

Date: August 27, 1990  
TO: Judge Robert Parker  
From: *PF* Bob Feidler  
Re: Legislative Issues

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*011/11/90*

Pursuant to our conversation of August 23, the following is a short list of legislative items that are not included in either of two Judiciary-related "vehicles" being processed in the House and Senate. The two underlying pieces of legislation which would be most suitable for amendment are S. 2648 and H.R. 5381. The former is the Biden bill that includes the Civil Justice Reform title and the Judgeship title; we expect a new Title III to be added to that bill by Senator Grassley which will include numerous Conference-supported measures as well as FCSC measures. The House bill is sponsored by Kastenmeier and the best guess is that it will be "married" with the Brooks judgeship bill at full committee sometime in mid-September. We have made and will continue to make the pitch for inclusion in the Kastenmeier bill of the amendments that I will describe shortly. However, realistically, I do not believe we will be successful in our efforts absent word coming down from the Chairman that he especially favors inclusion of x, y, or z.

The following is a list of six either discrete items or areas that could be the subject of amendment:

1. Section 140 Repealer.

Section \_\_\_\_\_. JUDICIAL COST-OF-LIVING INCREASES.

Section 140 of Public Law 97-92 (95 Stat. 1200) is repealed.

This section repeals a provision enacted in a continuing appropriation resolution in 1981 that bars annual cost-of-living adjustments in pay for federal judges except as specifically authorized by Congress. While the sponsors of the provision thought it applied only to a single year, the Comptroller General ruled that it was permanent law. However, the Comptroller General recommended repeal of section 140 to the 99th Congress and S. 2671 was introduced to accomplish that result. Instead, Congress adopted the practice of suspending application of section 140 to discrete cost-of-living raises. Repeal of section 140 would restore the operation of 28 U.S.C. 461 as to Article III judges, as enacted by the Federal Salary Cost-of-Living Adjustment Act of 1975. Repeal of section 140 does not necessarily mean that judges will get cost-of-living or salary adjustments (Congress would still have to agree to those and appropriate the money). But it does mean that

judges would not be singled out as needing specific congressional approval for what should be routine pay increases.

Politically Congressman Kastenmeier has been a supporter of repeal of section 140. However, he may be adverse to inclusion of the repealer in his bill because he is trying to keep it noncontroversial. The only Member we are aware of who has stated his opposition to repeal of section 140 is Senator Grassley, the Ranking Minority Member of the Courts Subcommittee of the Senate Judiciary Committee, and the author of what is expected to be Title III of S. 2648. Inclusion of 140 in the House package potentially sets up a clash with Grassley.

## 2. Retirement Improvement/Rule of 80.

The issue of some kind of enhanced retirement system has been percolating for several years within the Judiciary. The two key goals are to create an earlier vesting of retirement rights and the possibility of an earlier age at which to retire from office or take senior status. The Conference approach to this has been to attempt to create a pure "rule of 80" to enhance the present system whereby a judge may retire or take senior status beginning at age 65 with 15 years of service or at any age beyond that when chronological age and years of service total 80. The "pure" rule of 80 we are seeking would permit retirement at age 60 with 20 years service. The text to accomplish that follows at the end of this discussion. Politically neither Kastenmeier nor Grassley endorse the rule of 80. Kastenmeier has included in his bill a "rule of 87" permitting retirement at age 62 with 25 years of service. This will affect very few judges. Endless variations of age and service can be devised, but after all is said and done I would suggest that the best we can hope for is age 62 - 64 with 20 years service.

If one takes a completely different approach to achieving vesting of early retirement, many other options suggest themselves. For example, one could adopt the congressional retirement system which basically provides that a Member accrues 2-1/2 percent of salary times years of service to determine retirement annuity. They are also eligible to draw their vested retirement at age 55. For example if a judge served from age 40 to 55, this would allow him to retire at 37-1/2 percent of their base salary. Again one could play with combinations of age, percentage, and enhanced percentages and achieve many different results. Given the present fiscal mood, I doubt if anything much beyond what is described above could be accomplished.

SEC. 301. JUDICIAL RETIREMENT MATTERS.

(a) Age and Service Requirements.--Section 371 of title 28, United States Code, is amended--

(1) in subsection (a), by inserting "(1)" after "subsection (c)";

(2) in subsection (b), by inserting "paragraph (1) or (2) of" before "subsection (c)"; and

(3) in subsection (c)--

(A) by inserting "(1)" after "(c)";

(B) by inserting "subsection (a) or (b) of" after "under"; and

(C) by adding at the end thereof the following new paragraph:

"(2) A justice or judge of the United States who does not meet the age and service requirements provided in paragraph (1) of this subsection may retire under subsection (b) of this section if the justice or judge has attained the age of 60 years and has completed 20 years of service."

(b) Creditable Service for Certain Judicial Administrative Officials.--(1) Section 611(d) and 627(e) of title 28, United States Code, are each amended by inserting before the term "or" the third place it appears, "a Congressional employee in the capacity of primary administrative assistant to a member of Congress or in the capacity of staff director or chief counsel for the majority or the minority of a committee or subcommittee of the Senate or House of Representatives,".

(2)(A) Sections 611(b) and 627(c) of such title are each amended--

(i) in the first undesignated paragraph, by striking out "who has served at least fifteen years and" and inserting in lieu thereof "who has at least fifteen years of service and has"; and

(ii) in the second undesignated paragraph, by striking out "who has served at least ten years," and inserting in lieu thereof "who has at least ten years of service,".

(B) Sections 611(c) and 627(d) of such title are each amended--

(i) by striking out "served at least fifteen years," and inserting in lieu thereof "at least fifteen years of service,"; and

(ii) by striking out "served less than fifteen years," and inserting in lieu thereof "less than fifteen years of service,".

(c) Judicial Officers' Retirement Fund.--Section 905(g)(2)(B) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 905(g)(2)(B)) is amended by adding at the end thereof the following:

"Judicial Officers' Retirement Fund (10-8122-0-7-602).".

3. Modification of Diversity Jurisdiction.

SEC. 321. DIVERSITY JURISDICTION

(a) Jurisdictional Amount.--(1) Section 1332 of Title 28, United States Code, is amended--

(A) in subsection (a), by striking out "\$50,000" and inserting in lieu thereof "\$75,000";

(B) in subsection (b), by striking out "\$50,000" and inserting in lieu thereof "\$75,000";

(C) by redesignating subsection (d) as subsection (e); and

(D) by inserting after subsection (c) the following new subsection (d):

"(d)(1) Effective on January 1 of each year that immediately follows a year divisible by 5, the amounts specified in subsection (a) and (b) of this section shall be increased by the percent change published in the Federal Register during the preceding year pursuant to paragraph (2) of this subsection.

"(2) Before the end of each year that is divisible by 5, the Director of the Administrative Office of the United States Courts shall compute the percent change in the price index for September 1 of such year over the price index for September 1 of the fifth year preceding such year and shall publish such percent change in the Federal Register.

"(3) As used in this subsection, the term 'price index' means the Consumer Price Index (all items--United States city average) published monthly by the Bureau of Labor Statistics."

(2) The first increase under subsection (d) of section 1332 of title 28, United States Code (as added by paragraph (1)(D)), shall be made effective on January 1, 1996.

(b) Items Excluded from Jurisdictional Amount.--Section 1332 of title 28, United States Code, as amended by subsection (a), is further amended--

(1) in subsection (a), by striking out "interest and costs," and inserting in lieu thereof "interest, costs, noneconomic damages, and attorneys' fees,"; and

(2) by striking out subsection (d) and inserting in lieu thereof the following:

"(d) In this section:

"(1) The term 'noneconomic damages' includes pain and suffering, mental anguish, and punitive damages; and

"(2) The term 'state' includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

(c) Effective Date.--The amendments made by this section shall take effect with respect to civil actions commenced more than 90 days after the date of the enactment of this Act.

Subsection (a) of this section would amend section 1332 of title 28 relating to diversity jurisdiction to raise the jurisdictional amount from \$50,000 to \$75,000 and to index such amount for inflation to be adjusted at the end of each year divisible by five. The purpose of this amendment is to supplement the increase of the jurisdictional amount from \$10,000 to \$50,000 in the 100th Congress by a modest upward adjustment to \$75,000 and to maintain the workload reducing effects of these changes by indexing the diversity jurisdictional amount to inflation. This was an alternative recommendation of the Federal Courts Study Committee and fits within the rationale of the position of the Judicial Conference on diversity jurisdiction.

Subsection (b) of this section would amend section 1332 of title 28 to expand the category of items excluded in determining the jurisdictional amount to include "non-economic damages and attorneys' fees". The purpose of this amendment is to reduce the speculative nature of the amount in controversy so that a court can reasonably determine early in the case whether a complaint meets the jurisdictional requirements of the law and to facilitate disposition of inappropriate claims on a motion for summary judgment.

Politically, any tinkering with diversity jurisdiction is very sensitive and potentially controversial. The three adjustments embodied by the above amendment -- raising the amount in controversy, indexing, and limiting noneconomic damages -- represent a modest but nevertheless substantial limitation on diversity jurisdiction. Inclusion of the first two modifications would result in a permanent diminution of at least 10,000 cases in the federal system. Inclusion of the third modification would result in a number of additional thousands of cases being deleted. Kastenmeier has always supported a modification of diversity but has not been able to get it through the full committee. Senator Heflin, the Courts Subcommittee chairman on the Senate side, has generally opposed modification of diversity jurisdiction but may accept some modest adjustment.

4. Senior Judge Certification Modification.

(a) Retroactive Credit for Resumption of Significant Workload.--Section 371(f)(3) of title 28, United States Code, is amended by striking out "is thereafter ineligible to receive such a certification" and inserting in lieu thereof "may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year, satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than one year."

(b) Aggregation of Certain Work for Partial Years.--Section 371(f)(1) of title 28, United States Code, is amended by adding at the end of subparagraph (D) the following: "In any year in which a justice or judge performs work described in this subparagraph for less than the full year, one-half of such work may be aggregated with work described in subparagraph (A), (B), or (C) of this paragraph for the purpose of the justice or judge satisfying the requirements of such subparagraph."

This section would revise the senior judge work certification procedures set forth in 28 U.S.C. § 371(f). The law currently requires retired justices and senior judges to be certified every year in order to receive subsequent salary increases (other than cost-of-living increases). If a justice or judge is not certified in any year, 28 U.S.C. § 371(f)(3) provides that he or she is thereafter ineligible to be certified and to receive subsequent salary increases.

Subsection (a) alleviates this harsh result, and provides retired justices and judges with incentives to resume working after a lapse in service, by allowing retroactive certification if the justice or judge resumes a significant workload. Subsection (a) would revise 28 U.S.C. § 371(f)(3) by providing that justices or judges who are not certified in one year may perform work in a subsequent year and then attribute the subsequent work to the earlier year, in order to satisfy the certification requirement for the earlier year. Subsection (a) further provides that senior judges may not receive credit for the same work for more than one year.

The work certification requirement in 28 U.S.C. § 371(f)(1) distinguishes between judicial duties, which must be performed in an amount equal to what an average active judge performs in three months, and administrative duties, which must equal full-time work. There is no provision for aggregating judicial and administrative duties in proportional amounts, nor is there any provision for judges to receive credit for the work they do if they are unable to perform administrative duties for a full year. Subsection (b) would revise 28 U.S.C. § 371(f)(1) by allowing retired justices and judges to aggregate administrative work described in paragraph 371(f)(1)(D) with judicial work described in paragraphs 371(f)(1)(A), (B), or (C). Under this revision, only one-half of the administrative work may be aggregated, reflecting the proportionally greater amount of administrative duties that must be performed for certification purposes under the existing requirement.

Politically, this modifies provisions added to the Ethics Reform Act last year by Kastenmeier. I do not believe Kastenmeier would accept the above amendment; however, we had been led to believe that Brooks did not like the underlying provisions of the Kastenmeier proposal and thus maybe it is worth approaching him to modify it. Frankly I don't believe that this provision will have much if any impact on the ability of the senior judge to substantially continue to receive a large annuity upon retirement. And therefore I would not recommend that this amendment be given the highest priority.

5. Magistrate Jurisdiction Modification.

I do not know how you feel about adjustments to the magistrates' jurisdiction, but this has been an area of interest to the Brooks staff. The disposition of the Chairman of the Committee is to limit the number of Article III judges to the smallest number necessary to do the job; one way to accomplish this result is to enhance the authority (jurisdiction) of magistrates. Should you want to pursue options in this regard further, please contact me, Peter McCabe, Tom Jone (Magistrates Division) or Judge Hatchett, Chief of the Magistrates Committee.

6. Modification of Membership on Circuit Judicial Councils.

28 U.S.C. § 332(a)(1) is amended to read as follows:

The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit and district judges of the circuit, such number to be determined by majority vote of all such judges of the circuit in regular active service.

Delete 28 U.S.C. § 332(a)(3) and renumber the following subsections accordingly.

The above language serves to equalize the voice of the circuit and district judges in administration of the circuit's business. The policy embodied by the above language was adopted by the Executive Committee on August 15. The language I have used has not been specifically approved but gets the point across. Note that the amendment in practice will still provide for one more court of appeals judge than district judge on the judicial council -- this is what the Executive Committee approved.