1996 YEAR-END REPORT ON THE FEDERAL JUDICIARY

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I. Overview

Once again this year -- in my eleventh annual report on the state of the judiciary -- I am struck by the paradox of judicial independence in the United States: we have as independent a judiciary as I know of in any democracy, and yet the judges are very much dependent on the Legislative and Executive branches for the enactment of laws to enable the judges to do a better job of administering justice.

Federal judges have tenure during good behavior, and their compensation may not be diminished. And, since the time of Chief Justice John Marshall, these independent judges have exercised the authority to have the final say as to the meaning of the United States Constitution and the laws enacted by Congress. But it is Congress which decides how many federal judgeships there should be, and of what type they should be; Congress decides what kind of cases federal courts should hear, as well as, within limits, what procedures they should follow. Congress must appropriate money for the judiciary's budget and determine the salaries of all federal judicial officers.

The 104th Congress enacted two bills of great importance to the judiciary, both of which contained major parts of recommendations by the Judicial Conference: the Antiterrorism and Effective Death Penalty Act, and the Federal Courts Improvement Act. Unfortunately, judges can only regret that Congress failed to repeal Section 140 of the Continuing Resolution Act of December 15, 1981, Public Law 97-92 ("Section 140"), which provides that no cost-of-living salary increases shall be granted to federal judges without express legislative approval. The Senate version of this year's Federal Courts Improvement Act included a provision repealing Section 140, but that provision did not make it through the legislative process.

Congress compounded the negative impact of failing to repeal Section 140 when it declined in October to approve the 2.3 percent Employment Cost Index ("ECI") adjustment in salary for federal judges in January of 1997. This marks the fourth year in a row that federal judges have not received an ECI adjustment. The result is that federal judges today are paid no more than they were paid in 1993 -- which means that at this writing, inflation has reduced their salaries by 8.6 percent. In terms of dollars, federal judges are paid between $12,865 and $13,645 less than what they would have been paid if Congress had approved the ECI adjustments in the past four years.

The significance of Congress' failing both to repeal Section 140 and to grant an ECI adjustment to judges' salaries cannot be overstated in terms of its effects on the morale and quality of the federal judiciary. Section 140 jeopardizes the ability to retain and recruit to the judiciary the most capable lawyers from all socio-economic classes and geographical areas, including high-cost-of-living urban areas. We must ensure that judges, who make a lifetime commitment to public service, are able to plan their financial futures based on reasonable expectations.

While federal judicial salaries lag behind inflation, the salaries of the profession from which federal judges are recruited have fared differently. Today, the average salaries of partners in the nation's largest law firms are nearly two and one half times the salaries of federal judges. *The National Law Journal* reports that the average salary per partner in the nation's largest law firms in 1993 was $310,644 and the average salary of top corporate general counsel was $662,707. In contrast, in 1997 district and circuit court judges will be paid $133,600 and $141,700, respectively. Clearly, this disparity between the salaries of the judicial and legal professions cannot continue indefinitely without compromising the

morale of the federal judiciary and eventually its quality.

Judges realize that in smaller cities across our country these salaries will buy more than they do in metropolitan areas, and that lawyers' earnings vary considerably from place to place. But the judges are not expecting or requesting any major adjustment in their pay. They are only asking that the pay that was set some years ago be adjusted for increases in the cost-of-living since that time -- a benefit that many working people in the private sector, and almost all employees of the federal government, regularly expect and receive.

I recognize that some members of Congress have said that they should not receive any cost-of-living adjustments until the federal budget is balanced. This kind of decision is obviously up to Congress, which has the primary responsibility for coming up with a balanced budget. But the judiciary can play only a small part in the effort to balance the national budget. Congress, therefore, should not subject the judiciary to the same sort of incentives that Congress might impose on itself.

The federal judiciary is certainly mindful of the nation's effort to balance its budget. Indeed, the federal judiciary has made significant contributions within its own budget. Federal judges, who serve without compensation on committees of the Judicial Conference, such as the Budget Committee, have implemented management policies in the federal judiciary that, according to the Administrative Office of the U.S. Courts, saved the American taxpayers millions of dollars last year alone. By comparison, the amount of money involved in ECI salary adjustments for the federal judiciary is insignificant. The Office of Management and Budget projects that an ECI adjustment of 3.1 percent will be due to judges in January 1998. If approved by Congress, that adjustment would cost approximately six million dollars, which is equal to only about one-quarter of one percent of the estimated total judiciary budget for fiscal year 1998. And this percentage is from a judiciary budget that in turn is only two-tenths of 1 percent of the entire federal budget. In short, federal judges in this country need and have earned pay adjustments, and we therefore must renew our efforts to persuade Congress to repeal Section 140.

Another shortcoming in Congress' 1996 record on legislative matters concerning the federal judiciary that will confront us again in 1997 is its decision not to create additional federal judgeships. Despite an increasing caseload and the fact that no new Article III judgeships have been created since 1990, Congress declined the Judicial Conference's request to create such positions. A similar request for new bankruptcy judgeships also was not acted upon by Congress. Circuit court judges continue to be especially squeezed between time constraints and heavy dockets. Eventually, Congress will have to reconcile this mismatch between federal caseload and judicial personnel. Either the former must be reduced or the latter increased if the quality of justice administered by the federal judiciary is to be maintained.

Notwithstanding the problems of judicial administration that Congress and the federal judiciary did not resolve in 1996, there were significant achievements this past year. Two pieces of legislation bearing on matters of judicial administration deserve specific recognition: the Antiterrorism and Effective Death Penalty Act was signed into law on April 24th; and the Federal Courts Improvement Act was signed on October 19th. Both of these laws contain valuable reforms that will improve the administration of justice. They are also commendable examples of the results that can be achieved when Congress consults with members of the federal judiciary as it considers laws bearing on judicial administration.

The habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act ("Antiterrorism Act") are especially important. For many years the federal judiciary has been flooded by successive and repetitious habeas corpus petitions from state prisoners, especially in death penalty cases. State and federal courts have often duplicated each other's efforts or, even worse, worked at cross-purposes. Eight years ago, retired Justice Lewis F. Powell chaired a committee to investigate the problems in this area

and make appropriate recommendations. That committee -- the Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences -- began a process of legislative-judicial consultation, primarily through the Judicial Conference, that came to fruition in the habeas corpus provisions of the Antiterrorism Act.

Relevant provisions of the Antiterrorism Act establish one-year deadlines for filing petitions; require certificates of appealability; limit successive petitions; and restrict access to the federal judiciary if a claim was adjudicated at the state level. In capital cases, the law has narrowed federal habeas corpus jurisdiction. If a state provides a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose convictions have become final for state law purposes, those prisoners' access to federal habeas corpus review is limited. These reforms of habeas corpus review reflect the wisdom of Alexander Hamilton's observation that "the national and state systems are to be regarded as one whole" and they will improve the quality of justice by coordinating and unifying the work of state and federal courts.

The Federal Courts Improvement Act contains thirty-one provisions endorsed by the Judicial Conference. Some of these provisions are identical to those recommended in The Long Range Plan for the Federal Courts adopted by the Conference in 1995: Section 201 expands the authority of magistrate judges; Section 205 raises the amount-in-controversy requirement in diversity jurisdiction cases; Section 401 increases filing fees in civil cases; and Section 605 abolishes the Special Railroad Court. Derived from a long range integrated plan composed by experienced federal judges, these reforms are especially valuable.

To encourage such deliberate and thoughtful reforms in the future, I have in the past year established a new mechanism that will institutionalize long range planning in certain Judicial Conference committees. In this era of expanding federal litigation but shrinking resources, long range planning for the federal judiciary is as essential as legislative-judicial consultation on proposals concerning judicial administration before Congress.

The Year in Review

The Federal Courts' Caseload

As in 1995, the most significant highlight in the caseload of the Federal Courts in 1996 is that filings rose in the 12 regional courts of appeals, the U.S. district courts, and the U.S. bankruptcy courts. U.S. bankruptcy court filings soared 26 percent, from approximately 883,500 petitions to over 1,111,000, exceeding the one million mark for the first time in the history of the United States courts. Filings under chapters 7, 12, and 13 all increased. Chapter 7 filings, which accounted for over 68 percent of all bankruptcy filings, rose 27 percent. Chapter 13 filings, which accounted for 30 percent of all bankruptcy filings, rose 24 percent. Chapter 12 filings also increased 24 percent, but accounted for less than 1 percent of all bankruptcy filings. Filings under chapter 11, which accounted for 1 percent of all bankruptcy filings, remained essentially stable in 1996, dropping less than 1 percent.

Overall, district court filings climbed nearly 8 percent as civil case filings increased 8 percent, from approximately 248,300 to 269,100. A key reason for this growth was a rise in total private cases (up nearly 15,000 cases). This rise primarily resulted from an 18 percent jump in diversity of citizenship cases, mainly in personal injury/product liability filings (mostly related to the breast implant cases filed in the Northern District of Alabama), which jumped 56 percent. However, many of these cases were filed twice (i.e., once when they were transferred from state courts to federal courts, and again when

they were subsequently transferred from the district courts where they were originally filed to the Northern District of Alabama as part of Multidistrict Litigation Docket Number 926). The second major area of increase in private cases was federal question litigation, which grew 4 percent. This rise resulted chiefly from personal injury cases (up 82 percent) and civil rights employment cases (up 25 percent). The surge in private personal injury cases was directly related to an influx of oil explosion cases in the Middle District of Louisiana, where total civil filings more than doubled. Cases involving the U.S. government as plaintiff or defendant jumped 13 percent, primarily due to marked increases in U.S. plaintiff recoveries of defaulted student loans (which nearly quadrupled) and federal prisoner petitions related to motions to vacate sentence (up 62 percent).

Criminal cases in the U.S. district courts rose 5 percent, from nearly 45,800 to 47,900. While the 5 percent increase in drug filings contributed to this growth, the most significant factor was immigration cases, which went up 40 percent to approximately 5,500. Virtually all of the increase in immigration filings was concentrated in districts along the border with Mexico. Weapons and firearms filings declined 13 percent, and drunk driving and traffic cases decreased 3 percent.

The number of appeals filed in the 12 regional courts of appeals rose 4 percent in 1996 to attain an all-time high of almost 52,000 in 1996. Both criminal and civil appeals increased, rising 7 and 6 percent, respectively. Administrative agency appeals, bankruptcy appeals, and original proceedings decreased, dropping 14 percent, 14 percent, and 6 percent, respectively.

The number of judicial vacancies can have a profound impact on a court's ability to manage its caseload effectively. Because the number of judges confirmed in 1996 was low in comparison to the number confirmed in preceding years, the vacancy rate is beginning to climb. When the 104th Congress adjourned in 1996, 17 new judges had been appointed and 28 nominations had not been acted upon. Fortunately, a dependable corps of senior judges contributes significantly to easing the impact of unfilled judgeships. It is hoped that the Administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice.

The Supreme Court of the United States -- Caseload Statistics

The total number of case filings in the Supreme Court declined from 6,996 in the previous Term to 6,595 in the 1995 Term-a decrease of 5.7 percent. Filings in the Court's in forma pauperis docket declined from 4,858 to 4,500-a 7.4 percent drop. The decline in the Court's paid docket was only 43 cases, from 2,138 to 2095 -- a 2 percent decrease. During the 1995 Term, 90 cases were argued and 75 signed opinions were issued, compared to 94 cases argued and 82 opinions issued in the 1994 Term. No cases from the 1995 Term were scheduled for reargument in the 1996 Term.

The Administrative Office of the United States Courts

In the face of continuing fiscal austerity, the Administrative Office of the United States Courts continues to strengthen federal courts' capabilities to administer justice effectively. A decade ago, Administrative Office Director Leonidas Ralph Mecham launched an effort to delegate to the courts many of the administrative authorities Congress earlier had granted to the Administrative Office Director. As a result, the federal courts today are better able to manage their resources effectively and cope with resource shortages. Decentralized budget, procurement, and other management authorities have enabled each court to make decisions locally about how to achieve economies and where to devote its limited resources most productively. Combining flexibility and local accountability, decentralized judicial administration has been key to the success of the federal judiciary's ability to bring innovation and economy to the courts' operations while preserving high standards for the delivery of justice.

An important achievement in decentralization occurred this year with the full implementation of the Court Personnel System. The new system provides the federal courts with a modern human resource management program that gives each court the authority to determine the appropriate number and types of staff positions within overall budget limits. Within funding controls, jobs will be designed and compensation levels set based on each court's needs compared with standard benchmarks. In concert with the existing decentralized budget and procurement authorities, the decentralization of personnel management authority augments the capability of court managers to determine how to use budgeted funds most effectively -- enabling consideration, for example, of whether it would be most advantageous to spend limited additional funds on two entry-level positions, one senior position, contract services, computers, or other matters.

Throughout this year, the Administrative Office continued to play a central role in the judiciary's efforts to economize. The agency analyzed program and operating costs, conducted studies and evaluations, and identified opportunities for improvement or savings. The Administrative Office made recommendations to Judicial Conference committees and implemented Judicial Conference economy measures, assisted the courts in making changes, and communicated with Congress and others regarding the judiciary's needs and accomplishments. Many new approaches for improving program performance and reducing costs have been successful, and others hold promise for the future. Early this year, the Administrative Office published a report detailing the judiciary's numerous economy achievements, which amounted to more than $250 million annually in both savings and cost avoidances.

One of the more promising means of increasing the efficiency of judicial administration and the business processes in the courts is the use of technology. The Administrative Office is working with Judicial Conference committees, judges, and court personnel to increase the use of automation in the courts. Dozens of automation projects are under way, including new systems for financial accounting, jury administration, and library administration. Imaging, internet and web technologies, satellite video-conferencing, and other cutting-edge technologies may substantially improve routine court operations and reduce the volumes of paper handled. Electronic alternatives offer promise for streamlining court administrative operations, simplifying filing processes for litigants, saving time and money, and improving accessibility, accuracy, and usefulness of information.

In 1996, the Administrative Office registered many accomplishments that should help the courts operate more effectively. They include development of architecture standards for information systems in the judiciary; continued installation of the judiciary's data communications network; identification of efficient court administration practices through the Methods Analysis Program; completion of a study by the National Academy of Public Administration on alternative court administrative structures; continued development of a national automated bankruptcy noticing system; issuance of a contract to a service center to build jury wheels for district courts; coordination of a comprehensive space inventory; agreement with the Department of Justice on implementing a pretrial drug testing pilot program; and completion of more than 100 financial audits.

The Administrative Office continues to make the best of its own budget, which has been growing at a much slower rate than the judiciary's as a whole. In the face of an escalating workload, the judiciary's budget has risen 60 percent since 1991. The Administrative Office's funding grew only 23 percent in the same period. The agency has had a hiring freeze in place for several years, and its staff size is smaller today than it was two years ago. From a long-term perspective, the Administrative Office's portion of the total judiciary budget has substantially declined. Twenty years ago, the Administrative Office accounted for 3.6 percent of the judiciary's funding. Ten years ago, its portion was 3.1 percent; five years ago, it was 2.5 percent; and now it is 1.5 percent.

Since its establishment in 1939, the Administrative Office has provided a wide range of support and

services in administrative, financial, statistical, legislative liaison, technical, legal, communications, and program management areas for the federal judiciary, as well as staff support to the Judicial Conference of the United States and its committees. The agency has been shifting its emphasis away from the direct provision of administrative services better handled by the courts themselves to focus on program development, management, communications, analysis, and review functions critical to the operations of the Judicial branch. While the nature of its work has been changing, the demands on the Administrative Office to provide support to the judiciary nonetheless continue to grow.

The Federal Judicial Center

The Federal Judicial Center is the federal courts' agency for continuing education and research. Much of the Center's work in 1996 helped implement legislative actions. The Center inaugurated a newsletter to alert federal courts to decisions interpreting last April's Prisoner Litigation Reform Act, which governs inmate lawsuits over the conditions of their confinement, as well as to decisions regarding the habeas corpus provisions of the Antiterrorism Act which govern how federal courts handle prisoners' habeas corpus petitions.

Last September, from its studio here in Washington, the Center broadcast a videoseminar on "New Developments in the Federal Law of Habeas Corpus," which analyzed the new habeas corpus provisions for the benefit nationwide of approximately 1,700 federal judges, judicial staff, and others. The broadcast was part of the Center's efforts to help federal judges with death penalty litigation, and it also marked a new era in the Center's education and training programs. Developments in satellite technology now justify placing "downlinks" in federal courthouses to enable judges and court staff to receive educational broadcasts. Next year, the Center, the Administrative Office, the United States Sentencing Commission, and, of signal importance, federal courts across the country will establish a broadcast network in the federal courts. This effort is an excellent example of cooperation among the agencies. The Center's expertise in videoproduction and curriculum design will enable the entire third branch to make good use of this form of communication and education. I am grateful to the Congress, especially to Chairman Harold Rogers of the House Appropriations Subcommittee, for pressing the Center and the courts to explore use of this new technology.

Such broadcasts cannot replace education that allows judges and staff from different regions the opportunity for sustained sharing of techniques, but they add another dimension to Judicial branch education while responding to legislative demands to reduce travel costs. The Center's satellite broadcasts continue its efforts to provide training through videocassettes and other in-court methods. Eighty percent of federal court support staff who receive training from the Center received it at their work site.

As to prisoners' condition-of-confinement cases, the Center's new *Resource Guide for Managing Prisoner Civil Rights Litigation* provides practical advice on effective management of cases under the Prisoner Litigation Reform Act. *The Resource Guide* is part of a broader Center program to help federal courts with pro se litigation -- cases filed without lawyers. Such cases impose special burdens on courts to ensure that they are handled fairly and efficiently.

The first interactive electronic federal court "kiosk" began operations this November. It was a joint project of the United States District Court for the District of Columbia and the Center and was instituted in part to help with non-prisoner pro se litigation. Several state courts, such as Arizona's, have kiosks to let citizens file cases and get information about schedules, jury duty, and employment opportunities, thus enhancing services while saving staff time for other work.

The Center's education programs in 1996 reached over 30,000 judges and Judicial branch staff. These programs addressed case law and legislative developments, giving special attention to such areas as the use of bankruptcy appellate panels, science and health care issues in litigation, jury selection and operations, supervision and investigation of defendants and offenders, and effective court management.

The Center's research -- primarily in response to Judicial Conference committee needs -- included a major survey of judges and chief probation officers on sentencing statutes and guidelines and analysis of the operation of Federal Rules of Procedure governing class action litigation.

Lastly, at the suggestion of Judge Rya Zobel, the Center's Director, the Center's Board began a year-long analysis of the priorities the Center should assign to its many missions. I am confident that the results of this planning process will help maintain the Center as a vital element in improving federal judicial administration.

United States Sentencing Commission

Review of the sentencing guidelines was a top priority of the U.S. Sentencing Commission in 1996. The review's objective was to reduce the complexity of guideline application and to assess how well the guidelines are meeting the congressional objectives outlined in the Sentencing Reform Act of 1984. To this end, the Commission declared a moratorium on guideline amendments in 1996 (except for those necessary to implement congressional directives). The action was well received throughout the judiciary.

The amendment hiatus allowed commissioners to gather insights from judges, attorneys, probation officers, and academics on recommended changes, and to begin narrowing the options for possible guideline amendments. In addition, the Commission expended considerable resources reviewing and responding to sentencing-related legislation enacted by Congress involving mandatory restitution, terrorism, international counterfeiting, drug trafficking, and immigration. By year's end, the Commission plans to publish a series of amendment options for comment.

The Commission appointed Dr. John H. Kramer as its Staff Director in July 1996. Dr. Kramer is Executive Director of the Pennsylvania Commission on Sentencing and a Professor of Sociology and Criminal Justice at The Pennsylvania State University. Finally, the Commission plans to distribute its first televised Public Service Announcements in 1997. The ads target "at-risk" youth with an educational message about the significant punishments that result upon conviction for federal crimes.

Conclusion

The federal judiciary's achievements and disappointments of the past year illuminate both the basic principle of separation of powers and the interdependent relationship that exists between Congress and the judiciary. In the words of Justice Robert Jackson, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." To preserve liberty, the Judicial branch of the federal government is separate, equal, and independent from the Legislative branch. Yet both must work together if feasible solutions are to be found to the practical problems that confront today's federal judiciary.

Over the years, Congress has properly recognized the need for close consultation with the judiciary, thereby contributing to a proper reconciliation of judicial independence with the basic principle of democratic accountability. The Antiterrorism Act and the Federal Courts Improvement Act are two examples of what can be accomplished when the branches of government work together. We look

forward to working with Congress in the coming year to resolve the ongoing problems faced by the judiciary.