JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 6, 2018

Honorable Paul Ryan
Speaker
United State House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I write on behalf of the Judicial Conference of the United States, the policy-making body for the Federal Judiciary, concerning H.R. 6755, the Judiciary Reforms, Organization and Operational Modernization Act of 2018 (Judiciary ROOM Act) which was introduced on September 10, 2018, and ordered to be reported by the House Committee on the Judiciary on September 13, 2018. The bill contains provisions for new federal judgeships that the Judiciary has sought. The Judicial Conference of the United States opposes many of the other provisions in the bill, however, and therefore the Judiciary opposes enactment of H.R. 6755 as it is presently constituted.

Unfortunately, the Federal Judiciary was given little advance notice of the bill and therefore was unable to review the bill or express its views prior to consideration of the bill at the markup by the Judiciary Committee. Several of the bill's provisions had not appeared in any previous legislative proposals and were revealed to us just days before the markup. Since the time of the markup, the Judicial Conference has conducted a preliminary review of the proposed legislation. We appreciate the opportunity to comment formally on the bill's substance.

In June 2017, the Judicial Conference recommended to Congress the addition of five permanent judgeships to the courts of appeals, 52 permanent judgeships to the district courts, as well as the conversion of eight existing temporary district court judgeships to permanent status. The Judiciary continues to support this recommendation as a stand-alone measure.

The Judicial Conference opposes other provisions in the bill, including: Section 201, which would require the Judicial Conference to issue a code of conduct that applies to both judges and Supreme Court justices; Section 203, which would require judges and justices to undergo non-private medical examinations; and Section 301, which would mandate live video and audio streaming of all appellate court proceedings, unless the courtroom is closed to the public. The bill as passed by the Judiciary Committee also contains provisions whose purpose and effect are unclear, and appears to contain several drafting errors; the Judicial Conference continues to study these provisions. A section by section review of the bill as ordered reported by the Committee on the Judiciary follows.

Judgeships

Section 101 of the Judiciary ROOM Act contains the request of the Judicial Conference regarding district court judgeships. As reported out of Committee, however, the legislation fails to include the Judicial Conference request for five additional circuit judges, and contains a delayed effective date of January 22, 2021 for this section. The recommendation of the Judicial Conference addresses current and long-standing needs, not future projected requirements. Furthermore, the delay in conversion of temporary judgeships, which now have lapse dates in 2019, could put those judgeships at risk if a vacancy occurs between the current lapse dates and the future effective date.

Section 101 also includes a provision for the designation of an official duty station for one district judge in Bakersfield, California. This statutory designation of a specific official duty station for a district judge would be unprecedented. The designation of residence and place of abode for district judges is specified in 28 U.S.C. § 134, while the duty station for a district judge is governed by 28 U.S.C. § 456(d). These statutory provisions provide the courts with the necessary flexibility to meet changing circumstances while ensuring the efficient administration of justice, and we urge that this statutory framework not be altered.

Realignment of Judicial Districts

Section 102, to realign judicial districts in North Carolina, is legislation which was not sought by the Judicial Conference. The Judicial Conference has expressed no opinion on this section. Section 102(c) purports to be a conforming amendment. The language of that subsection, however, refers to unrelated topics and thus appears to be a drafting error which should be deleted.

Section 103 is a provision to realign the Eastern District of Arkansas. This is legislation which the Judiciary sought. A minor technical amendment is necessary for clarification. In the listing of counties of the Central Division, a comma should be inserted between "Pope" and "Prairie." These are separate and distinct counties.

Courthouses

Section 104 is a provision related to a construction project in San Diego, California. The Southern District of California is seeking to add four additional chambers and two courtrooms in the James M. Carter and Judith N. Keep U.S. Courthouse in San Diego to accommodate additional judges who are replacing active judges taking senior status. The Judicial Conference has no formal position on the language of the proposed section, but the Conference's Committee on Space and Facilities did approve a 2017 request by the court to fund this project. This need complies with all Judicial Conference-approved courtroom sharing policies and space planning protocols.

Unfortunately, the Judiciary is limited by a prior Committee Resolution adopted by the House Committee on Transportation and Infrastructure, and similarly one adopted by the Senate Committee on the Environment and Public Works, which places a ceiling on the number of

chambers and courtrooms at the San Diego courthouse complex. That ceiling has been reached. Therefore, the additional chambers and courtrooms cannot be constructed under the existing authorization. Section 104 would negate the previously imposed limitation and allow this construction project to proceed.

Section 105 directs the "Director of the Administrative Office of the Courts [sic]" to "maintain a courthouse in Harrisonburg, Virginia." This section presents a serious issue of implementation because the Director of the Administrative Office of the United States Courts has no authority over real property and has no ability to maintain a courthouse in Harrisonburg. The General Services Administration (GSA), as the landlord for the civilian federal government, through its Public Buildings Service (PBS) and property managers, acquires space on behalf of the federal government through new construction and leasing, and acts as a caretaker for federal properties across the country. Furthermore, Harrisonburg, Virginia is designated in 28 U.S.C. § 127(b) as a place of holding court. A federal courthouse is already in existence in Harrisonburg where a magistrate judge sits. There has been no indication by the courts – the Western District of Virginia or the United States Court of Appeals for the Fourth Circuit – to change the status quo. Accordingly, this section is not only impossible to implement but appears to be unnecessary.

Code of Conduct

Section 201 directs the Judicial Conference to issue a code of conduct which applies to each justice and judge of the United States. The Judicial Conference opposes Section 201 of H.R. 6755, or similar legislation, to the extent it requires the Judicial Conference to issue a code of conduct for each justice and judge of the United States because it is inappropriate for the Judicial Conference to design or administer such a code for justices (the Judicial Conference does not oversee the Supreme Court and does not have expertise to craft a code for their use), and it is redundant to authorize such a code for judges, because one already exists.

Moreover, regarding the application of a code of conduct to the Supreme Court, Chief Justice Roberts in his 2011 Year-End Report on the Federal Judiciary stated clearly that "[a]ll Members of the Court do in fact consult the Code of Conduct [for United States Judges] in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for all other federal judges...."

Recusal

Section 202 relates to recusal of Supreme Court justices. As previously noted, the Judicial Conference has no authority to speak for the Supreme Court and thus has no formal comment regarding this section.

As with the Codes of Conduct, Chief Justice Roberts addressed the issue of recusal by justices of the Supreme Court in his 2011 Year-End Report on the Federal Judiciary. He stated, "The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court."

Medical Examinations

Section 203 imposes an unfunded mandate for medical examinations for each justice or judge of the United States and would require doctors conducting such examinations to submit any findings of a judge's pertinent health condition to the appropriate chief judge or the Chief Justice. Again, the Judicial Conference does not speak to the applicability of this section to justices of the Supreme Court. The Judicial Conference opposes Section 203 of H.R. 6755, or any other similar legislation requiring Article III judges to undergo medical examinations whose results are required to be disclosed, because it would undermine judicial self-governance (particularly with respect to existing judiciary health and wellness efforts), discourage service by senior judges – who make significant contributions to managing our caseload – and undermine existing law addressing judicial disability.

This provision has never been the subject of any Congressional hearings, is not needed, would likely be ineffective, and could be counter-productive. The bill is unnecessary because, among other reasons, the Judiciary already has effective procedures under law and through its self-governance for identifying and addressing judicial disability. The provision would likely be ineffective since the term "may impact" is overbroad and imprecise. Physicians do not necessarily know whether any particular condition would affect a judge's work (with or without remediation). This could lead to an unfair and inappropriate conclusion that a judge is unable to perform his or her duties. In contrast, current procedures are centered on the principle that those who routinely and closely examine a judge's work are best positioned to identify an impairment, including impairments that are neither physical in nature nor due to age. The provision could be counter-productive by both undermining the existing statutory scheme for addressing disability of judges under 28 U.S.C. § 372, which includes provisions for both "voluntary" and "involuntary" disability and by discouraging continuation of service. A system of mandatory medical checks, with attendant risk of revealing embarrassing but ultimately irrelevant medical details, could discourage judges from participating in existing health and wellness programs. Furthermore, the provision would discourage judges, particularly senior judges – who carry a substantial workload for the Judiciary – from continuing to serve at all.

Internet Streaming of Video and Audio

Section 301 imposes an unfunded mandate for internet streaming video of proceedings of each hearing of a court of appeals and requires internet streaming of audio for oral arguments before the Supreme Court. The Judicial Conference has no authority to speak to the provisions relating to the Supreme Court. We note, however, that in response to an inquiry, on March 21, 2014, the Supreme Court of the United States, through its Office of Public Information, stated "the audio recordings of all oral arguments are available free to the public on the Court's website, www.supremecourt.gov, at the end of each argument week. The written transcripts of oral argument are available on the Court's website on the same day an argument is heard."

As pertaining to the courts of appeals, in 1996 the Judicial Conference authorized each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt. The Conference also

strongly urged each circuit judicial council to adopt an order reflecting its decision to authorize the taking of photographs and radio and television coverage of appellate court proceedings. Section 301 thus is unnecessary for the courts of appeals.

We note that similar legislative proposals have permitted a case by case review of the appropriateness of live media coverage or internet streaming. For example, one proposal allows the presiding judge to determine in writing, on the motion of any party to the proceeding or *sua sponte*, that allowing such photographing, recording, broadcasting, televising, or streaming would violate the due process rights of a party to the proceeding or is otherwise not in the interests of justice.

Advisory Committee

Section 302 establishes an Advisory Committee for Access to Court Broadcasts and Case Information which shall "advise the Federal courts" and be appointed by the "Executive Director of the Administrative Office of the Courts." As a technical matter, the correct title is "Director, Administrative Office of the United States Courts." Furthermore, advisory committees generally do not advise the federal courts *per se*, but rather advise the Judicial Conference, its Committees, and/or the Director of the Administrative Office of the U.S. Courts. Unless this provision were changed to conform to this practice, it is not clear how the Judiciary would be able to implement this section.

PACER

Section 303 requires each written opinion issued by a Federal court to be stored on the Public Access to Court Electronic Records (PACER) system in certain undefined electronic storage and citation formats. It also creates a pilot project for online accessibility to exhibits filed in federal cases. The Judicial Conference has not yet fully studied the implications and workability of these unfunded mandates and has no comment to provide at this time. As a technical matter, the PACER system was not established pursuant to section 205 of the E-Government Act of 2002, as is indicated in Section 303(a)(1). The PACER system predates the E-Government Act of 2002 by more than a decade.

In closing, we reiterate our disappointment in the way this legislation was brought forward without meaningful notice to or consultation with the Judiciary – voiced earlier by letter to the Chairman of the House Judiciary Committee and in person at the Judicial Conference of the United States on September 13, 2018. We are concerned with not only the manner in which this legislation was introduced and moved through committee, but also that many of the provisions of the Judiciary ROOM Act have and will unnecessarily create more tension between the branches of government. The public interest would be better served by more discussion among members of the Federal Judiciary and the Congress. We respectfully reiterate our request that the legislation as presently drafted not be advanced.

If we may be of additional assistance to you, please do not hesitate to contact me or the Office of Legislative Affairs, Administrative Office of the United States Courts at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

cc: Honorable Bob Goodlatte
Honorable Jerrold Nadler
Honorable Darrell Issa
Honorable Hank Johnson

Identical letter sent to: Honorable Nancy Pelosi
Honorable Kevin McCarthy