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2004 YEAR-END REPORT
ON THE FEDERAL JUDICIARY

I. Overview

This Year-End Report on the Federal Judiciary is my 19th.

In last year's report, I focused on the need to repair the relationship between the Judicial Branch and the Legislative Branch. There is still much work to do, but during the year many judges and members of Congress have worked together to begin to improve the relationship, and I thank all of them for their efforts. In part because of criticism by members of Congress, in May I appointed a committee, chaired by Justice Stephen Breyer, to evaluate and report on the way the Judicial Conduct and Disability Act of 1980 is being implemented. At the invitation of Representatives Judy Biggert and Adam Schiff, I met with the bipartisan Congressional Caucus on the Judicial Branch. Sitting down face-to-face helps to establish better working relationships. I hope that these and similar efforts continue in the coming years.

In this report, I will address the funding crisis currently affecting the federal Judiciary. I will also focus on the recently mounting criticism of judges for engaging in what is often referred to as "judicial activism."

II. The Judiciary's Budget Crisis

The Fiscal Year 2005 budget process has been very difficult. The Judiciary's appropriation for the fiscal year that began on October 1 was not signed into law until December 8. The recurring delays in enacting annual appropriations bills have severely disrupted its operations. Nine out of the last 10 fiscal years began with no appropriations bills passed for the Judiciary.

The continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force. In some cases they have had to cut back services available to the public. During Fiscal Year 2004, this resulted in a 6 percent reduction -- 1,350 positions -- in employees other than judges and the staff who work in their chambers. The area of probation and pretrial services was particularly hard hit.

In March I asked the Executive Committee of the Judicial Conference, chaired by Chief Judge Carolyn Dineen King, to develop an integrated strategy for controlling costs in Fiscal Year 2005 and beyond. The Committee did a yeoman's job, producing a comprehensive cost-containment strategy, which was endorsed unanimously by the Judicial Conference in September 2004. The strategy entails a moratorium on some courthouse construction projects; improving workforce efficiency; a study of basic changes in the Judicial Branch's approach to compensation for non-judges; promoting more effective use of technology; a study of possible program changes to reduce costs in defender services, court security,

probation and pretrial services, and bankruptcy case processing, among others; and regular examination of court fees to reflect economic changes.

This effort has involved nearly all of the committees of the Judicial Conference and court staff throughout the country, as well as the Administrative Office of the U.S. Courts and the Federal Judicial Center. I thank everyone who is participating in this effort.

Implementing this cost containment strategy will ameliorate but not end the Judiciary's funding crisis. As the Judiciary's workload continues to grow, the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice. One way in which Congress could immediately relieve the judicial budget crisis facing the country would be to reassess the rent that the Judiciary is required to pay to the General Services Administration for courthouses around the country. These rental payments today account for no less than 20 percent of the Judiciary's budget.

Another issue that I hope will be addressed this year is the critical need for additional judgeships, especially in the courts of appeals. In early 2003, the Judicial Conference requested nine permanent and two temporary court of appeals judgeships. No new court of appeals judgeships have been established since 1990 and three of the courts for which new judgeships are needed -- the First, Second and Ninth Circuits -- have not had any new judgeships for 20 years. I urge the members of the 109th Congress to ensure that the judgeship and funding needs of the federal Judiciary are met.

III. Criticism of Judges Based on Judicial Acts

Criticism of judges has dramatically increased in recent years, exacerbating in some respects the strained relationship between the Congress and the federal Judiciary. But criticism of judges and judicial decisions is as old as our republic, an outgrowth to some extent of the tensions built into our three-branch system of government. To a significant degree these tensions are healthy in maintaining a balance of power in our government.

By guaranteeing judges life tenure during good behavior, the Constitution tries to insulate judges from the public pressures that may affect elected officials. The Constitution protects judicial independence not to benefit judges, but to promote the rule of law: judges are expected to administer the law fairly, without regard to public reaction. Nevertheless, our government, in James Madison's words, ultimately derives "all powers directly or indirectly from the great body of the people." Thus, public reaction to judicial decisions, if it is sustained and widespread, can be a factor in the electoral process and lead to the appointment of judges who might decide cases differently.

John Marshall, who is known as the Great Chief Justice, was roundly criticized for Supreme Court decisions involving the authority of the national government -- decisions that are now recognized as essential building blocks of our nation. Federal judges were severely criticized 50 years ago for their unpopular, some might say activist, decisions in the desegregation cases, but those actions are now an admired chapter in our national history. On the other hand, criticism of the

Supreme Court's decision in the Dred Scott case, which Charles Evans Hughes rightly described as a "self-inflicted wound" from which it took the Court at least a generation to recover, proved correct.

Although arguments over the federal Judiciary have always been with us, criticism of judges, including charges of activism, have in the eyes of some taken a new turn in recent years. I spoke last year of my concern, and that of many federal judges, about aspects of the PROTECT Act that require the collection of information on an individual, judge-by-judge basis. At the same time, there have been suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream. And there were several bills introduced in the last Congress that would limit the jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action.

A natural consequence of life tenure should be the ability to benefit from informed criticism from legislators, the bar, academe, and the public. When federal judges are criticized for judicial decisions and actions taken in the discharge of their judicial duties, however, it is well to remember two principles that have long governed the tenure of federal judges.

First, Congress's authority to impeach and remove judges should not extend to decisions from the bench. That principle was established nearly 200 years ago in 1805, after a Congress dominated by Jeffersonian Republicans impeached Supreme Court Justice Samuel Chase. Chase was charged for actions he took in trials during the 1790s, sitting as circuit justice, and later for a series of grand jury charges. The

grand jury charges, coming near the time of the Supreme Court's 1803 decision in Marbury v. Madison that the federal courts have the power to declare an act of Congress unconstitutional, led the House to impeach Chase and send the matter to the Senate for trial.

Although there were 25 Jeffersonian Republicans and nine Federalists in the Senate, on each count, the Republicans failed to muster the two-thirds' vote necessary to convict. Chase was by no means a model judge, and his acquittal certainly was not an endorsement of his actions. Rather, the Senate's failure to convict him represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase's acquittal has governed the use of impeachment to remove federal judges from that day to this: a judge's *judicial* acts may not serve as a basis for impeachment. Any other rule would destroy judicial independence -- instead of trying to apply the law fairly, regardless of public opinion, judges would be concerned about inflaming any group that might be able to muster the votes in Congress to impeach and convict them.

Congress confirmed this underlying principle almost 25 years ago when it passed the Judicial Conduct and Disability Act authorizing anyone to file a complaint against a federal judge for misconduct or disability affecting the judge's ability to discharge his duties. If the charges are substantiated, they can lead to various kinds of discipline short of removal from office. Congress made clear, though, that the statute did not authorize complaints "directly related to the merits

of a decision or procedural ruling." The appellate process provides a remedy for challenges to such decisions or rulings.

If judges cannot be removed from office for judicial decisions, how can we be certain that the Judicial Branch is subject to the popular will? The answer to that question may be found in President Franklin Roosevelt's clash with the Supreme Court of the 1930s. The Court had invalidated legislation FDR thought was essential to restore the country to prosperity during the Great Depression. Roosevelt, and an overwhelmingly Democratic Congress, faced a Court that had for 30 years been reading into our Constitution a doctrine of "freedom of contract" which was hostile to social legislation, and had adopted a very limiting view of congressional authority under the commerce clause.

In FDR's view, the Court had become a roadblock to the progressive reforms needed in the nation, and he planned to use his immense political resources to bring the Court into step with the President and Congress. In February 1937, Roosevelt proposed a plan to "reorganize" the Judicial Branch, but the crux of his proposal was that the President would be empowered to appoint an additional six Justices to the Court and thereby enlarge the Court's membership up to a total of 15. Roosevelt's true aim, of course, was to "pack" the Court all at once to produce a majority sympathetic to the New Deal. Despite his huge majorities in both Houses of Congress, however, the bar, the press, and eventually public opinion began to rally against the proposal, and it was defeated.

President Roosevelt lost this battle in Congress, but he eventually won the war to change the judicial philosophy of the Supreme Court. He won it the way our Constitution envisions such wars being won -- by the gradual process of changing the federal Judiciary through the appointment process. Although Roosevelt appointed no Justices during his first term, in his second term he nominated and the Senate confirmed five, producing a Court that was much more sympathetic to the New Deal. During his entire tenure as President, FDR appointed seven Associate Justices and one Chief Justice.

In this way, our Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the federal Judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials. It is not a perfect system -- vacancies do not occur on regular schedules, and judges do not always decide cases the way their appointers might have anticipated. But for over 200 years it has served our democracy well and ensured a commitment to the rule of law.

No doubt the federal Judiciary, including the Supreme Court, will continue to encounter challenges to its independence and authority because of dissatisfaction with particular decisions or the general direction of its jurisprudence. Let us hope that the Supreme Court and all of our courts will continue to command sufficient public respect to enable them to survive basic attacks on the judicial independence that has made our judicial system a model for much of the world.

IV. The Year in Review

The Supreme Court of the United States

The total number of case filings in the Supreme Court decreased from 8,255 in the 2002 Term to 7,814 in the 2003 Term -- a decrease of 5.3 percent. Filings in the Court's *in forma pauperis* docket decreased from 6,386 to 6,092 -- a 4.6 percent decline. The Court's paid docket decreased by 147 cases, from 1,869 to 1,722 -- a 7.9 percent decline. During the 2003 Term, 91 cases were argued and 89 were disposed of in 73 signed opinions, compared to 84 cases argued and 79 disposed of in 71 signed opinions in the 2002 Term. No cases from the 2003 Term were scheduled for reargument in the 2004 Term.

The Federal Courts' Caseload

Civil and appellate filings increased in Fiscal Year 2004. Criminal filings were essentially static, and bankruptcy filings declined. Civil filings rose by 11 percent,¹

¹ Much of the increase in civil filings came about because of a 16 percent growth in federal question filings (*i.e.*, actions under the Constitution, laws, or treaties of the United States in which the United States is not a party in the case). In particular, there was a doubling of special statutory actions related to financial investments, which in the District of South Carolina resulted in a surge of 19,244 additional cases. Federal question filings related to personal injury/product liability, labor laws, and protected property rights also increased in 2004. Personal injury/product liability filings more than doubled to 2,221 cases because of a variety of new cases filed nationally; labor law filings grew 6 percent due to cases filed under the Fair Labor Standards Act; and a 7 percent rise in protected property rights actions consisted largely of copyright and patent cases.

Total diversity of citizenship filings increased 11 percent, mostly as a result of a 62 percent spike in personal injury/product liability filings. Most of these cases were filed in the Northern District of Ohio and the Eastern District of Pennsylvania. The Northern District of Ohio had many new filings under Multidistrict Litigation Docket Number 1535, which addresses alleged injurious effects of welding devices. The Eastern District of Pennsylvania had many new filings under Multidistrict Litigation Docket Number 1203, which addresses the alleged injurious effects of certain diet drugs.

filings of appeals grew 3 percent,² criminal filings grew less than 1 percent,³ and filings in the bankruptcy courts declined for the first time since 2000, falling 3 percent to

Filings with the United States as plaintiff or defendant fell 2 percent. Cases with the United States as plaintiff dropped 8 percent, largely due to a 24 percent decline in foreclosure cases. Filings with the United States as defendant rose by only 137 cases to 38,391. Filings of Social Security cases fell 7 percent; however, this reduction was offset by a 22 percent jump in motions to vacate sentence and a 13 percent rise in habeas corpus prisoner petitions.

Over the past 10 years, civil filings have risen 19 percent, mostly as a result of increases in personal injury/product liability, Social Security, and labor law cases.

² Filings in the 12 regional courts of appeals grew from 60,847 to 62,762, a record number. Administrative agency appeals surged 23 percent, original proceedings rose 13 percent, and criminal appeals increased 4 percent, which more than offset 4 percent declines in both bankruptcy appeals and civil appeals. The overall rise was due in large part to a continued influx of challenges to the decisions of the Board of Immigration Appeals -- as that agency cleared its backlog of cases -- and a jump in second or successive motions filed by inmates with habeas corpus petitions. Appeals filings have increased 25 percent since 1995.

³ Case filings increased in 44 districts, and in 29 of those districts the increase was at least 10 percent above 2003. The slight national increase in filings coupled with the expiration of a temporary district court judgeship caused criminal cases per authorized judgeship to rise from 104 in 2003 to 105 in 2004. The growth in the criminal caseload stemmed primarily from increases in cases involving immigration, sex offenses, and firearms, with filings for these offenses reaching their highest levels ever. Immigration cases climbed 11 percent to 17,021. Sixty-nine percent of all immigration cases were filed in five districts along the nation's southwestern border, each of which received more immigration filings than in 2003. Sex offense cases jumped 24 percent to 1,638, largely due to cases in which defendants were charged under laws relating to sex crimes involving juveniles. Firearms case filings climbed 3 percent to 9,352, rising in 52 districts. Nineteen districts received 25 percent or more case increases because of Project Safe Neighborhoods, which supports partnerships among federal, state, and local law enforcement agencies to promote the prosecution of firearms violations under federal laws in communities that have been most affected by gun violence. Drug cases fell 3 percent overall to 18,440, despite increases in such filings in 43 districts. The number of drug case filings has been affected by the government's focus on national security and the commitment of federal resources to anti-terrorism efforts. Filings of fraud cases fell 7 percent to 7,539. Social Security fraud cases fell 31 percent to 672 as these filings returned to their 2001 level, the year the Department of Justice began prosecuting defendants for identity theft under Social Security laws. Income tax fraud cases grew 15 percent to 496, and passport fraud cases grew 9 percent to 449. Since 1995, criminal case filings have grown 55 percent.

1,618,987 in 2004.⁴ The number of persons on probation and supervised release went up by 2 percent to an all-time high of 112,883,⁵ and there was a 3 percent gain in the number of defendants activated by the pretrial services system.⁶

V. The Administrative Office of the United States Courts

As the central support agency for the federal courts, the Administrative Office of the U.S. Courts performs a wide variety of functions. This past year, the staff of the Administrative Office devoted much of its time and energy to addressing critical funding shortages for the federal Judiciary. Director Leonidas Ralph Mecham and his staff played pivotal roles in helping the federal courts cope with the impact of reductions in personnel and services, and launched an intensive effort

⁴ Nonbusiness filings decreased 3 percent, and business petitions fell 4 percent. Filings decreased under all chapters except Chapter 11, falling 66 percent under Chapter 12, 4 percent under Chapter 13, and 2 percent under Chapter 7. The reduction in Chapter 12 filings occurred because the legislation authorizing this chapter expired on January 1, 2004. Bankruptcy filings under Chapter 11, which comprised less than 1 percent of all petitions filed, grew 2 percent. Even though filings declined in Fiscal Year 2004, they have soared 83 percent over the last 10 years and remain at close to peak levels.

⁵ Persons serving terms of supervised release following their release from prison totaled 78,594 on September 30, 2004, and they constituted 70 percent of all persons under post-conviction supervision. The number of individuals on parole declined 7 percent to 2,914 and comprised only 3 percent of those under supervision. The number of persons on probation declined 6 percent to 28,882, due to a drop in the imposition of sentences of probation by both district judges and magistrate judges. Of the 112,883 persons under post-conviction supervision, 44 percent were convicted of a drug-related offense, the same as one year ago. There are now 32 percent more persons under post-conviction supervision than there were in 1995.

⁶ The number of defendants in pretrial services system cases opened in 2004, including pretrial diversion cases, increased 3 percent to 100,005. Pretrial services officers prepared 2 percent more pretrial reports, while the number of defendants interviewed increased 3 percent. In conjunction with all pretrial services cases closed during the year, a total of 223,092 pretrial hearings were held, an increase of 1 percent over the total in 2003. During the past 10 years, cases activated in the pretrial services system have increased 62 percent.

to communicate with Congress about the effects of funding shortfalls on judiciary operations and services.

In conjunction with Judicial Conference committees, the Administrative Office is engaged in more than 50 cost-containment initiatives related to space and facilities cost control, workforce efficiency, compensation review, effective use of technology, and program changes. Chief among these initiatives are thorough reviews of the facilities planning processes and design standards for courthouses; a review of judiciary compensation systems; process redesign and methods analysis programs; a review of administrative support services in the courts; probation and pretrial services program revisions; defender services program studies; and the identification and implementation of more cost-effective service delivery models for information technology.

Both Fiscal Years 2004 and 2005 began with no appropriations bills passed for the Judiciary. This required the Administrative Office to dedicate considerable time anticipating and responding to the unpredictable budget situation. Staff developed contingency plans, recalculated detailed budgets for the operation of the federal court system, modified program activities, and kept the courts informed so they could make informed management, budget, and personnel decisions.

The continuing resolutions passed by Congress when it was unable to complete work on appropriations bills did not provide enough funds to continue current operations. In response, the Administrative Office developed and issued guidance on budget and workforce planning, furloughs, job abolishment, and buyout

and early-out retirement programs. The Administrative Office's human resources staff answered thousands of downsizing questions from concerned court managers and employees.

Due to budget constraints, the Administrative Office itself had over 100 vacancies -- leaving nearly 10 percent of its positions unfilled -- notwithstanding the increase in work. Anticipating the budget crisis, the Administrative Office already had begun efforts to cut program costs where feasible. Many ideas for achieving economies were considered and implemented, in consultation with court advisory groups. In support of the Judicial Conference and its committees, the Administrative Office produced extensive analyses of short- and long-term resource requirements.

In addition to the extensive budget and cost-containment activities, the Administrative Office focused its remaining resources on core business necessities and projects that will deliver future benefits. Emergency preparedness and continuity of operations remained high priorities. Significant progress was made in 2004 in making courts safer and in ensuring their continued and effective operation in the event of a crisis.

The deployment of vital information technology systems continued throughout the year. The installation of a new financial accounting system was completed so that for the first time ever, all courts are using a single, integrated financial system. The Judiciary's human resources management information system was extended to cover all court personnel. The agency also completed the

installation of a probation and pretrial services case-management system in all districts. Deployment of modern case management and electronic filing systems has now reached almost all bankruptcy courts, and is in place in well over half the district courts. These systems are key to managing increasing workloads in a limited-growth environment.

VI. The Federal Judicial Center

The Federal Judicial Center is the federal courts' agency for education and research. In 2004, the Center provided continuing education to at least 11,000 federal judge and support staff participants through 396 national, regional, and local seminars. Many more benefited from FJC programs on the Judicial Branch's television network and from Center publications, Web-based programs, and video and audio cassettes. Additionally, over 600 federal defenders, assistant defenders, and their staffs attended three Center programs.

Although Center programs covered the range of legal, procedural, and management challenges facing judges and court employees, a recurring theme in much of the Center's work this year was helping judges and court managers identify, and share with colleagues, ways to maintain quality services and effective operations in periods of budget austerity.

The Center itself has long faced this same challenge. Over the last 10 years, its appropriation has increased a mere 13 percent. In response, the Center has reduced its travel expenditures by 15 percent and its staff by 19 percent. The Center's Board, which I chair, this year committed the Center to continued

economizing so as to maintain current levels of service, believing that as the federal courts face the challenges of serious cost containment, their need for the Center's work is greater than ever.

Some specific highlights of the Center's work in 2004 are outlined below.

For several years, judges and lawyers have debated whether courts of appeals should prohibit citation to so-called unpublished opinions. The Judicial Conference's Standing Committee on Rules of Practice and Procedure, in cooperation with the Appellate Rules Advisory Committee, has asked the Center to report next spring on the possible impact of a rule permitting citation of unpublished opinions.

Center researchers also analyzed local court of appeals rules that impose requirements beyond those in the national rules on the form and content of appellate briefs, to help the Advisory Committee evaluate proposed amendments to the Federal Rules of Appellate Procedure.

The Center provided the Advisory Committee on Civil Rules its study of sealed settlement agreements, based on an examination of over 288,000 cases. The study found 1,270 cases that appear to have sealed settlement agreements, suggesting a national sealed settlement agreement rate of 0.44 percent.

Researchers also found that in 97 percent of these cases, although the settlement is sealed, the complaint is not, so the public has access to the plaintiffs' allegations.

The Center completed its work to develop new statistical case weights for the district courts. The case weights reflect the relative burden imposed on district

judges by different types of cases and are an important, objective tool that assists the Judicial Conference in formulating its requests to Congress for additional district judgeships. The Center is also developing revised case weights for the bankruptcy courts.

As I mentioned earlier, last spring I asked Justice Stephen Breyer to chair the special study committee to assess the federal Judiciary's administration of the 1980 statute that permits anyone to file a complaint alleging that a federal judge has engaged in misconduct or is unable to perform the duties of the office. I asked the Center, along with the Administrative Office, to support the study committee through rigorous, objective research on this sensitive subject, and I am grateful for the work that they began this year and that will continue through 2005.

VII. The United States Sentencing Commission

Judge Diana E. Murphy resigned as chair of the United States Sentencing Commission on January 31, 2004. Judge Murphy became chair in 1999 and oversaw significant accomplishments, including the issuance of a special report to Congress on disparities in cocaine penalties, an overhaul of white collar offenses under the guidelines, and the completion of a special report to Congress on departure trends. I thank her for her service.

In August, President Bush appointed Judge Ricardo H. Hinojosa of McAllen, Texas, to be the new chair of the Sentencing Commission. Judge Hinojosa has served as a member of the Sentencing Commission since May of 2003; his appointment as chair was confirmed by the Senate on November 21, 2004. In

addition to the appointment of Judge Hinojosa, the Senate also confirmed Ms. Beryl A. Howell as a commissioner on the Sentencing Commission, and confirmed the reappointments to the Commission of Judge Ruben Castillo (vice chair) and Professor Michael E. O'Neill.

On April 30, 2004, the Sentencing Commission sent to Congress a package of amendments that revised standards for corporate compliance and ethics programs and modified penalties for crimes including public corruption offenses, possession of certain destructive devices, mishandling of hazardous materials offenses, trafficking in the drug GHB, and fraudulently obtaining a U.S. passport. The amendments became effective November 1, 2004.

In May 2004, over 460 attendees participated in the 13th Annual National Seminar on the Federal Sentencing Guidelines. The seminar was co-sponsored by the U.S. Sentencing Commission and the Federal Bar Association in Miami Beach, Florida. In November 2004, the Commission held a series of public hearings in Washington, D.C., to hear testimony from judges, prosecutors, the defense bar, victims rights groups, and academics on the current status of federal sentencing policy and the challenges facing the Commission. In addition, throughout the summer and fall of 2004, Commission members and staff attended numerous seminars and conferences related to the Supreme Court's ruling in Blakely v. Washington.

Throughout the year, the Commission published a series of reports, including *Fifteen Years of Guidelines Sentencing*, a comprehensive review of the research

literature and sentencing data; and two reports on recidivism: (1) *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* and (2) *Recidivism and the "First Offender."*

In Fiscal Year 2004, the Commission received documentation on approximately 70,000 cases sentenced under the guidelines. Also, the Commission staff provided training at 74 seminars with over 6,600 participants. Commission staff continue to work with the Federal Judicial Center and the Administrative Office of the U.S. Courts to plan and develop educational and informational programming for the Federal Judicial Television Network. During the year, the Commission's "HelpLine" provided guideline application assistance to approximately 100 callers per month.

VIII. Conclusion

Because of the budget crisis, this was a particularly difficult year for judges and court staff throughout the country. I want to thank them for their continued dedication. We can all be proud of the job our courts perform in efficiently dispensing justice.

On a personal note, I also want to thank all of those who have sent their good wishes for my speedy recovery.

Finally, I offer my best wishes to President Bush and Vice President Cheney and to the members of the 109th Congress, just as I extend my best wishes to those legislators who have concluded their service. I extend to all my wish for a happy New Year.