

BANKRUPTCY JUDGES ADVISORY GROUP  
OF THE  
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Honorable Beth A. Buchanan, Southern District of Ohio  
Honorable Kevin J. Carey, District of Delaware  
Honorable D. Sims Crawford, Northern District of Alabama  
Honorable Robert D. Drain, Southern District of New York  
Honorable Diane Finkle, District of Rhode Island  
Honorable Catherine J. Furay, Western District of Wisconsin  
Honorable Ronald B. King, Western District of Texas  
Honorable Robert J. Kressel, District of Minnesota  
Honorable Margaret M. Mann, Southern District of California  
Honorable R. Kimball Mosier, District of Utah  
Honorable Charles L. Nail, District of South Dakota  
Honorable S. Martin Teel, Jr., District of District of Columbia  
Honorable David M. Warren, Eastern District of North Carolina

Honorable Robert D. Drain, Chair  
United States Bankruptcy Court  
Charles L. Brieant, Jr.  
United States Courthouse  
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White Plains, NY 10601-4150  
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June 4, 2019

Mr. James C. Duff  
Director, Administrative Office of the U.S. Courts  
One Columbus Circle, N.E.  
Washington, DC 20544

Re: Bankruptcy Judges Advisory Group's Comments on Proposed Changes to  
*Guide to Judiciary Policy*, Vol. 13, Ch. 2 (Judges' Pay During Appropriations  
Lapse)

Dear Director Duff:

The Bankruptcy Judges Advisory Group thanks you for the extended opportunity to comment on proposed changes to the *Guide to Judiciary Policy* regarding judges' pay during a future lapse in appropriations. By foresight and good management, the judiciary has avoided the ill effects of past appropriations lapses, but no doubt planning for a prolonged lapse is necessary.

We write with some concern, therefore, about the April 15, 2019 Administrative Office memorandum's explanation that "the Judiciary may certify salary payments to Article III judges [under the Antideficiency Act] when all other resources are depleted because those salaries are protected from diminution by Article III, Section 1 of the U.S. Constitution," but that "salaries for bankruptcy, magistrate, territorial, and Court of Federal Claims judges, however, do not appear to be afforded the same Constitutional protection and, if not, those judges would not receive their salary payments until Congress enacted an appropriation for the Judiciary."

We believe that this reading unduly narrows the Antideficiency Act’s own exception based on “any other provision of law,” 31 U.S.C. § 1342(a)(1), which would include Congress’ specific directive that bankruptcy judges’ salaries equal a fixed percentage of district judges’ salaries. 28 U.S.C. § 153(a). As importantly, we believe that singling out Article III judges from all other judiciary employees providing critical constitutional functions unduly narrows the constitutional exception to the Antideficiency Act and jeopardizes the collegiality and spirit of shared service and sacrifice that the judiciary has worked so hard to maintain. The judiciary has long taken the position, to the contrary, that during a shutdown Article III and Article I judges would be paid in parity, and we are not aware of any criticism of that approach either within or outside of the judiciary.

As stated by Justice Sotomayor regarding bankruptcy and magistrate judges, “[I]t is no exaggeration to say that without the distinguished services of these judicial colleagues, the work of the federal court system would grind nearly to a halt.” *Wellness Int’l Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1938-9 (2015). There are no more dedicated members of the judiciary than the nation’s bankruptcy judges. They fully understand the importance to our economy of delivering timely relief to debtors and creditors – from individuals to the largest corporations – and they would never shirk that duty though forced to work without pay, if they could help it. But we believe that this is not really the question and that Congress and the Constitution instead have already recognized that no members of the judiciary should be put to the test of administering justice or running out of cash. We urge you, therefore, to maintain the Administrative Office’s prior policy of pay parity during a shutdown.

Failing such a result, we also suggest that the Administrative Office consider two practical planning steps. First, at a minimum, it should plan to set aside during the early stages of a funding lapse a reserve fund to which judges could apply as an alternative to taking out emergency loans from, or defaulting on existing loans by, financial institutions appearing before them. (Of course, the prospect of such a result, one of the reasons that Congress enacted 28 U.S.C. § 153(a) in 1987,<sup>1</sup> argues for not implementing the proposed change to the *Guide* in the first place.) Second, the Administrative Office should urge Congress to exempt the courts from funding moratoriums, or at least to carve out a

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<sup>1</sup> See recommendation of Kenneth Feinberg, Report to Commission on Executive, Legislative, and Judicial Salaries, *Promises Made, Promises Still Unkept*, Vol. III, 3, 6, 9, (Nov. 1986).

significant portion of the court's already modest budget from such lapses. Constitutional as well as practical reasons warrant not jeopardizing the federal judiciary's excellence.

We welcome the opportunity to discuss these matters further with you.

Very truly yours,

/s/ Robert D. Drain

Robert D. Drain  
U.S. Bankruptcy Judge, Southern District of  
New York  
Chair, Bankruptcy Judges Advisory Group

By email and regular mail

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