Senate Debate

No. 150—Part II

Vol. 136 WASHINGTON, SATURDAY, OCTOBER 27, 1990 No. 150

Congressional Record

United States
of America

PROCEEDINGS AND DEBATES OF THE 101ST CONGRESS, SECOND SESSION

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
Washington, DC 20402

OFFICIAL BUSINESS
Penalty for private use, $300

SECOND CLASS NEWSPAPER

Postage and Fees Paid
U S Government Printing Office
(USPS 087-390)

Northern	3
Southern	6
Missouri:	
Eastern	6
Western	5
Eastern and Western	2
Montana	3
Nebraska	3
Nevada	4
New Hampshire	3
New Jersey	17
New Mexico	5
New York:	
Northern	4
Southern	28
Eastern	13
Western	4
North Carolina:	
Eastern	4
Middle	4
Western	3
North Dakota	2
Ohio:	
Northern	11
Southern	7
Oklahoma:	
Northern	3
Eastern	1
Western	6
Northern, Eastern, and Western	1
Oregon	6
Pennsylvania:	
Eastern	22
Middle	6
Western	10
Puerto Rico	7
Rhode Island	3
South Carolina	9
South Dakota	3
Tennessee:	
Eastern	5
Middle	3
Western	5
Texas:	
Northern	11
Southern	16
Eastern	6
Western	8
Utah	5
Vermont	2
Virginia:	
Eastern	9
Western	4
Washington:	
Eastern	4
Western	7
West Virginia:	
Northern	3
Southern	5
Wisconsin:	
Eastern	4
Western	2
Wyoming	3.".

SEC. 204. VIRGIN ISLANDS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate, one additional judge for the District Court of the Virgin Islands, who shall hold office for a term of 10 years and until a successor is chosen and qualified, unless sooner removed by the President for cause.

(b) AMENDMENT TO ORGANIC ACT.—In order to reflect the change in the total number of permanent judgeships authorized as a result of subsection (a) of this section, section 24(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1614(a)) is amended by striking "two" and inserting "three".

SEC. 205. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title, including such sums as may be necessary to provide appropriate space and facilities for the judicial positions created by this title.

SEC. 206. EFFECTIVE DATE.

This title shall take effect on the date of enactment of this title.

AMENDMENT NO. 3204

(Purpose: To amend title 28, United States Code, to provide for civil justice expense and delay reduction plans, authorize additional judicial positions for the courts of appeals and district courts of the United States, provide for the implementation of certain recommendations of the Federal Courts Study Committee, modify judicial discipline and removal procedures, and for other purposes)

Mr. BIDEN. Mr. President, on behalf of myself and Senator THURMOND, I send a substitute amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Delaware [Mr. BIDEN], for himself and Mr. THURMOND, proposes an amendment numbered 3204.

Mr. BIDEN. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The text of the amendment is printed in today's RECORD under "Amendments Submitted.")

Mr. KENNEDY. Mr. President, artists in America, as in every other country and civilization, have been the recorders and preservers of the national spirit. The creative arts are an expression of the character of the country; they mirror its accomplishments, warn of its failings, and anticipate its future. As Katherine Anne Porter wrote in 1940:

The arts live continuously. They outlive governments and creeds and societies, even the very civilizations that produce them. . . . They are what we find again when the ruins are cleared away.

The bill which the Senate has approved today, the Visual Artists Rights Act, will establish new protections for art and artists in America. Under its provisions artists will have the right to claim authorship of a work when it is displayed, and to disclaim the work if it is mutilated or altered. In addition, the bill prohibits the intentional mutilation or grossly negligent destruction of a work of visual art.

Painters and sculptors deserve this action. We are not talking about unearned benefits, but long overdue rights. Visual artists create unique works. If those works are mutilated or destroyed, they are irreplaceable.

A companion bill has been approved by voice vote in the House. I commend Congressman KASTENMEIER and Congressman MARKEY for their diligence and skill in bringing this legislation to enactment. The bill has evolved as a consensus approach to the legitimate needs of painters and sculptors. Earlier concerns expressed by art dealers, conservators, and museum professionals have been addressed so that there remains no opposition to the legislation.

It is the product of extensive hearings by the Subcommittee on Patents, Copyright and Trademarks. I am ... debted to Senator DECONCINI for ... help in providing a forum for the b... Expert witnesses were consulted in ... aspects of the art community. It ... clear that current law does not a... quately protect either artists or th... works.

Although many other countr... around the world already guarant... these basic rights to artists, the Unit... States has been slow to embrace the... It is time for Congress to act and to ... knowledge America's responsibility ... its creative artists.

Our artists are the chroniclers a... guardians of an important part of o... national heritage. They express t... character of our country, and th... contribute immensely to our natio... spirit. They deserve these modest sa... guards for their creativity.

The PRESIDING OFFICER. T... question is on agreeing to the ame... ment of the Senator from Delaware.

The amendment (No. 3204) w... agreed to.

Mr. BIDEN. Mr. President, I ... pleased that the Senate is about ... pass comprehensive legislation aim... at improving our Federal courts. It ... my hope that this legislation w... make the courts a little more affo... able, a little more efficient, and a lit... more accessible.

This legislation has three pa... First, it contains a revised version ... the civil justice reform bill that Se... tor Thurmond and I introduced earl... this year. Second, it creates 85 n... Federal district court and circuit co... judgeships. Third, it contains ... number of other reform proposals ... improve the functioning of our ju... cial system.

I will not delve into all the details ... this legislation today. The Judici... Committee's report is extensive a... addresses, in particular, the aspects ... the civil justice and judgeships legis... tion. As to title III, Senator GRASS... has submitted for the record a ... tailed section-by-section analysis.

I will limit my comments today ... the compromise with the House th... this legislation reflects. I am enthu... astic about the compromise we ha... reached, although, as with all comp... mises, some parts of the bill are ... exactly to my liking. Over-all, thou... I believe that the legislation is an ... cellent compromise that warrants ... mediate passage and enactment.

Turning to title I, the Civil Just... Reform Act, the compromise refle... two fundamental objectives that ... sought to accomplish when this leg... lation was introduced in January: ... quiring every U.S. district court ... convene a local advisory group, and ... quiring every district court to imp... ment a civil justice expense and del... reduction plan.

I am also pleased that the comp... mise includes a provision that I ha... long believed is necessary: providing ... the public statistics and informati...

on cases and motions that have been pending for an inordinate amount of time without decision. Section 476 ensures that, for the first time, the public will be allowed to learn which cases have been pending for a lengthy period of time and the identity of judges and magistrates before whom those cases have been pending.

One issue on which there has been much debate relates to the contents of the district court plans and, more specifically, the degree to which the legislation should mandate the contents. While I believe that the Senate bill is preferable to the House bill on this point, we have reached an appropriate compromise. The legislation now mandates that the district courts consider the six principles of litigation management and cost and delay reduction that we have specified, but leaves them the discretion to determine whether or not to adopt the principles.

In addition, and importantly, a pilot program is established that requires 10 district courts to include the 6 principles in their plans. The legislation specifically requires that at least five of the districts encompass metropolitan areas. It is my hope and expectation that the judicial conference will select these districts carefully and thoughtfully, and in full compliance with this requirement that at least five metropolitan areas will be included. I certainly hope and expect that some of the Nation's larger cities—New York, Atlanta, Chicago, Philadelphia, Los Angeles, for example—are included in the pilot program so as not to frustrate the will of Congress in this respect.

At the end of the pilot period, an independent organization with expertise in Federal court management will evaluate the effectiveness of the 6 principles and the degree to which costs and delays were reduced, compare those results to the impact on costs and delays in 10 other districts, and prepare a report. The judicial conference shall then submit its own report to Congress. If it recommends tht additional districts be required to include the six principles in their plans, it must initiate proceedings under the Rules Enabling Act to implement that recommendation. If the Judicial Conference does not recommend expansion of the pilot program, it—and this is significant—must identify alternative, more effective cost and delay reduction programs that should be implemented and take steps to implement such programs. Of course, Congress can revisit this subject as well, should we be dissatisfied with the manner in which the Judicial Conference proceeds.

Within a set number of years, then, this legislation insures that one of two things will occur. Either the six principles of litigation management and cost and delay reduction that Congress has specified in this legislation will be part of district court plans nationwide, or some other program, that has been shown to be demonstrably better, will be in place. One way or the other, the situation is bound to improve.

The bottom line is that we have, through this legislation, set in motion a sequence of action-enforcing events. Over the long run, these events will ensure that all courts, lawyers and litigants confront the dual problems of cost and delay and develop adequate means of reducing cost and delay.

There is one other provision in the civil justice bill offered today on which I would like to comment. We have amended the provision—section 473(a)(2)(B)—requiring that trial dates be set such that the trial is scheduled to occur within 18 months by including an ends of justice exception.

Frankly, I believe that the provision in the bill reported by the Judiciary Committee provided adequate flexibility to respond to those cases in which such a time frame was not feasible. Nevertheless, I believe the compromise language is acceptable. I would caution, however, that I hope that this exception is not abused—I hope that the exception does not swallow the rule. It is our intention that the ends of justice provison be limited to those few cases in which setting a trial within 18 months would indeed be incompatible with serving the ends of justice.

In title II, the compromise bill creates 85 new judgeships. We have added certain judgeships in the House bill primarily to provide additional resources to those districts hit hardest by drug cases.

This bill, unlike other judgeship proposals, ensures that the district courts with the heaviest drug caseloads will receive additional judgeships. By doing so, this bill is a critical anti-drug, anti-crime initiative. Quite simply, we need this bill to ensure that the courts can try more major drug dealers, bring to justice the S&L crooks, and cope with the explosion of violent crime in our country.

Mr. President, I would like to thank several of my colleagues, without whom passage of this bill would not have been possible. On the Judiciary Committee, Senator THURMOND's invaluable assistance and input on this legislation since its inception was critical. Senators HEFLIN and GRASSLEY, the chairman and ranking member of the Courts Subcommittee, also contributed greatly. Our colleagues in the House—Chairman BROOKS, Congressman FISH, Congressman KASTENMEIER and Congressman MOORHEAD—demonstrated once again that they are committed to improving the Federal court system and the delivery of justice in this country.

The staffs, too, played an integral part in the development of this legislation. Terry Wooten, Mary Avera, and Kevin McMahon of Senator THURMOND's staff deserve special thanks and appreciation, as do Sam Gerdano of Senator GRASSLEY's staff, Winston Lett and Scott Williams of Senator HEFLIN's staff, and Jon Leibowitz of Senator KOHL's staff. On my own staff, I would like to pay special tribute to Ron Klain, Diana Huffman, Jeff Peck, Scott Schell, and Lisa Meyer, whose unyielding commitment to this legislation is obvious. My former chief counsel, Mark Gitenstein, also played a critical role, starting with the Brookings conferences at which the legislation had its genesis.

Finally, I want to pay tribute to the members of the Brookings conferences, whose thoughtfulness, expertise and cooperation have made civil justice reform a reality. They all deserve a special note of thanks from anyone devoted to ensuring the just, speedy and inexpensive resolution of disputes in our Federal courts: Debra Ballen; Robert Banks; Robert G. Begam; Gideon Cashman; Alfred W. Cortese; Susan Geztendanner; Mark Gitenstein; Barry Goldstein; Jamie Gorelick; Marcia D. Greenberger; Patrick Head; Deborah Hensler; W. Michael House; Shirley Hufstedler; Kenneth Kay; Gene Kimmelman; Norman Krivosha; Leo Levin; Carl D. Liggio; Robert E. Litan; Frank McFadden; Francis McGovern; Stephen D. Middlebrook; Edward Muller; Robert M. Osgood; Alan Parker; Richard Paul; Judyth Pendell; John A. Pendergrass; George Priest; Charles B. Renfrew; Tony Roisman; John F. Schmutz; Christopher Schroeder; Bill Wagner; and Diana Wood.

Mr. President, what we have here is the product of a great deal of time, effort, and travail. It is a bill to reform the civil justice system which is very controversial and, after a great deal of time, hearings, compromise and consulation with both the House and the Senate, it has finally been agreed upon.

But even more important, Mr. President, there is the anomaly of a Democratic chairman of the Judiciary Committee rising to propose that the President of the United States, a Republican, appoint 85 new judges.

If past is prolog, they will all be Republican judges. Notwithstanding that, Mr. President, we on the Democratic side feel it very important that the number of judges in this country be expanded to meet the increased workload, a great deal of which is a consequence of the increased drug problem in the United States of America.

So, Mr. President, the judicial conference has suggested over 70-some judges. We have moved that to 85 to accommodate additional needs around the country. This has been worked out with the House of Representatives with the chairman of the Judiciary Committee on that side and others.

So, Mr. President, I now yield to my colleague from South Carolina, if he wises to speak to this issue.

Mr. THURMOND. Mr. President, I am in accord with the request made by the distinguished chairman of the

committee. The Judicial Conference has recommended these judges are badly needed, and I am in favor of the bill providing for them.

Today we are considering S. 2648, a bill to provide for civil justice expense and delay reduction plans and to authorize the creation of additional Federal judgeships. Originally introduced by Senator BIDEN and myself as S. 2027, the Civil Justice Reform Act, we are today offering a substitute version of the bill which incorporates the suggestions made by many to modify and improve the initial proposal.

The goal of this legislation is very laudable. This bill is intended to increase the administrative efficiency of the civil litigation process in the Federal courts and reduce litigation costs. Over the past several years, the workload of the Federal court system has increased dramatically. Currently, there is a feeling among many members of the bench and bar that civil litigation in the Federal court system is much too costly and takes far too long to resolve disputes.

The recognition of delay and cost concerns has been affirmed by the House of Representatives. On September 12, 1990, the House passed two separate bills addressing civil justice reform and the creation of additional Federal judgeships.

Based upon these concerns, the legislation we are considering today embodies principles from which each individual Federal district will develop their own plan for creating greater efficiencies in the civil litigation process.

Generally, under the modified provisions of title I contained in this substitute, a civil justice delay and expense reduction plan should be implemented for each district of the United States. The purpose of the plan is to simplify adjudication on the merits, monitor discovery, and improve the overall management of the litigation process. Implementation of the plan should result in a just, speedy, and inexpensive resolution of disputes.

While title I addresses judicial reform, title II provides the necessary judicial manpower to carry out these reforms. It is appropriate to consider the procedural changes in title I which will reduce the costs and delays confronted by those who seek to resolve their disputes through the civil litigation system within the Federal courts. However, any attempt to reform the civil justice system is futile without providing adequate manpower.

Title II of S. 2648 creates 85 additional Federal judgeships. Recently enacted drug and crime legislation increased the caseload of many judges across the country. As a result of the needs of the judiciary from the perspective of increased drug- and crime-related prosecution and its impact on the Federal docket, I believe more judgeships are vitally important. The Judicial Conference made recommendations to reflect its assessment of where judicial manpower should be placed. We have made every effort to accommodate these recommendations and embody them in this substitute proposal. The result is a provision to create additional Federal judgeships which will address the current demands on the judiciary and the needs of the citizens of this Nation.

In closing, S. 2648 will create the necessary judgeships and increase the administrative efficiency of the civil litigation process. For the above reasons, I support S. 2648 and urge its passage by this body.

Mr. KOHL. Mr. President, I am pleased to support S. 2648, the Judicial Improvements Act of 1990. As amended, this bill will make a number of significant improvements in our civil justice system, add scores of crucially needed Federal judges, and enhance our protections for intellectual property. I want to extend my congratulations to Chairman BIDEN for the fine job he did in finding the common interests among groups and Members who are often at cross-purposes.

I would like to speak briefly about my section, title IV, which will help develop and implement needed modifications to the judicial discipline and impeachment process. Much of the credit for this title should go to BOB KASTENMEIER, the dean of the Wisconsin delegation and chairman of the Courts Subcommittee, who introduced identical legislation in the House.

The first section of title IV would improve the method of filing and investigating complaints against Federal judges. I think a recent example demonstrates some of the problems with the existing system. After Federal Judge Harry Claiborne was convicted of tax fraud, he continued to collect his judicial salary even in prison. The House could not initiate impeachment proceedings because the chief circuit judge had not made a proper recommendation. The chief judge could not act until he had received a formal complaint. As a result, the Senate did not vote to remove Judge Claiborne until 2 years after his criminal trial. Similarly, it took more than 3½ years after Judge Walter Nixon's criminal conviction for us to complete his impeachment trial.

My provision will prevent such situations from occurring in the future. Under this proposal, when a judge has been convicted of a felony and has exhausted all direct appeals, the Judicial Conference may immediately transmit a recommendation of impeachment to the House. This would dispense with the requirement of an additional lengthy investigation by the circuit's special committee of judges. And in cases where there has been no conviction, the chief circuit judge may initiate a complaint of his own volition, so that there will be no unreasonable delay in commencing an investigation.

Neither of these proposed changes endangers the independence of the judiciary. On the contrary, by allowing more efficient action in the clearest cases of judicial abuse, this provisi should enhance people's faith in o judges and in our legal system.

The second section of title IV wou create a blue-ribbon commission study and report on possible chang in the impeachment structure. La yer, I served on the panel consideri the removal from office of Jud Walter Nixon. That experien brought home to me the importan of the Senate's constitutional role i thorough and fair impeachment pr ess. But I also learned first hand some of the problems with the syste

Judicial impeachment has recen become so cumbersome and unwiel that it adequately serves neither t Senate nor the accused. Two hundr years ago it was possible for every Se ator to hear all the arguments and termine the credibility of the w nesses in every impeachment ca Today, there are 100 Senators anc full schedule of pending legislative tions. For the full Senate to listen dozens of witnesses would require to suspend pressing legislative bu ness for weeks, or even months. The fore, we are forced to handle impeac ments just as we do all other issue through committees. But by treati impeachment like other issues, we asking the entire Senate to dec guilt or innocence based on the reco mendations of a 12-member panel a a few days of summarized argumer I know many Senators—particula those who have served on impea ment committees—find this opti practicable but not entirely satisf tory.

At the same time, some have argu that the existing process is unfair the accused judge. In their view, t defendant should be able to make case to each individual who will dec his fate—ultimately, that is 100 Se tors. Instead, according to this vi point, we have delegated the task ever smaller bodies—a judicial comn tee for the complaint, a House s committee for the impeachment a cles, and a Senate panel for the dict. While I believe that the curr approach is constitutional, we m consider some changes.

The Commission created by t measure would examine the curr impeachment process and sugg modifications. Commission memb will be appointed by the President, Chief Justice, and leaders of House and Senate. On the basis hearings and other expert assistar the Commission will release a n binding report within 1 year of its f meeting. The Commission's propos could include legislation, administ tive, or constitutional reforms should provide momentum for stre lining the process of removing art III judges.

Over the years, many of my leagues have proposed changes in judges are removed from office. In 96th Congress, for example, Sena

DECONCINI proposed a special court to evaluate complaints and recommend possible disciplinary actions. In the 99th Congress, Senator THURMOND introduced a constitutional amendment that would automatically remove a judge from office upon conviction for a felony. And in the current Congress, Senator HEFLIN introduced a constitutional amendment that would authorize Congress to address judicial discipline through legislation. Ultimately, we did not move on any of the proposals, though each has merit. But with the support of a bipartisan blue-ribbon commission, Congress might finally take the necessary steps to reform the impeachment process and preserve the integrity of our life-tenured judiciary.

Mr. President, S. 2648 includes many worthwhile components to make our legal system function more efficiently and more fairly. The new judgeships should reduce the backlog of cases in the Federal courts and the civil justice reform provisions will help ensure that the quality of justice is not strained by the quantity of demands. I am pleased to have contributed to this legislation, and I look forward to it soon becoming law.

Mr. HATCH. Mr. President, I am pleased to join with my colleagues in the passage of S. 2648, dealing with civil justice reform. This bill creates 85 new Federal judgeships. This will go a long way to expediting both criminal and civil cases in the Federal system. I commend Chairman BIDEN and Senator THURMOND for their work on this matter. Chairman BIDEN has recognized the dire need for new judgeships and has acted with statesmanship and skill in seeking this necessary increase.

This bill also contains the Computer Software Rental Amendments Act, which I introduced as S. 198. We have spent over 3 years attempting to move this important legislation.

The computer software industry, is a dynamic and blossoming source of growth for our Nation's economy. Yet today it is threatened by an emerging software rental industry which would make it possible for software users to make illegal copies; creating the potential for lost sales and the subsequent collapse of the software industry. This practice, if it is allowed to continue, will be devastating, and one of the brightest stars of the modern U.S. economy will be extinguished in its infancy.

The overwhelming rationale for renting a computer program is to make an unauthorized copy. Computer software cannot be enjoyed for an evening's entertainment and then returned. To have meaning to a user, the software packages require mastery of complex user manuals, often running hundreds of pages in length. Even after a user has mastered the use of a program, it has little value until he or she adds his or her own data base to the program. The functions of learning how to use a program and utilizing it in connection with one's own data base cannot be accomplished in the few hours or days available under a rental arrangement without copying the program and displacing a legitimate sale of the program.

The provision which we are voting on today provides software protection by prohibiting the rental of computer software unless authorized by the copyright owner. This portion of this legislative package has been the subject of extensive hearings and lengthy negotiations. I believe that it is a worthwhile change in the law.

ADDITIONAL FEDERAL JUDGESHIPS

Mr. DOMENICI. Mr. President, I am pleased that the bill now before the Senate will authorize the appointment of an additional Federal judge in New Mexico and two new judges on the Tenth Circuit Court of Appeals.

New Mexico, like other States along the southwest border, has seen a dramatic increase in drug-related crime in recent years. As a result, the number of felony filings per Federal judge in New Mexico increased 57 percent between 1984 and 1989, and is now twice the national average. Twenty-four percent of all criminal felony cases filed in 1989 were drug offenses.

The number of pending cases in the district increased 32 percent between 1984 and 1989 to 2,159. Our judges are doing their best to clear off this backlog, as evidenced by the fact that New Mexico—with an average of 70 trials per judge—is now ranked second in the country in the number of trials per judge.

This bill adopts the recommendation of the Judicial Conference that an additional Federal judgeship be created in New Mexico and that two judges be added to the Tenth Circuit Court of Appeals, which is the Federal appeals court that handles cases from New Mexico.

These judges are much needed to help clear the backlog of cases in New Mexico caused by the drug epidemic. I am pleased that the Senate is acting to create these positions, and I urge all Senators to support this bill.

Mr. GRAHAM. Mr. President, over the last few years Congress has stepped up its war on crime by providing additional resources to Federal, State, and local law enforcement, and passing tough new prosecutoral and sentencing measures.

However, we have overlooked the needs of a key player in the war on crime—the Federal judiciary.

While Congress has authorized increases in the number of FBI agents, DEA agents, border patrol officers, and Federal prosecutors, little corollary action has been taken to enable the judiciary to handle the rising caseload.

For example, Mr. President, the middle district of Florida has experienced a 30-percent increase in civil cases and a 55-percent increase in criminal cases over the last 8 years.

In the last year alone, the criminal caseload increased by 15 percent.

However, there have been no new judgeships authorized in the middle district since 1982.

In fact, Congress has not provided for any additional Federal judgeships in the Nation since 1984.

The northern district of Florida has one of the busiest trial dockets in the Nation.

Judges in this district completed 71 trials per judge over a 12-month period when the national average for that same time was 35 trials.

With the addition of five new DEA and customs offices in the northern district, and with added personnel in the U.S. Attorney's Office, there will continue to be an increase in the criminal litigation caseload.

Florida is additionally burdened by the slow speed at which judicial vacancies are filled.

Two seats on the bench are currently vacant, and other vacancies are expected with retirements and elevations.

The result of increasing caseloads without increasing capacity to handle these cases is that justice is delayed. Justice delayed, Mr. President, is justice denied.

Every effort we make to improve apprehension and prosecution of criminals will be negated if the judiciary is ill equipped to process those cases.

I am proud to be a cosponsor of this bill and I strongly encourage my colleagues to move quickly in passing this much-needed legislation.

Mr. GRASSLEY. Mr. President, I am pleased to support the Judicial Improvements Act of 1990—a most important and badly needed court reform package. I commend the chairman of the committee and Senator THURMOND, and their staff for their hard work to this point.

I particularly thank Chairman BIDEN for being responsive to the legitmate concerns of Federal district judges around the country with respect to the title on civil case management. Mr. President, I know that Federal judges in Iowa were especially concerned about the initial version of title I. These judges, like many others, do a fine job keeping their dockets current, and thus resisted the idea that Washington would seek to micromanage case management. The judges have a point, Mr. President. After all, a Congress that cannot perform its own constitutional obligations with respect to the Federal budget ought not to presume to tell another branch how to do its business. I am grateful that our chairman has worked out an accommodation that preserves a critical level of judicial automony.

With respect to the addition of new judges in title II, this is a long overdue action to enhance the ability of the third branch to simply keep up with current backbreaking caseloads. We have not had a judgeship authorization since 1984. Again, I thank the

chairman and ranking member for their efforts on this provision.

Mr. President, I am pleased that we are also adding a title III to this important court reform package. This title consists of a number of noncontroversial and somewhat technical recommendations of the Federal Courts Study Committee.

As you know, Mr. President, this past April, a blue-ribbon panel of judges, lawyers and members of Congress—authorized by Public Law 100-702, and appointed by the Chief Justice—proposed more than 100 changes in the administration and operation of the Federal court system. The study was historic: The work of the Federal Courts Study Committee represented the most comprehensive examination of the Federal courts since the passage of the Judiciary Act of 1789.

During the course of its work, the study committee solicited and received comments from hundreds of individuals and organizations. Public hearings were held early in the process to identify the areas of study. After a number of tentative recommendations were developed, the study committee held a second round of public hearings around the country.

Along with my colleague Senator HEFLIN, the chairman of the Subcommittee on Courts, I was privileged to serve on the study committee. Our final report represented the culmination of 15 months of work, under the direction and able leadership of Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals. Others on the study committee included J. Vincent Aprile, II, the general counsel of the Department of Public Advocacy in the State of Kentucky, the Honorable Jose A. Cabranes, a distict court judge from Connecticut, the Honorable Keith M. Callow, the Chief Justice of the Supreme Court of the State of Washington, the Hon. Levin H. Campbell, a judge on the U.S. Court of Appeals for the Second Circuit, the Hon. Edward S.G. Dennis, Jr., the then-assistant attorney general for the Criminal Division of the U.S. Department of Justice, Morris Harrell, a prominent lawyer in private practice in Dallas, TX, the Hon. ROBERT KASTENMEIER, chairman of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, the Hon. Judith Keep, a District Court judge from California, Rex E. Lee, the president of Bringham Young University and former solicitor general, the Hon. Carlos Moorhead, ranking member of the House Judiciary Subcommittee on Courts, Diana Gribbon Motz, a prominent lawyer from Baltimore, MD, and the Hon. Richard A. Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit.

A principal focus of the study committee was on institutional and procedural change, rather than substantive law reform. Some of the recommendations—such as the abolition of diversity jurisdiction and the repeal of mandatory minimum criminal sentences—do represent major changes in the law, and will require more study by Congress. The changes proposed by this amendment today, however, represent only those consensus items that enjoyed unanimous support among study committee members. Taken individually, these changes are quite modest. Collectively, I believe these changes will substantially improve the administration of justice in the Federal system.

I thank the chairman of the Judiciary Committee, Senator BIDEN, for being willing to consider this package of amendments as a compliment to titles I and II of S. 2648. Each of these titles, in their separate ways, will help the judiciary better serve the public: by reducing costs and delays in litigation, by increasing resources so that courts can better cope with burdensome caseloads, and by improving the efficiency and fairness of Federal court procedures.

I would also like to thank the many staff people who worked for months on this amendment, particularly Samuel Gerdano, my chief counsel, Winston Lett and Scott Williams with Senator HEFLIN, Jeff Peck and Scott Schell with Senator BIDEN, and Tony Coe with the Office of Senate Legislative Counsel. I am also grateful for the technical advice provided by the Administrative Office of the U.S. Courts.

I ask unanimous consent that a more detailed section-by-section analysis of title III be printed in the RECORD.

There being no objection, the analysis was ordered to be printed in the RECORD, as follows:

TITLE III—IMPLEMENTATION OF THE FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

SECTION-BY-SECTION ANALYSIS

Section 301 states the short title of this title.

Section 302 requests that the Federal Judicial Center study and report back to Congress by 1992 on the number and frequency of unresolved intercircuit conflicts.

As the Federal Courts Study Committee pointed out in its report,

"As recently as 1960, the Supreme Court reviewed approximately 3 percent of all federal appeals. That proportion has dropped precipitously to less than 1 percent, and will continue to drop as the total number of appeals rises. The Supreme Court handles roughly 150 or fewer cases annually (and that number may be dropping); approximately 75 percent come from the federal courts of appeals. This figures has remained constant for some time, with little prospect for expansion. We are not persuaded that the Court could increase its output, given the difficulty of the cases that the Court hears.

"Although the Court sits at the apex of the state and federal systems, theoretically to harmonize the federal law coming from both, the Court has long since given up granting certiorari in every case involving an intercircuit conflict. Thus, a federal statute may mean one thing in one area of the country and something quite different elsewhere—and this difference may never be settled. Some conflicts, of course, may have the redeeming feature, especially in the stitutional area, of helping to develop doctrine and insight. Other conflicts rapid resolution. Conflicts over some p dural rules and law affecting actors in one circuit at a time may have a negli effect. A federal judicial system, how must be able within a reasonable tim provide a nationally binding constructio these acts of Congress needing a single, fied construction in order to serve their pose.

"It appears from academic analyses the Supreme Court in 1988 refused re to roughly sixty to eighty "direct" inte cuit conflicts presented to it by petition certiorari. This number does not inc cases involving less direct conflicts (e.g., damentally inconsistent approaches to same issue). Not all these sixty to ei conflicts, however, are necessarily "int able," to use a commonly applied adjecti

The Federal Courts Study Committee ommended that these conflicts be anal to determine, as objectively as we can, t that are intolerable and yet, for what reason, are unlikely to be resolved by Supreme Court.

Commentators have suggested various teria for identifying "intolerable" conf For example, does the conflict:

Impose economic costs or other harm multi-circuit actors, such as firms enga in maritime and interstate commerce?

Encourage forum shopping among cuits, especially since venue is frequen available to litigants in different fora?

Create unfairness to litigants in differ circuits—for example, by allowing fed benefits in one circuit that are denied e where?

Encourage "non-acquiescence" by fed administrative agencies, by forcing them choose between the uniform administrat of statutory schemes and obedience to different holdings of courts in different gions?

Section 302 is not intended to prescrib rigid research scheme for the FJC to foll Indeed, the details of the study are inten to be left to the sound discretion of Board of the FJC. Nor does Section 302 ticipate any particular result from the FJ analysis.

Section 302, in subsection (c), also se the FJC's analysis and report to Congr within two years on a range of structural ternatives for the Federal Courts of peals. The Federal Courts Study Commit studied various structural alternatives, w out endorsing any particular approach. with subsection (a), this provision is not tended to suggest that the FJC will nee undertake massive, original resear Rather, it contemplates that, for exam the existing literature on structural alter tives will be canvassed and analyzed for benefit of Congress.

Section 303 would amend Title 28 to p vide, in effect, that the appointment of active Federal judge to the position of rector of the Federal Judicial Center, Di tor of the Administrative Office of United States Courts, or Administrative sistant to the Chief Justice will create a cancy in the courts on which the judge sitting and, if the judge subsequently turns to the court as an active judge, next judicial vacancy on the court will be filled.

The purpose of this section is to enco age active judges to seek to serve in th important Judicial Branch administrat positions without penalizing the court fr which they come or prejudicing their opp tunity to return to active service as a ju

Section 304 amends 28 U.S.C. 152(a) to permit a bankruptcy judge whose 14-year term of appointment has expired to continue to serve until a successor has been appointed. The provision includes a 180-day limitation on such extended service and is subject to the approval of the judicial council of the circuit.

Allowing a bankruptcy judge to serve up to 180 days after the judge's term of appointment has expired will provide invaluable assistance when the appointment of a successor is delayed. At present, the only assistance available during such a "gap" period is from visiting judges or retired bankruptcy judges recalled to active service. Because bankruptcy filings have increased rapidly across most of the country in recent years, visiting judges and recall judges are not available for all of the districts which need assistance.

Section 305 would permit, but not require, the judicial councils of two or more circuits to establish a joint bankruptcy panel if authorized by the Judicial Conference of the United States. This would allow small circuits (such as the First Circuit) to form multi-circuit bankruptcy appellate panels. (BAP).

The Federal Courts Study Committee recommended that Congress require each circuit to establish BAPs, with an "opt-out" provision, as well as authorize small circuits to create multi-circuit BAPs. The Study Committee was impressed with the experience of the Ninth Circuit BAP, which disposed of 902 appeals in 1987 and 664 in 1988, reducing the workload of both district and appellate courts. The Ninth Circuit BAP received favorable reviews from both bench and bar. It is expected that BAPs foster expertise and increase the morale of bankruptcy judges, in part by offering them an opportunity for appellate work. Section 305 is intended to be a modest first step, short of mandating BAPs, so as to encourage further experimentation with BAPs.

Section 306 provides a new retirement system for judges of the U.S. Claims Court, generally modeled after the system in place for judges of the U.S. Tax Court. This section solves a serious problem in the Claims Court: the apparent lack of independence of the judges.

This seriously undermines the ability of the court to be seen as an impartial decider between the government and the taxpayer, the contractor, the Indian tribe, government employees or patent holders. The independence problem is created by the fact that the judges livelihood is dependent upon reappointment by the defendant's representative. Under the current retirement system, most claims court judges are not eligible for any retirement at the time their term ends. Unlike bankruptcy judges and magistrates whose appointment is made by the judiciary, Article I judges are appointed by the President through the Department of Justice. Also, unlike the bankruptcy judges and magistrates whose independence is not threatened by the judicial appointment process, Article I judges might well be reluctant to rule against an executive branch that holds their future livelihood in its hands.

Currently, all United States Claims Court judges have a fifteen-year term, with no possibility of recall or pension until they are eligible for retirement, generally at age sixty-five. Some may not even be eligible for any significant pension at age sixty-five because of a lack of prior government service. There are only two realistic options available to a judge who will not be sixty-five when that judge's term ends (a majority of judges now serving on the court).

The judge must either seek reappointment from the President through the Justice Department or seek employment as a litigating attorney. The Justice Department is the defendant's representative in all suits pending before Claims Court judges. The most likely source of litigation employment is with firms that appear before the court on behalf of plaintiffs. A judge's seeking employment through either is unseemly and may at least appear to threaten the Claims Court judges' independence.

Since 1969, the judges of the United States Tax Court have been provided with both judicial independence and adquate job security through their reappointment and retirement provisions, 26 U.S.C. 7443(e), 7447(b)-(f). Prior to the expiration of a Tax Court judge's fifteen-year term, that judge will advise the President of a desire to be reappointed. A judge not reappointed becomes a senior judge of the Tax Court and immediately receives retirement pay. The Congress, in creating the most recent Article I court, the United States Court of Veterans Appeals, instituted almost identical reappointment and retirement provisions for that court as exist for the United States Tax Court. See 38 U.S.C. 4095-97.

The purpose of Section 306 then, is to generally conform the reappointment and retirement provisions of the Claims Court to that now in place at the Tax Court.

Under this section, the President can ensure continued judicial service by reappointment. If this does not occur, however, the judge who is willing to serve (and who seeks reappointment but is denied) receives his or her full salary. In return, the Claims Courts benefits from the continued service of the judge as a senior judge for life, or as long as that judge retains his or her full salary. Section 306 also eliminates the threat to the system's independence created by having judges who can be terminated by one party to its cases. Finally, the section sharply restricts what the judges can do outside of being senior judges. In the Tax Court, this system has led to a general trend of reappointment and has provided an active corps of senior judges to expedite the handling of cases.

Generally here is how the section would operate: if a Claims Court judge seeks reappointment by the President but is not reappointed, the judge then becomes a Senior Judge of the Claims Court. Senior Judges are subject to compulsory recall by the Chief Judge for up to 90 calendar days per year and voluntary recall for unlimited time. If a Senior Judge does not perform mandatory recall service, the full annuity for that year is forfeited. Senior Judges are sharply restricted in the work they may underake while not on recall service.

They may not assist in making any civil claim against the United States. Violation of this restriction will result in a permanent forfeiture of their annuities and possible criminal penalties under 28 U.S.C. 454. A person serving as a Senior Judge under the age of 65 does not have an option provided to those judges over 65 of freezing the annuity then paid and avoiding further mandatory recall and outside employment restrictions.

Section 306 creates a new 28 U.S.C. 178. Subsection (a), pertaining to normal retirement based on age and years of service, tracks the portion of 26 U.S.C. 7447 applicable to Tax Court Judges permitting retirement under the "Rule of 80" after age 65 and upon 15 years of service.

Subsection (b) pertains to retirement upon failure of reappointment and tracks the provisions of 26 U.S.C. 7447 applicable to Tax Court judges. It provides that a judge must serve at least one full term and seek reappointment by timely notice to President in order to be eligible for an an ity upon failure of reappointment.

Subsection (c), pertaining to retirement removal from office by reason of physica mental disability, tracks a similar provis in 26 U.S.C. 7447 for Tax Court judges. T amount of the annuity will be based whether the judge served 10 years or l but in no case less than five years.

Subsection (d) provides that judges v retire on the basis of age and years of s ice and upon failure of reappointm would, without age limitation, be subject compulsory recall for up to 90 days per y This requirement matches the current T Court provisions.

Subsection (e) provides that a reti judge shall be designated "senior judge" a shall not be counted as a judge of the co for purposes of the number of authori regulator active judgeships. This track similar provision in 28 U.S.C. 7447 appli ble to the Tax Court.

Subsection (f) provides that an eligi judge must elect into the new retirem system by notifying the Administrat Office of the United States Courts and t election of an annuity under the new syst precludes any other federal annuity.

Subsection (g) pertains to calculation service on which an annuity would be bas It provides that only prior service as a ju of the Claims Court or as a commissioner the Court of Claims may be included in t calculation. This corresponds precisely the creditable service provisions applica to Tax Court judges.

Subsection (h) provides that the time a manner for making annuity payments v be the same as for a judge in active servi These provisions track a similar provision 28 U.S.C. 7447 pertaining to the Tax Cou

Subsection (i) provides for payments fr a judge's annuity to a former spouse family member pursuant to court dec upon notice to the Director of the Admir trative Office of the U.S. Courts.

Subsection (j) pertains to permanent a temporary forfeiture of annuities in cert circumstances. Tracking a related provisi in 28 U.S.C. 7447 applicable to retired T Court judges, it provides that there shall permanent forfeiture if a retired judge, the practice of law, represents a client making any civil claim against the Uni States provided that upon advance electi and notice such retired judge could av total forfeiture and instead freeze his an ity at its level immediately prior to rep senting a claimant against the Uni States. This subsection also provides fo one-year forfeiture if a retired judge fails render required judicial services when cal upon by the chief judge. This subsecti also provides for a temporary forfeiture the case of a retired judge who accepts co pensation for other federal governme service.

Subsection (k) is a housekeeping provisi detailing the manner and effect of revoki an election to receive an annuity under t new system.

Subsection (l) contains a housekeepi provision pertaining to funding and m agement of the retirement fund ("Clai Court Judges Retirement Fund") fr which annuities under the new syst would be paid.

Subsection (b) of Section 306 pertains Judicial survivors' annuities. It makes t Judicial Survivors Annuity Plan set forth 28 U.S.C. 376 applicable to Claims Co judges and is thus analogus to 26 U.S 7448 for Tax Court judges.

Subsection (c) of Section 306 pertains the Civil Service Retirement System a

would apply to judges who, for whatever reason, prefer to remain under Civil Service rather than elect the new retirement system. It would specifically provide for enhanced civil service (vesting at 2½ percent year year) in exchange for a higher contribution rate. Some Claims Court judges with long federal service may prefer to retire at an earlier age under the Civil Service system without a restriction on the practice of law and could take advantage of these provisions which also apply to bankruptcy judges and magistrates. See 5 U.S.C. 8339(n). A judge who chose to retire under the Civil Service System rather than under the proposed new retirement system would receive a smaller annuity with a resulting savings to the Treasury.

Subsection (d) of Section 306 pertaining to participation in the Thrift Savings Plan is verbatim with language included in the recently enacted bankruptcy judge retirement legislation and participation in the plan has specifically been provided for the Article III judiciary. See 5 U.S.C. 8440a.

The Thrift Savings Plan is currently available to Claims Court judges and is participated in by most of them. Without subsection (d), a Claims Court judge who elected the new retirement system would no longer be eligible to participate in the Thrift Savings Plan. As a result, Claims Court judges would be losing an opportunity currently available to them. Participation in the Thrift Savings Plan pursuant to the subsection (d) provisions would involve no matching contribution by the Government.

Subsection (e) of Section 306 would make a number of technical and conforming amendments consistent with the purposes of section 306.

Subsection (f) of Section 306 provides that these new retirement provisions apply to all active and senior judges in active service as of the date of enactment of the Judicial Improvements Act of 1990.

Mr. President, I should note here that the Federal Courts Study Committee also recommended that a similar reappointment and retirement provision be included for judges of the U.S. Court of Military Appeals. Judges of this Article I court appear to face similar threats to their judicial independence. The U.S., through the Department of Defense and its military departments, is the prosecuting authority in all cases before the Court of Military Appeals. Judges of the Court must seek reappointment from the President through the Defense Department.

Because of an objection from the Armed Services Committee, however, no provision for these judges is included in this amendment.

Section 307 modifies 28 U.S.C. 601 which now states that the Supreme Court shall appoint the Director and Deputy Director of the Administrative Office, to instead provide that the Chief Justice shall make the appointment after consulting with the Judicial Conference of the United States.

The Chief Justice is the only member of the Supreme Court with official administrative duties regarding the courts of appeals and district courts and, of course the Chief Justice is the titular head of the Judicial Branch and Chairman of the Judicial Conference of the United States.

In these capacities, he works on a daily basis with the Director of the Administrative Office and has an obvious substantial interest in naming a qualified person to fill this major judicial branch position.

By giving the appointment authority specifically to the Chief Justice, the law will be modified to reflect actual practice and responsibility. By including a requirement that the election be made after consulting with the Judicial Conference, the law will also reflect in large part present practice and recognize the great interest that the Conference has in who becomes the District and Deputy Director of the Administrative Office.

Section 308(a) amends 28 U.S.C. 636(c)(2) to permit judges and magistrates to advise civil litigants of the option to consent to trial by a magistrate.

Under present provisions, judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate. Many judges refrain entirely from even mentioning to parties the option of consent to civil trial by a magistrate. Litigants in many jurisdictions often receive little more than a standardized written notification of this option with the pleadings in a civil case.

As a result, most parties in civil cases do not consent to magistrate jurisdiction. The present procedures have effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases.

The right of a litigant to have his civil case heard by an Article III judge remains paramount. Under the present Act, judicial officers are restricted from informing parties of their opportunity to have a civil matter referred to a magistrate because of concerns that judges would coerce parties to accept a reference to a magistrate. Those concerns have not been borne out in the decade since the 1979 revisions. The amendment made by Section 308 safeguards the right of a civil litigant to trial by an Article III judge by requiring judges and magistrates to advise parties of their freedom to withhold consent to magistrate jurisdiction without fear of adverse consequences. The amendment thus provides a proper balance between increased judicial flexibility and continued protection of litigants from possible undue coercion.

The need for the court system to have greater flexibility in utilizing judicial resources was recognized by the Federal Courts Study Committee. This need is particularly acute in handling the expanding civil caseload of federal courts. Liberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources. Both the Judicial Conference and the Federal Courts Study Committee have endorsed this amendment.

Section 308(b) amends 28 U.S.C. 631(f) by extending the period that a magistrate may continue to serve until a sucessor is appointed from 60 days to 180 days, so as to endure that no judicial district suffers from a gap in magistrate service. This section follows the rationale articulated in Section 304 with respect to bankruptcy judges.

Section 309 would amend 11 U.S.C. 305(c) and 38 U.S.C. 1334(c)(2) and 1452(b) to clarify that, with respect to certain determinations in bankruptcy cases, they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts.

The statutes provide that bankruptcy judges' orders deciding certain motions (motions to abstain in favor of, or remand to, state courts) are unreviewable "by appeal or otherwise." Because bankruptcy judges may enter trial orders only if there is appellate review in an Article III court, one result of this limitation is that bankruptcy judges cannot make final judgments in such cases even when they clearly involve "core" proceedings.

Section 309 would authorize bankruptcy judges to enter binding orders in connection with abstention determinations under Title 11 or Title 28 and remand determinations under Title 23, subject to review in the district court. The statutory language each of these sections now provides th decision of the bankruptcy court (to a or remand) "is not reviewable by app otherwise." The proposed amen would modify these three sections t vide that the decision of the banki court is not reviewable "by the court peals . . . or by the Supreme Court United States . . ." Such determin would therefore by reviewable by th trict court.

Speeding the disposition of these ty motions will better serve the purpose limitation on appeals from the d courts to the courts of appeals.

Section 310 implements a recomm tion of the Federal Courts Study Comr by authorizing federal courts to assert ent jurisdiction over parties without dependent federal jurisdictional base language originated in the House of R sentatives after the benefit of subst helpful comment from the academic munity. We here adopt the analysis o House.

The doctrines of pendent and ancilla risdiction, in this section jointly labele plemental jurisdiction, refer to the au ity of the federal courts to adjudicate out an independent basis of subject m jurisdiction, claims that are so relate other claims within the district court's nal jurisdiction that they form part o same cases or controversy under Articl of the United States Constitution. Su mental jurisdiction has enabled fe courts and litigants to take advantage o federal procedural rules on claim and p joinder to deal economically—in s rather than multiple litigations—with r ed matters, usually those arising from same transaction, occurrence, or serie transactions or occurrences.

Moreover, the district courts' exercis supplemental jurisdiction, by making fe al court a practical arena for the resolu of an entire controversy, has effectu Congress's intent in the jurisdictional utes to provide plaintiffs with a fe forum for litigating claims within ori federal jurisdiction.

Recently, however, in *Finley v. U States*, 109 S. Ct. 2003 (1989), the Supr Court cast substantial doubt on the aut ity of the federal courts to hear some cl within supplemental jurisdiction. In *Fi* the Court held that a district court, Federal Tort Claims Act suit against United States, may not exercise supple tal jurisdiction over a related claim by plaintiff against an additional nondi defendant. The Court's rationale— "with respect to the addition of partie opposed to the addition of only claims will not assume that the full constituti power has been congressionally author and will not read jurisdictional stat broadly." 109 S. Ct. at 2007—threaten eliminate other previously accepted fe of supplemental jurisdiction. Already, example, some lower courts have inter ed *Finley* to prohibit the exercise of sup mental jurisdiction in formerly unc tioned circumstances.

Legislation, therefore, is needed to pro the federal courts with statutory auth to hear supplemental claims. Indeed, Supreme Court has virtually invited gress to codify supplemental jurisdictio commenting in *Finley*, "What ever we regarding the scope of jurisdiction . . . of course be changed by Congress. Wh of paramount importance is that Con would be able to legislate against a b ground of clear interpretive rules, so th may know the effect of the langua

adopts." *Finley*, 109 S. Ct. at 2007. This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction. In federal question cases, it broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties. In diversity cases, the distict courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute. In both cases, the district courts as under current law, would have discretion to decline supplemental jurisdiction in appropriate circumstances.

Section 310 adds a new 28 U.S.C. 1368. Subsection (a) of the new section generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional cases or controversy as the claim or claims that provide the basis of the district court's original jurisdiction. In so doing, subsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*.

Subsection (b) prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. 1332, from exercising supplemental jurisdiction in specified circumstances. In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis.

In accord with case law, the subsection also prohibits the joinder or intervention of persons as plaintiffs if adding them is inconsistent with section 1332's requirements. The section is not intended to affect the jurisdictional requirements of 28 U.S.C. 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.

Subsection (b) makes one small change in pre-*Finley* practice. Anomalously, under current practice, the same party might intervene as of right under Federal Rule of Civil Procedure 24(a) and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding Rule 24(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19. If this exclusion threatened unavoidable prejudice to the interests of the prospective intervenor if the action proceeded in its absence, the district court should be more inclined not merely to deny the intervention but to dismiss the whole action for refiling in state court under the criteria of Rule 19(b).

Subsection (c) codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim.

Subsection (c) (1)-(3) codifies the factors recognized as relevant under current law. Subsection (c)(4) acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances. As under current law, subsection (c) requires the district court, in exercising its discretion, to undertake a case-specific analysis.

If, pursuant to subsection (c), a district court dismisses a party's supplemental claim, a party may choose to refile that claim in state court. In that circumstance, the Federal district court, in deciding the party's claims over which the court has retained jurisdiction, should accord no claim preclusive effect to a state court judgment on the supplemental claim. It is also possible that, if a supplemental claim is dismissed pursuant to this subsection, a party may move to dismiss without prejudice his or her other claims for the purpose of refiling the entire action in state court. Standards developed under Rule 41(a) of the Federal Rules of Civil Procedure govern whether the motion should be granted.

Subsection (d) provides a period of tolling of statutes of limitations for any supplemental claim that is dismissed under this section and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed. The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

Subsection (e) defines "State" in accordance with other sections of this title.

Section 311 is intended to establish venue for both diversity and federal question cases in identical terms.

The general venue statute (28 U.S.C. 1391) includes "the judicial district . . . in which the claim arose" as one of the districts where civil actions may be brought. The implication that there can be only one such district encourages litigation over which of the possible several districts involved in a multi-forum transaction is the one "in which the claim arose."

This section clarifies that phrase by substituting the words: "any judicial district in which a *substantial part* of the events or omissions giving rise to the claim occurred, or a *substantial part* of property that is the subject of the action is situated." Congress used the same phrasing in a 1976 amendment designating venue in actions against foreign states.

This section also eliminates the century-old anomaly, now codified in the venue statute, providing for venue in diversity but not federal question cases "in the judicial district where all plaintiffs . . . reside." There is no good historical or functional reason for this distinction, which perversely favors home-state plaintiffs in diversity cases. The American Law Institute's 1969 Study of the Division of Jurisdiction Between State and Federal Courts proposed eliminating plaintiffs residence as a basis for venue and providing for venue in a judicial district in which "any defendant resides, if all defendants reside in the same State." This moderate broadening of venue means that if a litigation has a significant relation to a plaintiff's home state, it may be brought there; if it has no such relation, the plaintiff's residence alone should not suffice for venue.

Subparagraph (3) makes a similar change (regarding "substantial part") in venue rules for civil cases where the government is a defendant.

Section 312, regarding removal of separate and independent claims (28 U.S.C. 1441(c)), would eliminate most of the problems that have been encountered in attempting to administer the "separate and independent claim or cause of action" test. Most of the cases have involved the requirement of absolute diversity to establish diversity removal jurisdiction. The plaintiff, for example, might sue a diverse defendant for breach of contract and join a claim against a nondiverse defendant for inducing the breach. Courts have found the test very difficult to administer and have reached confusing and conflicting results. At the same time, the need to provide removal to the defendants who are diverse is not great.

The amendment would, however, retain the opportunity for removal in the one situation in which it seems clearly desirable. The joinder rules of many states permit a plaintiff to join completely unrelated claims in a single action. The plaintiff could easily bring a single action on a federal claim and a completely unrelated state claim. The reasons for permitting removal of federal question cases applies with full force. In addition, the amended provision could actually simplify determinations of removability. In many cases the federal and state claims will be related in such a way as to establish pendant jurisdiction over the state claim. Removal of such cases is possible under 28 U.S.C. 1441(a).

The further amendment to 28 U.S.C. 1441(c) that would permit remand of all matters in which state law predominates also should simplify administration of the separate and independent claim removal. Of course, a district court must remand state claims that are so unrelated to the federal claim that they do not form part of the same Article III case or controversy.

Section 313 provides a fall-back statute of limitations (codified at new section 28 U.S.C. 1658) for federal civil actions by providing that, except as otherwise provided by law, a civil action arising under an Act of Congress may not be commenced later than four years after the cause of action accrues.

Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appeals to lack persuasive support as a matter of policy.

It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

Section 314 would provide for a modest increase in juror and witness fees, to account in part for an increase in the cost of living since the last adjustment and in recognition of the important contribution these citizens make to our Federal justice system. These fees were last set by congress in 1978. Witness and juror fees would increase from $30 per day to $40 per day.

Section 315 delegates to the Supreme Court the authority, pursuant to and limited by the Rules Enabling Act, to define what constitutes a "final decision" for purposes of 28 U.S.C. 1291. As the Federal Courts Study Committee noted:

"The state of the law on when a district court ruling is appealable because it

'final,' or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is 'final' and the time for appeal begins to run.

"Decisional doctrines—such as 'practical finality' and especially the 'collateral order' rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review."

The Supreme Court's rulemaking authority is, of course, constrained by the requirement that any rule "not abridge, enlarge or modify any substantive right."

Section 316 extends the life of the Parole Commission for five years beyond the 1992 date for abolition set out in the Sentencing Reform Act of 1984. This extension would permit the Commission an adequate time to consider cases where the offense occurred prior to November 1, 1987 (so-called "old law" cases).

Section 317 extends, for 10 years, the bankruptcy administrator program currently operating in the judicial districts of Alabama and North Carolina. These programs, established by the "Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1966" (P.L. 99-554), as an exception to the nationwide expansion of the U.S. Trustee program, would otherwise expire on October 1, 1992. Any of the six affected districts may elect to become part of the U.S. Trustee program before the year 2002.

This section also amends the 1986 law to give bankruptcy administrators in the six districts standing to raise issues and appear and be heard in the same manner as U.S. Trustees. The section further provides that the power given to bankruptcy courts to act *sua sponte* to take any action or make "any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process" is given to the six affected districts on the date of enactment of this Act. The section thus makes uniform the authority of courts under 11 U.S.C. 105.

Section 318 requires the Judicial Conference to conduct a comprehensive review of the Federal defender program with a report back to Congress, with recommended changes, by March 31, 1992. As the Federal Courts Study Committee reported:

"Some years have passed since the last comprehensive review of the Criminal Justice Act program. Since that time, the federal defender program has grown substantially in size and complexity. For example, panel attorney appointements have risen from 16,000 in 1966 to 65,000 in 1988. There have been many other changes: the maturation of the defender movement, the dramatic increase in criminal prosecutions, the evolving sophistication and complexity of criminal law, the constitutionally mandated necessity of competent defense counsel, the small percentage of the legal profession that practices criminal law, the legal and ethical requirement of an independent criminal defense bar, the heavy workload of the federal judiciary, the independence of the federal prosecutor, and the revival of the federal death penalty."

Consistent with the importance of this program, Section 318 contemplates that the Judicial Conference will appoint a special committee to conduct a detailed study of the federal defender program.

The review should assess the current effectiveness of the CIA program (consistent with the areas suggested for study in subsection (b)) and recommend appropriate legislative, procedural, and operational changes, including those dealing with compensation. In addition to present and former federal defenders, the study committee should include a cross-section of those knowledgeable with CIA matters.

Section 319 amends the Ethics in Government Act of 1978, as amended, to provide that compensation for teaching received by a federal senior judges shall not be subject to an outside income limitation.

In contrast to the federal judicial retirement system, which allows judges who satisfy age and service requirements to retire at full salary, senior judge status enables eligible federal judges to continue to serve, but with a reduced workload. Pursuant to the Ethics Reform Act, federal judges who take senior status rather than choosing to retire are currently required to carry a minimum caseload corresponding to 25% of the caseload of a full-time active federal judge.

The Federal Courts Study Committee report recognizes the significant contribution of senior judges to effective court operations and additional judicial capacity. The Report recommended that "Congress *not* enact disincentives to senior judge service." Section 319 is consistent with this recommendation, by removing a disincentive to senior judge service.

Section 501 of the Ethics in Government Act currently imposes a federal employees a 15% ceiling on outside earned income. 5 U.S.C. app. 210 (1988). Section 319 excepts from that 15% ceiling teaching income earned by eligible federal judges who choose to take senior status pursuant to section 294(b) of title 28, United States Code. This exception applies only to teaching income earned by federal judges on senior judge status. It does not apply to active status federal judges or other federal employees or officers.

Section 320 requires that circuit judicial conferences be held once every two years (instead of every year as in current law) with an option to be held in the off year, as a way to reduce the judiciary's costs. This provision, supported by the Judicial Conference, was included in S. 1482 (100th Congress) as introduced and H.R. 4807, as passed by the House.

Though the provision did not prevail, the idea of providing this degree of flexibility into expensive circuit conference meetings is cost-conscious and sound.

Section 321 changes the title of "United States Magistrates" to "United States Magistrate Judge." The effect of this provision is that any magistrate appointed pursuant to section 631 of 28 shall henceforth be referred to as a United States Magistrate Judge. The change in designation is intended to apply equally to full and part-time magistrates.

"Judge" is a name commonly assigned to non-article III adjudicators in the federal court system. Examples include Claims Court Judges, Tax Court Judges and Bankruptcy Judges. Accordingly, appending "judge" to the magistrates' title renders it consistent with adjudicators of comparable status. Moreover, United States magistrates are commonly addressed as "judge" in their courtrooms, so that the change of designation provided for in this section largely conforms to current practice. The provision is one of nomenclature only and is designed to reflect more accurately the responsibilities, duties and stature of the office. It does not affect the substantive authority or jurisdiction of full-time or part-time magistrates.

Section 322 amends the Judicial Su
Annuities System (JSAS), 28 U.S.
which provides for annuities for the
vors of Federal judges and judicial o
who elect to participate in JSAS. C
law limits entitlement to the survi
those who had completed at least 18
of service. Section 322 eliminates
month service requirement for survi
nuity eligibility in cases where a judg
dicial officer (as defined in 28
376(a)(1)(A), (B), and (F)) is assass
Amounts necessary to equal a
months of contributions are to be de
from the annuity where an assas
judge or judicial officers served for le
18 months.

Section 322 further amends 28 U.S
to permit a survivor of a judge or judi
ficer who is assassinated to receive ar
ity notwithstanding the survivor's
rent eligibility for Federal workers' c
sation benefits under 5 U.S.C. chap
Under existing law, survivors must el
tween workers' compensation benefits
JSAS annuity.

The determination as to whether t
ing of a judge or judicial officer wh
assassination is to be made by the D
of the Administrative Office, subj
review by the Judicial Conference
United States.

The amendments made by sectio
apply retroactively to May 18, 197
thus would permit the receipt of JS
nuities by survivors of the three judg
have been assassinated since that
Judge John Wood (W.D. Tex.) in
Judge Richard Daronco (S.D. N.Y.) i
and Judge Robert Vance (11th Cir.) i

Section 323 amends section 332 of T
with respect to the composition of j
councils, in a manner designed to
equalize the representation between
and district judges on the policy m
body of the circuit. Circuit judges wi
have one additional vote on the coun
cause of the presence of the circuit
judge. In other respects, however
number of district judges will equal t
circuit judges.

Section 324 contains several miscell
provisions. Subsection (a)(1) create
new places for holding court in Neva
Ely and Lovelock. These cities, whi
cently have become locations for
state prisons, need to be designat
places of holding court so that space
rented on an occasional basis for civ
trials relating to prisoner civil rights c

The new maximum security prison l
in Ely, Nevada, which is 284 miles fr
Vegas and 317 miles from Reno, hou
maximum security prisoners inc
death row inmates previously hous
Carson City (a designated court loc
The new medium security prison und
struction in Lovelock, Nevada, which
miles from Las Vegas and 92 miles
Reno, is scheduled to open in Sept
1992.

The Nevada Department of Prison
constructed a small hearing roo
judge's chambers in the Ely prison a
same will be included in the Lovelock
ty. Therefore, most hearings will b
inside the prisons. However, in order
commodate the additional space r
ments of jury trials, it will become nec
from time to time to rent space to s
ment the existing facilities. Designat
the locations as places of holding cour
quired in order to allow the rental of
for such purposes.

Subsection (a)(2) amends Section 11
Title 28, to add Watertown, New Yor
place of holding court within the No

District of New York. The Northern District of New York is a large district consisting of approximately 28,000 square miles. Litigants in the Watertown area presently have to travel approximately 70 miles to Syracuse, the nearest place of holding court.

There are federal facilities and Indian reservations in the Watertown area and litigation in the area has been increasing rapidly. The addition of Watertown as a place of holding court will reduce travel times and thus litigation expenses. The district court and the Judicial Council of the Second Circuit support the addition of Watertown and the Judicial Conference at its March 1988 session voted to support the designation of Watertown as a place of holding court.

Subsection (a)(3) amends Section 118(a) of Title 28 to add Lancaster, Pennsylvania as a place of holding court within the Eastern District of Pennsylvania. Litigants from Lancaster currently have to travel over 70 miles to Philadelphia. While Reading, over 30 miles from Lancaster, is also a place of holding court, no active district judge regularly sits in Reading. The addition of Lancaster as a place of holding court will reduce travel time and thus litigation expenses and will result in greater convenience for litigants from the Lancaster area. In addition, Lancaster County is one of the two fastest growing counties in Pennsylvania, and it has experienced the largest proportionate increase in federal court case filings of any of the ten counties within the Eastern District between 1987 and 1989.

Subsection (b) amends Section 122 of Title 28 to transfer Jackson County, South Dakota, to the Western Division of the district and to eliminate the designation of Washabaugh and Washington counties as part of the Western Divison. This technical change is made necessary to reflect the fact that the latter two counties were eliminated through merger.

The transfer of Jackson County to the Western Division was requested by the United States Attorney for the District of South Dakota. As a result of the merger of Washabaugh County into Jackson County, cases from the Pine Ridge Reservation which were formerly all in the Western Division (in Washabaugh and Shannon counties) were split between the Central and Western Divisions. The United States Attorney believes that this result is cumbersome and inconvenient for all concerned and that it is appropriate to handle all Pine Ridge Reservation cases in the Western Division. The transfer of Jackson County to the Western Division will accomplish this result and eliminate legal challenges which have arisen from the splitting of the reservation.

Section 325 makes a number of minor, technical amendments to existing law and tables of sections, consistent with this Act and other recent enactments.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on agreeing to the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. BIDEN. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 907, H.R. 5316, and that all after the enacting clause be stricken and that the text of S. 2648, as amended, be inserted in lieu thereof, and that the bill be deemed read for a third time, passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, will the Senator from Delaware be good enough to explain, is this the package of antitrust amendments that we are talking about?

Mr. BIDEN. No; it is not. That is next.

Mr. METZENBAUM. I see. I thank the Senator.

Mr. BIDEN. Mr. President, I ask unanimous consent that Calendar Nos. 768, 906, and 908 be indefinitely postponed.

Mr. METZENBAUM. Parliamentary inquiry. I do not believe we ever reached the point of passing the Senate bill.

Mr. BIDEN. We are not passing the Senate bill. We are indefinitely postponing it. The House bill contained all of the provisions that are in question.

Mr. METZENBAUM. I appreciate the clarification. I thank the Senator.

Mr. BIDEN. Now, I have trouble seeing the Chair because there is a 7-foot Senator standing between us.

Mr. SIMPSON. Six-seven.

Mr. BIDEN. Six-seven. I beg your pardon.

Part of the problem, Mr. President, I am informed by some of my colleagues that my jacket is so loud it is causing the lights to cause the TV cameras not to function well. These are the notes I keep being handed here, and the reflection is making it difficult for me to see the Chair.

Mr. President, I ask unanimous consent, to finish my request, that Calendar Nos. 768, 906, and 908 be indefinitely postponed.

The PRESIDING OFFICER. Without objection, it is so ordered.

INTERLOCKING DIRECTORATES ACT

Mr. BIDEN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 555, H.R. 29, an act to amend the Clayton Antitrust Act concerning interlocking directorates.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 29) to amend the Clayton Act regarding interlocking directorates and officers.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill? There being no objections, the Senate proceeded to consider the bill.

AMENDMENT NO. 3205

Mr. BIDEN. Mr. President, on behalf of Senators METZENBAUM and THURMOND, I send a substitute to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Delaware [Mr. BIDEN] for Mr. METZENBAUM (for himself and Mr. THURMOND) proposes an amendment numbered 3205.

Mr. BIDEN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

That this Act may be cited as the "Antitrust Amendments Act of 1990".

SEC. 2. Section 8 of the Clayton Act (15 U.S.C. 19) is amended to read as follows:

SEC. 8. (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are—

"(A) engaged in whole or in part in commerce; and

"(B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;

if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

"(2) Notwithstanding the provisions of paragraph (1), simultaneous service as a director or officer in any two corporations shall not be prohibited by this section if—

"(A) the competitive sales of either corporation are less than $1,000,000, as adjusted pursuant to paragraph (5) of this subsection;

"(B) the competitive sales of either corporation are less than 2 per centum of that corporation's total sales; or

"(C) the competitive sales of each corporation are less than 4 per centum of that corporations total sales.

For purposes of this paragraph, 'competitive sales' means the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year. For the purposes of this paragraph, 'total sales' means the gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year.

"(3) The eligibility of a director or officer under the provisions of paragraph (1) shall be determined by the capital, surplus and undivided profits, exclusive of dividends declared but not paid to stockholders, of each corporation at the end of that corporation's last completed fiscal year.

"(4) For purposes of this section, the term 'officer' means an officer elected or chosen by the Board of Directors.

"(5) For each fiscal year commencing after September 30 1990, the $10,000,000 and $1,000,000 thresholds in this subsection shall be increased (or decreased) as of October 1 each year by an amount equal to the percentage increase (or decreased) in the gross national product, as determined by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 30, 1989. As soon as practicable, but