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REPORT  
OF  
THE HONORABLE HERBERT BROWNELL, JR.  
ATTORNEY GENERAL OF THE UNITED STATES  
TO  
THE JUDICIAL CONFERENCE OF THE UNITED STATES



Washington, D. C.

March 14, 1957

Mr. Chief Justice, Members of the Judicial Conference:

I appreciate very much your invitation to appear at this special session of the Judicial Conference of the United States. As you know, at the request of the Chief Justice, the Attorney General makes an annual report to the September meeting of the Judicial Conference on matters of mutual concern which relate to the business of the courts. I do not propose, therefore, to make a detailed report today. Rather, I wish to discuss briefly several matters of current interest.

The drive to reduce excessive delays and congestion in the Federal courts is proceeding satisfactorily. As a part of it, the Department of Justice is actively supporting a number of legislative proposals which this Conference has recommended.

The so-called "omnibus judgeship bill" to provide additional district and circuit judgeships is already under consideration by Congressional Committees and we hope for early enactment of this necessary legislation.

Proposals which give recognition to the fact that improved judicial administration will aid immeasurably in this important endeavor are the bills to provide for relinquishment by Chief Judges of their administration duties at age seventy and to provide a roster of "Senior Judges" from judges who wish to take advantage of the retirement provisions of the law and yet are willing and able to undertake special judicial duties upon assignment by the Chief Justice.

We also support the proposal to authorize the appointment of an additional judge when the Judicial Conference certifies that a judge eligible to retire is either mentally or physically disabled. This would in substance replace 28 U.S.C. § 371(c) which was inadvertently repealed.

The Department has also endorsed the Conference recommendation to provide for district court representation on the Judicial Conference and the legislation to make judicial per diem comparable to that now authorized for many executive positions.

In addition to the Conference recommendations, the Department is supporting two legislative proposals which the President mentioned in his recent Budget message. One would provide in substance that whenever any district judge appointed to hold office during good behavior attains the age of seventy years and neither resigns nor retires, and the Judicial Conference of the United States certifies to the President that there is need for an additional judge in that district, the President may appoint, by and with the advice and consent of the Senate, an additional judge for the district.

The other would provide that the Congress extend an invitation to the Chief Justice to address it in person on the state of the Judiciary soon after the beginning of each session of Congress. We are firmly convinced that the Judicial Branch needs a spokesman who can present effectively the immediate and long range requirements of the courts and that the Chief Justice is the best qualified person to speak persuasively and authoritatively on this subject. We invite attention of the Judicial Conference to these two proposals.

I also wish to call to your attention a matter relating to national defense emergency planning. 28 U.S.C. § 141 provides that "Special terms of district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders, pursuant to rules approved by the judicial council of the circuit." (Emphasis added.) The revisor's note states that judicial council approval was included in this provision to insure uniform practice among the courts for convening special terms. 28 U.S.C. section 142 provides that "Court shall be held only at places where Federal

quarters and accommodations are available or suitable quarters and accommodations are furnished without cost to the United States."

The premise underlying national defense emergency planning is to insure the availability and use of existing civil authority in the event of a national emergency to the maximum extent possible consistent with the factual situation presented. Unquestionably, the continued availability of the Federal courts may be of the greatest importance. Yet it is possible to envisage a situation wherein the courts in a particular district might not be able to convene at their regular place of business.

We are advised that at the present time the judicial councils have not promulgated rules to meet this possible contingency. In the event such authority was required, it might not be possible to convene the councils for that purpose. In these circumstances the Judicial Conference may wish to suggest to the judicial councils the issuance of appropriate stand-by rules. Such rules might include authority to permit special sessions of court during an emergency anywhere within the district. In addition, the courts may wish to determine in advance appropriate alternate locations pursuant to section 142.

I turn now to the special question concerning the examining functions which the Department of Justice has been performing for the Judicial Branch even since the establishment of the Administrative Office of the United States Courts. While I recognize that we are all perhaps equally familiar with this matter, it may be useful to set forth briefly the factual background out of which this procedure emerged and why we are seeking at this time Judicial Conference approval of a transfer of these functions to the Administrative Office.

Prior to the creation of the Administrative Office of the Courts, the responsibility for supervising the administration of the Courts and for securing judicial appropriations was vested in the Attorney General. With the enactment of the Administrative Office Bill, it was possible to transfer with relative ease and within a short period of time most of the functions which we had theretofore performed. However, because of budgetary problems, it was apparently not possible to make an immediate transfer of the task of inspecting or examining offices in the court system. Since it was necessary for the Department to maintain an inspection unit for the United States Attorneys' and Marshals' offices, and because of the budgetary problem involved, it was agreed that the Department would continue to examine the judicial posts for an interim period. This fact is reflected in the Report of the Judicial Conference of January 22, 1940, as follows:

"With respect to the supervision of the finances of clerks and other officers of the courts. -- Resolved, That the Conference is of the opinion that the supervision of the finances of the clerks and other officers of the courts is within the function of the Administrative Office, but that for the time being, (underscoring supplied) due to the fact that appropriations are not adequate to provide for that purpose, it is the desire of the Conference that the field examinations shall be conducted by the Department of Justice as heretofore, and that the Director be requested to notify the Department of Justice to that effect, and also to request that the reports of its examinations be communicated to the Director."

At the September 1944 session, the Conference considered a recommendation from the Judicial Conference of the Seventh Circuit that personnel examining the offices of the courts be transferred from the Department of Justice to the Administrative Office but decided to take no action on the recommendation.

In 1950, Congress enacted legislation (64 Stat. 380; 5 U.S.C. 341(b)) which "empowered" the Attorney General to investigate the official acts, records and accounts of the clerks of courts, probation officers, referees, trustees and receivers in bankruptcy, commissioners, and court reporters "at the request of and in behalf of the Director of the Administrative Office." This legislation was enacted solely in order to provide that requests for appropriations from year to year would not be withheld on a point of order. The language contained in this provision makes it perfectly clear that there has been no change in the view that the function was properly one for the Director of the Administrative Office. Thus while we are expressly authorized to make such investigations the law does not require it.

The Administrative Office was created because it was generally recognized that under the doctrine of separation of powers it was wholly inappropriate for the Department of Justice to be responsible for the administration of the Judicial Branch of the Government. Certainly the present procedure under which Departmental officials are called upon to examine the records and books and official acts of court personnel comes within this general principle. The duties vested in the Director of the Administrative Office by 28 U.S.C. 601 respecting supervision, examination, and auditing of vouchers of court personnel make it clear that Congress did not contemplate that the Department should continue to exercise this function. Indeed, except for the budgetary problem involved, which tended through inadvertence to perpetuate itself, presumably this function would have been transferred out of the Department long ago.

Therefore, our primary reason for seeking a transfer of these examining duties to the Administrative Office is our strong belief that it

is inappropriate for the Department to supervise and examine the activities of a separate branch of the Government. In addition, however, we are currently undergoing a reorganization which will result in the disbandment of the unit which heretofore has performed examinations, including that of the courts. It is this latter aspect which results in this matter being brought to your attention at this time.

We have discussed this matter with Mr. Whitehurst with a view to transferring, in conjunction with this reorganization, the responsibility for court inspections to the Administrative Office. It has been determined that 67.2% of the time of the present examiners is consumed in court examining work. This represents approximately \$75,000 of the appropriation allotted to the overall examining function. Subject to Judicial Conference approval, it was proposed that a transfer of this function might be effectuated by requesting the Senate Appropriations Committee to reduce our appropriation and increase the Judicial appropriation in the above amount in the pending budget for the fiscal year 1958. If this could be accomplished, the surplus experienced personnel in our examining unit could be transferred to the Administrative Office as of July 1, 1957.

For the reasons outlined above, we respectfully seek Judicial Conference approval of this action.

Finally, in my report to the Judicial Conference of last September, I indicated that the Department of Justice would undertake a comprehensive study of sentencing procedures in criminal cases in the Federal district courts. This matter is currently receiving top priority consideration by the Department and by the Advisory Corrections Council on which both the Chief Justice and the Attorney General have designated members.

The basic shortcoming of the present sentencing system is the lack of a uniform sentencing philosophy. This has resulted in disparate sentences being imposed even where by comparison the crime and the background of the criminal are substantially similar. Such a result is unfair and poses serious morale problems. Therefore, in consultation with representatives of the courts we are attempting to formulate a program (both legislative and administrative) which will provide for greater uniformity in sentences without at the same time withholding from the sentencing authority the power to fit the punishment to the criminal and not necessarily to the crime.

Our study is by no means complete, and for this reason I am not in a position to comment on the specifics of any recommendation. However, we plan in the near future to submit a draft of legislation for your consideration.