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REMARKS BY JOHN L. NAPIER AT THE 49th ANNUAL NATIONAL CONVENTION OF THE FEDERAL MAGISTRATE JUDGES ASSOCIATION. REFERENCE PAY COMPARABILITY AND EQUITY FOR FEDERAL JUDGES. THE ATLANTA HISTORY MUSEUM. ATLANTA, GEORGIA, JULY 21, 2011.*

"SOMETHING IS WRONG HERE"

Judge Kurren, Judge Mannion, my dear friend and Legislative Chair, Judge Bob Collings, with whom I have had the privilege to work for over 15 years and from whom I have learned so much; Members of the Judiciary; Law School Deans; and other Distinguished Guests:

You honor Pam and me greatly by having us with you at your national convention in Atlanta this evening. I shall never forget the honor you have accorded me tonight with The Founders' Award.

Over the years I have watched how sparingly you have given out this tribute. I have admired the eminent federal jurists and public servants you have chosen to honor with The Founders Award. I am humbled to have my name recorded on your rolls along side theirs.

I trust my remarks are received as a measure not only of my gratitude for what you have done this evening, but to a much larger extent, as an acknowledgement for what I have learned from you over the years in representing you. I also trust these remarks are received as an expression of a citizen's gratitude for what you and your brothers and sisters throughout the federal judiciary do for our country.

Judge Collings' recitation of the organization's successes over the last 15 years is impressive. My work with this organization as a client has been one of my most satisfying professional associations ever. To the extent our joint efforts have improved the federal judiciary, I thank you for the recognition and am most proud to have been a part of these efforts. Let me be quick to say, it has been the commitment of your organization, your legislative committee's team efforts, cooperation from Ralph Mecham and Jim Duff and their able staffs at the Administrative Office of the U.S. Courts, and the merits of your arguments that have enabled these successes.

The federal magistrate judges system as we know it today was refined in 1968 to expand and upgrade the old United States commissioner system which served our Nation so well for 175 years. Your responsibilities are unique and heavy ones. You are on call to hear emergency matters of national consequence and matters of life and death at any hour.

You put your lives on the line every day. All one has to do is to observe the security apparatus to enter your chambers, your courtrooms, and even the courthouses where you work. Your system has for over 200 years been integral

to the delivery of justice in our Nation. Your expanded assignments and enhanced jurisdiction in today's environment are now even more central to the delivery of justice to the American people.

Your caseload is phenomenal. Over 350,000 judicial duties in the last year. Almost 250,000 pre-trial duties. 160.000 motions. 20,000 settlement conferences. Almost 2,500 evidentiary hearings. The list goes on and on. This system has always been at the heart of the federal judiciary. Now there are over 500 United States Magistrate Judges who perform unheralded, but essential duties to make for an efficient and modern federal judiciary.

Several years ago, Pam and I were with Judge Michael Mukasey one evening at a social function at the Vice President's residence. He had just been confirmed to be the Attorney General a short time earlier. A former U.S. District Court Judge, he had gained wide acclaim and some celebrity over the years as a no nonsense judge in the Southern District of New York. He was the judge who had tried the first major terrorist trials in New York City. I understand he was under protective service for a long time because he had served as a judge in controversial cases. He may still be under protective service, even in private life today, as that is a another burden that judges --especially trial judges in sensitive cases-- often carry without the general public ever knowing about it, or ever giving a second thought about how judicial service requires such a sacrifice.

In conversation that evening, I mentioned to the Attorney General that I represented your association. He said, "Please bring your leadership by to meet sometime."

Shortly thereafter, your national leadership and I visited with Judge Mukasey in his office at the Department of Justice in Washington. He was quite blunt when we walked in the door. He said the federal judicial system simply could not function without the invaluable service and dedication of federal magistrate judges. He talked at length about relationships among the various benches in the federal system and their interface. He could not say enough about the meritocracy of the federal magistrate judges bench.

Judge Furgeson of the Northern District in Texas, President of the Federal Judges Association, honors us by his presence with us this evening. Chief Judge Carnes of the Northern District of Georgia does so as well. They have expressed the same sentiments tonight about the valuable service you render.

Attorney General Mukasey's statement particularly has resounded with me over a long time; primarily, I believe, because he was not speaking as a sitting judge, but as a former judge and as the Chief Law Enforcement Officer of the Nation. What General Mukasey said when we visited with him, translated into lay terms, was that you are professionals –and I speak now of judges generally-- who risk your reputations, your lives, your families' security, your everything in

the jobs you perform to assure that justice is delivered in our democratic system. That is a very heavy burden.

Yet, judges' former peers still in the active practice often dwarf the salary, remuneration and benefits they receive. Something is wrong here.

Let me return to Judge Mukasey again. I do so because the Judge is a well known and well-respected public servant who has rendered service that really cannot be replicated. There is no way to compensate Judge Mukasey, or his family, adequately for the invasive intrusion on their privacy that resulted from his assignment of a complex and controversial terrorist trial. There are many of you in this room tonight who have had similar experiences, though less high profile. You are on call for that type duty daily.

Which brings me to the heart of the message I want to leave with you this evening. We have an unresolved issue in pay comparability for federal judges. It is an issue which is emblematic of a larger societal problem which is neither Democrat nor Republican, and neither liberal nor conservative. It is an issue of how society, as a whole, has not dealt responsibly with the question of assigning our priorities. It is about how our pay values in the federal structure have become skewed and out of alignment. Let me repeat: Something is wrong here.

Historically, elected officials have been forced to operate in a poisonous political culture where pay comparability has been off limits....for themselves, for judges, and for other public servants except in limited instances....so much so that we have never had the political will and courage to address the problem frontally and with a permanent solution.

Please do not misunderstand. I do not and will not begrudge those who are exceptions under the federal pay structure whose compensation is not capped as Members of Congress and the federal judiciary are capped. We must have the most talented professionals doing the important medical research at the National Institute of Health. I am thankful we do. There are many other examples where the federal government must, and does, pay the price for the best talent. But the fact remains that many federal employees earn more than our federal legislators and judges. The perception is otherwise. The Volcker Report was replete with those examples many years ago. But an answer to the question has languished; and, as forceful as Governor Volker and his commission spoke, there never has been a solution.

I raise this issue again tonight. In the name of good government, the answer is that we must find the public will to compensate our federal judiciary and legislature commensurately with the private sector. I suggest it unfortunately is evidence of misguided national policy priorities that have risen to a crisis proportion. Some of our best and brightest are now declining federal judgeship assignments, and some of our best judges are now being forced to leave the bench because of this issue. The same is true for a number of excellent candidates who

would otherwise have aspirations for federal elective office and for some able legislators who are leaving public service.

My first law partners in private practice were in the small town of Bennettsville, South Carolina. Edward Cottingham is now a well-respected State circuit court judge in South Carolina. Harry Easterling is an able general practitioner and State leader who has distinguished himself as a board member on several public corporations.

Edward and Harry both counseled me in early private practice with them that lawyers can live well, but should never aspire to be rich just to be rich. The practice of law, as a profession, has a much more satisfying element than simple monetary success. They also stressed in my early practice with them that judges should be considered not as mere referees, but as men and women who bring an extra dimension to the courtrooms and men and women who should be recognized as such. They thought judges should be compensated to reflect a position that lawyers and litigants would respect.

I have always had that respect for the judiciary throughout my career. My first employer, a former trial judge himself, later Chairman of the United States Senate Judiciary Committee, the late Senator Strom Thurmond, took the same view. I was fortunate in my early career. Fortune allowed me to become a federal judge at a relatively early age.

But I left the federal bench in 1989 because I had a daughter to educate and a family to support. For the Court where I sat (The Court of Federal Claims in Washington), I was required by statute to have a residence within 50 miles of the capital.

President Reagan had appointed me and the Senate had confirmed me to a national trial court at age 39. It was a fantastic opportunity to sit. I had the occasion to hear some of the most complex civil litigation in the federal system; and, yes, to feel the loneliness of decision-making that a judge endures. I have seen the sacrifices of my colleagues first hand. This experience is another reason why I have thought the federal judiciary should be paid in line with what others in comparable responsibility in the profession are paid. Something on the order of law school deans, corporate counsel, or some of the plaintiffs' or defense bar.

I did not inherit great wealth. Nor had I become wealthy in the private practice when I was appointed. My previous assignments had been in public service. I had a cumulative service of about 4 years of private practice. I could not make it financially and keep a residence in South Carolina where my family was and provide for the things in life that I felt I needed to provide. So I felt I had no alternative but to resign my commission at age 42 and re-enter private practice. I never had the aspiration for great wealth. I still do not. I have a feeling that the aspiration for wealth alone can leave one awfully unfulfilled. That is much like the sole aspiration for power or position. But I have always aspired to earn

enough to provide adequately for my family within the parameters of what earlier professional expenses, attainment, hard work and good fortune had afforded me the right to pursue.

The last case I heard on the Court was a very large one monetarily. It was United Technologies against General Electric, which as a company had an agreement with the Government to defend. It was a huge case that was a spin-off of the complex case in the Southern District of New York that had worked its way through the federal system for years. It involved the patent on the Blackhawk helicopter.

There were protective order issues. They were highly contentious. They had distracted from the trial. We had an ancillary hearing to determine the protective order violations. I asked the different sides to brief the issues and finally drafted an order that the losing side would pay the costs for the hearing. After the hearing, the opposing sides complied by submitting the fees and costs. The fees were $500 and $600 an hour. That was 25 years ago. All this is on the public record.

I learned all of this after I had made my decision to return to private practice, but it re-enforces the point I want to make this evening. The bar very often – more often than not – eclipses the bench in compensation.

There is a problem in our system where our trial lawyers, baseball, basketball, football players, golfers and rock stars eclipse what judges and federal legislators earn. I don't think the issue really needs further justification. It is a self-evident issue. There is a terrible problem here.

So, as we move through our federal budget crisis, the continued and sustained emphasis on the pay comparability issue for judges is at risk. That should not be. It cannot be. The same is true for other public servants with whom you are linked in compensation.

Most lawyers aspire to be a judge one day. It is a natural aspiration of the profession. But we are reaching the point where good and exceptional lawyers cannot afford to be judges unless they are wealthy or unless they are willing to sacrifice many of their families' needs. Something is wrong here.

Having the four law school deans with us tonight reminds me of the wide support for pay comparability from academia. The bar associations are supportive. The American Bar Association. The American Judicature Society. Business is supportive. The Chamber of Commerce. This issue has been a priority for the Chief Justice since his appointment.

The statistics, the equities, the arguments are on your side. Judicial temperance and judicial ethics require you to be circumspect in your governmental relations. We all understand that.

In the "no holds barred" atmosphere in Washington today, I urge the Federal Magistrate Judges Association , acting for you; and the Federal Judges Association, and the National Association of Bankruptcy Judges to further collaborate and to keep up the pressure on elected officials to bring judicial compensation more in line with what the profession generally gives to its leading advocates, its law school deans, and its corporate counsel.

Great goals are not realized without a lot of sweat and a lot of work....sacrifice and set-backs. Goals and objectives become causes....and causes become ends. We are now in a struggle to see the end of a worthy and necessary cause. Think of other great causes and struggles....civil rights, the end of child labor, the minimum wage. There were set-backs. Ultimately, right prevailed.

A number of former judges and former legislators, including myself, have tried to stress this point in different forums. Judges leaving the system, since I did in 1989, have accelerated at an alarming pace. The Administrative Office's statistics confirm that this is becoming more severe by the year. The trend will continue in the wrong direction until the problem is confronted.

As my first law partners told me early in private practice, there is much more professional satisfaction in the practice of law than just trying to accumulate great monetary wealth. This is certainly true for judges. But judges should surely be paid commensurately with their responsibilities, their risks, their contributions, and their value to our society.

Something is terribly wrong here, and it needs to be fixed. It needs to be fixed without delay. I am always available to you to make this case.

Pam and I again thank you again for having us with you this evening, and I thank you again for this special honor. I shall treasure it forever.

John L. Napier is formerly United States Congressman from South Carolina. and former federal judge on The United States Court of Federal Claims in Washington. Napier has also served as Chief Republican Counsel for the United States Senate Committee on Official Conduct which wrote the first Code of Ethics for the Senate. He also served as outside counsel for the U.S. House of Representatives' committee investigating political activities and financial irregularities in the House Post Office. He is a member of the South Carolina and the DC Bars.