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November 29, 1990

MEMORANDUM TO L. RALPH MECHAM

SUBJECT: Composition of Circuit Judicial Councils

You asked that I set forth the background of the amendment recently passed by Congress reconstituting the membership of the circuit judicial councils and analyze how this change will affect existing law on that subject.

The Statute

Section 323 of the Judicial Improvements Act of 1990, H. R. 5316, as passed by both the Senate and House of Representatives and thus cleared for Presidential signature on October 27, 1990,¹ will amend section 332(a)(1) of title 28, United States Code, 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 or she 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 judges and district judges of the circuit, as such member [?] is determined by majority

¹H. R. 5316 reportedly was enrolled and transmitted to the White House on November 21, 1990, meaning that the President has until December 1 to sign it into law.

²This word should have read "number," which is the language of the draft legislative proposal submitted to Congress on behalf of the Judicial Conference. As reprinted in the Congressional Record (daily ed., Oct. 27, 1990, at pages S-17913 and H-13306), this word also read "member," which is apparently an editorial mistake. That mistake was called to the attention of the enrolling clerks by our Office of Legislative and Public Affairs and was expected to be corrected in the enrolled enactment. Unfortunately such correction was not made, which would suggest the desirability of a technical amendment at some future time.

vote of all such judges of the circuit in regular active services [sic].

Section 323 then proceeds to strike out paragraph (3) of section 332(a), thus deleting the former rule that the councils' size had to be fixed by court order at least six months prior to scheduled meetings of the councils, and to redesignate the succeeding paragraphs. These amendments have the effect of changing existing law by requiring equal representation (except for the chief circuit judge) of circuit and district judges on each judicial council, in lieu of the former provision that the number of circuit and district judges thereon was to be fixed by vote of that circuit's active circuit judges (with a statutory minimum complement of district judges, depending upon the number of circuit judges so fixed).³ Section 332 had so provided since it was last amended in 1980.⁴

Background

The impetus to effect this change in 28 U.S.C. § 332 came originally from this year's report of the Federal Courts Study Committee. The Committee there recommended "that the Judicial Conference consider whether the composition of judicial councils ought not [sic] to be prescribed by statute in a nationally uniform manner," on the basis that "[t]he Committee believes that variations in the degree of district judge representation from circuit to circuit may weaken the councils' effectiveness. . . ." Report of the Federal Courts Study Committee, chp. 8(A)(2)(a)(1) at 151 (April 2, 1990).

The first initiative toward implementing this recommendation occurred when the Executive Committee of the Judicial Conference met on August 15, 1990, to consider a variety of legislative recommendations from the Federal Courts Study Committee's report. The Executive Committee's report to the Judicial Conference, submitted in September 1990, recounted that the Committee had identified more than 20 items recommended by the Federal Courts Study Committee for inclusion in a suggested title

³Since no effective date for title III of H. R. 5316 is specified therein, this section and the remainder of that title appear to become law upon Presidential signature, completing the enactment process.

⁴The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Public Law No. 96-458, § 1, 94 Stat. 2035 (effective as of October 1, 1981). Prior to that time, the circuit councils had consisted ex officio of the active United States circuit judges for each circuit.

III to the Civil Justice Reform Act and, on recommendation of the Committee on Judicial Improvements, "had voted to recommend that Title III include an amendment to 28 U.S.C. 332 to impose equal representation of district and circuit judges as members of circuit judicial councils, in addition to the chief judge of the circuit as council chairman. . . ." The Memorandum of Action from the Executive Committee's August meeting stated as follows (at page 3):

The Committee also agreed to recommend that Title III include an amendment to 28 U.S.C. 332 to impose equal representation of district and circuit judges as members of circuit judicial councils, in addition to the chief judge of the circuit as council chairman.

This action of the Executive Committee on behalf of the Conference was communicated to Congress informally by Judge Robert Parker and by our Office of Legislative and Public Affairs, together with draft legislative language to accomplish such purpose. That language was identical to what is now contained in the enrolled enactment of H. R. 5316. This issue was not considered during the September 6, 1990, hearing before the House Judiciary Committee's Courts Subcommittee, nor was the language included in H. R. 5381 as reported from the Subcommittee or from the Committee on September 14, 1990. It first appeared in the text of H. R. 5381 as it passed the House of Representatives on October 2, 1990.⁵

Two errors of content were later introduced into the proposal, apparently by inadvertence, during congressional consideration: the word "number" in the final phrase of amended section 332 became "member" and the last word "service" was changed to "services." These errors apparently arose as the Senate amended S. 2648 on October 27, 1990, to add a title III including this provision. See the Congressional Record at page S-17913 (daily ed. Oct. 27, 1990). Subsequently the Senate adopted the same amendment to H. R. 5316, the Federal Judgeship Act of 1990 as originally passed by the House of Representatives, and then passed this bill in amended form, which was accepted by the House thus clearing the measure for the President. See the Congressional Record at page H-13297 through 13316 (daily ed. Oct. 27, 1990) (section 323 in the same form as finally enacted appeared at page H-13306).

⁵The provision changing the composition of circuit judicial councils was contained in H. R. 5381 as section 206 thereof. It appeared in that bill in correct form and without either of the errors which were subsequently introduced.

The Issues

I am aware of two concerns having been voiced about section 323 of H. R. 5316 as enacted:

1. In equalizing circuit council representation of circuit and district judges (except for the circuit chief judge), it also appears to have changed existing law to place voting power to determine the number of circuit and district judge members (and hence the size of the council) in both the active circuit and district judges of each circuit.

2. Some judges have also inquired whether the effect of the section as enacted is to give active circuit and district judges voting power as well to elect all members of the council (including circuit and district judge representatives) on an "at large" basis.

As to the first concern, I can find no clear record of Federal Courts Study Committee or Judicial Conference deliberation on the issue of extending the voting franchise to district judges to set the size of the council, a power which had theretofore resided solely with the circuit judges. Nevertheless it might be concluded that the inclusion of district judges in voting on this particular is consistent in philosophy with the legislation's principal purpose to equalize circuit and district judge representation on the councils, except for the circuit chief judge who shall be an additional member.⁶

The second concern appears to me to arise from a misreading of section 323, which is caused or at least exacerbated by the legislative mistake in changing to "member" the word "number" in the section's final phrase. Nevertheless it is evident to me that no substantive alteration in the bill's meaning was intended by this change, nor

⁶Compare 28 U.S.C. § 332(a)(2), which states that the terms for members of the judicial councils shall be established "by majority vote of all judges of the circuit in regular active service." Although this language could be read to include circuit and district judges, Chairman Kastenmeier of the House Judiciary Subcommittee on Courts authored a letter to Chief Justice Burger on January 30, 1981, stating that it had been his subcommittee's intention to refer there to circuit judges only. Assuming that this interpretation is entitled to deference, it cannot necessarily be extended to the new wording of section 332(a)(1) because the context is different and the words "judges of the circuit" are preceded by "such," suggesting an antecedent.

is any signaled by the history behind this enactment.⁷ If Congress had seriously meant to extend the vote to the selection of "members," it would have used the plural rather than the singular of this word, or more likely it would have employed the word "membership." Further, the word "number" appears previously in the same sentence, and it seems apparent from the following use of "such member" that the intention was to repeat the antecedent, "number." Finally, the interpretation that this is clear error is reinforced by the appearance of a second technical error in the same sentence through the conversion of the final word "services" to the plural from the singular form originally utilized and obviously intended.

Until this matter might be formally cured by technical amendment in the 102nd Congress next year, I recommend that the term "member" be treated as a patent error evident on the face of this statute as enacted. It would follow that the section should be interpreted as if this error did not exist and Congress had actually said what it is reasonable to infer was meant.⁸ By this interpretation the collective voting of circuit and district judges would be restricted to choosing the "number" of each that shall serve on the judicial councils. Thus no change would occur in the manner of choosing the incumbents to fill the number of seats so established; that practice, as under present law, would be left to each circuit as it traditionally has been since 1981, and

⁷The history recited above makes clear that "number" appeared in the transmittal to Congress of this proposal and that it remained in the proposal through various stages of congressional consideration, including the passage of H. R. 5381 by the House. The subsequent change to "member" is wholly unexplained, supporting its inadvertence.

⁸"[D]eparture from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question." 2A Sutherland, Statutory Construction § 45.12 (4th ed. by Sands, 1984 revision by Singer). "[I]f the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature." Id. at § 46.07.

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could be accomplished by election among some or all judges or by operation of an administrative rule prescribed by the council.⁹


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⁹The report of the House Judiciary Committee upon the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 stated: "As to the size and nature of the councils, *as well as the method of selecting council members*, the proposed legislation *delegates this to the judicial branch* with the following provisos [then enumerating the various statutory provisions herein discussed that regulated certain aspects of these processes]. H. R. Rep. No. 96-1313, 96th Cong., 2d Sess. 7 (1980) [emphasis supplied].