiffs appealed to this court. On January 15, 2010, a panel of this court summarily affirmed the judgment of the Court of Federal Claims. We agreed

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[2] In the government's July 26, 2010, brief to the Supreme Court opposing certiorari and in the parties' additional briefing to this court regarding preclusion, the question is referred to as one of "issue preclusion." *See* Brief for U.S. Opposing Certiorari at 12, *Williams*, 535 U.S. 91 (No. 01-175); Appellant's Supplemental Br. at 4, 9; Appellee's Supplemental Br. at 10.

with the parties "that this court's opinion in *Williams* . . . controls the disposition of this appeal by a panel of this court," and accordingly summarily affirmed the decision of the Court of Federal Claims. *Beer v. United States*, 361 F. App'x 150, 151-52 (Fed. Cir. 2010). We did not reach the government's alternative preclusion argument. On the same day, the court denied a petition for hearing en banc, with four judges dissenting. *Beer v. United States*, 592 F.3d 1326 (Fed. Cir. 2010).

The plaintiffs subsequently petitioned for certiorari to the Supreme Court. In its opposition brief, the government argued that our decision in *Williams* was correct, and alternatively that plaintiffs were precluded from relitigating the Compensation Clause issue decided in *Williams* because they were members of the certified class in that case. On June 28, 2011, the Supreme Court granted certiorari, and entered the following order:

> The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for consideration of the question of preclusion raised by the Acting Solicitor General in his brief for the United States filed July 26, 2010. The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits.

Beer v. United States, 131 S. Ct. 2865, 2865-66 (2011).

DISCUSSION

The preclusion question here is whether absent class members in an unsuccessful Rule 23(b)(2) class action, who did not receive notice of the pendency of the action, are subject to preclusion. The Supreme Court has held that absent class members may not challenge the certification of a Rule 23(b)(2) class on the grounds that the certification was improper under the Federal Rules of Civil Procedure. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam). However, absent class members may later object to a res judicata or collateral estoppel bar on grounds of due process, for example, on the grounds that the absent class members were inadequately represented in the prior action, *see Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), or did not receive constitutionally required notice, *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011). Thus, the issue before us is whether the plaintiffs were entitled, as a matter of due process, to notice of the *Williams* litigation before being bound by the final judgment in *Williams*. If notice was required, we must also determine what constitutes sufficient notice to meet the requirements of due process. We address each of these two issues in turn.

I

As a general matter, there is "no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank*

& Trust Co., 339 U.S. 306, 313 (1950). However, there may be an exception for certain injunctive class actions, perhaps on the theory that the right to injunctive relief does not constitute a traditional property interest.[3] Thus, language in some Supreme Court opinions, and various decisions of our sister circuits, have suggested that in some Rule 23(b)(2) class actions for injunctive or declaratory relief, notice and opt-out rights are not constitutionally required if the named plaintiffs were adequately representative of the class. For example, the Supreme Court in *Hansberry*, 311 U.S. at 42-43, stated that "members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ."[4]

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[3] *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 273 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921) (Court obligated to apply intervening legislation that eliminated a right to injunctive relief against labor picketing); *see also Benjamin v. Jacobson*, 172 F.3d 144, 164 (2d Cir. 1999) (en banc) ("[T]he provisions of a consent decree that order prospective relief remain subject to . . . changes in law" and are "neither final nor 'vested' in the constitutional sense."); *Plyler v. Moore*, 100 F.3d 365, 374-75 (4th Cir. 1996) (concluding that the plaintiffs "had no property right in the continued enforcement of a decree granting prospective relief").

[4] *See also Richards v. Jefferson Cnty.*, 517 U.S. 793, 800-801 (1996) (quoting *Hansberry*); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) ("When only equitable relief is sought in an action involving a cohesive plaintiff group . . . , the due process interests of absent members will usually be safeguarded by

However, the Supreme Court has not definitively decided whether absent class members in such actions are entitled to notice as a matter of due process. In *Wal-Mart*, the Supreme Court noted that "[Rule 23](b)(2) does not require that class members be given notice and opt out rights, presumably because it is thought (*rightly or wrongly*) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause." 131 S. Ct. at 2559 (emphasis added); *see also Richards*, 517 U.S. at 801 (noting the "*possibility* that in some class suits adequate representation might cure a lack of notice" (emphasis added)). The issue of whether notice is required in all injunctive or declaratory actions is not before us, and we do not address it. This case involves a far narrower question—whether absent class members are entitled to notice in class actions involving injunctive or declaratory claims as well as monetary claims.

It is well established that, in class actions seeking only monetary recovery, notice is essential to binding absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Indeed, for

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adequate representation alone."); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165 (2d Cir. 2001) ("Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action . . . , there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process.").

claims "wholly or predominately for money judgments," absent class members, as a matter of due process, "must receive notice plus an opportunity to be heard and participate in the litigation" as well as the opportunity to "opt out" before being precluded from pursuing individual damage claims. *Id.* at 811, 812 & n.3; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class."); *Wal-Mart*, 131 S. Ct. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process."). In other words, in a Rule 23(b)(3) class action for money damages, notice and opt-out rights are essential to due process. Adequate representation is not alone sufficient. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974).

The Supreme Court established in *Wal-Mart* that due process requires notice be given to absent class members when monetary claims are more than just "incidental" to the claims for injunctive or declaratory relief. *See Wal-Mart*, 131 S. Ct. at 2557, 2559-60. *Wal-Mart* explicitly declined, however, to decide whether notice was required as a matter of due process when monetary claims were "incidental" to injunctive or declaratory claims in a class action. *Id.* at 2560. The Court held instead that the monetary claims in *Wal-Mart* were clearly not "incidental," because Wal-Mart was "entitled to individualized deter-

minations" of its liability, affording Wal-Mart the opportunity to "show that it took [] adverse employment action[s] against [particular] employee[s] for any reason other than discrimination." *Id.* at 2560-61. Thus the Court stated: "We need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause." *Id.* at 2560.

As recognized in *Wal-Mart*, the source of the "incidental" concept lies in decisions of some of our sister circuits that concluded that a Rule 23(b)(2) class action could be certified without notice to absent class members in circumstances where monetary relief "is incidental to requested injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000) ("[C]ertification under Rule 23(b)(2), without notice or opportunity to opt out, is impermissible unless the requested monetary damages are 'incidental' to requested injunctive or declaratory relief."). But those cases did not involve issue preclusion, and did not decide whether notice was required as a matter of due process before binding absent class members.

Even if we were to assume that there could be an "incidental" exception for due process purposes, the question would remain as to the scope of the exception. The parties here disagree as to what monetary relief qualifies as "incidental." Citing *Allison*, the government argues that the monetary aspects of the claims in

Williams were incidental because they "flow[ed] directly from liability to the class as a *whole*" and were "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415. The plaintiffs, on the other hand, argue that monetary relief is the quintessential remedy at law, readily divisible, and cannot be reduced to "incidental" status through a combination with a request for injunctive or declaratory relief. The plaintiffs further argue that the monetary aspect of *Williams* could not be incidental to the requested declaratory relief because that requested declaratory relief was itself about an entitlement to money.

We agree with the plaintiffs that the incidental exception, if there is one, cannot apply where the requested injunctive or declaratory relief is directed to the payment of money. The requested relief in *Williams* was framed as declaratory relief, asking the court, for example, to "declare" that the blocking legislation was "unconstitutional and void," and to "declare" that the plaintiffs were "entitled to damages in an amount to be determined by the Court." Complaint at 18, *Williams*, 48 F. Supp. 2d 52 (No. 97-CV-3106). Thus the government conceded that the declaratory relief requested in *Williams* was itself directed to the payment of money, and the case was "essentially one for money damages." Brief of Defendant-Appellant at 24, *Williams*, 240 F.3d 1019 (No. 99-1572), 1999 WL 33607449.

It may be, as the government argues, that the "other than money damages" provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, turns on whether a request is for past damages or an order for payment of money in the future.[5] But, as far as the due process right to notice is concerned, we are unable to distinguish between actions in which the suit is for past due money and those situations in which the action is for both past due money and the payment of future money. Nor are we aware of any cases in which other circuits have made such a distinction.[6] Indeed, the District of Columbia Circuit has held that notice is required in a class action seeking declaratory and injunctive relief that would merely "serve as a

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[5] *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). However, recent Supreme Court authority suggests that the APA may make no such distinction. "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Bowen*, 487 U.S. at 918-19 (Scalia, J., dissenting)) (internal quotation marks omitted).

[6] The class certification cases such as *Allison* all involved claims for non-monetary declaratory or injunctive relief. *See, e.g.*, *Allison*, 151 F.3d at 407 (seeking "restructuring of offending [discriminatory] policies" and "instatement into existing jobs"); *see also, e.g.*, *James v. City of Dallas, Tex.*, 254 F.3d 551, 572 (5th Cir. 2001) (seeking removal of liens and the clearing of titles).

foundation for a damages award." *Richards v. Delta Airlines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006).

Because we conclude that both the prospective and retrospective aspects of the claims in *Williams* were essentially monetary in nature, we hold that due process does not allow the plaintiffs' claims in the present suit to be precluded by *Williams* in the absence of notice of the *Williams* class. In other words, *Williams* was a case in which money claims predominated and in which, accordingly, notice to absent class members was required as a matter of due process. We need not address whether opt-out rights are also required as a matter of due process.

II

The government argues that even if notice were required, the due process notice obligation was satisfied because the plaintiffs here received actual notice of the *Williams* litigation while it was pending. We consider whether actual notice is sufficient.

The government's theory is that the plaintiffs received actual notice of the *Williams* suit through the press, and specifically through an article in *The Third Branch*,[7] a monthly newsletter distributed by the Ad-

[7] The article stated in relevant part: "Twenty U.S. court of appeals and district court judges have filed a class action suit in the U.S. District Court for the District of Columbia (*Williams v. United States*) seeking to restore cost-of-living adjustments (COLAs) denied to the Judiciary from 1994 to 1997. The lawsuit claims congressional denial of annual COLAs provided under the Ethics Re-

ministrative Office of the United States Courts to the federal judiciary. The government requests at least a remand to the trial court so that a record can be developed with respect to whether plaintiffs in fact had actual notice of *Williams*. We hold that actual informal notice is insufficient to satisfy due process, making such a remand unnecessary.

The government relies on *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), to support its argument that actual notice is sufficient. However, the government's reliance on *United* is misplaced. *United* involved a bankruptcy proceeding whereby the debtor sought to obtain a discharge of a government-sponsored student loan debt via an "undue hardship" determination. *Id.* at 1373. Though the debtor failed to serve United with the proper summons and complaint in order to initiate an adversary proceeding, the bankruptcy court mailed notice and a copy of the debtor's discharge plan to United. *Id.* at 1373-74. The Supreme Court found that the debtor's "failure to serve United with a summons and complaint deprived United of a right granted by a procedural rule . . . [b]ut this deprivation did not amount to a violation of United's constitutional right to due process." *Id.* at 1378. The procedural shortcomings of

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form Act of 1989, coupled with inflation, have led to an unconstitutional erosion of judicial compensation. The constitutional claim, according to the lawsuit, is based on Article III, section 1, which provides that a judge's compensation may not be reduced." *Lawsuit Seeks to Restore COLAs*, The Third Branch, Feb. 1998, at 2.

the debtor were of no constitutional concern because "United received *actual* notice of the filing and contents of [the debtor's] plan" from the bankruptcy court, including the information United needed "for filing a proof of claim or an objection to the plan." *Id.* at 1374, 1378. Here, unlike *United*, there was no formal notice regarding the pendency of the claims. *United* hardly supports the proposition that informal notice through an article in a newsletter satisfies due process because formal notice was provided.

The Supreme Court has recognized the fundamental importance of providing a party with formal notice before binding them to a judgment. The Court's decision in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), is in fact quite similar to this case in rejecting the proposition that actual notice is sufficient. In *Nelson*, a trial court added the president and sole shareholder of a defendant company to a judgment against that company without affording him, in his individual capacity, formal notice or an opportunity to be heard. *Id.* at 462-63. The Supreme Court noted that Nelson "knew as soon as Adams moved to amend the pleading and alter the judgment that he might ultimately be subjected to personal liability." *Id.* at 466. But despite Nelson's actual knowledge of the circumstances, he could not be added to the judgment, as a matter of due process, without first receiving formal notice and being given an opportunity to be heard. *Id.* at 465-67.

In this case, it is undisputed that the plaintiffs did not receive formal notice of the class certification in

Williams from either the court or the class representatives. "[D]ue process . . . demand[ed] a more reliable and orderly course." *Id.* at 467. Though *Nelson* involved the provision of notice to a defendant as opposed to an absent class member, we find no basis for distinguishing between the two, as each were entitled to notice. Consistent with this principle, we hold that when absent class members are entitled to notice as a matter of due process, formal notice must be provided advising absent class members of the pendency of the action and their right to participate before being precluded from bringing their own action.

III

In summary, we hold that the plaintiffs are not precluded by the *Williams* litigation from bringing their Compensation Clause claims in the present case. However, there has been no intervening precedent bearing on the underlying constitutional issue since our prior affirmance on January 15, 2010. There we stated: "The parties agree, and we must also agree," that "this court's opinion in *Williams* . . . controls the disposition of this appeal by a panel of this court." *Beer*, 361 F. App'x at 151-52. Accordingly, we must again affirm the judgment of the Court of Federal Claims. If the original *Williams* panel was mistaken in its interpretation of the *Will* case, the remedy lies with this court en banc, with the Supreme Court, or with Congress.

Accordingly,

IT IS ORDERED THAT:

The judgment of the Court of Federal Claims is affirmed.

FOR THE COURT

Feb. 17, 2012
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

* * * * *

MAYER, *Circuit Judge*, concurring.

I join the court's opinion, but I continue to believe *Williams v. United States* was wrongly decided for the reasons set out in my opinion dissenting from the refusal to rehear that case *en banc*. 264 F.3d 1089, 1090-93 (Fed. Cir. 2001).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5012

PETER H. BEER, TERRY J. HATTER, JR., RICHARD A. PAEZ, LAURENCE H. SILBERMAN, A. ALLACE TASHIMA AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Aug. 4, 2011

ORDER

Appeal from the United States Court of Federal Claims in case no. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

NOTE: This order is nonprecedential.

Upon consideration of the order of the Supreme Court of the United States in *Peter H. Beer, et al., v. United States*, 131 S. Ct. 2865 (2011), vacating this court's judgment and remanding to this court for further consideration,

IT IS ORDERED THAT:

The mandate of this court issued on March 30, 2010 is recalled, the appeal is reinstated, and this court's January 15, 2010 judgment is vacated.

FOR THE COURT

Aug. 4, 2011 /s/ JAN HORBALY
Date JAN HORBALY
Clerk

cc: Christopher Landau, Esq.
Brian M. Simkin, Esq.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 09-1395

PETER H. BEER, ET AL.

v.

UNITED STATES

Decided: June 28, 2011

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petition for writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for consideration of the question of preclusion raised by the Acting Solicitor General in his brief for the United States filed July 26, 2010. The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits. Further proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance. JUSTICE BREYER would grant the pe-

tition for writ of certiorari and set the case for argument.

JUSTICE SCALIA, dissenting.

It has been my consistent view, not always shared by the Court, that "we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered." *Webster* v. *Cooper*, 558 U.S. ___, ___ (2009) (SCALIA, J., dissenting) (slip op., at 3). Today's vacatur resembles that in *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006) *(per curiam)*, from which I dissented, *id.*, at 870. I would grant the petition and set the case for argument.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2010-5012

PETER H. BEER, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, JAMES ROBERTSON, LAURENCE H. SILBERMAN, A. WALLACE TASHIMA AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Jan. 15, 2010

ON PETITION FOR HEARING EN BANC

ORDER

Before: MICHEL, *Chief Judge*, NEWMAN, MAYER, LOURIE, RADER, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, *Circuit Judges*.

PER CURIAM.

MICHEL, *Chief Judge*, with whom LOURIE and MOORE, *Circuit Judges*, join, dissents from the denial of the petition for hearing en banc.

NEWMAN, *Circuit Judge*, dissents from the denial of the petition for hearing en banc.

A petition for initial hearing en banc or, in the alternative, a motion for summary affirmance* was filed by the Appellants. A response thereto was invited by the court and filed by the Appellee. A reply thereto was invited and filed by the Appellants. The petition for initial hearing en banc and the motion for summary affirmance were referred to the circuit judges who are in regular active service. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for initial hearing en banc is denied.

(2) The motion for summary affirmance has been referred to the motions panel.

FOR THE COURT

Jan. 15, 2010
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

cc: Christopher Landau, Esq.
Brian M. Simkin, Esq.

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* Action on the motion for summary affirmance will issue in a separate order.

* * * * *

Appeal from the United States Court of Federal Claims in Case No. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

MICHEL, *Chief Judge,* with whom LOURIE and MOORE, *Circuit Judges*, join, dissenting from the denial of the petition for hearing *en banc*.

I dissent from the decision of the court to deny the petition of the plaintiffs-judges for *en banc* hearing. Because it presents constitutional issues of the Compensation Clause and the independence of the judiciary as a separate and equal Branch, this is clearly an appeal "of exceptional importance." *See* Fed. R. App. P. 35(a)(2). Further, there appears to be no meaningful consideration any panel of the court can give the appeal in light of the binding precedent of *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001). Unless this court agreed to hear this appeal *en banc*, it could do no more than rubber stamp the dismissal of the judges' complaint ordered by the Court of Federal Claims based on the very same *Williams* precedent. I would have preferred that we shouldered our responsibility as the reviewing court for the Court of Federal Claims to consider the appeal on its merits, which requires revisiting *Williams*, whether or not we ultimately upheld it. In my view, our responsibility is in no way diminished because the case involves judicial pay, and hence self-interest, and presents constitutional issues that may be considered controversial. From the divided vote not to hear the appeal *en banc*, I therefore respectfully dissent.

* * * * *

Appeal from the United States Court of Federal Claims in Case No. 09-CV-037, Senior Judge Robert H. Hodges, Jr.

NEWMAN, *Circuit Judge*, dissenting from denial of the petition for hearing *en banc*.

This case concerns the constitutional functioning of government, the balance of government power as affects the judicial branch. The appellants, all of whom are federal judges who had entered into service before 1989, state that Congress' repeated denials of the cost of living adjustments that had been legislated in 1989 are in violation of the Compensation Clause of Article III.[1] The Court of Federal Claims dismissed the complaint, deeming itself bound by the decision of this court in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001). The appellants acknowledge this precedent, but ask this court to hear this appeal *en banc* in order to reconsider our decision in *Williams*, citing the exceptional significance of the issues for our system of divided government.[2] The constitutional principles and statutory relationships indeed strike at

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[1] U.S. Const. art. III, §1 ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[2] In accordance with Fed. R. App. Proc. 35(a), an appeal may be initially heard *en banc* either when the requested panel decision would conflict with binding precedent, or the case raises a question of exceptional importance. For this appeal, both provisions are met.

the foundation of our government's structure, and the Federal Circuit's 2001 decision—a split and controversial ruling—has been disturbed by ensuing events and subsequent Supreme Court authority.

This appeal presents a combination of the principles of separation of powers and judicial independence. As stated in *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933): "The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States." The *Williams* court did not fully consider these principles, for that case was decided solely on the ground that the result was controlled by the Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (1980). However, events since *Williams* was decided warrant hearing this appeal *en banc*, for they cast additional doubt on the correctness of the decision in *Williams*. Thus I respectfully dissent from the court's denial of the requested hearing *en banc*.

The issue in Williams

The suit in *Williams* flowed from the enactment in 1989 of a statute that included provisions designed to ameliorate the increasing inequities in judges' compensation, resulting from periods of high inflation. Thus the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, established that the salaries of judges, members of Congress, and certain other senior government officials would be adjusted auto-

matically in any year in which a cost-of-living adjustment was made for all federal civil servants under the General Schedule. The Act barred the receipt of honoraria from any source, and limited compensation in other areas such as teaching.

The judges have continued to comply with the restrictions set in the 1989 Act. However, for the 1995, 1996, 1997, and 1999 fiscal years, Congress enacted legislation barring the automatic cost-of-living adjustments established by the 1989 Act. These enactments led to the *Williams* case, the plaintiffs raising concerns of undue "linkage" with the political branches, and arguing that since the 1989 Act provided automatic adjustments for judges, Congress' blocking legislation effectively reduced the judges' salaries in violation of the Compensation Clause. Although the district court agreed with the plaintiffs, a split panel of the Federal Circuit held that the Court's decision in *United States v. Will* validated these blocking actions, and that no unconstitutional diminishment in judicial compensation occurred in any year in which Congress voided the cost-of-living adjustment before the start of the payment year. The panel majority rejected the plaintiffs' argument that the 1989 Act precluded such congressional action, and this court denied rehearing *en banc*, amid controversy.

These issues are again presented, this time by the Beer appellants, again raising fundamental issues of constitutional import that have never been addressed by the *en banc* court. It is our obligation to consider these issues, particularly in view of subsequent events.

Events after the Williams decision

After our decision in *Williams* the Court decided *United States v. Hatter*, 532 U.S. 557 (2001), reviewing application of the Compensation Clause to legislation imposing certain taxes from which the judiciary had previously been exempt. The Court in *Hatter* explained that the imposition of a new financial burden solely on judges affected the constitutional guarantee of judicial freedom from discriminatory legislative action:

> Were the Compensation Clause to permit Congress to enact a discriminatory law with these features, it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees—characteristics which, as we have said, the public needs to secure that judicial independence upon which its rights depend. We consequently conclude that the 1983 Social Security tax law discriminates against the Judicial Branch, in violation of the Compensation Clause.

Hatter, 532 U.S. at 576. The principles elaborated in *Hatter* have not yet been applied to the situation confronted in *Williams* and raised by the Beer appellants.

Another post-*Williams* event is relevant, a legislative enactment specific to judges. This statute, referred to by the parties as Section 140 (tracking its origin in a 1981 appropriations act) is as follows:

> Notwithstanding any other provision of law or of this joint resolution none of the funds appropriated

> by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court. This section shall apply to fiscal year 1981 and each fiscal year thereafter.

28 U.S.C. § 461 note. This enactment, Pub. L. No. 107-77, tit. VI, § 625 (Nov. 28, 2001), has been interpreted by the government as undoing the automatic cost-of-living provision in the 1989 Ethics Act, and has been so implemented. Thus judges do not receive a government-wide cost-of-living adjustment unless authorized by a specific act of Congress. Congress did authorize such adjustment for several years, but not for the year 2007, and not for 2010. The shift from the blocking legislation in the 1990s that grouped judges with members of Congress and other senior officials for the purpose of cost-of-living adjustments, which this court considered in *Williams*, to this 2001 enactment that isolates judges for differential treatment, raises new concerns in light of the *Hatter* Court's holding that discriminatory treatment of judges is prohibited by the Compensation Clause. *See Hatter*, 532 U.S. at 561 ("the clause . . . does

prohibit taxation that singles out judges for specially unfavorable treatment").

These ensuing events could not have been considered by the *Williams* court. They appear to reflect continuing departure from constitutional principles, and to encroach on the fundamentals of judicial independence. Judicial independence requires independence of thought, and independence from influence. The Framers designed an elegant balance, implementing Hamilton's insight that "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, at 472 (C. Rossiter ed. 1961), *quoted in Hatter*, 532 U.S. at 568. All branches of government, indeed all citizens, share the responsibility of preservation of constitutional principles.

New issues do not diminish our obligation of zealous preservation of the fundamentals of the nation. The question is not how much strain the system can tolerate; our obligation is to deter potential inroads at their inception, for history shows the vulnerability of democratic institutions. As the Court pointed out in *Hatter*, the guarantees of "complete independence of the courts of justice" were deemed necessary "because the Judiciary is 'beyond comparison the weakest of the three' branches of Government." 532 U.S. at 568 (quoting The Federalist No. 79, at 472). Although judges may be uncomfortable in the role of debating our compensation, this court's decision in *Williams* has

affected the entire judiciary.[3] It behooves us to accept the appeal *en banc*. From my colleagues' denial of the petition, I respectfully dissent.

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[3] Several states have become embroiled in similar controversy. *See, e.g.*, *Jorgensen v. Blagojevich*, 811 N.E.2d 652 (Ill. 2004) (observing that the *Will* case that *Williams* relied on is distinguishable in a way that *Williams* did not recognize); *Larabee v. Governor of the State of N.Y.*, 880 N.Y.S.2d 256, 275 (App. Div. 2009) ("The Legislature, by subordinating the Judiciary to its whims and caprices in matters of salary adjustments, brings the Judiciary closer to the world of politics than is tolerable for the disinterested functioning of a court system that must act for 'the benefit of the whole people.'" (quoting *O'Donoghue*, 289 U.S. at 533)), *appeal pending*.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5012

PETER H. BEER, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, JAMES ROBERTSON, LAURENCE H. SILBERMAN, A. WALLACE TASHIMA, AND U.W. CLEMON, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Jan. 15, 2010

ON MOTION

ORDER

Appeal from the United States Court of Federal Claimsin case no. 09-CV-37, senior Judge Robert H. Hodges, Jr.

NOTE: This order is nonprecedential.

Before: MAYER, BRYSON, and DYK, *Circuit Judges*.

Order for the court filed by *Circuit Judge* DYK. Concurrence filed by *Circuit Judge* MAYER.

By order issued today, the en banc court has denied initial hearing en banc. Peter H. Beer et al. (the plaintiffs) move in the alternative for summary affirmance of the judgment of the United States Court of Federal Claims in case no. 09-CV-37. The United States responds and agrees that summary affirmance is appropriate. The plaintiffs reply.

The plaintiffs are eight current and former federal judges. On January 16, 2009, the plaintiffs brought suit in the Court of Federal Claims, seeking back pay and declaratory relief based on their assertion of an unconstitutional diminution of judicial compensation due to the failure to receive cost-of-living salary adjustments (COLAs) to which they assert entitlement pursuant to the Ethics Reform Act of 1989. The United States moved to dismiss the complaint. On October 16, 2009, the Court of Federal Claims dismissed the complaint. In that October 16, 2009, order, the Court of Federal Claims stated:

> Plaintiffs acknowledge that the facts and the law of this case are controlled entirely by a ruling of the Court of Appeals for the Federal Circuit in *Williams v. United States. Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *reh'g denied*, 240 F.3d 1366, *cert. denied*, 535 U.S. 911 (2002). They do not attempt to distinguish this case from *Williams*, or ask that we consider new or additional circumstances. Plaintiffs "do not oppose dismissal

> of the Complaint on the basis of the *Williams* precedent." *See id.*

Beer v. United States, No. 09-CV-37, at 1 (Fed. Cl. Oct. 16, 2009) (order dismissing complaint).

The plaintiffs appealed and filed a petition for hearing en banc. Within the petition for hearing en banc, the plaintiffs moved in the alternative for summary affirmance if the petition for hearing en banc were denied. As noted, the court today denies hearing en banc. In the ordinary course pursuant to Internal Operating Procedure 2, paragraph 4, the motion for summary affirmance was referred to the motions panel. We now rule on that motion.

In their motion for summary affirmance, the plaintiffs state:

> In the alternative, plaintiffs respectfully move for summary affirmance. As noted above, plaintiffs do not deny that their claims are foreclosed by the *Williams* precedent. Under that precedent, the decision below "is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994).

Pet. for Initial Hr'g *En Banc* or, in the Alternative, Mot. for Summ. Affirmance, *Beer v. United States*, No. 2010-5012, at 4-5 (Fed. Cir. Nov. 9, 2009).

In response, the United States notes:

> The United States agrees that summary affirmance of the Court of Federal Claims' October 16, 2009 decision is appropriate. Moreover, we do not

> disagree that the Court of Federal Claims' judgment can be summarily affirmed upon the ground cited—*i.e.*, that the Court of Federal Claims' "ability to grant plaintiffs the relief they seek" is foreclosed by this Court's decision in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001).

Def.-Appellee's Resp. to Pl.-Appellants' Mot. for Summ. Affirmance, *Beer v. United States*, No. 2010-5012, at 2 (Fed. Cir. Nov. 12, 2009).

In sum, the parties are in agreement that this court's opinion in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), controls the disposition of this appeal by a panel of this court. In *Williams*, we reviewed a judgment of the United States District Court for the District of Columbia that held that the judges in that lawsuit were entitled to back pay and future COLAs under the Ethics Reform Act of 1989. We reversed the district court's judgment, holding that we were bound to do so by the Supreme Court's decision in *Will v. United States*, 449 U.S. 200 (1980). *Williams*, 240 F.3d at 1029. This court denied hearing en banc and subsequently denied rehearing and rehearing en banc in *Williams*.

The parties agree, and we must also agree, that *Williams* controls the disposition of this matter. Thus, we grant the motion for summary affirmance.

Accordingly,

IT IS ORDERED THAT:

The motion for summary affirmance is granted.

FOR THE COURT

Jan. 15, 2010
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

* * * * *

MAYER, *Circuit Judge*, concurring.

I continue to believe *Williams v. United States* was wrongly decided for the reasons set out in my opinion dissenting from the refusal to rehear that case *en banc*. 264 F.3d 1089, 1090-93 (Fed. Cir. 2001). But neither Congress nor the Supreme Court has done anything in the interim that would warrant this court taking the matter up again.

APPENDIX H

UNITED STATES COURT OF FEDERAL CLAIMS

No. 09-37C

PETER H. BEER, TERY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, JAMES ROBERTSON, LAURENCE H. SILBERMAN, A. WALLACE TASHIMA, AND U.W. CLEMON

v.

THE UNITED STATES

Filed: Oct. 16, 2009

JUDGMENT

Pursuant to the court's Order, filed October 16, 2009,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

John S. Buckley
Acting Clerk of Court

Oct. 20, 2009 By:

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $455.00.

* * * * *

ORDER

Plaintiffs acknowledge that the facts and the law of this case are controlled entirely by a ruling of the Court of Appeals for the Federal Circuit in *Williams v. United States. Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *reh'g denied*, 240 F.3d 1366, *cert. denied*, 535 U.S. 911 (2002). They do not attempt to distinguish this case from *Williams,* or ask that we consider new or additional circumstances. Plaintiffs "do not oppose dismissal of the Complaint on the basis of the *Williams* precedent." *See id.*

Defendant contends that plaintiffs' Complaint should be dismissed on additional grounds. These are (1) *res judicata*, (2) applicable statutes of limitations, (3) statutory limitations on this court's remedial authority, and (4) "the effect of § 140 of Pub. L 97-92, as amended in November 2001." The only issue presented, therefore, is whether we should discuss and rule upon the Government's alternative grounds for dismissal.

Plaintiffs do not oppose dismissal on the authority of *Williams,* but they resist defendant's request that we rule on alternative dispositive theories. We have considered the Government's additional arguments carefully, including application of the doctrine of *res judicata* and jurisdictional concerns attending this

court's statute of limitations. The trial court should not rule on such alternatives in the circumstances presented.

Defendant's additional reasons for dismissing plaintiffs' case present complex legal and constitutional issues as applied here. The parties agree that we must dismiss plaintiffs' Complaint in light of the *Williams* precedent. A discussion of the court's views on alternative arguments would not be an effective use of judicial resources or serve the parties' interests.

We conducted hearings and conferences with counsel to satisfy the court that plaintiffs' case cannot be distinguished from *Williams*. Plaintiffs' position has been straightforward throughout, making no effort to suggest that *Williams* may be distinguished or its conclusive impact diminished. Defendant's arguments are appropriate and relevant to the ultimate issue in this case. Our summary ruling that such arguments should not be considered at the trial court level does not imply a position on the merits. We rule only that *Williams* "forecloses this court's ability to grant plaintiffs the relief they seek. . . . "

The Clerk of Court will dismiss plaintiffs' Complaint for the reasons stated. No costs.

/s/ ROBERT H. HODGES, JR.
ROBERT H. HODGES, JR.
Judge

APPENDIX I

UNITED STATES COURT OF FEDERAL CLAIMS

Case No.

PETER H. BEER, TERRY J. HATTER, JR., THOMAS F. HOGAN, RICHARD A. PAEZ, JAMES ROBERTSON, LAURENCE H. SILBERMAN, AND A. WALLACE TASHIMA, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Jan. 16, 2009

COMPLAINT

The Framers of the Constitution recognized that an independent judiciary is a cornerstone of a free society, and that judicial independence hinges in part on insulating judicial compensation from the political process. Thus, the Framers specified in Article III that federal judges' "Compensation . . . shall not be diminished during their Continuance in Office." U.S. Const. Art. III § 1. This case calls upon the courts to enforce that provision, and to invalidate legislation diminishing the compensation that Congress previously promised to federal judges. In particular, Congress promised federal judges cost-of-living salary adjustments in the Ethics Reform Act of 1989, Pub. L.

101-194, 103 Stat. 1716 (1989), but withheld those salary adjustments in contravention of the 1989 Act for fiscal years 1995, 1996, 1997, 1999, and 2007. Although a divided panel of the Federal Circuit held in 2001 that the 1989 Act did not vest federal judges with any right to future salary adjustments within the meaning of the Compensation Clause of Article III, *see Williams v. United States*, 240 F.3d 1019, that decision was criticized by several other judges of the Federal Circuit in dissenting from the denial of rehearing en banc, *see Williams v. United States*, 264 F.3d 1089 (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* at 1093 (Newman, J., joined by Mayer, C.J. and Rader, J.), and by three Justices of the Supreme Court in dissenting from the denial of certiorari, *see Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ.). Plaintiffs respectfully submit that the Federal Circuit's *Williams* decision is wrong, and poses a profound threat to judicial independence. Accordingly, plaintiffs seek by this lawsuit to overturn it, and thereby to prevent the unconstitutional diminution of the compensation promised to them by the 1989 Act.

PARTIES

1. Plaintiff Peter H. Beer is a judge on the United States District Court for the Eastern District of Louisiana. Judge Beer was appointed to that position by President Jimmy Carter, and entered into service on December 7, 1979. He assumed senior status on April 12, 1994.

2. Plaintiff Terry J. Hatter, Jr. is a judge on the United States District Court for the Central District of California. Judge Hatter was appointed to that position by President Jimmy Carter, and entered into service on December 20, 1979. From 1998 to 2001, he served as Chief Judge of the court, and he assumed senior status on April 22, 2005.

3. Plaintiff Thomas F. Hogan is a judge on the United States District Court for the District of Columbia. Judge Hogan was appointed to that position by President Ronald Reagan, and entered into service on October 4, 1982. From 2001 to 2008, he served as Chief Judge of the court, and he assumed senior status on May 1, 2008.

4. Plaintiff Richard A. Paez is a judge on the United States Court of Appeals for the Ninth Circuit. Judge Paez was appointed to that position by President Bill Clinton, and entered into service on March 17, 2000. Judge Paez previously served as a judge on the United States District Court for the Central District of California. He was appointed to that position by President Bill Clinton, and entered into service on July 11, 1994. He served in that position until his entry into service on the Ninth Circuit.

5. Plaintiff James Robertson is a judge on the United States District Court for the District of Columbia. Judge Robertson was appointed to that position by President Bill Clinton, and entered into service on October 11, 1994. He assumed senior status on December 31, 2008.

6. Plaintiff Laurence H. Silberman is a judge on the United States Court of Appeals for the District of Columbia Circuit. Judge Silberman was appointed to that position by President Ronald Reagan, and entered into service on October 28, 1985. He assumed senior status on November 1, 2000.

7. Plaintiff A. Wallace Tashima is a judge on the United States Court of Appeals for the Ninth Circuit. Judge Tashima was appointed to that position by President Bill Clinton, and entered into service on January 4, 1996. He assumed senior status on June 30, 2004. Judge Tashima previously served as a judge on the United States District Court for the Central District of California. He was appointed to that position by President Jimmy Carter, and entered into service on June 30, 1980. He served in that position until his entry into service on the Ninth Circuit.

8. Defendant the United States of America employs the plaintiff judges, and is responsible for paying their salaries.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under the Tucker Act, which confers upon this Court "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . in cases not sounding in tort." 28 U.S.C. § 1491(a)(1); *see also Hatter v. United States*, 953 F.2d 626, 627 (Fed. Cir. 1992) ("[T]he Tucker Act gives the Claims Court jurisdiction

over claims of salary diminution under Article III of the Constitution.").

10. Venue in this court is also proper under the Tucker Act.

FACTUAL BACKGROUND

The Ethics Reform Act of 1989

11. This case arises out of the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (1989), which, among other things, brought about substantial changes with respect to judicial compensation. In particular, the Act sharply limited federal judges' ability to earn outside income, but in exchange protected judicial income from inflation by establishing a system for judges to receive annual salary adjustments in future years.

12. The 1989 Act established judicial salary adjustments in express and unambiguous terms, providing that each year "each [judicial] salary rate . . . *shall* be adjusted by an amount . . . as determined under section 704(a)(1)" whenever the salaries of General Schedule (GS) employees (*i.e.*, federal civil servants) were adjusted. 28 U.S.C. § 461(a)(1) (emphasis added). The judicial salary adjustment formula set forth in section 704(a)(1) starts with the annual change in the Employment Cost Index (ECI), a measure of private-sector salaries published by the Bureau of Labor Statistics, and then subtracts 0.5%. *See id.*; 5 U.S.C. § 5318 note. In no event may such a judicial salary adjustment exceed either (1) the annual salary increase, if any, for GS employees, or (2) 5%.

See 28 U.S.C. § 461(a)(2); 5 U.S.C. § 5318 note. Under the law as it existed then (and continues to exist now), GS employees are entitled to automatic annual salary adjustments unless the President determines that there is either (1) a "national emergency," or (2) serious economic conditions affecting the general welfare." 5 U.S.C. § 5303(b)(1).

13. The 1989 Act took effect on January 1, 1990, and judicial salaries were duly adjusted as required by the Act for each of the first three fiscal years (1991, 1992, and 1993). For fiscal year 1994, the President denied GS employees a salary adjustment by invoking the statutory exception for "serious economic conditions" (namely, a massive federal budget deficit).

14. For each of the three next fiscal years (1995, 1996, and 1997), however, the judicial salary adjustments dictated by the 1989 Act did not take effect, even though in each of those years the salaries of GS employees were adjusted. That happened because, in each of those years, Congress included in appropriations legislation language stating that, other laws to the contrary notwithstanding, the salaries of federal judges would not be adjusted. *See* Pub. L. 103-329, § 630(a)(2), 108 Stat. 2382, 2424 (FY 1995); Pub. L. 104-52, § 633, 109 Stat. 468, 507 (FY 1996); Pub. L. 104-208, § 637, 110 Stat. 3009, 3009-364 (FY 1997). While the judicial salary adjustments dictated by the 1989 Act took effect for fiscal year 1998, Congress once again blocked those adjustments for fiscal year 1999. *See* Pub. L. 105-277, § 621, 112 Stat. 2681, 2681-518 (FY 1999). The judicial salary adjustments dictated

by the 1989 Act once again took effect for fiscal years 2000 and 2001. The salary adjustments provided for fiscal years 1998, 2000, and 2001 were calculated by reference to base compensation that did not include the salary adjustments withheld for fiscal years 1995, 1996, 1997, and 1999.

15. In 2001, Congress enacted legislation automatically blocking any future salary adjustments for federal judges unless specifically approved by Act of Congress. *See* Pub. L. 107-77, Title VI, § 625, Nov. 28, 2001, 115 Stat. 748, 803 (2001), *codified in relevant part at* 28 U.S.C. § 461 note. In essence, Congress thereby attempted to undo the system established by the 1989 Act, which had tied judicial salary adjustments to the virtually automatic GS employee salary adjustments.

16. Notwithstanding the 2001 statute, Congress gave federal judges the salary adjustments promised by the 1989 Act for fiscal years 2002, 2003, 2004, 2005, 2006, and 2008 by enacting legislation specifically approving those adjustments. *See* Pub. L. 107-77, Title III, § 305, Nov. 28, 2001, 115 Stat. 748 (FY 2002); Pub. L. 108-6, § 1, Feb. 13, 2003, 117 Stat. 10 (FY 2003); Pub. L. 108-167, § 1, Dec. 6, 2003, 117 Stat. 2031 (FY 2004); Pub. L. 108-491, § 1, Dec. 23, 2004, 118 Stat. 3973 (FY 2005); Pub. L. 108-447, Div. B, Title III, § 306, Dec. 8, 2004, 118 Stat. 2895 (FY 2005); Pub. L. 109-115, Div. A, Title IV, § 405, Nov. 30, 2005, 119 Stat. 2470 (FY 2006); Pub. L. 110-161, Div. D, Title III, § 305, Dec. 26, 2007, 121 Stat. 1989 (FY 2008). For fiscal year 2007, however, Congress failed to enact

such legislation, so the judges received no salary adjustments. The salary adjustments provided for fiscal years 2002, 2003, 2004, 2005, 2006, and 2008 were calculated by reference to base compensation that did not include the salary adjustments withheld for fiscal years 1995, 1996, 1997, 1999, and 2007.

The *Williams* Litigation

17. In 1997, several federal judges sued the United States for withholding the salary adjustments promised in the 1989 Act for fiscal years 1995, 1996, and 1997 (and, subsequently, 1999). The plaintiffs brought a putative class action on behalf of all similarly situated federal judges in the U.S. District Court for the District of Columbia under the so-called Little Tucker Act, 28 U.S.C. § 1346(a)(2), seeking both back pay and declaratory relief. The district court granted the *Williams* plaintiffs summary judgment, holding that they had "vested" in the future salary adjustments promised in the 1989 Act, and that Congress had therefore violated the Compensation Clause of Article III by enacting subsequent legislation blocking those salary adjustments. *See Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999).

18. A divided panel of the Federal Circuit, however, reversed. *See Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001). The majority interpreted the Supreme Court's decision in *United States v. Will*, 449 U.S. 200 (1980), to establish the rule that a promised future judicial salary adjustment does not "vest" for purposes of the Compensation Clause until a judge *actually receives* the adjusted salary, regardless of

how explicit the promise of a future adjustment. *See* 240 F.3d at 1029. Under this view, in other words, Congress may not reduce a salary a judge has already received, but need not honor a promise of a future salary adjustment. *See id.* Judge Plager dissented from the panel decision, *see* 240 F.3d at 1040-64, and three judges dissented from the denial of rehearing *en banc*, *see* 264 F.3d at 1090-93 (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* at 1093-94 (Newman, J., joined by Mayer, C.J. and Rader, J.).

19. The *Williams* plaintiffs thereupon petitioned for review in the U.S. Supreme Court, but their petition was denied over the spirited dissent of three Justices. *See Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Scalia and Kennedy, JJ., dissenting from denial of certiorari). Those three Justices specifically rejected the Federal Circuit majority's assertion that *Will* had established a bright-line rule that a promised future salary adjustment could never "vest" for purposes of the Compensation Clause until a judge actually received the adjusted salary. *See id.* at 1224-25. Rather, those three Justices took the position that "vesting" was to be analyzed by reference to the reasonable expectations of judges in a promised future salary adjustment. *See id.* at 1225.

20. Plaintiffs respectfully submit that the *Williams* decision is wrong for the reasons set forth in that case by (a) the district court, (b) the dissenting judge on the Federal Circuit panel, (c) the three Federal Circuit judges who dissented from the denial of

rehearing en banc, and (d) the three Justices who dissented from the denial of certiorari. At the very least, plaintiffs have a good faith belief that *Williams* should be reversed.

The Injury To Plaintiffs

21. The *Williams* decision notwithstanding, the 1989 Act gave plaintiffs a reasonable expectation that they would receive the future salary adjustments specified by that statute. As Justice Breyer, joined by Justices Scalia and Kennedy, put it in their dissent from the denial of certiorari in *Williams*:

> The [1989] Act mandates adjustments to judicial salaries; the adjustments are mechanical and precise; and they are to take place automatically, for they are tied to the adjustments provided to General Schedule employees which themselves are automatic but for the two possible exceptions. These features of the law assured federal judges . . . that their real salaries would stay approximately level unless the real salaries of the average private sector worker or those of the typical civil servant declined significantly as well.

535 U.S. at 1222. In light of that reasonable expectation, plaintiffs acquired a vested interest in the promised salary adjustments within the meaning of the Compensation Clause of Article III, and Congress thereafter violated that constitutional provision by enacting legislation denying plaintiffs those promised adjustments in 1995, 1996, 1997, and 1999, and then enacting legislation denying plaintiffs those promised adjustments in any future year (such as 2007) when

those adjustments are not affirmatively approved by Congress.

22. But for the unconstitutional diminution of judicial compensation in each of the five fiscal years described in the preceding paragraph, plaintiffs' base compensation would have been and should have been increased in each of those years, and hence each subsequent salary adjustment would and should have been calculated with reference to a higher base compensation. Accordingly, every unconstitutional diminution of judicial compensation gives rise to new injury and claims. *See, e.g.*, *Hatter v. United States*, 203 F.3d 795, 797-800 (Fed. Cir. 2000) (*en banc*), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 557 (2001).

COUNT ONE

Legislation Blocking the Salary Adjustments Promised In the 1989 Act Violates the Compensation Clause of Article III

23. Plaintiffs incorporate the allegations in the foregoing paragraphs as if fully set forth herein.

24. Because the 1989 Act gave plaintiffs a vested interest in future salary adjustments pursuant to the terms of that statute, subsequent legislation blocking those adjustments unlawfully diminished, and continues unlawfully to diminish, plaintiffs' compensation in violation of the Compensation Clause of Article III of the United States Constitution.

25. But for the system of salary adjustments established by the 1989 Act, the corresponding provisions of that Act sharply limiting federal judges' abil-

ity to earn outside income would have violated the Compensation Clause.

26. As a remedy for the constitutional violation set forth herein, plaintiffs are entitled to back pay and declaratory relief. "This provision of the Constitution . . . mandates the payment of money in the event of a prohibited compensation diminution. . . . [B]y forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers." *Hatter*, 953 F.2d at 628.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Grant them the salary adjustments promised to them by the 1989 Act but withheld in violation of the Compensation Clause of Article III;

2. Grant them the salary adjustments promised to them by the 1989 Act calculated by reference to the base salary to which they would have been entitled but for the unlawful withholding of prior salary adjustments promised to them by the 1989 Act;

3. Declare that Congress may not in the future withhold the salary adjustments promised to them by the 1989 Act;

4. Declare that the future salary adjustments promised to them by the 1989 Act must be calculated by reference to the base salary to which

they would have been entitled but for the unlawful withholding of prior salary adjustments promised to them by the 1989 Act; and

5. Grant them such other and further relief as this Court may deem just and proper.

Respectfully submitted this 16th day of January, 2009.

/s/ CHRISTOPHER LANDAU
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APPENDIX J

1. The Compensation Clause of Article III, Section 1 of the United States Constitution provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. Section 140 of the Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1200 provides:

> Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided,* That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.

3. Sections 702-704 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1767 provides:

SEC. 702. RESTORATION OF COMPARABILITY ADJUSTMENTS.

(a) RESTORATION.—

(1) IN GENERAL.—Effective for pay periods beginning on or after the date of enactment of this Act, the rate of basic pay for any office or position in the executive, legislative, or judicial branch of the Government or in the government of the District of Columbia shall be determined as if the provisions of law cited in paragraph (2) had never been enacted.

(2) CITATIONS.—The provisions of law referred to in paragraph (1) are as follows:

(A) Section 620(b) of the Treasury, Postal Service and General Government Appropriations Act, 1989 (2 U.S.C. 5305 note).

(B) Section 619(b) of the Treasury, Postal Service and General Government Appropriations Act, 1990 (Public Law 101–136).

(b) EXCEPTIONS.—Notwithstanding any other provision of this section, the rate of basic pay for a Senator, the President pro tempore of the Senate, and the majority leader and the minority leader of the Senate shall be determined as if subsection (a) had not been enacted.

(c) SPECIFIC AUTHORITY.—For purposes of section 140 of Public Law 97–92 (28 U.S.C. 461 note), appro-

priate salary increases are hereby authorized for Federal judges and Justices of the Supreme Court pursuant to subsection (a).

(d) SPECIAL RULE.—Notwithstanding any other provision of this section, no adjustment in any rate of pay shall become effective, as a result of the enactment of this section, before the first applicable pay period beginning on or after the date as of which the order issued by the President on October 16, 1989, pursuant to section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 is rescinded.

SEC. 703. SALARY LEVELS OF SENIOR GOVERNMENT OFFICIALS.

(a) SALARY LEVELS.—

(1) EXECUTIVE POSITIONS.—Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for positions in the Executive Schedule shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100).

(2) LEGISLATIVE POSITIONS; OFFICE OF THE VICE PRESIDENT.—

(A) GENERALLY.—Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for the offices and positions under subparagraphs (A) and (B) of section 225(f) of the Federal Sal-

ary Act of 1967 (2 U.S.C. 356 (A) and (B)) shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100), except as provided in subparagraph (B).

(B) EXCEPTIONS.—Nothing in subparagraph (A) shall affect the rate of basic pay for a Senator, the President pro tempore of the Senate, or the majority leader or the minority leader of the Senate.

(3) JUDICIAL POSITIONS.—Effective the first day of the first applicable pay period that begins on or after January 1, 1991, the rate of basic pay for the Chief Justice of the United States, an associate justice of the Supreme Court of the United States, a judge of a United States circuit court, a judge of a district court of the United States, and a judge of the United States Court of International Trade shall be increased in the amount of 25 percent of their respective rates (as last in effect before the increase), rounded to the nearest multiple of $100 (or, if midway between multiples of $100, to the next higher multiple of $100).

(b) COORDINATION RULE.—If a pay adjustment under subsection (a) is to be made for an office or position as of the same date as any other pay adjustment affecting such office or position, the adjustment under subsection (a) shall be made first.

SEC. 704. REVISION IN METHOD BY WHICH ANNUAL PAY ADJUSTMENTS FOR CERTAIN EXECUTIVE, LEGISLATIVE, AND JUDICIAL POSITIONS ARE TO BE MADE.

(a) PERCENT CHANGE IN THE EMPLOYMENT COST INDEX.—

(1) METHOD FOR COMPUTING PERCENT CHANGE IN THE ECI.—

(A) DEFINITIONS.—For purposes of this paragraph—

(i) the term "Employment Cost Index" or "ECI" means the Employment Cost Index (wages and salaries, private industry workers) published quarterly by the Bureau of Labor Statistics; and

(ii) the term "base quarter" means the 3–month period ending on December 31 of a year.

(B) METHOD.—For purposes of the provisions of law amended by paragraph (2), the "most recent percentage change in the ECI", as of any date, shall be one-half of 1 percent less than the percentage (rounded to the nearest one-tenth of 1 percent) derived by—

(i) reducing—

(I) the ECI for the last base quarter prior to that date, by

(II) the ECI for the second to last base quarter prior to that date,

(ii) dividing the difference under clause (i) by the ECI for the base quarter referred to in clause (i)(II), and

(iii) multiplying the quotient under clause (ii) by 100, except that no percentage change determined under this paragraph shall be—

(I) less than zero; or

(II) greater than 5 percent.

(2) PROVISIONS THROUGH WHICH NEW METHOD IS TO BE IMPLEMENTED.—

(A) AMENDMENT TO TITLES 3, 5, AND 28 OF THE UNITED STATES CODE.—Section 104 of title 3, United States Code, section 5318 of title 5, United States Code, and section 461(a) of title 28, United States Code, are amended by striking "corresponds to" and all that follows thereafter through the period, and inserting the following:

"corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.".

(B) AMENDMENT TO THE LEGISLATIVE REORGANIZATION ACT OF 1946.—Section 601(a)(2) of the Legislative Reorganization Act of 1946 (2

U.S.C. 31(2)) is amended by striking "corresponds to" and all that follows thereafter through the period and inserting the following:

"corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.".

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on January 1, 1991.

4. Section 630 of the Act of Sept. 30, 1994, Pub. L. No. 103-329, 108 Stat. 2424 provides:

(a)(1) The adjustment in rates of basic pay for the statutory pay systems that takes effect in fiscal year 1995 under section 5303 of title 5, United States Code, shall be an increase of 2 percent.

(2) For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1995 in the rates of basic pay for the statutory pay systems.

(3) For purposes of this subsection, the term "statutory pay system" shall have the meaning given

such term by section 5302(1) of title 5, United States Code.

(b) For purposes of any locality-based comparability payments taking effect in fiscal year 1995 under subchapter I of chapter 53 of title 5, United States Code (whether by adjustment or otherwise), section 5304(a) of such title shall be deemed to be without force or effect.

(c) Notwithstanding section 5304(a)(3)(B) of title 5, United States Code, the annualized cost of pay adjustments made under section 5304 of such title in calendar year 1995 shall be equal to 0.6 percent of the estimated aggregate fiscal year 1995 executive branch civilian payroll—

(1) as determined by the pay agent (within the meaning of section 5302 of such title); and

(2) determined as if the rates of pay and comparability payments payable on September 30, 1994, had remained in effect.

5. Section 633 of the Act of Nov. 19, 1995, Pub. L. No. 104-52, 109 Stat. 507 provides:

For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1996 in the rates of basic pay for the statutory pay systems.

6. Section 637 of the Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-364 provides:

For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1997 in the rates of basic pay for the statutory pay systems.

7. Section 621 of the Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681-518 provides:

For purposes of each provision of law amended by section 704(a)(2) of the Ethics Reform Act of 1989 (5 U.S.C. 5318 note), no adjustment under section 5303 of title 5, United States Code, shall be considered to have taken effect in fiscal year 1999 in the rates of basic pay for the statutory pay systems.

8. Section 625 of the Act of Nov. 28, 2001, Pub. L. No. 107-77, 115 Stat. 803 provides:

Section 140 of Public Law 97-92 (28 U.S.C. 461 note; 95 Stat. 1200) is amended by adding at the end the following: "This section shall apply to fiscal year 1981 and each fiscal year thereafter.".