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

B-178360

October 31, 1973

The Honorable Rowland F. Kirks, Director
Administrative Office of the
United States Courts

Dear Mr. Kirks:

Your letter of April 2, 1973, with attachments, requests our decision as to whether appropriations contained in the annual "Judiciary Appropriation Act" for "travel and miscellaneous expenses not otherwise provided for, incurred by the judiciary," are available to pay certain litigation costs, and attorneys fees, incurred in representing or defending Federal judges and other Federal judicial officers or entities in the circumstances considered below. We have had several discussions concerning this matter with members of your staff.

A large, and still growing, number of cases have been brought against individual judges, district courts, and judicial councils and against a variety of judicial officers, including referees in bankruptcy, clerks, United States magistrates, public defenders, court executives, officers of the Administrative Office of the United States Courts and foremen of juries. We understand that the cases causing the most concern involve judges sued, in their official capacity, by a petitioner or by the United States seeking a writ of mandamus pursuant to Rule 21 of the Federal Rules of Appellate Procedure (FRAP) and 28 U.S.C. 1651, collaterally attacking the judges' rulings in original actions. See, for example, Colgrove v. Battin, 41 LW 5025 (June 21, 1973), and United States v. Ferguson, 448 F.2d. 169 (1971). Your General Counsel, in a memorandum dated February 9, 1973, to the Deputy Director of your Office stated:

> "Surely it would be unconscionable to expect judges and courts sued in their official capacities to support the defense by private contributions of the judges. It would be equally unconscionable for a judge to have to rely on the attorney of a private litigant to represent him and to pay the considerable cost of transcription, printing and the attorney's travel involved in an appeal on behalf of the court being sued."

The general question you raise, as stated in your letter, is as follows:

> "When a Federal judge or other judicial officer is sued in his official capacity and representation is furnished by private counsel on request, rather than by the Department of Justice (pursuant to 28 U.S.C. 516-519, 547(2)), can the expenses of litigation be paid by the Administrative Office of the United States Courts from the Travel and Miscellaneous Expenses appropriation of the Judiciary Appropriation Act?"

In addition, you ask the following specific questions with respect to the representation of judicial officers:

> "(1) If we can apply the Judiciary Appropriations to payment of litigation costs in some cases involving judicial officers, what specific categories of cases are involved?
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> "(2) In addition to general litigation costs, would it be permissible to pay a minimal fee to an attorney representing a judge, court, judicial officer, judicial council, etc., where gratutious representation is not otherwise available?
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> "(3) If the Judiciary Appropriation is not available for payment of costs described in questions 1 and 2 above, is there any other source of payment where services of counsel furnished by the Department of Justice are not available either because of a conflict of interest, or for any other valid reason?
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> "(4) Would the same answers to the above questions apply to suits against Federal public defenders appointed pursuant to 18 U.S.C. 3006(h) whom the Department has previously declined to represent because of the inherent conflict of interest involved?"

The general rule is that, in the absence of specific statutory authority for departments and establishments of the Government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the Government, to institute, prosecute and defend actions in behalf of the United States in matters involving court proceedings and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings. See 44 Comp. Gen. 463 (1965) and 46 id. 98 (1966).

In a letter to you of January 31, 1973, the former Attorney General, Richard G. Kleindienst, set forth the circumstances under which the Department of Justice (Department) will assume the burden of representing judicial officers. First, he stated, the Department will provide representation where the acts which are the basis of the suit are within the scope of the defendant officer's authority and where the only relief sought is money damages against the defendant personally. It is his position, however, that when representation is requested in collateral proceedings which are in the nature of appeals to overturn a decision of the judicial officer rendered in favor of one party or another, and the Government is not a party to the litigation, the result of the Department's furnishing representation in such a situation amounts to the Department's defending the position of one or the other private litigants. The former Attorney General further stated that:

> "In our view, when no personal relief is sought against the judicial officer, such officer is no more in need of a personal defense than he would be if an appeal were taken from any of his appealable rulings. Nor is there any impropriety in counsel for one of the private litigants representing the judicial officer, as if he were defending an appeal from the officer's ruling."

Accordingly, the Department will not provide representation in such cases. Where a collateral suit against a judicial officer in the nature of an appeal also seeks personal damages against the officer, the Department intends to evaluate the nature of the claim to determine if the money claim is frivolous and make its representation decisions on that basis.

The former Attorney General stated that the Department cannot furnish representation to a judicial officer in a situation where the Department's interests collide with those of the judicial officer, such as in a mandamus action instituted against a judge by the Department. He further stated that the Department could not furnish a special attorney in those cases where it could not on its own represent the judicial officer.

In addition, he stated, however, that the Department will file amicus statements in any type case where it will be helpful to the court to know the Government's position or for a relatively impartial statement of what the law is or should be. The former Attorney General stated that whenever the Department furnishes an attorney to represent a judicial officer, it will bear the costs attendant to the representation; however, he concluded that the Department cannot bear the costs of litigation or the fees of private counsel retained by a judicial officer.

We have been informally advised by members of your staff that in those situations, where judicial officers have felt that representation was required, local bar associations were frequently asked to provide attorneys without compensation and that the expenses of such representation, including in some cases attorneys' fees, had to be borne by the judicial officers or their attorneys or by the bar associations.

In his memorandum your General Counsel points out that while many of the cases involving the procedure of suing a judicial officer to test collaterally a legal issue arising out of the original litigation are frivolous, some--such as Colgrove v. Battin, supra., testing the constitutionality and legality of a local rule of court (similar to that adopted by a majority of the Federal district courts) providing for a six-member jury in civil cases--involve basic and novel issues. Moreover, it is your Office's position that even where the suit is frivolous, some pro forma submission should be made to the court. As we understand it, such a submission is not necessarily required to protect the judicial officer in the Courts of Appeals, since Rule 21 of FRAP provides that the failure of an officer to appear will not result in his losing by default; however, in the absence of an appearance in the Courts of Appeals, the judicial officer is precluded by the applicable rules from appealing an adverse decision to the Supreme Court of the United States. In this connection we suggest your Office may wish to consider proposing a change in the applicable rules which will allow an appeal to the Supreme Court by a judicial officer-defendant without the necessity of an appearance in the Court of Appeals.

In summary, there are numerous cases in which judicial officers are being sued in their official capacities as to which the Department of Justice, for a variety of reasons, has determined that it will, or can, not provide representation. While your Office agrees that many of these suits are frivolous, it has determined that some sort of defense--frequently involving merely a pro forma submission to the Court of Appeals--is necessary in almost every case. Thus, you ask our views as to the availability of appropriations made to the judiciary to pay the costs of making a pro forma appearance in these cases, and of attorneys fees in those cases--which we have been informally advised will be few in number--which will actually require the personal appearance of counsel for the judicial officers where gratuitous representation is not available.

As noted above, under the provisions of 28 U.S.C. 516-519 and except as otherwise authorized by law, the conduct and supervision of litigation in which the United States, an agency or officer thereof is a party is reserved to the Department of Justice under the direction of the Attorney General. Accordingly, whenever a judicial officer, acting

in the scope of his official duties, is named as defendant, the Attorney General should be requested to provide representation for such official. (Of course, a request need not be made in those categories of cases--such as those in which the Department of Justice has instituted a mandamus action against a judicial officer--as to which the Attorney General has stated he will not provide such representation.) Also, 5 U.S.C. 3106 contains a restriction on the employment of attorneys or counsel for the conduct of litigation in which the United States, an agency or employee thereof, is a party, but this restriction is directed to the heads of executive and military departments and does not restrict the right of the judiciary to employ attorneys for the conduct of litigation.

It is clear, however, that if we were to hold that the judiciary's appropriations are not available to pay the costs of providing a defense, with respect to a case in which the Attorney General declines for any valid reason to provide representation, such defense, even though it involves defending actions taken by Federal employees in the normal course of their business, might have to be borne by the defendants. It is well established that where an officer of the United States is sued because of some official act done in the discharge of an official duty the expense of defending the suit should be borne by the United States. See Konigsberg v. Hunter, 308 F. Supp. 1361, 1363 (W.D. Mo., 1970) and 6 Comp. Gen. 214 (1926). Also, we note that under Rule 21 of FRAP judges are entitled, but not required, to appear in court in mandamus and prohibition proceedings (as well as other extraordinary writ proceedings) and it would be burdensome to require that the expenses of such appearances, when made in the best interest of the United States, be borne by the judicial officers involved. Moreover, the present situation involves having the Attorney General, an official of the Executive Branch of the Government, determine whether and to what extent members of institutions of a coordinate branch of the Government, the Judiciary, are to be represented in litigation in which they are named as defendants or respondents.

With these factors in mind, and subject to the qualifications listed below, it is our view that the above cited provisions of law would not preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private attorneys--if you determine the use of private attorneys is necessary--in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation. In connection with the matter generally compare 42 Comp. Gen. 595 (1963), in which litigation costs incurred incident to a trial between private parties were authorized to be reimbursed to private attorneys defending a private party where the United States, though not a party in the case had a beneficial interest in its outcome.

Our approval of the payment of litigation costs including minimal attorney's fees where gratuitous representation is not available is subject to two further qualifications. First, your Office should, at the first appropriate opportunity, advise fully the appropriate legislative and appropriations committees of the Congress of your plans and the estimated cost thereof.

Second, we strongly feel that the decision in each case as to the necessity for and the amount of representation required, if any, should be made by someone other than the defendant or respondent (i.e., the judicial officer or entity involved) in that case. In other words, we do not feel that the determination as to whether a defense of a judicial officer's ruling or a judicial body's rule is in the best interest of the United States and necessary to carry out the functions of the judiciary, should be made by the judicial officer or body concerned. Such an independent determination made by your Office would be designed to assure, to the extent possible, that appropriated funds are used only to the extent necessary to protect the judiciary's interest in the outcome of the subject litigation, rather than the judicial officer's personal interest in having his decision upheld, and that such funds are not used, in effect, merely to defend a private litigant's position where, as is the case in most appeals of judicial rulings, the judiciary and the United States have no real interest in the outcome of the appeal.

Much of the same reasoning used above may be applied with respect to Federal public defenders who are appointed pursuant to the Criminal Justice Act, as amended, 18 U.S.C. 3006A(h), who are sued for activities undertaken within the scope of their duties. The Department of Justice has declined to represent these defenders because of the inherent conflict of interest involved. Hence, in the absence of the availability of appropriated funds for their defense, such defense would have to be undertaken, out of the public defender-defendant's own private resources. We understand that it is your intention that the defense of the public defenders will be handled for the most part by other public defenders.

Appropriations for the public defender service, under 18 U.S.C. 3006A(h) are available to pay the necessary costs of litigation undertaken by the Public Defender Service. We believe that such appropriations are also available to pay litigation costs (including minimal attorney's fees where other public defenders are not available for such purpose) incurred in defending actions undertaken within the scope of the official duties of public defenders where such defense is considered as necessary for

carrying out the purposes of the appropriations and in the best interest of the United States. Nonetheless, as in the case above, we feel that the Congress should be advised of the proposed use of appropriated funds.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States