

**EMBARGOED until 6 p.m. E.S.T.
December 31, 2018 (No wires, TV,
radio, Internet, or other formats
before 6 p.m. E.S.T.)**

For further information, contact the
Public Information Office
pio@supremecourt.gov

2018 Year-End Report on the Federal Judiciary

In the spring of 1928, Justice Louis Brandeis labored over what would prove to be a momentous dissent. Federal agents had uncovered “a conspiracy of amazing magnitude to import, possess and sell liquor” in violation of the National Prohibition Act. See *Olmstead v. United States*, 277 U.S. 438, 455 (1928). Prosecutors secured convictions based, in significant part, on evidence obtained when the agents listened in on the home and office telephones of the defendants. The Supreme Court rejected the defendants’ contention that the wiretaps, conducted without a warrant, constituted an unreasonable search or seizure prohibited by the Fourth Amendment. But Justice Brandeis dissented, and his understanding that such electronic surveillance can constitute a search was embraced by the Court nearly 40 years later. See *Katz v. United States*, 389 U.S. 347 (1967).

In drafting his far-sighted dissent in *Olmstead*, Brandeis noted that “[t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping.” 277 U.S., at 474.

Brandeis had planned to give as an example the newly invented technology of television that, he would explain, enabled the government “to peer into the inmost recesses of the home.” It fell to his law clerk to tell him: “Mr. Justice, it doesn’t work that way! You can’t just beam a television set out of somebody’s home and see what they’re doing.” The Justice was unrelenting until that young clerk, Henry Friendly, produced scientific articles to support his position, and Brandeis eliminated his reference to television in the final version of the dissent. See DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA p. 30 (2012).

As the exchange between Brandeis and Friendly illustrates, judges benefit from the assistance of their law clerks, who bring energy, new learning, and fresh perspectives into their chambers. Law clerks of course do not share judges’ authority to decide cases, but judges nevertheless look to their clerks for help with research, testing legal analysis, and preventing mistakes. The benefits flow both ways. Law clerks learn the legal craft from jurists who have earned positions of high trust and responsibility within the profession. While Brandeis benefited from his clerk’s help in understanding a nascent technology, Friendly saw how a master jurist with a clear vision of the interests at stake could craft a transformative dissent.

That experience surely shaped Friendly's own service, years later, as a distinguished federal judge.

This coming year will mark a full century since Congress first provided funds to pay for legally trained assistants to federal judges. Each day, in courts across the country, judges and law clerks work together in a collaborative spirit to advance the cause of justice. Circuit judges, district judges, magistrate judges, and bankruptcy judges, like many state colleagues, employ law clerks to help perform their public work efficiently and optimally. The judge serves as a mentor, teacher, and supervisor; the clerk provides a wide range of assistance, such as performing legal research, drafting memoranda, and tracking action and needs for attention on busy dockets. The law clerk's responsibilities will vary depending on the type of court and nature of the workload. But consistently, the relationship is one of close association, candid intellectual exchange, and confidentiality.

Recent events have highlighted that the very qualities that make the position of law clerk attractive—particularly, the opportunity to work with a senior member of the legal profession in a position of mentorship and trust—can create special risks of abuse. Similar concerns have of course been highlighted with respect to misconduct in other prestigious and high profile professions.

I noted these concerns at the conclusion of my 2017 Year-End Report, and I asked the Director of the Administrative Office of the United States Courts to convene a working group that would evaluate the sufficiency of the safeguards currently in place to protect law clerks and all other judiciary employees from inappropriate conduct in the workplace. I specifically asked the Director to examine whether changes were needed to the Judiciary's codes of conduct, its guidance to employees respecting confidentiality and reporting of misconduct, its educational programs, and its processes for investigating misconduct complaints. The Federal Judiciary Workplace Conduct Working Group, consisting of judges and senior judicial administrators, assembled soon thereafter and rapidly completed its charge, issuing its [report](#) on June 1, 2018.

This year, I would like to provide a brief update on the Working Group's efforts and the important actions that have followed from them. Although the Working Group found that the Judiciary compares favorably to other government and private sector workplaces, it did not give the Third Branch a completely clean bill of health. It determined—based on input from employees, advisory groups, and court surveys—that inappropriate workplace conduct is not pervasive within the Judiciary, but it also is not limited to a few isolated instances involving law clerks. The Working

Group concluded that misconduct, when it does occur, is more likely to take the form of incivility or disrespect than overt sexual harassment, and it frequently goes unreported. On the positive side, the Working Group determined that the Judiciary does have in place key foundations for combatting inappropriate conduct, including committed leadership, an ethos of accountability, positive workplace policies and practices, and established training programs. But the Working Group concluded that more could be done, especially in encouraging all employees—not just law clerks—to come forward in reporting misconduct, and it set out a series of specific recommendations to improve the workplace environment.

I endorse those recommendations, which focus on three discrete areas: First, the Working Group proposed that the Judiciary revise its codes of conduct and other published guidance to delineate more clearly the obligations and responsibilities that promote appropriate behavior. Second, the Working Group suggested that the Judiciary strengthen and streamline its internal procedures for identifying and correcting misconduct, incorporating more informal alternative mechanisms for employees to seek guidance and register complaints. Third, the Working Group recommended that the Judiciary expand its training programs to raise awareness of conduct

issues, prevent inappropriate behavior, and promote civility throughout the Judicial Branch.

The Working Group addressed its recommendations to the Judicial Conference of the United States, which is the policymaking body for the federal court system. The Conference, which I chair, is composed of twenty-six other federal judges—the thirteen chief circuit judges and thirteen trial judges from each of the federal circuits that together cover the entire Nation. The Conference formulates judicial policies, including codes of conduct and procedures for judicial and employee discipline, through a committee system employing other experienced judges from throughout the federal courts. The Conference promptly referred the Working Group’s recommendations to three relevant committees—the Committee on Codes of Conduct, the Committee on Judicial Conduct and Disability, and the Committee on Judicial Resources—for consideration and action. Between June and September, those committees swiftly formulated proposed changes, which they unveiled at the September meeting of the Judicial Conference.

The Committee on Codes of Conduct has proposed changes to the codes governing the conduct of both judges and employees to state explicitly what has always been implicit in them: Judges and judicial employees may not engage in abusive or harassing behavior; must be civil and respectful in

dealings with co-workers and subordinates; and may not engage in retaliation against persons who report misconduct. The proposed changes also address the obligations of judges and judiciary employees to report observed misconduct to those who can take action to stop it.

The Committee on Judicial Conduct and Disability has proposed correlative revisions to the Judiciary's rule governing disciplinary procedures to enlarge the definition of workplace misconduct and to make clear that such behavior is actionable. The proposed revisions also make clear that the duties of confidentiality shared by judges, law clerks, and court employees do not pose any obstacle to reporting or disclosing misconduct.

The Committee on Judicial Resources is implementing changes to the Judiciary's Model Employment Dispute Resolution Plan to broaden its coverage and streamline the procedures for judicial employees to report misconduct. Those changes extend protections to interns and externs and significantly lengthen the time that employees have to seek relief.

The Judiciary is, of course, an independent and self-governing branch of government, but it has nevertheless sought input from all interested quarters. The Working Group welcomed advice from Members of Congress, the Equal Employment Opportunity Commission, non-profit organizations, and private citizens. On October 30, the Committee on Codes

of Conduct and the Committee on Conduct and Disability held a joint public hearing to obtain comment from judges, judicial employees, ethics experts, past and future law clerks, and members of the public. That input will assist the committees in fine-tuning their proposals before the next meeting of the Judicial Conference in March 2019.

Judicial Conference action is necessary to revise the Judiciary's codes of conduct and the rules governing disciplinary proceedings. But some of the Working Group's other proposals could be implemented immediately through administrative action, and the responsible entities have already moved forward. The Administrative Office of the United States Courts—the judicial entity responsible for the day-to-day management and operation of the federal courts—responded to the need for enhanced informal advisory processes by creating the Office of Judicial Integrity. That office, led by an experienced senior court administrator, will work with the circuit courts to provide a national clearinghouse for monitoring workplace conduct issues and will provide employees throughout the Judiciary with an independent source for confidential guidance and counseling. Similarly, the Federal Judicial Center (FJC), which is responsible for developing and conducting training programs for judges and judiciary employees, has supplemented its robust workplace conduct programs—which already address sexual

harassment and civility in the workplace—with additional resources. For example, the FJC has developed video training for judges and law clerks on workplace rights and responsibilities, including reporting options if a law clerk experiences or observes inappropriate conduct. And it has augmented its orientation and continuing education materials with in-person programs on workplace policies and bystander responsibilities.

Individual federal courts, from coast to coast, have also jumped to action. The Ninth Circuit established its own workplace study committee last December and undertook a comprehensive examination of the workplace environment through questionnaires, focus groups, and interviews with law clerks, law school deans, and other interested parties. Other courts of appeals, including those for the District of Columbia, Seventh, and Tenth Circuits, and district courts, including those for the District of Columbia and Utah, have since taken similar steps. They are adopting changes at the regional and local levels similar to those that are being undertaken at the national level, including the appointment of circuit-wide directors of workplace relations; the revision of employment dispute resolution and confidentiality policies; and improvements to their hiring, orientation, and training programs. The Supreme Court will supplement its existing internal

policies and training programs for all of its employees based on the initiatives and experience of the other federal courts.

I am grateful to the judges and other members of the Judicial Branch who have formulated and are implementing these changes, which strengthen our culture of accountability and professionalism. We are committed to addressing this challenge throughout our federal court system, including the Probation and Pretrial Services Offices, Federal Defender Offices, and other units that operate within the Judiciary. I appreciate the contributions of the members of the Working Group and of so many chief judges and other judicial colleagues and unit executives this year to signal our shared resolve to protect all judiciary employees from improper workplace behavior.

While I am pleased that our Branch has mobilized to ensure that the Judiciary is the exemplary workplace that we all want, I also realize that the job is not yet done. I have directed the Working Group to remain in place over the next year to monitor the progress and success of those efforts. The job is not finished until we have done all that we can to ensure that all of our employees are treated with fairness, dignity, and respect.

* * *

Last year, I expressed my concern for our fellow citizens in Texas, Florida, Puerto Rico, and the Virgin Islands who were recovering from

Hurricanes Harvey, Irma, and Maria, and those in California who confronted historic wildfires. I also expressed my thanks to the judiciary employees who undertook emergency response to ensure that the federal courts damaged by those events remained in operation or promptly reopened. It is not lost on me that many who suffered from these natural disasters last year are still in need of assistance, even while new disasters over the past year have put others in jeopardy. I wish to recognize the judiciary employees who again provided emergency aid, and especially those who responded to the floods in Florida and North Carolina, Super Typhoon Yutu in the Northern Mariana Islands, the Alaska earthquake that damaged the Anchorage courthouse, and the new wildfires in Northern California. The Judiciary is fortunate to have so many caring and generous judges and employees who quietly and selflessly work to support the public good.

I recognize my privilege and good fortune to be in a position to thank the dedicated judges, court staff, and judicial personnel throughout the Nation for their commitment to public service and the rule of law.

Best wishes to all in the New Year.

Appendix

Workload of the Courts

In the 12-month period ending September 30, 2018, the number of cases filed in the Supreme Court was nearly the same as in the prior year. The number of cases filed in the regional appellate courts, bankruptcy courts, and probation offices decreased slightly. The number of cases filed in the district courts and cases activated in the pretrial services system increased. The number of persons under post-conviction supervision declined.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court was nearly even, increasing from 6,305 filings in the 2016 Term to 6,315 filings in the 2017 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased three percent from 4,755 filings in the 2016 Term to 4,595 filings in the 2017 Term. The number of cases filed in the Court's paid docket increased 11 percent from 1,550 filings in the 2016 Term to 1,720 filings in the 2017 Term. During the 2017 Term, 69 cases were argued and 63 were disposed of in 59 signed opinions, compared to 71 cases argued and 68 disposed of in 61 signed opinions in the 2016 Term. The Court also issued six *per curiam* decisions during the 2017 Term.

The Federal Courts of Appeals

In the regional courts of appeals, filings fell two percent to 49,276. Appeals involving pro se litigants, which amounted to 50 percent of filings, declined three percent. Total civil appeals decreased two percent. Criminal appeals fell one percent, appeals of administrative agency decisions decreased one percent, and bankruptcy appeals declined 10 percent.

Original proceedings in the courts of appeals, which include prisoner requests to file successive habeas corpus proceedings in the district court, dropped eight percent this year, continuing the decline from last year. These filings had spiked in 2016 after the Supreme Court's decision in *Welch v. United States*, 578 U.S. ___, No. 15-6418 (Apr. 16, 2016), which provided a new basis for certain prisoners convicted under the Armed Career Criminal Act to challenge their sentences.

The Federal District Courts

Civil case filings in the U.S. district courts rose six percent to 282,936. Cases with the United States as defendant decreased three percent. That reduction continued a return to typical levels, following a spike in 2016 caused by post-*Welch* challenges to criminal sentences. Cases with the United States as plaintiff declined six percent, mainly because courts received fewer actions related to defaulted student loans. Cases involving

diversity of citizenship (i.e., disputes between citizens of different states) grew 17 percent as personal injury cases rose 23 percent.

Filings for criminal defendants (including those transferred from other districts) increased 13 percent to 87,149. Defendants charged with immigration offenses rose 37 percent, largely in response to a 40 percent increase in defendants charged with improper reentry by an alien. The southwestern border districts received 78 percent of national immigration defendant filings. Drug crime defendants, who accounted for 28 percent of total filings, grew two percent, although defendants accused of crimes associated with marijuana decreased 19 percent. Filings for defendants prosecuted for firearms and explosives offenses rose 21 percent, the highest total since 2004. The district courts saw increased filings involving general offenses, violent offenses, and sex offenses, and reduced filings involving justice system offenses, traffic offenses, and regulatory offenses.

The Bankruptcy Courts

Bankruptcy petition filings decreased two percent to 773,375. Fewer petitions were filed in 60 of the 90 bankruptcy courts. Consumer petitions dropped two percent, and business petitions fell four percent. Filings of petitions declined two percent under Chapter 7 and three percent under

Chapter 13. Filings under Chapter 11 remained relatively stable, decreasing less than one percent.

This year's total for bankruptcy petitions is the lowest since 2007, which was the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last eight years.

The Federal Probation and Pretrial Services System

A total of 129,706 persons were under post-conviction supervision on September 30, 2018, a reduction of four percent from one year earlier. Of that number, 113,189 persons were serving terms of supervised release after leaving correctional institutions, a three percent decrease from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, increased 13 percent to 99,931.