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2001 YEAR-END REPORT
ON THE FEDERAL JUDICIARY

I. Overview

The 2001 Year-End Report on the Federal Judiciary is my 16th. 2001 will surely be remembered by the entire country, including the federal Judiciary, for the terrorist attacks of September 11 and the anthrax contamination that followed.

I received word of the first strike on the World Trade Center as the 26 federal judges who are members of the Judicial Conference of the United States were preparing to convene at the Supreme Court the morning of September 11. It soon became clear that we would have to cancel the Conference session and evacuate the building, the first cancellation of a Conference meeting since its creation in 1922.

Just six and a half weeks later, our Court was forced to evacuate the building again after traces of anthrax were found in our off-site mail facility. For the first time since our building opened in 1935, the Court heard arguments in another location -- the ceremonial courtroom in the District of Columbia E. Barrett Prettyman Federal Courthouse. The Court was also forced out of its quarters in the Capitol when the British burned part of the Capitol building in August 1814.

Despite the effects of events since September 11, the federal courts, along with the rest of our government, have gotten back to business, even if not business as usual. Our Court has kept its argument schedule, federal (and state) courts have met, albeit with heightened security, and within three weeks, the Judicial

Conference completed by mail all of the business that had been on the schedule for September 11 and that could not be postponed.

II. Ensuring a Well-Qualified and Fully Staffed Judicial Branch

The federal courts were created by the Judiciary Act of 1789, which established a Supreme Court and divided the country into three circuits and 13 districts. This structure has obviously changed greatly since 1789, but one thing has not changed: the federal courts have functioned through wars, natural disasters, and terrorist attacks. During times such as these, the role of the courts becomes even more important in order to enforce the rule of law. To continue functioning effectively and efficiently, however, the courts must be appropriately staffed. This means that necessary judgeships must be created and judicial vacancies must be timely filled with well-qualified candidates.

Promptly Filling Vacant Judgeships

It is becoming increasingly difficult to find qualified candidates for federal judicial vacancies. This is particularly true in the case of lawyers in private practice. There are two reasons for these difficulties: the relatively low pay that federal judges receive, compared to the amount that a successful, experienced practicing lawyer can make, and the often lengthy and unpleasant nature of the confirmation process.

Of the inadequacy of judicial pay I have spoken again and again, without much result. Judges along with Congress have received a cost-of-living adjustment this year, and for this they are grateful. But a COLA only keeps judges from falling further behind the median income of the profession. I can only refer back to what I have previously said on this subject.

I spoke to delays in the confirmation process in my annual report in 1997. Then as now I recognize that part of the problem is endemic to the size of the federal Judiciary. With more judges, there are more retirements and more vacancies to fill. But as I said in 1997, "[w]hatever the size of the federal judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994."

At that time, President Clinton, a Democrat, made the nominations, and the Senate, controlled by the Republicans, was responsible for the confirmation process. Now the political situation is exactly the reverse, but the same situation obtains: the Senate confirmed only 28 judges during 2001. When the Senate adjourned on December 20th, 23 court of appeals nominees and 14 district court nominees were left awaiting action by the Judiciary Committee or the full Senate. When I spoke to this issue in 1997, there were 82 judicial vacancies; when the Senate adjourned on December 20th there were 94 vacancies. The Senate ought to act with reasonable promptness and to vote each nominee up or down. The Senate is not, of course, obliged to confirm any particular nominee. But it ought to act on each nominee and to do so within a reasonable time. I recognize that the Senate has been faced with many challenges this year, but I urge prompt attention to the challenge of bringing the federal judicial branch closer to full staffing.

The combination of inadequate pay and a drawn-out and uncertain confirmation process is a handicap to judicial recruitment across the board, but it most significantly restricts the universe of lawyers in private practice who are willing to be nominated for a federal judgeship. United States attorneys, public defenders, federal magistrate and bankruptcy judges, and state court judges are often nominated to be district judges. For them the pay is a modest improvement

and the confirmation process at least does not damage their current income. Most academic lawyers are in a similar situation. But for lawyers coming directly from private practice, there is both a strong financial disincentive and the possibility of losing clients in the course of the wait for a confirmation vote.

Former magistrate, bankruptcy, and state court judges, as well as prosecutors and public defenders, have served ably as federal district and circuit judges, bringing their insights into the process gained from experience. But we have never had, and should not want, a Judiciary composed only of those persons who are already in the public service. It would too much resemble the judiciary in civil law countries, where a law graduate may choose upon graduation to enter the judiciary, and will thereafter gradually work his way up over time. The result is a judiciary quite different from our common law system, with our practice of drawing on successful members of the private bar to become judges. Reasonable people, not merely here but in Europe, think that many civil law judicial systems simply do not command the respect and enjoy the independence of ours. We must not drastically shrink the number of judicial nominees who have had substantial experience in private practice.

The federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice. As to the Supreme Court, Justice Louis D. Brandeis, who was known as "the people's attorney" for his *pro bono* work, spent his entire career in private practice before he was named to the Supreme Court in 1916 by President Wilson. Justice John Harlan served in several government posts early in his career, but the lion's share of his experience prior to his nomination by President Eisenhower in 1954 was in private practice. When appointed to the Court of Appeals for the Second Circuit, a year before his appointment to the Supreme Court, Justice Harlan succeeded Judge Augustus Hand. Judge Hand and his cousin, Learned Hand, are well known as great court of appeals judges; both spent

virtually all the time between their graduation from law school and their appointment as federal judges in private practice. Retired Justice Byron White, who played professional football for the Detroit Lions on the weekends while attending Yale Law School, was in private practice in Colorado for nearly 14 years before joining the Justice Department as deputy attorney general to Robert Kennedy. Less than a year later, President Kennedy named Justice White to the Court. Justice White was the circuit Justice for the Tenth Circuit, where Judge Alfred P. Murrah served as a district judge in Oklahoma and as a judge on the court of appeals. Judge Murrah, who spent his entire career in private practice before becoming a judge, is remembered for much more than having the Oklahoma City federal building named after him. Before being named a judge on the Court of Appeals for the Second Circuit, Justice Thurgood Marshall spent his career in the private sector. He first opened his own law practice in Baltimore and then for many years worked as the top lawyer for the NAACP, becoming known as "Mr. Civil Rights." Justice Marshall left his seat on the court of appeals to become Solicitor General of the United States before President Johnson named him to the Supreme Court in 1967. John Brown, Richard Rives, Elbert Tuttle and John Minor Wisdom, well-known for their courage in enforcing this Court's civil rights decisions as judges on the Court of Appeals for the Fifth Circuit, all served almost exclusively in private practice before their appointments to the bench.

On behalf of the Judiciary, I ask Congress to raise the salaries of federal judges, and I ask the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination.

Creating Necessary New Judgeships

Last year I expressed hope that the 107th Congress would take action on the Judicial Conference's request to establish 10 additional court of appeals judgeships, 44 additional district court judgeships and 24 new bankruptcy judgeships. No

additional court of appeals judgeships have been created since 1990. No new bankruptcy judgeships have been created since 1992, although the number of cases filed has increased by nearly 500,000 since then. The 107th Congress has not created a single new judgeship.

Despite a significant increase in workload, the Courts of Appeals for the First, Second, and Ninth Circuits have not increased in size for 17 years -- since 1984. During that time period, appellate filings in the First Circuit have risen 65%, in the Second Circuit they have risen almost 58%, and in the Ninth Circuit appellate filings have almost doubled -- rising 94.6%. The Judicial Conference has asked that the Congress create one new appellate judgeship for the First Circuit, two judgeships for the Second Circuit, five for the Ninth Circuit and two for the Sixth Circuit, which has had only one additional judgeship since 1984.

Congress has recognized the crisis faced by the overwhelming caseloads in the Southwestern border states. Although we are thankful that Congress has provided additional judges during the 106th Congress for four of the five affected districts, it has not alleviated the very serious problem faced by the Southern District of California, based in San Diego, a district with no judicial vacancies. The judges there have the highest number of filings per judge of any federal district court in the nation and the Judicial Conference has requested that eight additional district judgeships be created for this district.

I urge the Congress to act on all of the pending requests for new judgeships during its next session.

III. International Judicial Exchanges

The federal Judiciary continues to play a vital role in the development of independent judicial systems in countries around the world. This year over 800 representatives from more than 40 foreign judicial systems formally visited the Supreme Court of the United States seeking information about our system of justice.

On September 25, 2001, I led a small delegation representing the federal Judiciary on a judicial exchange in Guanajuato, Mexico. The visit was at the invitation of Genaro David Góngora Pimentel, President of the Mexican Supreme Court, and followed a similar visit to Washington by a Mexican delegation in November 1999. Our traveling to Mexico within two weeks of the September 11 attacks underscored the importance of this exchange. I am grateful to President Góngora Pimentel and his colleagues for their invitation to meet with them in Mexico and for their commitment to strengthening cross-border judicial relations in North America.

The visit brought home not only the close connections of our two countries, but the importance of working with other judiciaries to improve the functioning of all judicial systems. The Federal Judicial Center, the Administrative Office of the United States Courts, and the International Judicial Relations Committee of the Judicial Conference have also provided many international visitors with information, education, and technical assistance to improve the administration and independence of foreign courts and enhance the rule of law. Through these judicial exchanges, we also gain valuable insights into our own judicial system by exchanging information with foreign visitors and by visiting foreign courts. Improving the administration of justice -- here and in other courts around the world -- has become even more important in the age of the global economy.

IV. The Year in Review

The Supreme Court of the United States

The work of the Supreme Court continues to grow modestly, putting an increasing strain on the Supreme Court's building, the infrastructure of which has not been changed in any basic way since the building was opened in 1935. I wish to thank Chairman Byrd, Ranking Minority Member Stevens, Chairman Young, Ranking Minority Member Obey, Chairman Hollings, Ranking Minority Member Gregg, Chairman Wolf, and Ranking Minority Member Serrano for their efforts to secure funds to modernize our Supreme Court building. I am hopeful that the remaining funds necessary to implement our building modernization program, which has been in the planning stage for several years, will be included in our Fiscal Year 2003 appropriation. Significant safety and security upgrades to the Supreme Court building are included in the project and should not be delayed.

The total number of case filings in the Supreme Court increased from 7,377 in the 1999 Term to 7,852 in the 2000 Term -- an increase of 6.4%. Filings in the Court's *in forma pauperis* docket increased from 5,282 to 5,897 -- an 11.6% rise. The Court's paid docket decreased by 138 cases, from 2,092 to 1,954 -- a 6.6% decline. During the 2000 Term, 86 cases were argued and 83 were disposed of in 77 signed opinions, compared to 83 cases argued and 79 disposed of in 74 signed opinions in the 1999 Term. No cases from the 2000 Term were scheduled for re-argument in the 2001 Term. Although the closing of our building did not delay any scheduled arguments, the interruption in mail delivery in the Washington area may have an impact on the number of cases heard by the Court this Term.

The Federal Courts' Caseload

In Fiscal Year 2001, filings in the 12 regional courts of appeals rose 5% to 57,464 -- a new all-time high.¹ Civil filings in the U.S. district courts fell 3% to 258,517,² and, after six consecutive years of growth, the number of criminal cases and defendants declined slightly.³ The essentially static level of criminal filings

¹ Original proceedings surged 48%, largely as a result of a rise in habeas corpus petitions filed by prisoners. Criminal appeals grew 5%, administrative agency appeals increased 2%, and civil appeals rose 1%. Bankruptcy appeals fell 5%. Appeals filings have increased 22% since 1992.

² Filings with the United States as plaintiff seeking the recovery of student loans dropped 47%. New administrative procedures implemented by the Department of Education led to fewer such filings in the federal courts. Excluding student loan filings, total civil filings increased 1%. Total private case filings fell less than 1%. Filings related to federal question litigation were consistent with the total decline in private cases, falling less than 1% to 138,441. Diversity of citizenship and civil rights filings each rose less than 1%. Filings related to federal question litigation and diversity of citizenship were greatly affected by the stabilization of personal injury/product liability case filings related to breast implants, oil refinery explosions, and asbestos. Despite an 11% decrease in total filings with the United States as plaintiff or defendant, filings with the United States as defendant increased 10% to 40,644. This was mostly due to a 23% surge in federal prisoner petitions and an 8% rise in social security filings. Motions to vacate sentences filed by federal prisoners grew by 36%. Social security filings related to disability insurance and supplemental security income rose 9% and 6%, respectively. Civil filings have increased 9% since 1992.

³ Filings of criminal cases dropped by 37 cases to 62,708, and the number of defendants decreased 1% to 83,252. As a result of the creation of 10 additional Article III judgeships, criminal cases per authorized district judgeship declined from 96 to 94. This was the first decrease in cases per judgeship since 1994, when the effects of a hiring freeze on assistant U.S. attorneys was being felt. In succeeding years, federal courts saw increases in criminal filings, primarily due to immigration and drug law-related cases in districts along the Southwestern border of the United States. This year, drug cases rose 5% to 18,425, firearms cases rose 9% to set yet another record at 5,845, traffic cases rose 6% to 4,958, robbery cases rose 8% to 1,355, and sex offense cases rose 8% to 1,017. Immigration filings fell by 873 cases, a 7% decline over last year due to fewer immigration cases reported by the Western District of Texas, the Southern District of California, and the District of New Mexico. However, in the Western District of Texas and in the Southern District of California, the decline in immigration filings was offset by a rise in drug filings. As

was reflected in a 1% gain in the number of defendants activated in the pretrial services system.⁴ The number of persons on probation and supervised release went up by 4% to an all-time high of 104,715.⁵ Filings in the U.S. bankruptcy courts climbed 14% from 1,262,102 to 1,437,354, following two years of decline.⁶

V. The Administrative Office of the United States Courts

The Administrative Office of the United States Courts serves as the central support agency for the administration of the federal court system. In light of the terrorist attacks of September 11 and the ensuing anthrax contamination, the

a result, overall criminal filings increased 2% in the Western District of Texas and declined 3% in the Southern District of California. Criminal filings since 1992 have increased 30%.

⁴ In 2001, the number of defendants activated in the pretrial services system increased 1% to 86,140, and the number of pretrial reports prepared rose 1%. During the past five years, pretrial services case activations and pretrial reports prepared each rose 24%, persons interviewed grew 16%, and defendants released on supervision increased 25%. Pretrial case activations have risen each year since 1994, and this year's total is 54% higher than that for 1994.

⁵ There is an average lag of several years before defendants found guilty and sentenced to prison appear in the probation numbers. Supervised release following a period of incarceration continues to account for a growing percentage of those under supervision and now stands at 65% of this total. In contrast, the number of individuals on parole is small and declining, composing only 4% of those under supervision. Of the 104,715 persons under probation supervision, 42% had been charged with a drug-related offense. The number of persons on probation has increased 22% since 1992.

⁶ Nonbusiness petitions rose 14% and business petitions increased 7%. Filings increased under all chapters except Chapter 12, jumping 17% under Chapter 7, rising 7% under Chapter 11, and increasing 8% under Chapter 13. Bankruptcy filings under Chapter 12, which constituted 0.03% of all petitions filed, fell 31%. This decrease resulted from the expiration of the provisions for Chapter 12 on July 1, 2000. Subsequently, Public Law 107-8 extended the deadline for filing Chapter 12 petitions to June 1, 2001, and Public Law 107-17 extended the deadline further to October 1, 2001. Bankruptcy filings have increased 47% since 1992.

Administrative Office played a pivotal role in ensuring that the federal courts around the country had effective security precautions and mail-screening procedures in place. An emergency response team was convened to work with the staff of the affected courts in New York to get communications and computer systems working and to return the courts to normal operations as soon as possible. In November 2001, Administrative Office Director Leonidas Ralph Mecham created a Judiciary Emergency Preparedness Office to focus on the planning aspects of crisis response.

Even before September 11, court security was a high priority. A study of the court security program by independent security experts was completed in November. The consultants concluded that although there have been substantial improvements in court security over the last two decades, security needs continue to grow. They recommended options for enhancing the physical security of courthouses, addressing security needs during court proceedings, improving the protection of judges in and outside the courthouse, and conducting background checks on employees. The Judicial Conference's Committee on Security and Facilities and the Administrative Office are currently reviewing the report's recommendations.

One of the Administrative Office's key priorities is to secure adequate funding from Congress so that the federal courts can carry out their critical work and maintain the quality of justice. Director Mecham, Judge John Heyburn II, chair of the Judicial Conference's Budget Committee, and Judge Jane Roth, chair of the Security and Facilities Committee, deserve credit for their efforts in this area. The funding provided to the courts for fiscal year 2002 represents a 7.1% increase and will provide the courts adequate staff (including probation and pretrial services offices) to meet growing workloads. I want to express thanks to the Congress for funding an increase in the rates of pay for private "panel" attorneys accepting

appointments under the Criminal Justice Act to \$90 per hour. This has been a high priority for the Judiciary for several years. I am also pleased to report that Congress has continued to provide significant funds for the courthouse construction program, funding 15 needed courthouse construction projects costing \$280 million.

Last year, an independent consultant concluded that the Judiciary is making effective use of technology and that it is doing so with fewer resources invested in technology when compared with other organizations. The Administrative Office continues to develop and implement automated systems that will enhance the management and processing of information and the performance of court business functions. Deployment of a new bankruptcy court case management/electronic case files system began this year, and it is now operating in 14 bankruptcy courts. The system's electronic case files capabilities include the ability to receive and file documents over the Internet. The creation of electronic files will reduce the volume of paper records and make these records more readily accessible. Testing of the district court case management/electronic case files system began in 2001, and development work on the appellate court system is underway.

Under the guidance of the Judicial Conference's Committee on Court Administration and Case Management, the Administrative Office completed a two-year study on how to balance privacy concerns with the rights of the public to access court electronic records. After extensive public comment, the Committee recommended that civil case documents be made available electronically to the same extent they are available at the courthouse (except that certain personal identifiers will be partially redacted). A similar policy will be followed for bankruptcy case documents assuming necessary statutory changes are enacted. The Committee recommended that there be no electronic access to documents in criminal cases at this time. These policies were endorsed by the Judicial

Conference in September, and several Conference Committees, supported by Administrative Office staff, are currently working to implement them.

A review of the Judiciary's use of libraries, lawbooks, and legal research materials – both hard copy and electronic – was completed in 2001. While the use of on-line legal resource materials is expanding and continues to show promise for increased use, the study concluded that a clear and compelling need continues to exist for lawbooks and other legal research materials in hard-copy format. The Judicial Conference adopted recommendations to control costs further and to improve the management of court libraries.

VI. The Federal Judicial Center

The Federal Judicial Center, the federal courts' statutory agency for education and research, last year provided education to some 50,000 participants in traditional and distance education programs and continued its research and analysis to improve the litigation process. A few highlights of the Center's work in 2001 follow.

Science and technology. Litigation is increasingly dominated by scientific and technical evidence. The Center's efforts to help judges included its acclaimed Reference Manual on Scientific Evidence, now in its second edition, and a six-part Federal Judicial Television Network series, Science in the Courtroom, on principles of microbiology, epidemiology, and toxicology, and how to manage cases involving these types of evidence. Other judicial education programs dealt with genetics, the human aging process, astrophysics, and the impact of computer technology on the law of intellectual property.

To assist federal judges in dealing with the sophisticated technology many attorneys use to present evidence, the Center provided federal judges its Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial, developed in cooperation with the National Institute for Trial Advocacy. It also provided judges a Guide to the Management of Cases in ADR, which it prepared in light of the growing use of alternatives to traditional litigation.

Management skills for federal courts in uncertain times. Center programs responded to another challenge facing the courts: the need for leadership skills and management practices befitting the complex organizations that federal courts have become. Courts must integrate technology with increasingly sophisticated business practices, and deal with growing caseloads and diverse workforces and litigants, while pursuing their overarching purpose to deliver justice for all.

Demystifying the legal process. The Center assisted the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure with a different type of challenge. The Committee has proposed a requirement that attorneys use "plain language" in the notices they send to potential class members in class action suits and asked the Center to develop illustrative language as examples. The Center tested alternative wordings with focus groups of ordinary citizens typical of class members. This testing explored recipients' willingness to open and read a notice as well as their ability to comprehend and apply the information it contained. From this research, the Center produced illustrative notices, which remain on the Center's Web site (www.fjc.gov) for public comment and use.

International judicial cooperation. Given its international reputation, the Center gets frequent visitors from other countries seeking to create or enhance their judicial branch research and education centers. Although it does not use its own

funds in responding to these requests, the Center has been of assistance this year in important ways. It hosted seminars or briefings for 422 foreign judges and officials representing 34 countries. The Center also responded to more specific requests for assistance. For example, a delegation from the Russian Academy of Justice spent a week at the Center attending a program on teaching methodology. Three Center representatives traveled to Moscow for a follow-up workshop focusing on distance learning and judicial ethics. Center personnel also played an important role in the U.S. delegation's visit to Mexico, which I described earlier, and will continue that relationship by organizing a seminar next May in Washington for interchange with Mexican judicial educators.

VII. The United States Sentencing Commission

On May 1, 2001, the newly reconstituted United States Sentencing Commission completed its first full sentencing guidelines amendment cycle and submitted to Congress a package of guidelines amendments covering 26 areas. This package of amendments resolved 19 circuit conflicts and included responses to nine new congressional directives (five with emergency amendment authority). For the first time in years, there are no congressional directives awaiting implementation by the Commission.

The amendments include a multi-part, comprehensive economic crimes package with a new loss table that significantly increases penalties for crimes involving high-dollar loss amounts, but gives judges greater discretion in sentencing defendants convicted of crimes with relatively low loss amounts. The amendments also increase the penalties for ecstasy and amphetamine trafficking; counterfeiting; high-dollar fraud offenses; child sex offenses; and the use of nuclear, biological, and chemical weapons. The Commission also expanded eligibility for first-time, non-violent offenders to obtain relief under the guidelines' "safety valve" provision and it

clarified that participants who play a limited role in a crime are eligible for an adjustment to their sentences under the guidelines' "mitigating role" provision. The guidelines went into effect November 1, 2001.

On June 19, 2001, the Sentencing Commission held a public hearing in Rapid City, South Dakota, in response to the March 2000 Report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, which recommended that an assessment of the impact of the federal sentencing guidelines on Native Americans in South Dakota be undertaken. As a result of suggestions made at the hearing and subsequent written submissions, the Commission is forming an *ad hoc* advisory group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country.

The Tenth Annual National Seminar on the Federal Sentencing Guidelines, co-sponsored by the Commission and the Federal Bar Association, was held May 16-18, 2001, in Palm Springs, California. More than 400 federal judges, U.S. probation officers, and attorneys attended. During fiscal year 2001, Commission staff also participated in training for thousands of individuals at training sessions across the country (including ongoing programs sponsored by the Federal Judicial Center and other agencies). Commission staff continue to work with the Federal Judicial Center and the Administrative Office to plan and develop educational and informational programming for the Federal Judicial Television Network. During the year, the Commission's "HelpLine" provided assistance to approximately 200 callers per month.

Finally, congratulations are due to Sentencing Commission Chair Diana E. Murphy who, together with Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit, received the 19th Annual Edward J. Devitt Distinguished Service to Justice Award on September 10, 2001. This award recognizes Article III judges who have achieved exemplary careers and have made significant contributions to

the administration of justice, the advancement of the rule of law, and the improvement of society as a whole.

VIII. Conclusion

Once again the Judiciary can look back upon the year ended as one of accomplishments in the face of adversity. In spite of the terrorist attacks that have affected the entire country, our courts continue to conduct business, day in and day out. We continue to find ways to perform our work more efficiently.

Despite an alarming number of judicial vacancies, our courts continue to serve as a standard of excellence around the world. At bottom, federal judges are able to administer justice day in and day out because of their commitment and the commitment and hard work of court staff around the country. My thanks go out to all of them.

I extend to all my wish for a happy New Year.