COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-129874

September 26, 1984

The Honorable Jeremiah Denton
Chairman, Subcommittee on Security
and Terrorism
Committee on the Judiciary
United States Senate

RELEASED

Dear Mr. Chairman:

This is in response to a March 2, 1984 joint letter from you, Senators East and Symms, and a May 4, 1984 letter from you, requesting this Office to determine whether the Federal judiciary is improperly using Federal funds to lobby Congress. You cited information contained in two newspaper articles as possibly constituting evidence of improprieties on the part of Federal judges in utilizing Federal funds to influence legislation pending before Congress. We obtained a report from the Director, Administrative Office of the United States Courts concerning the issues raised in your letter. On the basis of our review of the allegations and the information contained in the Administrative Office Report, we have not found any evidence of violations of anti-lobbying statutory restrictions.

The primary allegations of lobbying were contained in a Friday November 4, 1983, Los Angeles Times article entitled "U.S. Judges Now Court Legislators" by Jim Mann, a Times staff writer. The article states that Federal judges are becoming more interested in influencing legislation through such measures as individual direct contacts with their congressional representatives, conducting grass roots campaigns, and forming trade associations.

The Times article points out that Federal judges have two organizations that keep track of legislation of concern to the judiciary and represent their interests in Congress. The organizations are the Judicial Conference of the United States and the Federal Judges Association. The article recognizes that the Judicial Conference was created by Congress as an official organization within the Federal judiciary.

One statute that prohibits Federal officers and employees from using Federal funds for lobbying activities is found in 18 U.S.C. § 1913, entitled "Lobbying with appropriated moneys." It provides as follows:

"§ 1913. Lobbying with appropriated moneys

"No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deemed necessary for the efficient conduct of the public business.

"Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

To our knowledge, there has never been a prosecution under this statute. Moreover a review of the case law indicates that only a few Federal court decisions have cited the statute. See for example, National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973) where the court denied a motion to dismiss a cause of action brought to enforce, 18 U.S.C. § 1913 and American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976) and American Trucking Association v. Department of Transportation, 492 F. Supp. 566 (D.D.C. 1980), where the courts denied injunctions against these agencies distributing publications favoring deregulation of the industries represented by the plaintiff associations.

Since the above statute contains fine and imprisonment provisions, its enforcement is the responsibility of the Department of Justice. Six years ago, the Attorney General requested his legal counsel to render an opinion on the propriety of comments by judicial officers on legislation directly

affecting the judiciary in light of the restrictions contained in 18 U.S.C. § 1913. The Memorandum Opinion for the Attorney General (Applicability of Anti-lobbying Statute (18 U.S.C. § 1913) - Federal Judges, 2 Ops O.L.C. 30, 31 (1978)) stated that:

> "The limited legislative history demonstrates that its enactment was spurred by a single, particularly egregious instance of official abuse -- the use of Federal funds to pay for telegrams urging selected citizens to contact their congressional representatives in support of legislation of interest to the instigating agency. See 58 Cong. Rec. 403 (1919). The provision was intended to bar the use of official funds to underwrite agency public relations campaigns urging the public to pressure Congress in support of agency views."

The Department of Justice, in analyzing the meaning of the exception for official views, concluded that:

> "The thrust of this language is to recognize the danger of ultra vires expressions of individual views in the guise of official statements. Congress did not define the scope of the term 'official channels'; rather, it recognized the need for monitoring the opinions expressed under color of office in order to insure a consistent agency position. This difficulty is not removed by a direct solicitation of an individual official's views by a Member of Congress.
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> "In light of the context in which the language was adopted, it is particularly inappropriate to engage in legalistic arguments as to whether a Federal judge, who lacks any direct superior, speaks 'through proper channels' whenever the judge takes a position with respect to matters of judicial concern. Instead, it must be recognized that Congress' intent was to leave to the other branches of government the determination of what internal checks and methods of clearance would be appropriate. Id. at 32."

The Department of Justice has interpreted the "official channels" exception in 18 U.S.C. § 1913 as permitting Federal

judges to expend appropriated funds for the purpose of contacting members and committees of Congress to express their views on legislative issues. Under this interpretation of the statute, judges would be permitted to either utilize the Legislative Affairs Office of the Judicial Conference to contact members or to contact the members directly to express their views on legislation of interest to the judiciary. Unlike other Federal officials and employees, Federal judges have no direct superior to prescribe official channels of communication to express their views to Congress. Accordingly, each Federal judge may arguably act as an agency spokesperson and express his or her view on legislation that would have an impact on the judiciary.

Since the early 1950's, various appropriation acts have contained provisions prohibiting the use of appropriated funds for "publicity or propaganda" purposes to influence legislation. The acts appropriating funds for the Federal judiciary do not contain any such restrictions. On the other hand, the annual Treasury, Postal Service, and General Government Appropriation Act, provides:

> "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress." (Emphasis added.)

The above-quoted provision applies to the use of any appropriation "contained in this or any other Act." Thus, it is conceded by the Administrative Office of the United States Courts to be applicable to the use of appropriated funds by the Federal judiciary, which receives its appropriations in the annual Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act.1/

In interpreting "publicity and propaganda" provisions such as the one quoted above, this Office has recognized that every Federal agency has a legitimate interest in communicating with

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1/ The annual Treasury Department et al. appropriation act for fiscal year 1984 (H.R. 4139) did not pass the Senate and was incorporated by reference in Pub. L. No. 98-151, 11/14/83 a 97 Stat 964 fiscal year 1984 continuing resolution. H.R. 4139 did not contain the anti-lobbying appropriation restriction quoted above. Hence the restriction was not applicable for most of fiscal year 1984.

the public and with Congress regarding its policies and activities. This interpretation of the "publicity and propagenda" provision applies to the Federal judiciary as well as to agencies in the other branches of Government. If an executive branch agency or the Federal judiciary is affected by pending legislation, discussion by officials of the issues raised by the legislation will necessarily, either explicitly or by implication, refer to it and will presumably be either in support of or in opposition to it. An interpretation of the above-quoted provision which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by Government officials on the policies of their agencies, a result we do not believe was intended.

In our view, Congress did not intend, by enactment of measures such as the one quoted above, to prohibit Government officials, including Federal judges, from expressing their views on pending legislation. Rather, the above-quoted prohibition applies primarily to expenditures for grass roots lobbying campaigns involving appeals addressed to members of the public suggesting that they contact their elected representatives to indicate support of or opposition to pending legislation, or to urge their representatives to vote in a particular manner. The foregoing general considerations form the basis for our determination in any given instance of whether there has been a violation of the anti-lobbying restriction contained in the annual Treasury, Postal Service, and General Government Appropriation Act. 56 Comp. Gen. 889 (1977) and 60 Comp. Gen. 423 (1981).

The following discussion of the allegations contained in the Times article and the issues raised in the request letter is based on our interpretation of the anti-lobbying appropriation restriction, discussed above. In summary, the Times article indicates that Federal judges have involved themselves in the following activities in an attempt to influence legislation.

1. The Judicial Conference has established a legislative affairs office to provide liaison with the Congress.

2. Federal judges have established the Federal Judges Association, a private membership organization, designed to promote the legislative objectives of Federal judges.

3. Federal judges, individually, have been contacting Members of Congress in an attempt to

influence legislation in which they are interested.

4. The Federal Judges Association is attempting to organize a grass roots movement.

The Judicial Conference is the policy making body of the Federal judiciary and acts under the authority contained in 28 U.S.C. § 331. The Conference is vested with the primary responsibility for formulating comments and recommendations on legislation affecting the administration of justice. The Conference formulates its policy recommendations through a system of eight standing and seven special committees. Responses prepared by these committees to congressional inquiries are coordinated by the Administrative Office of the United States Courts. The Chief Justice of the United States, as presiding officer, formally communicates recommendations and proceedings of the Conference to the Congress biannually.

Preliminary analyses of proposed legislation which may impact upon the judiciary or improve the administration of justice are performed by members of one of the Conference committees. The chairperson of a committee is authorized to present the views of the Judicial Conference on matters within the jurisdiction of his or her committee or to delegate that authority.

The Legislative Affairs Office within the Administrative Office, which is staffed by four attorneys and three supporting personnel, is responsible for responding to congressional requests, informing the Conference and its committees of the status of legislation affecting the judiciary, and coordinating the preparation of technical legal advice and impact assessments of pending legislation on the judiciary.

The Administrative Office has advised us that with rare exceptions, the Conference limits its comments and recommendations to issues directly affecting the administration of justice or the operation of the Federal court system. That office has further advised us that the Conference has taken action to insure that appropriated funds are not expended for non-official purposes. In this regard, the Conference adopted regulations in September 1982 that provide:

"A judicial officer may be reimbursed for travel to testify before a Congressional Committee on behalf of the Judiciary only if he has been designated to do so by the Presiding Officer of the Judicial Conference, a chairman of a

> Judicial Conference Committee, or the Director of the Administrative Office. No reimbursement may be made for appearances before a Congressional Committee or subcommittee if a judicial official is representing a private group or association, or himself, nor may reimbursement be made for appearances in cases in which a judge solicits a Congressional panel or Member to obtain an invitation to testify for purposes of expressing his or her personal opinions. In the latter two instances a judicial officer may choose to testify, but reimbursement from funds appropriated for the administration of the judicial branch may not be made. Proceedings of the Judicial Conference of the United States, September 1982, at 75."

The Administrative Office states that it is unaware of any instances in which a Federal judicial officer or employee has expended Federal funds in violation of the anti-lobbying statutes or judicial conference regulations.

The Administrative Office points out that the Judicial Conference has occasionally expended appropriated funds to express its views on pending legislation as follows:

> "* * * Funds have occasionally been expended in explaining Judicial Conference views on legislation in response to legitimate inquiries from the organized bar where proposals under discussion might have an impact upon the federal court system. Those occasions have also, of course, permitted the bar to place before the Conference its views, which the Conference should consider in formulating recommendations. That mutual 'information process' has never involved a request by the Judicial Conference for public support of legislation comporting with the Conference's recommendations. The Judicial Conference and this Office will not condone activity that goes beyond informing the Congress and the legal profession of the Judiciary's views on the scope, terms and impact of pending legislation.
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> "In addition to recommendations made by the Conference, individual judges often have a duty to inform the Congress of problems peculiar to their districts or circuits. For example, the Judicial Conference has historically deferred to district courts on matters of particular local

concern, such as recommendations concerning statutorily designated places of holding court. The impact of any such proposal upon a specific court is best known to the judges who serve that particular district court and the Representatives and Senators elected from that particular state. Each judge's oath of office and Canon 4(B) sustain the conclusion that they have a duty to communicate their concern to Members of Congress concerning proposals that affect the administration of justice in their own courts."

As mentioned earlier, we have not construed the anti-lobbying appropriation restriction as prohibiting public officials from expressing their views on pending legislation either to the Congress or to the public. Accordingly, we do not believe that officials of the Judicial Conference are prohibited by statute from expending appropriated funds to explain their views on pending legislation either to the Congress or to the public. On the other hand, the anti-lobbying restriction does apply to expenditures for grass roots lobbying campaigns involving direct appeals addressed to the public exhorting them to contact Members of Congress to indicate their support of or opposition to pending legislation. There is no evidence presented by the referenced articles that appropriated funds have been used by officials of the Judicial Conference for grass roots lobbying activities.

On page 2 of the request letter, the point is made that 28 U.S.C. § 331 requires the Chief Justice to "submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." It is argued that this provision should be interpreted as authorizing only the Chief Justice to recommend legislation. Under this strict construction, the Chief Justice would personally be required to submit recommendations for legislation and other Federal judges would be prohibited from expressing recommendations on legislation.

Based on a review of the provisions of the entire statute and its legislative history, we find nothing to support such a rigid interpretation. We believe Congress intended to make the Chief Justice, as the senior official in the judicial branch and Chairman of the Conference, responsible for submitting the annual report of the Conference and its recommendations for legislation. However, this does not mean that he is precluded from delegating portions of this function to other members of the Conference and to the Administrative Office so long as he

remains responsible to insure that the requirements are accomplished. The recommendations are not those of the Chief Justice alone, but are a product of the collective effort of the members of the Conference.

Congressional committees considering proposed legislation on subjects of interest to the judiciary often request members of the appropriate Conference committee, as expert witnesses, to provide testimony on the matters contained in such legislation. The Administrative Office of the Courts states that the interaction between the Judicial Conference and the Congress is so extensive that it would be impossible for the Chief Justice to personally satisfy these congressional requirements and to accomplish his other responsibilities. For these reasons, we agree with the Administrative Office that the provisions of 28 U.S.C. § 331 should not be construed as precluding members of the Judicial Conference from expressing their views on proposed legislation that affects the judiciary.

With regard to the establishment of the Federal Judges Association, that organization is a private, voluntary membership organization with no official connection to the Federal Government. To our knowledge, it receives no appropriated funds. The June 13, 1981 Washington Post article "Judges Act to Organize for Salaries, Benefits" indicates that the financial support of the Association is primarily derived from membership dues. Although the Association engages in grass roots lobbying activities, presumably with the assistance of its member judges, we have not uncovered any evidence that Federal judges use their official time, clerical staff, office supplies, or facilities in support of this Association objective, which would involve the use of Federal funds for an illegal purpose. Inasmuch as no Federal funds are involved, the anti-lobbying restrictions would not be applicable to the Association and similar organizations.

Finally, there is the issue of Federal judges directly contacting Members of Congress in an attempt to influence pending legislation. Although we have no evidence that any such direct contacts have occurred, the Times article and the request letter raise the possibility that Federal judges are expending appropriated funds through the use of their office telephones, office equipment and secretarial staffs to telephone or write letters to their congressional contacts expressing their views on legislation. As explained earlier, we have never construed the anti-lobbying appropriations restrictions as prohibiting executive agency officials from expressing their views on legislation either directly to Congress or to the public. We believe this exception should apply to Federal

judges on the same basis as it applies to executive agency officials. Accordingly, we do not believe that a Federal judge would be prohibited by the above-quoted anti-lobbying appropriation restriction from expending appropriated funds to directly contact a Member of Congress and express his or her views on pending legislation. On the other hand, the appropriation restriction would prohibit a Federal judge from expending Federal funds, by utilizing his official time and office facilities, to organize a grass roots campaign to influence legislation. However, we have no evidence that any Federal judge has expended Federal funds to exhort the public to contact Members of Congress in an attempt to influence legislation. While the Times article indicates that the Federal Judges Association refers to itself as a grass roots movement, it does not expend Federal funds on such activities. Consequently, it does not come within the ambit of the appropriation restriction.

In summary, our review of the Times article and an administrative report that we obtained from the Administrative Office of the Courts does not reveal any evidence that Federal judges have been violating applicable anti-lobbying appropriation restrictions.

Sincerely yours,

for Comptroller General
of the United States