# The Third Branch

**Bulletin of the Federal Courts**

VOL. 13 NO. 1

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JANUARY, 1981


## SUPREME COURT DECIDES *WILL* CASES

In a partial victory for Article III judges, the Supreme Court on December 15 held 8-0 that freezes of increases in federal judicial salaries in 1976 and 1979 violated the Compensation Clause of the Constitution because they diminished salary levels already in force. As a result of this ruling, both FY 1980 and FY 1981 salary increases, totalling approximately 22 percent, will be paid to Article III judges (see related story, page 4). The Court also ruled, however, that freezes imposed in 1977 and 1978 were enacted in a timely—and constitutional—manner. *Will v. United States,* Nos. 79-983 and 79-1689.

The two consolidated class actions, brought by a group of federal judges in Chicago, centered upon

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*Reflections on the 70's; a look at the future*

## CHIEF JUSTICE BURGER RELEASES 1980 YEAR-END REPORT

Following his practice, the Chief Justice last month issued his year-end report on the problems, needs and accomplishments of the judiciary.

The Chief Justice's report started with reflections on significant accomplishments in the courts which have come about during the 1970's, including the establishment of the Institute for Court Management, the National Center for State Courts, the Brookings Institution annual seminars for the leaders of the three branches to consider problems hindering the effective administration of justice, and the historic gathering in St. Paul for the "Pound Revisited Conference."

**1980 Developments.** Highlighted as illustrative of major developments during 1980 were:

- The enactment of judicial disability and tenure legislation which was endorsed by the Judicial Conference of the United States in 1979.
- The passage of legislation effective October 1, 1981 to split the Fifth Circuit and create a new Eleventh Circuit (encompassing the states of Alabama, Florida and Georgia). The new Fifth Circuit will encompass the states of Louisiana, Mississippi, Texas and the Canal Zone.
- The creation of a Court of International Trade. The new Article III court has broader jurisdiction than its forerunner, the U.S. Customs Court. The new court will also have exclusive jurisdiction over conflicts arising from the Tariff Act of 1930, the Trade Act of 1974 and the Trade Agreements Act of 1979. Nine judges will sit on this court.
- The passage of the Dispute Resolution Act. The Act stemmed from the Pound Conference's call for alternative forums for dispute resolution. It authorizes the Department of Justice to establish a resource center to provide money to support state and local programs of conciliation, arbitration, and mediation. "This Dispute Resolution Center shall serve as a national clearinghouse for the exchange of information concerning the improvement of these existing dispute resolution mechanisms."

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## SEMINAR ON ANTITRUST

As announced in the October issue of *The Third Branch,* the Federal Judicial Center will sponsor a seminar on antitrust law for all federal appellate and district judges who wish to attend. The program will be conducted on the campus of the University of Michigan Law School in Ann Arbor on July 27-31, 1981.

The seminar will provide a comprehensive introduction to antitrust law and its interpretation and application. Professor Phillip Areeda of the Harvard Law School will present the first three days of the seminar. He will accompany his presentation with a detailed syllabus, including citations, and prepare a brief monograph for publication and distribution by the Center. On Thursday and Friday mornings, a panel of federal judges will deal with various aspects of antitrust case management.

Since the initial announcement close to 100 judges have expressed interest in attending. Judges who are interested but have not yet notified the Center are asked to send a short letter to the Division of Continuing Education and Training at 1520 H Street, N.W., Washington, D.C. 20005.

## 96TH CONGRESS ADJOURNS

Long after it intended to, the 96th Congress finally adjourned *sine die* on December 16. The length of the lame duck session was not a hallmark of progress, however, as election day gains of the Republicans compelled holding over many measures for the 97th Congress.

**Appropriations.** As has happened before, one of the principal stumbling blocks faced by the outgoing 96th Congress was money, in this case the appropriation bill for the Departments of State, Justice and Commerce and the judiciary (H.R. 7584).

As cleared by Congress last month, H.R. 7584 contained a provision forbidding the Department of Justice from initiating court suits or other action to compel directly or indirectly the busing of students to achieve racial integration. True to an earlier threat, the President vetoed the bill on December 13 because of the anti-busing language. "We should not turn back the clock," he said, "to an era when the Department of Justice stood passive and the entire burden of seeking a remedy for the infringement of constitutional rights fell on the victims of discrimination themselves."

Congress then turned to a continuing resolution (H.J. Res. 637) to provide funds until the new Congress could act, but the possible inclusion of the same anti-busing language threatened passage. After extensive debate and the threat of another veto, an amendment withdrawing the language was approved.

Another imbroglio ensued, however, when some House members attempted to amend the resolution to eliminate a previously imposed pay cap on legislative, executive and judicial salaries. The Senate refused to accept such action, and subsequently a substitute resolution (H.J. Res. 644) was approved by both chambers on December 15 and signed by the President the next day (P.L. 96-536).

**Customs Court.** Despite the extensive debate on appropriations, Congress was able to pass a bill to correct a drafting error and clarify that the effective date of the Customs Court Act of 1980 is November 1, 1980. The bill (S. 3235) was both introduced and passed by the Senate on December 2, passed the House the next day and was signed as P.L. 96-542 on December 16.

**Jurisdictional Amount.** Public Law 96-486, signed December 1, eliminated the $10,000 jurisdictional amount for federal question cases. The new law makes no changes in diversity jurisdiction.

**Unsuccessful Bills.** Victims of the November elections and a lack of time on the congressional calendar, several major bills of importance to the judicial branch were left languishing by the departing Congress.

- A bill (H.R. 5200) authorizing government suits against violators of the fair housing civil rights law was withdrawn from Senate consideration December 9 when it failed to get the necessary 60 votes to end debate, 54-43. The point of contention here was whether the government would have to prove a discriminatory intent, rather than merely demonstrating a discriminatory effect.

- A bill (S. 658) making numerous technical amendments to the Bankruptcy Reform Act failed to pass because of controversy concerning pension benefits for bankruptcy judges.

- Proposals for a completely new federal criminal code (S. 1722 and H.R. 6915) progressed further than any previously-proposed reforms, but the bills were never considered on the floor of either chamber. Though cleared by the Senate Judiciary Committee thirteen months ago, S. 1722 remained pending throughout 1980. H.R. 6915 was the first criminal code bill to clear the House Judiciary Committee, but it never got to the floor for lack of a rule governing time for debate and the introduction of amendments.

- Also expiring for lack of final action were bills to create a State Justice Institute (S. 2387) and to combine the Court of Customs and Patent Appeals and Court of Claims into a Court of Appeals for the Federal Circuit (H.R. 3806)

## CIRCUIT EXECUTIVE CERTIFICATION BOARD TO MEET IN SAN FRANCISCO

The Board of Certification for Circuit Executives of the United States Courts of Appeals will interview applicants in San Francisco on February 23, 1981—the Board's first meeting outside of the District of Columbia. Because the Board does not pay travel expenses of candidates, the session was scheduled to accommodate the convenience of applicants from the western portion of the country.

The circuit executive is a senior administrative position in the United States judicial system, created by Congress to improve judicial administration in the federal courts. Individuals who wish to serve as circuit executives must be certified as qualified by the statutorily created Board of Certification. While certification is a prerequisite for appointment as circuit executive, certification does not assure employment. The standards for certification—requiring executive ability, usually demonstrated by substantial experience in progressively more responsible management positions in the government or in the private sector—are set forth in full in 45 Federal Register 78,193 (November 25, 1980).

For information about the circuit executive positions and application procedures, write: Board of Certification, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

# Noteworthy

The Department of Justice on December 16 issued the federal government's first comprehensive set of standards for prisons and jails. These standards, which were prepared by the Justice Department with opportunity for comment by interested groups and persons, apply, with some variation, to all adult correctional institutions, detention facilities and holding facilities. They cover basic rights of inmates, physical plants, newly constructed facilities, health and safety, security, discipline, inmate and staff education and training, and other matters. The standards are not intended as statements of constitutional minimum requirements and do not confer rights or legal causes of action. The Bureau of Prisons will develop a plan for the implementation of the standards in its facilities.

* * * * *

At its December 11, 1980 meeting the Administrative Conference of the United States adopted a recommendation which could, if adopted by Congress, eliminate or simplify the so-called "race to the courthouse" by litigants appealing from agency actions.

Under 28 U.S.C. §2112 (a), when petitions for appellate review are filed in two or more courts of appeals, the record of the agency proceeding is filed by the agency in the court in which the first petition was filed.

The recommendation states that the "race" is "an unedifying one" that tends to discredit the judicial process. The Administrative Conference therefore recommends that Congress amend the existing statute to provide that if petitions to review the same agency order have been filed in two or more courts of appeals within ten days after the order was issued, the agency should notify an appropriate official body, "such as the Administrative Office of the United States Courts of that fact; and that the appropriate official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice. . . ."

* * * * *

In a letter last month to the Attorney General, the Standing Committee on the Federal Judiciary of the ABA announced that it would immediately discontinue its use of age guidelines in preparing recommendations of candidates for the federal bench. The guidelines required that candidates aged 60 to 65 receive the top two ratings of "well qualified" or "exceptionally well qualified" and be in excellent physical condition to be recommended for appointment. Recommendations were never given to nominees over the age of 64 except for nominees to the Supreme Court. Both the Senate and House last year passed by overwhelming margins resolutions condemning the guidelines.

*News from the Center*

## VIDEO PLAYBACK EQUIPMENT DISTRIBUTED TO ALL FEDERAL COURTS

*This report is the first of a new* Third Branch *feature that will appear from time to time to inform readers of developments at the Federal Judicial Center.*

The Continuing Education and Training Division of the Federal Judicial Center has now completed distribution of video playback units and receivers to all district and circuit courts not previously equipped with them. The most recent distribution was accomplished with funds reprogrammed from categories in the Center's fiscal 1980 budget.

The distribution is part of the Center's continued expansion of local training services and its increased reliance on education by video. The equipment is increasingly used by judges and others for viewing specialized tapes of interest, which are available from the Center. Unfortunately, the cost of the equipment prohibits the Center from providing it to each divisional court office. To achieve the optimal use of the equipment within each court, one person in the court, usually the local training coordinator, is responsible for its coordination and maintenance. For information regarding the use of the playback equipment, interested persons should contact their local training coordinator. The office of the clerk of court can identify the training coordinator for that court.

The Center's Media Services Unit has acquired approximately 150 video cassettes that address topics ranging from effective time management and supervisory techniques to substantive legal areas and civil and criminal case management. These are available for circulation to the courts for use on the video equipment. A listing of available cassettes may be obtained by contacting the Media Services Unit, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005; 202/FTS 633-6415.

The Center urges training coordinators to publicize within their courts the availability of the video equipment as well as the kinds of programs that are available.

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the Executive Salary Cost of Living Adjustment Act, which was intended to automatically provide annual cost of living adjustments to top government officials such as judges in the same manner as given to other government workers. The plaintiff judges challenged the constitutionality of legislative actions from 1976 through 1979 (for fiscal years 1977 through 1980) that eliminated or reduced the otherwise applicable adjustments. In two of the years, the President signed the statutes imposing the freezes before the start of the affected fiscal year, but in the other two years the bills were signed on or after the first day of the fiscal year.

**Facts.** In Year 1 (FY 1977), a 4.8 percent raise was frozen by a bill signed on October 1, 1976—the first day of the fiscal year. [Subsequently, in March 1977, judges and other officials did receive an increase pursuant to a quadrennial salary review. The period in controversy for Year 1 was therefore limited from October 1, 1976 to March 1, 1977.] In Year 2 (FY 1978), the President signed a bill on July 21, 1977 nullifying an otherwise applicable raise of 7.1 percent. The increase was inappropriate, stated the House report on the bill, in light of the previously-received quadrennial adjustment. In Year 3 (FY 1979), a 5.5 percent increase was frozen for one year by a bill signed September 30, 1978. And in Year 4 (FY 1980), a total increase of 12.9 percent (the compounded total of a "new" 7 percent adjustment plus the 5.5 percent increase from the previous year) did go into effect on October 1, 1979. On October 12, however, the President signed a law reducing that increase to 5.5 percent and mandating that those who accepted the smaller increase would waive their entitlement to the higher amount. No federal judge in fact accepted the 5.5 percent adjustment.

District Judge Stanley J. Roszkowski (N.D. Ill.) in August 1979 and January 1980 held that the congressional actions in all four years violated the Compensation Clause of the Constitution, and he granted summary judgment in favor of the plaintiffs. On the government's direct appeal to the Supreme Court under 28 U.S.C. §1252, the two actions were con-

See *WILL*, p. 5

*Will III Filed*

## ADMINISTRATIVE OFFICE TO PAY FY 1981 RAISES

In light of the Supreme Court's decision in the *Will* cases, Administrative Office Director William E. Foley has announced that a previously withheld 9.11 percent pay increase for federal judges in fiscal year 1981 will now be paid prospectively. The basis of the administrative decision is that, exactly as occurred in Year 1 of the *Will* dispute, the law nullifying the otherwise automatic increase was signed on the first day of the fiscal year (October 1, 1980), after the time judges became constitutionally entitled to the adjustment.

In a memo distributed to all federal judges on December 31, Mr. Foley indicated that the salary adjustment will be paid "at the first opportunity," perhaps in the checks mailed at the beginning of February. Payments will be prospective only so that the district court in Chicago, in accordance with the instructions of the Supreme Court, may calculate the exact amount of retroactive payments due. Mr. Foley also indicated that retroactive adjustments in life insurance and annuity accounts will have to be made.

In a related development, a third class action suit has been filed in Chicago by Judge Hubert L. Will and others to compel the government to pay the FY 1981 adjustment. No answer to the complaint has yet been filed.

Reflecting both the FY 1980 and 1981 adjustments, the new salary levels for federal judges are as follows: Chief Justice, $92,400; Associate Justices, $88,700; Judges, Courts of Appeals, Court of Claims, and Court of Customs and Patent Appeals, $70,900; and Judges, District Courts and Court of International Trade, $67,100.

*Position Available*

### CLERK VACANCY FOR CA-11

**Position:** Clerk, U.S. Court of Appeals for the Eleventh Circuit, effective October 1, 1981, with immediate interim appointment as Chief Deputy Clerk of the Fifth Circuit.

**Duties:** Managing the Satellite Fifth Circuit (new Eleventh Circuit) Clerk's Office in Atlanta, Georgia.

**Salary:** Up to $47,500 per annum, depending on qualifications.

**Qualifications:** A minimum of ten years of progressively responsible administrative experience in public service or business which provided a thorough understanding of organizational, procedural and human relations aspects in managing an organization. At least three of the ten years' experience must have been in a position of substantial management responsibility. An attorney who is in the active practice of law in either the public or private sector may substitute said active practice on a year-for-year basis for the management or administrative experience requirement.

**To Apply:** Application and resume should be received by February 7, 1981. Send to: Gilbert F. Ganucheau, Clerk, U.S. Court of Appeals, Fifth Circuit, 600 Camp Street, New Orleans, La. 70130. Additional information on other qualifications and duties will be sent on request.

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solidated for briefing and oral argument.

**Disqualification.** Although none of the parties contested the Supreme Court's ability to hear the case, a significant portion of the Chief Justice's opinion for the Court was devoted to the applicability of the disqualification statute, 28 U.S.C. §455 [a judge should disqualify himself if "his impartiality might reasonably be questioned" or if "he knows that he . . . has a financial interest in the subject matter in controversy"]. It was noted that all Article III judges were disqualified under this standard and that no substitute panel of appellate judges could be convened to hear the case in lieu of the Supreme Court Justices themselves. Resort was therefore made to the ancient Rule of Necessity, which holds that a judge must hear a case in which he is personally interested if the case could not be heard otherwise.

Although not expressly adopted previously, the Court concluded that earlier decisions had taken the Rule's validity "for granted," and that its application would not be inconsistent with the Congress's intent in drafting §455. Finally, said the Court, ". . . the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented. On balance, the public interest would not be served by requiring disqualification under §455."

**The Compensation Clause.** The core issue in the case was whether and how Congress could deny Adjustment Act increases without violating the Compensation Clause, which provides that judges' compensation "shall not be diminished during their Continuance in Office." With regard to Year 1, resolution of that issue was straightforward. The nullification of the increases, even though coming only hours after judges had been entitled to them, unconstitutionally "diminished" the compensation of judges. The Court also held that the Compensation Clause makes no exceptions for across-the-board reductions such as this which do not "discriminate" against judges.

With regard to Years 2 and 3, the question was when does a salary increase authorized by Congress under a statutory formula "vest"—i.e. become irreversible under the Compensation Clause? The answer, the Court ruled, is when the increases take effect rather than when the formula is enacted. "[T]he Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an effect on compensation of judges. Rather, that provision embodies a clear rule prohibiting decreases but allowing increases. . . ." The Court therefore found it was permissable to eliminate—before October 1—salary increases contemplated but not yet implemented. "[T]he departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula."

The action in Year 4, as in Year 1, was found to violate the Constitution. [The Court specifically found, contrary to the District Court in the still-pending case of *Foley v. Carter,* that the statute reducing the FY 1980 increases *was* intended to apply to the judiciary.]

## QUADRENNIAL COMMISSION RECOMMENDS JUDICIAL PAY HIKE

The Commission on Executive, Legislative, and Judicial Salaries on December 15 (ironically, the same day as the *Will* decision) submitted to the President its recommendations for quadrennial adjustments to the salaries of judges, Members of Congress, and top executive branch personnel. Noting that the nation is facing a "quiet crisis" of attracting and retaining outstanding persons for top positions in the government, and commenting that the judiciary is under "even more extreme pressures" than the other branches, the Commission recommended salary increases at pre-*Will* levels averaging 50 percent for members of the judicial branch.

The Commission's salary recommendations are: Chief Justice—$120,000; Associate Justices—$115,000; Judges of the Courts of Appeals, Court of Claims, Court of Customs and Patent Appeals and Court of Military Appeals —$90,000; Judges of the District Courts, Court of International Trade and Tax Court—$85,000; full-time Magistrates and Bankruptcy Judges and Trial Judges of the Court of Claims—$75,000; part-time Magistrates and Bankruptcy Judges—$37,500.

In addition to the salary increases, the Commission also recommended that Congress permit annual adjustments to top-level salaries to go into effect (they have been frozen since 1976); that new judges receive a relocation allowance; that the quadrennial review system be changed to a biennial system; and that a special commission be formed to study, *inter alia,* the adequacy of judges' survivors' benefits.

It is now incumbent upon President Carter to submit to Congress his recommendations—which may differ from those of the Commission—in his budget message this month. Within 60 days, the legislature must then make a record vote approving or disapproving the increases. If approved, the adjustments will go into effect in 30 days, unless a different time is specified in the President's recommendations. The law does not specify what happens if the recommendations are not approved.

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- Senate passage of a bill creating a State Justice Institute. The bill, which has the support of the Conference of Chief Justices, would create a nonprofit State Justice Institute to improve access to and the administration of state courts, which currently handle more than 90 percent of all litigation in the United States.
- Legislation sponsored by Senators Thurmond and Heflin to create a "Federal Jurisdictional Review and Revision Commission." If reintroduced and enacted into law, this bill would establish a commission to study the jurisdiction of federal and state courts and to report to the President, Congress and the judiciary.

**Update.** The Chief Justice also referred to new developments in matters of continuing interest:

- High cost of litigation. The Chief Justice, in referring as he has in the past to the importance of this subject, called for "the exploration for better procedures." He reported that he had reactivated the Judicial Conference Committee on Appellate Rules "to consider, among other problems, the matter of the courts of appeals, especially in the printing of large records of trials." Also mentioned were costs incurred through abuse by some lawyers of the discovery process, and he commended the American Bar Association for taking steps to implement solutions to the problems, which are caused by unnecessary discovery processes.
- Rulemaking. The Chief Justice in his 1979 "State of the Judiciary" report suggested that "the time has come to take another look at the entire rulemaking process." The Federal Judicial Center is currently studying this subject and a report is expected to be released in 1981. Chief Justice Burger in his 1980 report reiterated that rulemaking procedures should be of major concern and attention at state levels also, and suggested that lessons from state procedures may guide revision efforts at the federal level.

**The Future.** As a look forward, the Chief Justice cautioned that there are special areas which still need concentrated and immediate attention, such as:

- "Increasing complexity of cases being brought to the federal courts" and the "crucial need to better understand special problems created by protracted cases." Reported was the fact that during 1980 there were 80 cases tried in the U.S. District Courts which lasted 30 days or more, some running many months and even years before final disposition. While this number may not seem of great significance, the Chief Justice pointed out that even one such case in a district can be very disruptive to an already demanding calendar. Steps already taken to study this problem: appointment of a Judicial Conference Subcommittee, chaired by Judge Alvin Rubin (CA-5), to study and recommend better procedures; a parallel study by the Conference of Chief Justices for the state courts; plans to make highly experienced judges available when protracted cases invariably call for special attention and skills; and, finally, the production of films to present suggestions for effective management of protracted litigation.
- Necessity for fundamental changes in our criminal justice system, especially in the corrections area. The Chief Justice cited as an example of this need the tragic riot last year at the New Mexico penitentiary when 33 lives were lost and damage was estimated at over $60 million.
- Trial advocacy and the work of the Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice. The Chief Justice singled this out as an area where changes are still needed. He called upon the law schools to make available more practical training such as trial practice courses and more instructional use of experienced and able lawyers and judges, as recommended by the ABA Task Force which studied and reported on this subject.
- Judicial education for state and federal judges. The Chief Justice urged continued and expanded programs.

See REPORT, p. 7

## CHIEF DEPUTY CLERK VACANCY IN CA-2

The United States Court of Appeals for the Second Circuit has obtained authorization for the position of Chief Deputy Clerk. This position involves the full range of managerial responsibilities for operation of the court, and specifically for administration of the office of the Clerk. Depending on qualifications, the starting salary will be JSP-15 (similar to GS-15), currently, $44,547.

The court is seeking applications from senior court managers who will be qualified ultimately for promotion to the position of Clerk of the Court. Substantial experience in court management is required, preferably in a federal court clerk's office. A law degree, experience in the practice of law, and graduate training in judicial administration are highly desirable. Applicants should have knowledge of judicial process and procedures, the ability to effectively supervise subordinate staff, the ability to communicate clearly and concisely, both orally and in writing, and exceptional judgment in analyzing complex problems.

The court is an affirmative action employer and members of minority groups, women and the handicapped are encouraged to apply.

Applicants should send a resume by January 30, 1981 to:

Steven Flanders, Circuit Executive
1803 U.S. Courthouse
Foley Square
New York, N.Y. 10007

## FEDERAL PROBATION SYSTEM ADOPTS RISK PREDICTION SCALE 80 (R.P.S. 80)

The Probation Division of the Administrative Office of the United States Courts has directed the adoption of a uniform system for the initial classification of all incoming federal probationers. This classification permits probation officers to assign to the incoming federal probationers the level of supervision most appropriate to their risk of probation violation. The system directed by the Probation Division utilizes the Risk Prediction Scale 80 (R.P.S. 80), an actuarial predictive device that was chosen from among four devices after extensive study by the Research Division of the Federal Judicial Center. The study compared the devices to determine which of the four would yield the most accurate prediction of the risk of probation violation utilizing a nationally representative sample of 1,620 cases. It found that R.P.S. 80, a modified version of the model used in the District of the District of Columbia (U.S. D.C. 75), offered the best combination of predictive efficiency and ease of use.

Implementation of R.P.S. 80 will insure that the same predictive device is used for all federal offenders and, as accurately as practicable, insure that offenders who require supervision services receive priority attention from the probation system. The system also insures that offenders with a lower likelihood of probation violation may be assigned a lower level of supervision.

For each newly received probation or deferred prosecution case, the probation officer will complete the Risk Predication Scale to determine a risk score. This score is determined by use of a form that assigns numerical values to certain factors in the offender's background. The result will be used to determine the initial level of supervision—either high (one or more contacts per month) or low (one to three contacts per quarter). Cases of low supervision may be raised to the high level if certain exceptional circumstances, such as the use of violence by the offender, are present.

Systemwide use of the system was first contemplated in January 1980, when the Judicial Conference Committee on the Administration of the Probation System, which had originally asked for the study, endorsed the Center's recommendations and moved to adopt the system on a nationwide basis. A field test was conducted in five districts, and after reviewing the results of that test, the Probation Committee at its July 1980 meeting approved implementation of R.P.S. 80 as part of the caseload classification system. The Probation Division is now in the process of advising probation officers of that implementation.

A manual for the use of R.P.S. 80 has been prepared for use by probation officers and will be distributed shortly.

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**The Supreme Court.** The Chief Justice again asked Congress to "immediately end the present mandatory jurisdiction of the Supreme Court by providing that review of all cases be on the writ of certiorari." Also a repeated request: "Congress must begin serious study of profound structural changes to assist the Supreme Court in the handling of its discretionary jurisdiction. Congress must stop adding burdens or it must create an additional appellate court."

The Chief Justice concluded his 1980 report by asking for the establishment of a commission, constituted of representatives of all three branches of the Government, to be responsible for an appropriate observance of the 1987 bicentennial of the United States Constitution.

## THE SOURCE

The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed only for information purposes, and are generally not available from the Federal Judicial Center.*

The American Jury—Vanishing or Only Shrinking? Jim R. Carrigan. 9 The Brief (ABA) 21-25+ (August 1980).

Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions. Irving R. Kaufman. 49 Fordham L. Rev. 26-39 (1980).

The Finality Rule: A Proposal for Change. Lawyers Conference Committee on Federal Courts and the Judiciary. 19 Judges' J. 33-38 (Fall 1980).

How to Try a Jury Case: A Judge's View. Patrick E. Higginbotham. 7 Litigation 8-11 (Fall 1980).

Proposed Techniques for Streamlining Trial of Complex Antitrust Cases: Pro & Con. Frederick B. Lacey. 48 ABA Antitrust L.J. 487-504 (1979).

Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation. Ruth Bader Ginsburg. 28 Clev. St. L. Rev. 301-324 (1979).

The Trial Judge's Role. William W. Schwarzer. 9 The Brief (ABA) 15-19+ (August 1980).

When Should the Lions be on the Throne? Reflections on Judicial Supremacy. Joseph T. Sneed. 21 Ariz. L. Rev. 925-944 (1979).

Why Are Things Being Done This Way? Dorothy W. Nelson. 19 Judges' J. 12-15+ (Fall 1980).

## AO COSFJC calendar

Jan. 20-23 Judicial Conference Committees on Judicial Ethics and Codes of Conduct; Singer Island, FL

Jan. 21-23 Workshop for Judges of the Ninth Circuit; San Diego, CA

Jan. 26 Judicial Conference Committee on the Judicial Branch; Palm Beach, FL

Jan. 26-27 Judicial Conference Committee on Court Administration; Singer Island, FL

Jan. 26-27 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice; Singer Island, FL

Jan. 26-27 Judicial Conference Committee on Intercircuit Assignments; Singer Island, FL

Jan. 26-28 Seminar for Federal Public Defenders; San Diego, CA

Jan. 26-28 Workshop for Magistrates' Staff; Jacksonville, FL

Jan. 28-30 Judicial Conference Committee to Implement the Criminal Justice Act; San Diego, CA

Jan. 28-30 Seminar for Assistant Federal Public Defenders; San Diego, CA

Jan. 29-30 Judicial Conference Committee on the Administration of the Federal Magistrate System; Singer Island, FL

Jan. 29-30 Judicial Conference Committee on the Administration of the Probation System; Amelia Island, FL

Jan. 29-30 Judicial Conference Committee on the Budget; Singer Island, FL

Feb. 6 Judicial Conference Committee on the Administration of the Bankruptcy System; Coronado, CA

Feb. 9-12 EEO Coordinators Workshop; Wilmington, DE

Feb. 15-21 Seminar for Newly Appointed District Judges; Washington, DC

Feb. 18-20 Advanced Seminar for Full-time Magistrates; Reno, NV

Feb. 18-20 Advanced Seminar for Part-time Magistrates; Reno, NV

Feb. 23-25 Workshop for Magistrates' Staff; Wilmington, DE

Mar. 2-5 EEO Coordinators Workshop; Oklahoma City, OK

Mar. 12-13 Judicial Conference of the United States; Washington, DC

Mar. 12-13 Judicial Conference Advisory Committee on Bankruptcy Rules; Philadelphia, PA

Mar. 16-18 EEO Coordinators Workshop; Cincinnati, OH

Mar. 18-20 Workshop for Judges of the Fourth Circuit; Williamsburg, VA

Mar. 19-21 Seminar for Senior Staff Attorneys; New Orleans, LA

## PERSONNEL

### APPOINTMENT

Stephen G. Breyer, U.S. Circuit Judge, CA-1, Dec. 18




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*One Year Under the New Code*

## INTERVIEW WITH BANKRUPTCY JUDGE LLOYD D. GEORGE

*Bankruptcy Judge Lloyd D. George of Nevada has been in the federal court system for almost seven years, having received his appointment in March of 1974. His B.S. degree was from Brigham Young University in 1955 and his J.D. degree was awarded by the University of California in 1961. Judge George has been a member of the Board of the Federal Judicial Center since October 1, 1979.*

*In the following interview Bankruptcy Judge George speaks about the changes brought about by the new Bankruptcy Code of 1978, how economic factors have had an impact on bankruptcy filings, and why state judges should be aware of the new expanded jurisdiction of the bankruptcy courts as well as the potential for removal.*

**The Bankruptcy Code of 1978 became effective October 1, 1979. Since that time, bankruptcy filings have increased markedly: up 59.4 percent in the twelve months ending June 30, 1980. Do you attribute any of this increase to the more liberal provisions of the new Code? What effect has the downturn in business conditions during that period had on filings?**

I believe that there have been three primary contributing factors in the increase in bankruptcy court ilings. Economic conditions have had a very significant impact upon such filings. This factor cannot be underestimated. Consumer debt has risen spectacularly during the past few years. In recent years, the percentage cost of servicing that debt, in terms of interest, has also increased drastically.

Another cause of the recent increase in Bankruptcy Code filings is, I believe, the degree to which attorneys now advertise. In our district, I have seen much more attorney advertising in the past year or so than was ever the case before. Much of this advertising directly relates to matters of broad public interest, such as bankruptcy and divorce. Clearly, I think that most of this advertising must now be considered ethical, because of its role in informing the public of its legal rights. Nevertheless, such information, I believe, has been a major impetus in convincing people that the bankruptcy route is a legitimate means of resolving their debt difficulties.

Finally, I do believe that the

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## *DISTRICT OF COLUMBIA CIRCUIT HAS NEW CHIEF*

On January 14 Chief Justice Burger announced the designation of Carl McGowan as the new Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. He succeeds Judge J. Skelly Wright, who reached his seventieth birthday on this date. Judge Wright will continue active duty on the court he has served since April 16, 1962 (almost three years as Chief Judge).

In announcing the designation, the Chief Justice said, "My distinguished colleague and friend, Carl McGowan, succeeds another distinguished colleague and friend, J. Skelly Wright, and the work of this

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## SENTENCING FORMS ADDED TO BENCH BOOK

The Federal Judicial Center last month mailed out a new chapter of the *Bench Book for United States District Court Judges* entitled Model Sentencing Forms. The 70 pages of new text comprise the 21st of the 44 chapters which Volume 1 of the *Bench Book* will contain upon completion.

Preparation of the *Bench Book* is under the direction of a committee of experienced district judges who have served on the Center's Board. The book has been distributed to all district judges, magistrates and bankruptcy judges.

## FURTHER ACTION IN SALARY AND FINANCIAL DISCLOSURE LITIGATION

Shortly after announcing its decision in the federal judges' salary litigation of *Will v. United States,* the Supreme Court on January 12 dismissed without comment questions certified to it by the D.C. Circuit in the case of *Foley v. Carter.* In *Will,* the Court in effect answered those questions by holding that a 1980 freeze of increases in judicial salaries was unconstitutionally imposed after judges had become entitled to the adjustments. (The Administrative Office this month began paying judges at the new, higher level.)

However, several issues regarding the salaries of non-Article III personnel remain pending in the *Foley* case. In particular, it must be determined whether the cancellation of an allegedly vested right to the increases violates the obligation of contracts and due process clauses of the Constitution; whether Congress, in reappropriating funds sufficient to pay the adjustments, effectively rescinded the earlier freeze; or whether the simple expiration of the 1980 fiscal year terminated the legislation imposing the freeze.

**Financial Disclosure.** Also on January 12, the Supreme Court denied certiorari in *Duplantier v. United States,* thereby leaving intact a November 1979 decision of the Fifth Circuit which upheld the application to the federal judiciary of the Ethics in Government Act of 1978. Brought as a class action by six district judges, the suit had challenged the constitutionality of the Act's requirements that all federal judges annually file financial disclosure statements, which are available for public inspection. The Fifth Circuit concluded that the Act did not violate the doctrine of separation of powers, did not through its penalty provisions diminish the compensation of judges, and did not improperly invade judges' right to privacy.

## *PRESIDENT CARTER SUBMITS SALARY RECOMMENDATIONS*

Reacting to the findings of the Commission on Executive, Legislative and Judicial Salaries, President Carter last month submitted to Congress his recommendations for quadrennial adjustments to the salaries of top government officials. He recommended that the executive and legislative branches be given the approximately 16.8 percent increase recently received by federal judges as a result of the decision in *Will v. United States,* but he proposed no further increases in judicial salaries.

These recommendations are not directly subject to revision by President Reagan, but there is no prohibition against the new administration making recommendations of its own. Congress is required to make a record vote within 60 days approving or disapproving of all or part of Mr. Carter's recommendations.

Although Mr. Carter indicated he had "no doubt" that the Commission's recommended 40 percent increases were justified, he concluded that the government's "leadership in fighting inflation and in minimizing the overall cost of government" required smaller increases at this time.

He did recommend that, contrary to recent experience, the annual cost of living adjustments given to General Schedule employees each October be paid as well to top level officials. Waiting four years to make salary adjustments in a time of rapid inflation, he said, makes the needed catch-up so large as to be unacceptable to the public. The 1982 budget proposed by Mr. Carter calls for a 5.5 percent increase this October. The new administration, however, has the authority to revise the budget proposal.

Mr. Carter also urged "that Congress give consideration to a salary scale for judges that would explicitly recognize the public importance of continuous judicial service; for example, by an annual or periodic increase for longevity in addition to the cost of living adjustments that are made from time to time."

## ALEXANDER STEVAS NEW CLERK OF THE SUPREME COURT

The Chief Justice last month announced the appointment of Alexander Stevas as the Clerk of the Supreme Court of the United States. The Clerk, the Librarian, the Marshal, and the Reporter of Decisions are appointed by the Court and bear responsibility for providing administrative support to the Justices.

Mr. Stevas will be the seventeenth person to occupy the office of Clerk of Court since it was first created in February 1790. He replaces Michael Rodak, who retired after having held the position since 1972.

The new Clerk is a native of Pennsylvania and his previous experience includes service as Clerk of the District of Columbia Court of Appeals, Deputy Clerk of the U.S. Court of Appeals for the D.C. Circuit, Assistant District Attorney in the District of Columbia, and a law clerkship with the late Judge Alexander Holtzoff. In 1975 Mr. Stevas received one of President Ford's Management Improvement Awards.

The new Chief Deputy Clerk of the Supreme Court is Francis John Lorson, who holds a J.D. Degree from Catholic University.

The Third Branch

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## *HEARINGS HELD ON EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL JUDICIARY*

On November 19, 1980 the last in a series of 96th Congress hearings was held before the House Subcommittee on Civil and Constitutional Rights on the subject of equal employment opportunity in the federal judiciary.

The Subcommittee's first hearing on the subject was held in 1979 and coincided with the filing of a petition calling for the establishment of an equal employment opportunity plan for the federal courts. The petition was submitted to the Judicial Conference by 12 legal organizations, several of which were represented at the November 19 hearings.

Subsequently, the Judicial Conference at its September 1979 meeting unanimously endorsed—as they had previously—the concept of equal employment opportunity in the federal courts and directed that a "model affirmative action plan" be developed. Such a plan was adopted at the March 1980 meeting of the Judicial Conference. At that time, the Judicial Conference also directed that each federal court adopt a plan—based on the model plan—in conformance with the national policy of providing equal employment to all persons regardless of their race, sex, color, national origin, religion, age or handicap.

At a second Subcommittee hearing on May 30, Chief Judge Elmo Hunter, Chairman of the Court Administration Committee, and William E. Foley and James E. Macklin, Jr. of the Administrative Office answered questions about the plan and its implementation. During his testimony Judge Hunter emphatically stated that "Under no circumstances will any court be permitted to compromise qualification or performance standards in order to achieve a superficial compliance with preordained statistical standards . . . . Substantive achievement will not derive from adherence to hollow formulas. It will only be realized when individual people are employed in positions and promoted because they have earned the promotion through their own initiative or with the help of specially created training programs."

The November 19th hearings on the adequacy of that plan included testimony by several of the original petitioners and their attorney, Daniel Lewis, as well as that of Dr. Arthur Flemming, chairman of the U.S. Commission on Civil Rights and Steve Suitts, the director of the Southern Regional Council.

The testimony was consistent in its criticism of the model plan. All of the witnesses termed the plan vague and "more exhortation than direction." All criticized the plan for having no specific goals or timetables for implementation of affirmative action guidelines. And all criticized the plan for having no enforcement mechanism. Several of the witnesses stated that the vagueness of the plan revealed a lack of commitment on the part of the judiciary in hiring persons who would make the judiciary more representative of the populations which it serves. This was viewed as ironic in light of the courts' role in enforcing compliance with civil rights legislation in the private sector.

The plan was also criticized for not requiring an analysis of the current make-up of the judiciary to identify areas where minorities and women are underutilized and for not requiring the collection of data so that programs could be monitored. In addition, Mr. Lewis testified that the implementation of affirmative action required money and that no specific appropriations had been made for this purpose. One of the original petitioners, Angel Manzano, of the Mexican-American Legal Defense and Educational Fund, said that in his opinion the requirement that a complaint be filed within 15 days was burdensome and unnecessarily short. He also indicated that third parties should be permitted to complain of discrimination in the system. Mr. Manzano stated that the plan contained a good description of how non-discriminatory hiring should be done, but that it did not contain specific standards and accountability for failure to comply. Judith Lichtman of the Women's Legal Defense Fund complained that the plan contained no provisions for the training of women and minorities for upward mobility.

When questioned by members of the subcommittee, several of the witnesses opined that although the judicial system should remain independent from congressional and executive pressures and direction, non-discrimination was an important enough value to justify such direction if the courts did not act independently. In addition, several of the witnesses indicated that in order to attract qualified members of under-represented groups it was necessary to establish better notice procedures for job openings. Several suggested that a nationwide screening process or nationwide advertising should be established.

The federal courts are required to file with the Administrative Office their first annual reports on the achievement of equal employment opportunity objectives by August 1. More than half of the federal courts have adopted plans to date.

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important Court remains in strong hands."

Chief Judge McGowan, a graduate of Columbia University Law School, first came to the District of Columbia Court of Appeals in 1963 as an appointee of President John F. Kennedy. Judge McGowan will also reach his seventieth birthday next May and must then, under the mandatory age limit, relinquish the chief judgeship.

## POST-FILING PRISONER MEDIATION PROJECTS STUDIED

Two prisoner mediation projects have recently been instituted that, unlike other mediation programs, are designed to resolve complaints *after* an inmate has filed a civil rights action in federal court. Both projects are funded through grants from the National Institute of Corrections.

In Maryland, the Prisoner Mediation Project utilizes the mediation services of the Center for Community Justice to hear complaints of inmates in state prisons. Mediation occurs at hearings that involve the prisoner and his attorney, and representatives of the state Attorney General's office and the state Department of Corrections Services.

In Connecticut, the Danbury Prisoner Mediation Project utilizes the services of the National Center for Correctional Mediation to resolve disputes of prisoners at the Federal Correctional Institution at Danbury. In this project mediation services are conducted in individual sessions with the prisoner and in subsequent meetings with federal corrections officials. No face-to-face confrontation between the prisoner and corrections officials occurs.

The American Bar Association's Action Commission to Reduce Court Costs and Delay is studying both projects to determine their utilization, effectiveness to resolve complaints, effects on the workload of the courts and other issues. A progress report is expected in mid-1981.

## *PROCEDURES SUGGESTED FOR CORRECTING ERRORS IN PRESENTENCE REPORTS*

The Parole Commission and the Bureau of Prisons are stressing the importance of insuring that errors found in reports of presentence investigations are corrected before the reports leave the court. Because both agencies use the information in presentence reports in making important decisions such as security level selection for inmates and parole release determinations, inaccuracies could lead the agencies into significant error.

Erroneous information in a presentence report can be corrected either by having the Probation Office correct the report itself or by preparing a separate communication (such as an AO Form 235) that will go into the offender's file. Because of the risk that someone will read the report without having attention called to a separate communication, the best practice is to require either that the report be changed or that a page showing the correction be made an integral part of the report.

It should also be kept in mind that remarks made in open court will not automatically find their way into the offender's file. If oral findings are made with regard to the accuracy of the presentence report, steps should be taken to have them transcribed and included in the file.

In some cases when information in a presentence report is challenged, judges conclude that sentencing can proceed without resolving the doubts about that particular item of information. It is important in such cases that the doubts about the accuracy of the information be communicated. This can be done in the same manner as communicating a correction.

**The new United States Court of International Trade** was officially inaugurated at a recent ceremony in New York City. Addressing the court was then-Attorney General Benjamin Civiletti. On the bench from left to right: Judge Bernard Newman; Judge James L. Watson; Judge Scovel Richardson; Judge Paul P. Rao; Chief Judge Howard T. Markey (C.C.P.A.); Chief Judge Edward D. Re; Chief Judge Wilfred Feinberg (CA-2); Judge Morgan Ford; Judge Frederick Landis; Judge Herbert N. Maletz; and Judge Nils A. Boe.

## FEDERAL PRACTICE COMMITTEES FORMED

Chief Judge Donald P. Lay has formed Federal Practice Committees in each of the districts within the Eighth Circuit. The purpose of these committees is to study and recommend improvements in practice and procedure in the federal courts throughout the Circuit.

One goal of the committees will be to provide forums to maintain a high level of competency of all attorneys practicing in the federal courts, and to this end the committee members will work closely with law schools and bar associations to co-sponsor continuing legal education seminars.

Also encompassed within the orbit of the committees' tasks will be input into the organization and conduct of the annual Eighth Circuit Judicial Conference.

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promulgation of the new Code has resulted in part in the recent increase in bankruptcy filings. In particular, the large amount of information which accompanied the implementation of the new Code undoubtedly made attorneys more aware of this option and of its uses. On the other hand, many attorneys may have only become convinced from such information that bankruptcy under the new Code was far too complex to be an attractive immediate alternative in solving their clients' debt problems. Some districts actually saw a deluge of bankruptcy filings during the weeks just *before* the implementation of the new Code, undoubtedly in response to the uneasiness of attorneys toward this new statutory device. It would be pure speculation, however, for me to attempt an assessment of the percentage of filings directly attributable to this, or any other, factor. Nevertheless, without any question in my mind, the present state of the economy is a much more important cause for the increased use of bankruptcy than are the new protections provided debtors under the 1978 Code.

**The new Code, which combines Chapters X, XI, and XII into the new Chapter 11 and eliminates the summary vs. plenary jurisdiction concept, was designed to avoid "procedural" litigation as to which chapter was the proper one under which to file. There is some concern, however, that the language of Section 1471(b) of amended 28 U.S.C., which broadens the jurisdiction of the bankruptcy court to include any proceedings in or "related to" bankruptcy cases, is ambiguous and could result in equally burdensome litigation concerning the court's jurisdiction. Has this been your experience?**

That has not yet been a problem, as far as I am concerned. I doubt that such ambiguities will ever create so great a burden as was the case in determining matters of summary and plenary jurisdiction under the old Act. The language is, as you indicate, very broad and it includes, without any question, much more than was included under the earlier Act. As time passes, judicial determinations will perhaps suggest some parameters for that language. Whether a problem will eventually result in the definition of such parameters shall depend, I believe, upon the way in which bankruptcy judges handle their new jurisdiction. If they are prudent and pursue matters with some degree of caution, I am not sure that this question will trouble them greatly.

*"Without any question in my mind, the present state of the economy is a much more important cause for the increased use of bankruptcy than are the new protections provided debtors under the 1978 Code."*

**The new Code permits cases pending in most other forums to be removed to the bankruptcy court for further proceedings. How has this process worked? Has it been abused to cause delay or hardship to the parties?**

At this point, at least, I have encountered no problems in this area. With respect to the removal provisions, Congress again wisely provided the bankruptcy court with a method of abstaining from hearing matters which could best be entertained elsewhere. In this regard, 28 U.S.C. §1478(b) provides as follows:

> "The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."

Again, I believe that much is going to depend upon the sound judgment of the bankruptcy courts.

I might mention, in this regard, an experience that invited my doing something which may be wise for many bankruptcy judges to consider. I recently spoke to a group of state and federal judges in California and I addressed the questions of bankruptcy jurisdiction and removal. The federal judges were much more aware of these matters than were the state judges. The state judges, in part because of their busy schedules, had not been able to look into the new Bankruptcy Code and to know the details of that statute. Every single one of them seemed *very* surprised when I spoke about the expanded jurisdiction and the potential for removal. They received my observation well, but because of the surprise which had registered in their faces, I felt that it would be prudent for me, when I returned to Nevada, to contact the chief judge of our local state trial court and meet with all of the local state judges in order to explain to them my view on these subjects.

At this point, removal has not been a problem and, with proper sensitivity to principles of comity, I believe that we can preclude the occurrence of many unfortunate conflicts. Nevertheless, to some extent we have been spared such problems because of the lack of awareness of counsel to this device. Once again, only the future will tell if this is going to represent a major problem in the handling of bankruptcy cases and their related proceedings. Still, I think that we can take some action now to prevent it from being a difficulty or, at least, to make the removal procedure more palatable to those who are involved.

**While full implementation of the new Code will not occur until March 31, 1984, the expanded jurisdiction available under the Code was effective as of October 1, 1979. Suddenly, sitting bankruptcy judges are being called**

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**upon to resolve controversies which may include real estate, commercial law, domestic relations, taxation, partnership and corporate law. Has this resulted in any problems? What steps did the bankruptcy judges take to prepare themselves for these new responsibilities?**

Strangely enough, the difference is not as significant as many might suppose. Even under the old Act, bankruptcy judges were addressing most of the topics mentioned in your question. They were doing so, for example, in adjudicating the allowability of claims. In this regard, it was recognized that in practical terms the summary/plenary limitation was not realistic in some cases, and that any resort to other courts to resolve such matters would create problems in the administration of bankruptcy estates. Therefore, a number of procedures evolved with which to bring questions such as this before the bankruptcy court.

For example, if, in a summary/plenary question, there had been no timely objection made as to summary jurisdiction, the court presumed that a waiver of the right to demand plenary jurisdiction had occurred. The court could then deal with the legal question which had been raised. If a proof of claim were filed by an alleged creditor of a bankrupt, the bankruptcy court was then allowed to address certain otherwise plenary questions which were also raised.

Often, the bankruptcy courts would have to address the merits of each cause of action before it could ascertain whether or not it had summary jurisdiction with respect to the matter. This represented a troublesome area of litigation and wasted much judicial time, if the eventual finding of the court was that it lacked jurisdiction to hear the matter in the first place. Nevertheless, bankruptcy judges were given a taste of some of the areas of substantial law which they are now free to address under the expanded jurisdiction provided by the new Code.

Still, the bankruptcy courts will undoubtedly receive a greater spectrum of cases than was previously possible. In order to prepare themselves for such a result, the bankruptcy judges have for some time been working together to educate themselves. Nevertheless, the primary work in this regard has been done by the Federal Judicial Center. The Center, in my opinion, has done a remarkable job in preparing the bankruptcy courts and their personnel to meet the new problems created by their expanded jurisdiction. For example, immediately upon the passage of the Code, Ken Crawford [Director of Division of Continuing Education and Training] wondered about the problems which we might have with jury trials. Therefore, in order to meet this need, Mr. Crawford, with the assistance of Judge Campbell, put together a seminar on jury trials which was taken throughout the country. It involved a number of federal judges who did an outstanding job in preparing us for difficulties relating to jury trials, discovery, settlements, and a myriad of other troubling areas we could never have otherwise anticipated. Even now, new seminars are being conducted to address our current problems.

*"Congress has done a good job. As I see problems arise under the Code, I am usually amazed to discover that there is an answer somewhere in the language of that statute."*

As I talk to judges throughout the country, they have been delighted and impressed with the thoughtful and dedicated teaching programs that have been prepared by the Center.

**Bankruptcy judges now may conduct jury trials. Have many jury trials been requested? Has this caused any special problems?**

Oddly enough, not many jury trials have been requested in my court. I have tried only one in the last year. This surprises me a bit. Still, with the newness of the Code, it would be unwise to assume that there won't be more jury trials in the future. It would surprise many to know that there was some use of juries under the old Act. Under the Act, questions of insolvency in involuntary cases could be tried before a jury, as well as certain other limited questions. The jury questions to be asked now are, of course, much broader.

Here, again, the previously-mentioned seminar by the Federal Judicial Center has given us some insight into problems arising in jury trials. Locally, also—and I am sure that this is the case throughout the country—the federal district judges have been a tremendous help. Here in Nevada the district judges have been willing to give us the benefit of their experiences and to loan us a clerk for a few hours to assist us in the initial jury selection process. They have also made us privy to checklists which they use in conducting jury trials. This proved to be of incalculable value when I conducted my first jury trial under the Code last December.

Still, as I said earlier, we are not being inundated with jury trial requests at this time. There have been a few in each of the districts in the country, but not so many as to pose a substantial difficulty for the judges and personnel involved.

**The new Code prohibits a bankruptcy judge from attending the first meeting of creditors. Do you think that this provision is beneficial for the resolution of cases?**

This was a very important matter to a number of practitioners. They were concerned about the bankruptcy judge getting so involved in a particular case that he or she, in effect, became a "rooter" for the estate. I would hope that this didn't really happen in many cases, but it might have happened enough to

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be troubling to litigants. I think that the change does provide for a more objective resolution of cases and it will help, I think, to reach the ideal level of objectivity for all bankruptcy judges. In this, I believe that it is a good provision. And, if the litigants feel better about this system, I think that it is worth whatever it costs in terms of the judge not being able to so clearly follow the supervision of each estate. Of course, it is intended that to some degree the trustees will now provide that supervision.

I would have to say that, generally speaking, this change should be beneficial to the bankruptcy process.

**The new Code provides several methods of appeal: to the district court; to a three-judge panel, if one has been appointed by the circuit council; or, with the consent of the parties, directly to the circuit court of appeals. How many panels have been appointed to your knowledge? Has this new appellate structure resulted in more or fewer requests for review than occurred under the old Act?**

To my knowledge, only two circuits have utilized the new appellate panel process, the First and the Ninth Circuits. The First Circuit, of course, is much smaller and it is being used throughout the entire circuit.

In the Ninth Circuit, the circuit council chose to pick a pilot area in which to implement the panels. We began to utilize the system on December 1, 1979 in the Central District of California—the largest district in the circuit—and in the District of Arizona. Five judges were selected to serve on the initial panels. It has been an extremely interesting process, and has recently been expanded to include all of the districts of California and our own District of Nevada.

I think that in most cases the district judges are happy to be relieved of the responsibility of hearing appeals from the bankruptcy courts. And, in the Ninth Circuit, as I am sure in the First Circuit, the judges involved have taken the duty most seriously. Furthermore, we have had some extremely interesting cases to review.

The panels system is new and exciting and, to a degree, quite unique. Its utilization, I believe, may result in a number of innovative procedures. Time alone will tell whether it represents a better or a worse method for handling bankruptcy appeals.

**Overall, do you think that the new Code has been effective? Has it accomplished what it was designed to accomplish—to make proceedings relating to bankruptcies more efficient and complete and to expedite the resolution of bankruptcy actions?**

My assessment of the Code is that the bankruptcy procedure has properly been "liberalized"—if you want to use that term—with respect to consumer debtors. But in most areas in which such liberalization has occurred, it comes because of past abuses. I would think that most would not be offended by attempts to put an end to such abuses, some of which tie people to unfair, inescapable financial obligations.

On the other hand, other sections of the new Code have provided creditors with important advantages over the old Act. In particular, the handling of automatic stays in bankruptcy was often unduly slow under the old Act. Now, exacting time limitations are placed upon the bankruptcy courts in resolving such matters. Once a request is made to lift an automatic stay in bankruptcy, the court must make a preliminary decision on the matter within 30 days after the date of the filing of the request. The judge then has an additional 30 days in which to make a final determination. And, the judge's decision must be made upon carefully delineated factors. This gives creditors both speedy action on their requests and some degree of predictability as to when they will be able to reach their security. Other time limitations are placed upon the bankruptcy courts and upon debtors in the filing and confirmation of plans of arrangement under Chapter 11.

The comments which I have received from persons in the business community have generally been reasonably favorable as to this new approach. Some are even recommending that their people file under the Code, so as to provide a more workable method for resolving debt collection difficulties.

Again, time alone will reveal the strengths and weaknesses of this new system. In legislation as broad and sweeping as the new Bankruptcy Code, there is going to have to be some adjusting done by all concerned. The comments which I receive from judges range from those who believe that the passage of the new Code came at a providential time in the nation's economic history, to those who are a little unhappy with the system. Some believe that the new Chapter 11 is a little more complex than it needs to be. Others believe that the new Chapter 13 should have included provisions for small corporate businesses.

Still, Congress has done a good job and the balance arrived at is quite adequate. It took seven to eight years for them to work out this legislation and its intricacy is evidence of that care. As I see problems arise under the Code, I am usually amazed to discover that there is an answer somewhere in the language of that statute. It is apparent that some very good minds were at work in its creation. As in all such legislation, there are some compromises which will please no one. Congress should, nevertheless, be complimented for their work in the drafting and passage of the new Bankruptcy Code. I hope that Congress is not stampeded into making unwarranted changes without allowing adequate time to test the Code in actual operation.

# AO COFJC Calendar

Feb. 15-21 Seminar for Newly Appointed District Judges; Washington, DC

Feb. 17-20 Orientation Seminar for Full-time Magistrates; Reno, NV

Feb. 17-20 Orientation Seminar for Part-time Magistrates; Reno, NV

Feb. 18-20 Advanced Seminar for Full-time Magistrates; Reno, NV

Feb. 18-20 Advanced Seminar for Part-time Magistrates; Reno, NV

Feb. 23-25 Workshop for Magistrates' Staff; Wilmington, DE

Feb. 23-27 Orientation Seminar for U.S. Probation Officers; Washington, DC

Mar. 2-4 EEO Coordinators Workshop; Oklahoma City, OK

Mar. 9-11 Advanced Seminar for U.S. Probation Officers; Tampa, FL

Mar. 12-13 Judicial Conference of the United States; Washington, DC

Mar. 12-13 Judicial Conference Advisory Committee on Bankruptcy Rules; Philadelphia, PA

Mar. 16-18 EEO Coordinators Workshop; Cincinnati, OH

Mar. 18-20 Workshop for Judges of the Fourth Circuit; Williamsburg, VA

Mar. 19-21 Seminar for Senior Staff Attorneys; New Orleans, LA

Mar. 23-25 Workshop for Magistrates' Staff; Sacramento, CA

Mar. 23-25 Management Seminar for Chief Probation Clerks; Washington, DC

Mar. 25-27 Conference of Metropolitan District Chief Judges; Orlando (Winter Park), FL

Mar. 30-Apr. 1 EEO Coordinators Workshop; Sacramento, CA

# PERSONNEL

**RECESS APPOINTMENT**

Walter M. Heen, U.S. District Judge, D. HI, Dec. 31

**NOMINATION WITHDRAWN**

Walter M. Heen, U.S. District Judge, D. HI, Jan. 21

**ELEVATION**

Carl McGowan, Chief Judge, CA-DC, Jan. 14

**RESIGNATION**

William H. Mulligan, U.S. Circuit Judge, CA-2, effective Apr. 1

**DEATH**

M. C. Matthes, U.S. Circuit Judge, CA-8, Nov. 30

## FIFTH CIRCUIT ACCEPTING APPLICATIONS FOR CIRCUIT EXECUTIVE

**Position:** Circuit Executive. Salary up to $50,112 per year, commensurate with education and experience. Certification by the Board of Certification, pursuant to statute (28 U.S.C. §332(f)), is a prerequisite to appointment. However, the Court encourages applications from all qualified individuals, whether or not they are currently on the certified list.

**Responsibilities:** Under direction of the Court and pertinent statutes and rules, the Circuit Executive performs a broad range of tasks related to the business of the circuit, including relationships with the circuit, district, and bankruptcy courts, and the judicial council of the circuit.

**Qualifications:** Proven management and administrative skills. Undergraduate degree in management or related field with experience in judicial administration. Advanced graduate and/or legal training desirable.

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## NEW JUDICIAL LEADERSHIP IN FIFTH CIRCUIT

On January 29th, James P. Coleman of Mississippi, then Chief Judge of the Fifth, announced he would take "retirement as Chief Judge effective . . . February 2, 1981." Judge Coleman added that he would retain his seat on the Court for a while and that he had been eligible to retire since last August but had delayed "because the legislation to divide the Fifth Circuit did not clear the Congress until just before the presidential election."

Judge John C. Godbold, as the active judge with greatest seniority, was designated by the Chief Justice as the new Chief in the Fifth, effective February 2, 1981 (see 28 U.S.C. §45(c)). As a member of the Judicial Conference of the United States, Chief Judge Godbold is now ineligible to serve

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## INTERVIEW WITH CHIEF JUSTICE ROBERT SHERAN, CHAIRMAN OF THE CONFERENCE OF CHIEF JUSTICES

*Robert J. Sheran has been the Chief Justice of the Supreme Court of Minnesota since his appointment in 1973. Although notable for his work on that court, his comments are of special interest because he is Chairman of the Conference of Chief Justices of the United States. This body, composed of the chief judicial officers in each state, works for the improvement of the state court systems and acts as an advocate for the state judiciaries at the national level. Chief Justice Sheran was formerly chairman of the Conference's Committee on Federal-State Relations, and he has frequently testified before Congress, often on jurisdictional issues such as the abolition of diversity jurisdiction.*

*Previously a special agent for the Federal Bureau of Investigation, a member of the Minnesota House of Representatives, a practicing attorney and Associate Justice of the Minnesota Supreme Court, Chief Justice Sheran brings to his work a national perspective, one concerned not only with issues between state and federal courts but also between states, Congress and the executive branch.*

**One of the programs being developed by the Conference of Chief Justices is aimed at reducing delay in the state courts, and the Conference has asked the Chief Justice in each of the states to design a special program to bring about less delay in processing cases to finality. Has any progress been made on this program?**

Preliminary progress has been made in this effort. We are in the process of organizing, on a regional basis, conferences of trial judges, appellate judges and state

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*Chief Justice Speaks on Crime in America*

## ABA HOUSE OF DELEGATES ACTION ON FEDERAL COURT ISSUES

For the twelfth year the Chief Justice addressed the American Bar Association to discuss the administration of justice in this country. This year's address, delivered last month at Houston, focused on crime.

The transcript of the Chief Justice's remarks is available in the Information Service Office at the Federal Judicial Center.

Also, the Association's House of Delegates met and adopted several resolutions related to federal court matters, including:

- **Grand Jury Principles.** The resolution reads in part: "No attorney, his agent or employee, shall be questioned by the grand jury concerning matters he had learned in the legitimate investigation, preparation or representation of his client's cause or be subpoenaed to produce before the grand jury private notes, memoranda, and the like constituting his professional work product." Another subsection of this resolution reads: "The grand jury should be provided separate

See ABA, p. 8

## *1979 DISTRICT COURT TIME STUDY RELEASED*

The Federal Judicial Center has recently published *The 1979 District Court Time Study,* by Steven Flanders. This report was undertaken at the request of the Subcommittee on Judicial Statistics of the Judicial Conference of the United States, and is intended to aid the subcommittee and the Judicial Conference in determining the need for additional judgeships.

"Case weights" measure the comparative judicial time required to dispose of different types of cases. In the most recent survey, for example, antitrust cases were found to have a weight of 5.3499, as compared to patent cases with a weight of 2.9971, indicating that antitrust cases took nearly twice as much judicial time as did patent cases. The "case weights" are used to construct a "weighted caseload" for each district court. Weighted caseloads provide a more accurate picture of workload than do raw filings, and are one element in the process of determining which courts should receive additional judgeships and in supporting such requests before Congress.

With the guidance of the subcommittee, the Center designed the survey to produce uniform national weights for both civil and criminal cases. The case weights had not been revised since a 1969-70 time study. For a twelve-week period in 1979, ninety-nine federal district judges, selected at random, maintained logs showing how much time they spent on their various cases. The Center then analyzed these records according to case types and worked with the Statistics Subcommittee and the Administrative Office to develop the case weights. The report describes the survey in detail and summarizes its results and applications.

The survey data also illuminate some related and important questions: How much judicial time is consumed by the various alternative bases of jurisdiction? What is the impact of protracted cases on the judiciary? What have been the changes over time in the relative difficulty of the various case types and bases of jurisdiction?

The author of the report, Steven Flanders, was appointed Circuit Executive for the Second Circuit last year. He undertook this study prior to that appointment, when he was a Project Director in the Research Division of the Center.

The report is a part of the subcommittee's sustained study of the demands on judicial resources arising from litigation commenced in federal district courts. While this report reflects the most recent data available, the subcommittee and the Center recognize that changes in the nature of litigation and in case management processes require continuing study and refinement of devices for measuring both the demands placed on the judiciary and the available resources for meeting that demand.

Copies of the report are available from the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005, 202/FTS 633-6365. Including a self-addressed, gummed label (which need not be franked) with the request will expedite shipment.

## C.C.P.A. CONFERENCE SET FOR APRIL 10TH

For the eighth year the Court of Customs and Patent Appeals will hold a spring conference in Washington on April 10. The Conference will include the judges of the C.C.P.A. and the U.S. Court of International Trade, and members of the Patent and Trademark Boards and the International Trade Commission. Officials of Treasury, Justice and the Customs Service have also been invited, as have members of the bar.

The program, to be held at the Sheraton-Washington Hotel, will include an annual report by Chief Judge Howard T. Markey; a luncheon address by Senator Strom Thurmond (Chairman of the Senate Judiciary Committee); a review of CCPA Patent, Trademark and International Trade Commission developments in the law; and panel discussions. Chief Judge Edward D. Re of the U.S. Court of International Trade will deliver the closing address at the International Trade session.

There will be a special session of the CCPA to admit new members to the bar of that court at 9:45 a.m. April 10. Candidates for admission should contact the Clerk's Office at 202-633-6550 for applications and information.

## CIRCUIT EXECUTIVE BOARD TO MEET

The Board of Certification for Circuit Executives of the United States Court of Appeals will interview applicants in Washington, D.C. on March 13 and in Chicago on April 30.

The circuit executive is a senior administrative position in the United States judicial system, created by Congress to improve judicial administration in the federal courts. Individuals who wish to serve as circuit executives must be certified as qualified by the statutorily created Board of Certification. While certification is a prerequisite for appointment as circuit executive, certification does not assure employment. The standards for certification are set forth in 45 Federal Register 78,193 (November 25, 1980). For further information about the circuit executive positions and application procedures, write: Board of Certification, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

The Third Branch

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## JUDGMENT IN *WILL III* ENTERED: SALARIES OF OTHER SENIOR PERSONNEL TO BE RAISED

Federal judges and other senior judicial branch employees will soon be receiving salary increases and in some cases damage awards for past salaries withheld. This action is the combined result of the issuance of a judgment in litigation concerning judges' salaries as well as administrative decisions made by the Administrative Office of the United States Courts.

**Salary Litigation.** District Judge Stanley J. Roszkowski on January 28 entered judgment in favor of the plaintiffs in *Will III,* a class action contesting the freeze of a 9.11 percent pay increase for federal judges in fiscal year 1981 (*Will v. United States,* No. 80 C 6692). The judgment was based upon the government's admission that the legislation imposing the freeze came unconstitutionally late under the Supreme Court's decision in *Will I* and *Will II* (see *The Third Branch,* January 1980, p. 1). Judge Roszkowski held that judges appointed before October 1, 1980 (the beginning of FY 1981) were entitled to the adjustment. [The Court reserved any findings as to the rights of judges appointed on or after October 1, 1980.]

The ruling will not increase the salaries currently being paid judges, because the Administrative Office in January made the administrative decision, based upon the Supreme Court's *Will* ruling, to pay the new salaries prospectively. Judge Roszkowski's order did, however, call for the award of damages for the period October 1, 1980 to December 31, 1980 in the approximate amounts of $1,400 to District Judges; $1,475 to Circuit Judges; $1,850 to Associate Justices; and $1,925 to the Chief Justice. It was further directed that the Administrative Office determine the sums needed to be paid as increased employer contributions to life insurance premiums and to the Judicial Survivors Annuity System.

**Non-Article III Personnel.** On February 9, Administrative Office Director William E. Foley informed senior non-Article III personnel in the judicial branch, including bankruptcy judges and magistrates, that he would commence the payment of salary increases ranging from 5.5 to 7.02 percent.

First, Director Foley indicated that, retroactive to October 1, 1980, the salaries of full-time bankruptcy judges will be increased 7.02 percent from $50,000 to $53,500. The salaries of part-time bankruptcy judges will be adjusted as well.

Mr. Foley explained that bankruptcy judges had been denied an otherwise applicable 7.02 percent increase for FY 1980 because of a legislative freeze of the salaries of senior government officials (P.L. 96-86, signed October 12, 1979). Although the Administrative Office was of the opinion that bankruptcy judges "could in no rational basis be deemed to be included in the pay freeze language," the increases were withheld for fear of working a forfeiture under a provision in the legislation which stated that acceptance of a smaller adjustment (5.5 percent) would be "in lieu of" entitlement to a higher amount. Since the pay freeze and forfeiture provision have now expired with the end of the 1980 fiscal year, the Administrative Office is of the opinion that the 7.02 percent increase can be paid for FY 1981, which began on October 1, 1980. The entitlement of bankruptcy judges to a salary increase for FY 1980 is still before the Court of Appeals for the D.C. Circuit in the case of *Foley v. Carter.* [In that case, the court *en banc* on its initiative recently ordered all parties to set forth their "positions" in light of the Supreme Court's *Will* decision.]

The salary of U.S. magistrates will also be increased by 7.02 percent retroactive to October 1, 1980. The Judicial Conference, which is empowered by statute to set the salary of magistrates, equalized the pay levels of magistrates and bankruptcy judges at its September 1979 and March 1980 meetings. Director Foley has therefore proceeded to give magistrates the same adjustments given to bankruptcy judges. As before, adjustments for FY 1980 will have to await the final judgment in *Foley v. Carter.*

Finally, other senior non-Article III judicial branch personnel will be receiving a 5.5 percent increase retroactive to October 1, 1980. Public Law 96-86 reduced a 12.9 percent adjustment for these personnel to 5.5 percent. Because the waiver provision of that law clearly could apply if the smaller amount were accepted, the Administrative Office paid no adjustments in FY 1980. Since that fiscal year (and the pay freeze legislation and forfeiture provision) has now terminated, and since it was clear that Congress intended at least a 5.5 percent adjustment, Director Foley is proceeding to pay that increase retroactive to the beginning of FY 1981 (October 1, 1980). He explained that salary rates for both FY 1980 and 1981 may be subject to further adjustments as the result of a decision in *Foley v. Carter.*

Director Foley stated that all of the adjustments in salaries are likely to appear in pay checks issued this month.

### THIRD BRANCH INDEX DISTRIBUTED

All subscribers to *The Third Branch* should have received under separate cover an index to Volume 12, covering January through December 1980. Each article published during 1980 is listed under as many of the index's subject matter topics as is appropriate.

The index should be of special value to librarians and others desiring quick reference to judicial appointments, legislation, and other matters of interest in the field of federal judicial administration.

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court administrators. Both state and local level officials will participate in exchanging experiences relevant to the problem of moving litigation through the state court systems with greater dispatch. So the answer to your question is yes, we are making preparations for a dialog, which I am sure will be fruitful and I expect that within the next year we will be holding those meetings in all regions of the country. I anticipate much good from that dialog in that we will learn from the experiences of other states how to improve our own techniques for monitoring the progress of decision-making.

*"The federal judiciary is and should be a judicial system of limited jurisdiction, dealing with specific identifiable problems that can be handled more efficiently at the federal level."*

**Have several of the states already submitted their plans?**

Not in a formal way, but as Chairman of the Conference of Chief Justices, I have been kept informed as to what progress is being made. The most significant example perhaps is New York state where, under the leadership of Chief Justice Lawrence Cooke, judges from upstate areas have been assigned on a short term basis to the metropolitan New York area where about 80 percent of the difficulty in case lag is occurring. It appears that within less than a year the number of undecided cases in the New York metropolitan area has been reduced by over 25 percent. That is a significant percentage in a major state and in a metropolitan area where dispute resolution has posed a significant problem.

**Does the Conference of Chief Justices have some other special programs that are being urged?**

I would say that the things that we are emphasizing during the current year would be these. In the first place, we are urging the adoption of the State Justice Institute Act. This is a bill in which the Conference has a very keen interest. The motivation for it is that in recent years the burdens of state courts have been increased greatly by actions—executive, legislative and judicial—taken at the federal level. For example, decisions of the United States Supreme Court making the Bill of Rights binding on the states in the trial of criminal cases have added to the complexities of the trial of criminal cases in state courts. In addition, actions of the Congress in adopting legislation which requires enforcement through state court systems have added significantly to state caseloads. A similar effect results from executive branch determinations, such as the requirements that parentage be established as a precondition to aid to dependent children.

These things have all combined to add significantly to the workload of state court systems. That being the case, the judgment is that the federal government should respond by giving some measure of support to efforts to improve state judicial systems so that they can handle their caseload more effectively.

The most important feature of the bill, perhaps, is the creation of a separate entity to make the needed funding determinations on the federal level. This entity, which would have a board appointed by the President with the approval of the Senate, would be made up of representatives of state court systems and, most significantly, by representatives of those parts of the state court systems responsible for the administration of state courts. This body is important, we believe, because programs for the improvement of state judicial systems can be more effectively instituted if the federal contribution to the effort is funnelled to state court systems through an entity, the policies of which are determined by the representatives of those same systems.

During the last session of Congress the State Justice Institute Act was introduced in both the Senate and the House. It passed easily in the Senate and received favorable consideration in a subcommittee of the Judiciary Committee of the House—and there were indications of strong bipartisan support on the part of the membership of the House in general.

In addition to our support for the State Justice Institute Act, the Conference of Chief Justices will during the current year involve itself in major studies of such issues as the allocation of jurisdiction between state and federal courts; the development of guidelines t improve and make more uniform the process of sentencing; meth-

See INTERVIEW, p. 5

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odology of dealing with small claims at acceptable costs; methods by which the public can be better informed as to the function of the judiciary, particularly in the state court systems, and the rationale underlying the state dispute resolution processes. Our impression is that the public is not at all well informed as to the nature of the dispute resolution processes or the reason for the limitations which exist with respect to them. Finally, to return to the point mentioned at the outset, we are involved in efforts to ascertain the amount of time it takes to move a case through a state court system, the places where avoidable delays are occurring, and methods by which those delays can be eliminated.

**Last summer you addressed the Minnesota State-Federal Judicial Council. Is Minnesota doing anything special that other councils might emulate to their advantage?**

Well, at the outset I think that the concept is an excellent one. Many good things come from such councils if they are properly organized. I would say that if there is anything that is the key to making those councils successful, it is to lay the groundwork at the beginning through the chief judge of the federal court in that district and his colleagues on the one hand, and the chief justice of the state court and his colleagues on the other. That way the council can be conducted with a common feeling of cordiality and the common desire to make the system function effectively.

This past summer the state-federal judicial council in Minnesota met for a two day period at Brainerd with all the federal judges, all the members of the Minnesota Supreme Court, and a number of our trial court judges in attendance. In addition to simply enjoying one another's company, we dealt with a number of serious issues, including certification of state court questions, and we reached a general consensus as to how we would deal with problems of that kind in the future.

We also discussed the possibilities of mediation in dealing with inmates of correctional institutions, whether federal or state; responsibilities of both federal and state judges who observe unprofessional conduct occurring in the courtroom; the reaction of the federal courts to disciplinary proceedings brought against lawyers in state courts; and the response of our state board of professional responsibility to situations called to its attention by federal judges.

In addition we had an excellent discussion by Judge Melvin Peterson, who is the Judge of the Probate Court of Hennepin County, on current litigation involving the constitutionality of procedures followed in mental commitment proceedings in Minnesota. Those were the general subjects that were discussed both formally and informally. I am quite satisfied that everybody who attended felt that it was time well spent.

**Do you have a statute in Minnesota that authorizes certification of state questions?**

We have a statute that authorizes us to deal with certified questions, although my impression is that state courts have inherent authority if they are disposed to use it and if their structure and time constraints permit it.

**You have in the past said that you felt diversity jurisdiction in the federal courts should be abolished; that the state courts could, in fact, absorb this work without undue burdens being imposed upon them. Do you still feel this way, and what are your answers to the larger states where the objections have been the keenest?**

My opinion that diversity jurisdiction should reside exclusively in the state courts remains the same. In my judgment, every logical and theoretical consideration supports this resolution of the problem of jurisdiction allocation, although I must concede that there is a practical problem which needs resolution before state court systems could take over diversity jurisdiction cases throughout the country. The problem is that in several large urban centers the state court systems are so overburdened with state litigation that they might find it extremely difficult if not impossible to take on an additional caseload. Another aspect of that same practical problem is that the number of diversity cases is greater in proportion to the population in these same large metropolitan areas than it is generally. The question, then, is how do you deal with that practical problem. The answer, I think, is that you deal with it by strenuous efforts to alleviate congestion in the state courts, which is something that ought to be done anyhow, and which is imperative not only in the state interest but in the federal interest as well.

The illustration that comes immediately to mind, which I have mentioned before, is the situation in New York. Programs have been instituted which deal specifically with the problem of congestion in the large metropolitan areas, and if more of those programs can be instituted, if they can be guided, above all else, if they can be funded,that problem is resolvable.

That ties in with my enthusiasm for the concept of the State Justice Institute Act because, were such an act to be passed, one of the first problems that the Institute would deal with is the problem of congestion in these large metropolitan areas. One of the first things it should do, in my judgment, is to make available the kind of resources that would be needed to make those calendars current, an objective which should be achieved regardless of what is done with diversity cases.

Once that objective is accomplished, the final concern against giving diversity cases to state courts dissolves. Although diver-

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sity cases constitute something in excess of 25 percent of the civil caseload of the federal courts, the number of judges in the state systems is so much greater than the number of judges in the federal system that that caseload could be absorbed by the state court systems, once their dockets are current, without any significant difficulty.

The other principal reason diversity cases should be handled in state courts is that those cases involve precisely the kind of problems that state courts, since *Erie R.R. v. Tompkins,* are dealing with every day and resolving in terms of state law, not federal law. That being so, a reasonable allocation of responsibility between state and federal courts would strongly suggest if not impel the movement in this direction.

**Last June, in a speech before the American Law Institute, Chief Justice Burger said, "There are signs that state and federal dockets are becoming more and more alike and that the federal system seems to be on its way to a *de facto* merger with the state court system. There are risks that this trend will undermine accepted principles of federalism." Do you share this concern?**

I do share that concern. It is a concern that has attracted the attention of many people, not only in the judiciary but in the legislative branches of government as well. Senator Strom Thurmond, for example, has introduced in the Senate a bill calling for a specific study of this problem. The principle of federalism that I believe is significant is that governmental authority should be exercised so far as possible by that unit of government closest to the people affected by its exercise. This principle acknowledges that in a country like the United States, with a population that moves about freely, and with people who share so many ideals, traditions, and common modes of thought that there must be national standards to which all of the people adhere. But the process by which the judiciary absorbs these standards should be one which so far as possible is managed through courts which are linked as closely to the people affected by their operation as possible. That is why the state courts have always been considered the courts of general jurisdiction in our federal system. And that is why more than 90 percent of the cases and controversies which arise in this country are resolved in state courts. In terms of volume, state courts are—and in my judgment should continue to be—a major part of the integrated judicial system of the country.

This is not in any way to disparage the great importance of the federal judicial system. But the federal judiciary is and should be a judicial system of limited jurisdiction, dealing with specific identifiable problems that can be handled more effectively at the federal level.

In the years ahead, it seems to me, we can expect that throughout the country the rules of law that will be applied, whether in federal or in state courts, will increasingly become more uniform because as communication increases—radio, television, etc.—people's thinking and attitudes become more uniform. And uniformity also comes about because the decisions of the United States Supreme Court, which are the final authority in construing the federal Constitution and federal laws, become not only accepted but implemented by state courts. Uniformity also exists in the sense that state legislatures adopt uniform laws dealing with matters that have multistate impact—child custody, for example, marriage dissolution, things of that kind.

While standards become uniform, the implementation of those standards through the court system should so far as possible and feasible be primarily through state courts. Because if the distinction between federal courts and state courts is altogether dissolved, neglected or overlooked, we may arrive at a situation where there is such a separation between the people who are affected by the operation of the courts on the one hand, and the courts themselves on the other, that the kind of voluntary acceptance of authority which is the key to the operation of a judicial system will be diluted and I think that would be quite unfortunate.

**Federal courts have sometimes been criticized for "judicial activism." Has your court received such criticism? How would you characterize the Supreme Court of the United States in this regard?**

I think the criticism of judicial activism is endemic. Because it is, I think it is important to make some distinctions. The principal distinction is between judicial activism as it relates to rulemaking or lawmaking on the one hand, and judicial activism as it relates to the administration of the courts on the other.

Speaking of the latter first, there is no question but that our courts have been involved deeply in an effort to bring modern methods of administration into court systems, both state and federal. In my view of things, it is an absolute necessity that that kind of judicial activism be encouraged and increased. With the number of cases coming into the court system increasing at a rate of about seven percent per year, which means that caseloads are doubling every seven years, and with the number of judges available to deal with the problems remaining relatively constant in state court systems, we must have modern methods of administration to make the system work effectively. There is criticism of state court systems as being activists when they inaugurate programs of that kind because there are many people both in and out of the system who don't favor efforts to make things work more efficiently.

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Those kind of criticisms simply have to be absorbed.

The other criticism is that judges are activists in the sense that they perform governmental responsibilities more appropriately carried out by the legislative branch of government. In other words, the complaint is that judges legislate. They do this, it is claimed, by giving interpretations to provisions of the Constitution or to legislative enactments through the ascertainment of legislative intent, a process which goes far beyond anything that either the framers of the Constitution or the enactors of the legislation had in mind.

My response is that this criticism is exaggerated for two reasons. The first is that courts, whether they be the United States Supreme Court or the supreme courts of the states, do not deal with difficult interpretations of the Constitution unless a problem has been permitted to develop that is so aggravated and so extensive that resolution is demanded by the strongest kinds of public policy. Even then, the courts will take on those problems with the greatest reluctance and always subject to being overridden by constitutional amendment or, in the case of a legislative interpretation, by reenactment or rephrasing by the legislature.

The second reason is that the charge of excessive activism on the part of the federal court system vis-a-vis state court systems comes about because state court systems are not, or at least in the past were not, as attentive as they should have been to their responsibilities to recognize the Constitution of the United States and the laws passed pursuant thereto as the supreme law of the land. The reason the United States Supreme Court entered into the series of decisions, which began in 1963, dealing with the trial of criminal cases in state courts is that in many instances over a period of two decades state courts had not dealt in effective and aggressive ways with clear violations of federal constitutional rights occurring in the cases before them. One of the reasons I think that federal courts have become caught up in what I regard as a serious extension of Section 1983 actions against persons acting under color of state law, including members of the state judiciary, is, in part at least, because the state courts in some situations have been more tolerant of denials of federally protected rights of individuals than they should have been.

The point is that justice abhors a vacuum. In the relationship between the federal courts and the state courts, the most effective way of avoiding reluctant federal action to correct problems occurring in the states is for state courts to take the initiative and deal with those problems in aggressive and constructive ways.

**Chief Justice Roger Traynor in his book "The Riddle of Harmless Error" questoned just what errors really are "harmless." Do you have any special ideas on "harmless errors?"**

Harmless error has been dealt with in a provocative way by Roger Traynor in his 1970 treatise. He makes the distinction between errors that are purely technical and have no impact on the outcome of the case and those which would have an impact. The latter are referred to as substantial errors. Everybody would agree that technical errors should be overlooked.

But when an appellate court finds substantial error, it can either disregard it or reverse the case and direct a new trial. In making the decision whether it should do one or the other, it can ask itself one of three possible questions: Is it more likely than not, or is it probable, that this substantial error affected the outcome of the case? If the appellate court finds the answer to that question is "yes," the case should be sent back and tried over again. The second way that question could be framed, and this is the way that Roger Traynor suggests, is: Is it highly probable that that substantial error affected the outcome of the case? Judge Traynor says if the answer to that question is "yes," send it back and have it tried over again not only because of the impact that it might have had on the outcome of the case but because by sending it back you make sure that trial courts will be diligent to avoid error. Finally, as was suggested by the United States Supreme Court in the *Chapman* case, should the rule as applied to substantial error affecting constitutional rights be: Is it probable beyond a reasonable doubt that the error did not affect the outcome of the case? That is probably a more stringent test. My own impression is that if it is a clear violation of a constitutionally protected right of the defendant in a criminal case, the appellate court should be disposed, at least in doubtful cases, to direct that the case be tried over again. This is not only because of the fairness to the individual involved but because by insisting on a retrial in those cases you give a greater assurance that the process, speaking generally, will work effectively.

This again raises a point that runs all through the operations of both state and federal court systems. That is that we have more cases coming into our courts than we can deal with in the time that we have at our disposal. When you are pressed for time, when you have so many cases that you can't get an opportunity to look at them all thoroughly, the tendency is to treat error as harmless where in a more leisurely, scholarly and intellectually correct kind of an atmosphere you would make your judgment without regard to considerations of time. Decisions that are affected by considerations of workload and time are unsatisfactory, especially when you are dealing with people's liberties. That is why we have to recognize the necessity of applying more personnel resources to judicial systems than we have in the past.

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voting forms for each defendant in a proposed indictment, and each count in an indictment should be the subject of a separate vote."

U.S. District Judge Frank Kaufman (D. MD), a delegate in the House, spoke against this resolution and argued that this issue is not now ripe for codification; that changes should, at least for the time being, come by case law.

- **Model products liability.** This resolution as adopted opposes enactment of legislation which would impose a model product liability proposal as federal law. (Some legislation introduced in the 96th Congress would preempt all current state regulations in the area of product liability as well as state case law that is contrary to it.)

- **Voir dire.** Taking the same position as they consistently have in the past, the House voted for a resolution that would allow greater participation by counsel in the voir dire process by changing Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure. The resolution was opposed by Judge Floyd Gibson (CA-8) and former ABA President Robert Meserve.

**1981 CIRCUIT CONFERENCES**

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| First Circuit | October 26-28 | Providence, RI |
| Second Circuit | May 7-10 | Buck Hill Falls, PA |
| Third Circuit | Sept. 1-3 | Pittsburgh, PA |
| Fourth Circuit | June 25-27 | Hot Springs, VA |
| Fifth Circuit | May 3-6 | Biloxi, MS |
| Sixth Circuit | May 13-16 | Louisville, KY |
| Seventh Circuit | May 4-6 | Chicago, IL |
| Eighth Circuit | July 7-10 | Kansas City, MO |
| Ninth Circuit | June 28 - July 2 | Moran, WY |
| Tenth Circuit | September 9-12 | Santa Fe, NM |
| D.C. Circuit | May 31 - June 2 | Williamsburg, VA |

- **Advocacy.** A resolution proposed by the Committee for a Study of Legal Education divided the House membership to such a degree that it voted deferral to the August 1981 meeting. This resolution deals with, among other things, changes in law school curriculum to provide greater opportunities for law students to study trial advocacy under competent and experienced lawyers; to take special instructions in interviewing, counseling, and negotiation with clients; and to perform at least one rigorous legal writing experience in each year of law study. The American Bar Foundation did receive special commendation from the House for its "scholarly and helpful research" in the field of legal education. The House recommended continued ABF work in this area, adding, though, that it be done "consistent with the resources and other priorities of the Foundation."

- **Federal and state judicial pension plans.** The Appellate Judges' Conference asked that the "ABA support legislation to insure that the federal tax consequences applicable to a state judicial pension plan are equivalent to the federal tax consequences currently applicable to the federal judicial pension plan . . . ." Action was deferred until August, 1981.

- **Standards on the legal status of prisoners.** The House approved criminal justice standards regarding the legal status of prisoners that are designed to assist prison officials, prisoners, prison litigators, judges and others who must evaluate prison conditions. After several submissions to the House at previous meetings, this fourth draft received approval by a close vote. [Note: The Department of Justice has issued 352 federal standards for prisons and jails, a product of some three years' effort. The Department's standards drew heavily on standards drafted by the American Correctional Association and the Commission on Accreditation for Corrections and they took into consideration standards of the ABA, the AMA, the American Public Health Association, the American Institute of Architects and the National Sheriffs' Association.]

Complete text of these and other resolutions introduced in the House of Delegates last month are available from the Information Service Office of the Federal Judicial Center.

**Michael J. Tonsing** (center) last month received the Justice Tom C. Clark Fellow Award, a designation made of one Judicial Fellow each year. Photographed at the Supreme Court, Mr. Tonsing is flanked by William E. Foley (left), Director of the Administrative Office of the U.S. Courts, and Joseph F. Spaniol, Jr., Deputy Director. The Tom C. Clark Fellowship was established by the former law clerks of Mr. Justice Clark as a living memorial to the late Justice. Tonsing, a San Francisco lawyer, is holding a framed bow tie formerly worn by the Justice, a gift from Mrs. Tom C. Clark.

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on the Board of the Federal Judicial Center, a position he had held since 1976.

When the division of the Fifth Circuit becomes effective on October 1, 1981, Judge Godbold will become Chief Judge of the Eleventh Circuit, which will encompass the states of Alabama, Florida and Georgia. This appears to be the first time in the nation's history that one individual has been chief judge of two different circuits. Judge Charles Clark of Mississippi will on the same date become the Chief Judge of the Fifth, which will then encompass Louisiana, Mississippi, Texas and the Canal Zone.

## LAW DAY USA—MAY 1

*Law—The Language of Liberty* is the American Bar Association's theme for this year's Law Day on May 1.

The message, to be conveyed nationally through bar association programs, radio and TV announcements and civic events, is that a "democratic rule of law must prevail in order that we may live together in peace and as a civilized society; that in the final sense, we ourselves create the rule of law through our legislative representatives, our courts, and our daily conduct."

Federal judges and other personnel in the judicial branch are encouraged to plan special programs on or near May 1 to mark the observance of the 24th Annual Law Day. Special literature—pamphlets, sample speeches, films and posters—are available at the ABA by contacting Dean Tyler Jenks, 1155 E. 60th Street, Chicago, Illinois 60637.

## ELEVENTH CIRCUIT SEEKING ASSISTANTS TO CIRCUIT EXECUTIVE

**Positions:** Two positions available on October 1, 1981, with immediate interim employment for both positions in the office of the Circuit Executive of the U.S. Court of Appeals, Fifth Circuit. The place of employment for both positions is Atlanta, Georgia.

**Duties:** The positions entail broad obligations in assisting the Circuit Executive to meet his responsibilities for court management and administration of the circuit court, and involve planning, development, and implementation of non-judicial activities of the court.

**Requirements:** A bachelors degree, with graduate work in law, public administration, or judicial administration desirable, or a minimum of five years progressively responsible work experience, three of which should be with a federal or state court in a management position.

**Salary Range:** Currently $22,486 - $32,048 per year, based on experience and qualifications.

**To Apply:** Submit resume by April 3, 1981 to: Thomas H. Reese, Circuit Executive, U.S. Court of Appeals, 600 Camp Street, Room 109, New Orleans, Louisiana 70130.

Equal Opportunity Employer.

## ELEVENTH CIRCUIT SEEKING DIRECTOR, STAFF ATTORNEYS' OFFICE

**Position:** Director, Staff Attorneys' Office. Salary $37,871 to $44,547 per year, commensurate with education and experience. The duty station will be Atlanta, Georgia.

**Responsibilities:** Under the direction of the Court and applicable rules, the Director is responsible for coordinating, assisting and reviewing the work of eleven attorneys on the staff in addition to all administrative responsibilities incident to management of a research and drafting law office. Serves as Senior Law Clerk to the Court, advising the Court in this capacity.

**Qualifications:** Proven management, legal, and supervisory skills. Must be a graduate of an accredited law school, a member of a State Bar, and with a minimum of seven years experience in the practice of law, preferably in the federal courts, in the United States.

**To Apply:** Send resume along with appropriate writing samples to the Honorable Albert J. Henderson, United States Circuit Judge, Post Office Box 1638, Atlanta, Georgia 30301, no later than March 25, 1981.

Equal Opportunity Employer

## THIRD CIRCUIT ACCEPTING APPLICATIONS FOR CIRCUIT EXECUTIVE

**Position:** Circuit Executive. Salary up to $50,112 per year, commensurate with education and experience. Certification by the Board of Certification, pursuant to statute (28 U.S.C. §332(f)), is a prerequisite to appointment. However, the court encourages applications from all qualified individuals, whether or not they are currently on the certified list. The official station of the Circuit Executive is the United States Courthouse, Philadelphia, Pennsylvania.

**Responsibilities:** Under direction of the Third Circuit Judicial Council and pertinent statutes and rules, the Circuit Executive performs a broad range of tasks related to the business of the circuit, district, and bankruptcy courts, and the Judicial Council of the Circuit.

**Qualifications:** Proven management and administrative skills. Undergraduate degree in management or related field with experience in judicial administration. Law degree preferred.

**To Apply:** Send four copies of resume to M. Elizabeth Ferguson, Acting Circuit Executive, Room 20716, U.S. Courthouse, Philadelphia, PA 19106.

Equal Opportunity Employer.

## AO/FJC calendar

Mar. 12-13 Judicial Conference of the U.S.; Washington, DC
Mar. 12-13 Judicial Conference Advisory Committee on Bankruptcy Rules; Philadelphia, PA
Mar. 16-18 EEO Coordinators Workshop; Cincinnati, OH
Mar. 18-20 Workshop for Judges of the Fourth Circuit; Williamsburg, VA
Mar. 19-21 Seminar for Senior Staff Attorneys; New Orleans, LA
Mar. 23-25 Workshop for Magistrates' Staff; Sacramento, CA
Mar. 23-25 Management Seminar for Chief Probation Clerks; Washington, DC
Mar. 25-27 Conference of Metropolitan District Chief Judges; Orlando (Winter Park), FL
Mar. 30 - Apr. 1 EEO Coordinators Workshop; Sacramento, CA
Apr. 2-3 Judicial Conference Advisory Committee on Civil Rules; Washington, DC
Apr. 5-11 Seminar for Newly Appointed Bankruptcy Judges; Washington, DC
Apr. 13-15 EEO Coordinators Workshop; Clayton, MO
Apr. 13-15 Basic Instructional Technology Workshop; Buffalo, NY
Apr. 27-29 Management Seminar for Chief Probation Clerks; Washington, DC
Apr. 29 - May 1 Workshop for Judges of the Third Circuit; Gettysburg, PA

## PERSONNEL

### APPOINTMENT

Carmen C. Cerezo, U.S. District Judge, D. PR, Sept. 12

### ELEVATIONS

Frank H. Seay, Chief Judge, E.D. OK, Nov. 5
Russell G. Clark, Chief Judge, W.D. MO, Dec. 31
John C. Godbold, Chief Judge, CA-5, Feb. 2

### RESIGNATION

Howard D. Hermansdorfer, U.S. District Judge, E.D. KY, Jan. 31

### DEATHS

Herman E. Moore, U.S. District Judge, D. VI, Dec. 2
John F. Dooling, Jr., U.S. District Judge, E.D. NY, Jan. 12
John Miller, U.S. District Judge, W.D. AR, Jan. 30
Pat Mehaffy, U.S. Circuit Judge, CA-8, Jan. 31
Edward M. McEntee, U.S. Circuit Judge, CA-1, Feb. 14

## THE SOURCE

The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. Only those entries appearing in bold are available from the Federal Judicial Center; other listings are for information purposes only.*

**Evaluating Judicial Performance and Related Matters. James R. Browning. Houston, Texas, Feb. 7, 1981.**

Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue. Judicial Conference of the U.S., Sept. 25, 1980. 87 F.R.D. 519-36 (1980).

The Role of Courts and the Logic of Court Reform: Notes on the Justice Department's Approach to Improving Justice. Austin Sarat. 64 Judicature 300-11 (1981).

Trial Advocacy on Trial. Judith Ann Yanello. VII Ohio N. U. L. Rev. 3-19 (1980).

The Windfall Profit Tax—An Overview. Barry R. Miller and Dan G. Easley. 12 St. Mary's L. J. 414-35 (1980).

THE THIRD BRANCH

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# The Third Branch

**Bulletin of the Federal Courts**

VOL. 13 NO. 4 | Published by the Administrative Office of the U.S. Courts and the Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005 | APRIL, 1981


*Legislative Update*

## JUDGESHIP BILL; CRIMINAL CODE REVISION INTRODUCED

The opening months of the 97th Congress have seen the introduction of several bills of interest to the federal courts. While most Congressional hearings to date have concerned only economic issues, these bills are likely to merit Congress's attention in the future.

**New Judgeships.** On March 19, Congressman Peter Rodino, Chairman of the House Judiciary Committee, introduced a Judicial Conference-drafted bill that would create 35 permanent and nine temporary positions in the district and circuit courts of appeals. Eleven permanent and three temporary positions would be allotted among eight of the judicial circuits, and 24 permanent and six temporary positions would be distributed among 25 district courts. Chairman Rodino promised "full and fair consideration of this request," but he stressed, as he has before, that "I have yet to be convinced that continuing growth of the federal court system is the wisest way in the long run to address the problem of overloaded courts."

See LEGISLATION, p. 7

## FOURTH ANNUAL BROOKINGS SEMINAR ALLOWS INTERBRANCH DISCUSSION OF FEDERAL COURTS LEGISLATION

Since 1978, the Brookings Institution has sponsored an annual seminar to allow key personnel in the three branches of government to consider current and future issues of federal judicial administration, including matters on the legislative agenda.

The fourth seminar was held in Williamsburg, Virginia on March 6-8. Among those attending were Chief Justice Burger, Attorney General Smith, Chairman Rodino and twelve other members of the House Judiciary Committee, and Chairman Thurmond and three other members of the Senate Judiciary Committee.

The seminar agenda each year is developed by a planning committee composed of representatives of both judiciary committees, the judicial branch, the Justice Department, and Brookings. The 1981 seminar considered the following issues, some of which had been discussed at previous seminars.

- **Creating Judgeships, Selecting and Retaining Judges: The Long Term Perspective.** The seminar considered current procedures, both formal and informal, by which federal judgeships are created by the Congress, judges selected, and judicial compensation determined. Included in the inquiry were what conditions and procedures are most likely to ensure attraction and retention on the bench of the most qualified lawyers, and how to provide judgeships when they are needed.
- **Planning for the Future of the Judiciary.** The seminar discussed several specific proposals for commissions or other bodies to review what the future holds for the federal judiciary, and how the federal judiciary might adapt, and be adapted, to meet the challenges of the future.
- **The Federal Court Rule-Making Process.** During most of

See BROOKINGS, p. 6

## JUDICIAL CONFERENCE MEETS; APPROVES CLUB MEMBERSHIP COMMENTARY TO CODE OF JUDICIAL CONDUCT

At its semiannual meeting last month, the Judicial Conference of the United States approved guidelines for judges' membership in organizations that practice invidious discrimination. At its March 1980 meeting, the Judicial Conference endorsed the principle that it is inappropriate for a judge to hold membership in such an organization and directed its Advisory Committee on Codes of Conduct to draft definitions and standards to implement this principle. At its September 1980 meeting the committee was given additional time to study the question and was directed to survey all federal judges for their responses to two proposed standards. After considering those responses, the committee recommended and the Conference approved the following commentary to Canon 2 of the Code of Judicial Conduct (i.e., that a judge should avoid impropriety and the appearance of impropriety in all activities):

"The Judicial Conference of the United States has endorsed the

See JUDICIAL CONFERENCE, p. 3

*From time to time,* The Third Branch *carries reports on procedures, innovations, and other practices that some courts or judges have found helpful and in which others may be interested. Reviewed this month are two techniques: one to catalog a circuit court's indications of preferred practices in the trial courts; the other concerning two courts' use of teleconferencing to facilitate the presentation of oral arguments.*

## CIRCUIT COURTS' RECOMMENDED PROCEDURES INDEXED

It is not unusual for courts of appeals to indicate, in dicta, that a certain procedure should be followed by district judges. The recommendation of the procedure is usually not in the form of a reversal, but rather simply a statement that the particular procedure favored by the appellate court is a "better practice" or "preferred policy."

The totality of these appellate admonitions would provide useful information to trial judges, but they are not typically cataloged nor even likely to be found by the use of common legal research tools such as Shepard's.

However, any computerized system that can scan the full text of appellate court opinions for particular phrases can be used to derive this information. Chief Judge Carl Rubin of the Southern District of Ohio, with the assistance of students Mark Huddy and John Barnes of the University of Cincinnati College of Law, used the LEXIS system to search the Sixth Circuit Court of Appeals opinions for any reference to the phrase "better practice" or "preferred policy." The computer search found the opinions of the court that contained these phrases. Those opinions were then analyzed, and the specific procedures that were recommended arranged in an easy to use index.

In a search of appellate opinions for the years 1965 to 1980, Judge Rubin and his associates found a total of 99 cases containing the phrase "better practice" or "preferred policy." Approximately 60 of these opinions used the terms in the manner discussed here, that is,

See CIRCUIT INDEX, p. 7

## TELECONFERENCING USED TO CONDUCT APPELLATE AND TRIAL ARGUMENTS

**Appellate Arguments.** The Seventh Circuit on January 23rd utilized a speaker telephone system to permit Circuit Judge Luther M. Swygert to participate in oral arguments while confined at home. Judge Swygert had read the briefs and desired to participate in the oral arguments, but he was disabled because of a leg injury. A speakerphone was installed in the court's conference room with a telephone cord long enough to allow it to be brought into the adjacent courtroom. With a teleconferencing hook-up, Judge Swygert was able to hear all oral arguments and to ask questions of counsel. After conclusion of the cases, the speakerphone was returned to the conference room where the panel, including Judge Swygert, discussed the cases which had been presented.

Chief Judge Thomas E. Fairchild was very pleased that the use of the speakerphone made it unnecessary to obtain a substitute judge. The initial cost of the installation was $61 and the monthly charge will be $12.

The Chief Judge intends to retain the speakerphone so that it will be available for emergency situations when a judge or attorney is unable to be present at oral argument.

**Motions.** Chief Judge Jack B. Weinstein has announced that several judges in the Eastern District of New York will, upon application of counsel, hear motions and other applications by telephone. The participating judges will have speakerphones in their chambers so that discussion may be recorded by a court reporter if requested by counsel. The technique may also be used, by stipulation, to take the testimony of witnesses not otherwise available. In jury trials, a portable speakerphone will be installed in the courtroom. Arrangements may also be made for taking testimony by closed circuit television.

*A Reminder*

## FINANCIAL DISCLOSURE STATEMENTS DUE MAY 15

Pursuant to a request from the Judicial Ethics Committee, Administrative Office Director William E. Foley has distributed forms to be used in reporting financial disclosure statements for the year 1980.

Under the Ethics in Government Act of 1978 (Public Law 95-521), these forms must be filed each year by May 15 for the preceding calendar year by all individuals who have served 60 days or more in the period covered. Included are: all justices and judges appointed to hold office during good behavior; judges of the district courts of the Canal Zone, Guam, the Virgin Islands and the Northern Mariana Islands; judges of the courts of the District of Columbia; judges of the Tax Court and Court of Military Appeals; bankruptcy judges; magistrates; and all judicial employees who are compensated at or in excess of the minimum rate for grade 16 of the General Schedule (5 U.S.C. 5332).

Judicial officers who did not perform official duties in excess of 60 days during the year must certify this fact in a letter to the Chairman of the Judicial Ethics Committee in lieu of a report. However, every senior judge who has been certified by the judicial council of his circuit as performing "substantial judicial service" is required to file a report.

Director Foley notes that the forms now distributed are a revision from those previously used.

Disclosure statements are public documents open to inspection at the office of the Judicial Ethics Committee or at the office of the clerk of court.

# Noteworthy

For the first time in the history of the federal judicial system, an appellate panel of three female judges was convened last month. Ninth Circuit Judge Betty B. Fletcher, sitting with Circuit Judge Dorothy Nelson and District Judge Judith Keep, remarked on the significance of the event.

"We understand that this is an historic occasion. Not only is it the first time that three women have sat together as a panel of appellate judges in the Ninth Circuit but, we believe, in the United States and perhaps in all the world. . . . We wish to take note of it and to let all of you know, not only on behalf of all the women judges, but of the women lawyers and of the women of the world, that we rejoice in it, and we hardly believe it."

"Speaking from my own perspective, when I graduated from law school in 1956, not only was it legal to discriminate against women, but discrimination was rampant. My law school advised me that although I had been first in my class, it was unlikely that they could help me get a job with a law firm and that I must make my own way. . . ."

* * * * *

The American Bar Association's Committee on Courts and the Community is seeking copies of written speeches for adult or student audiences on the role and function of the courts. The Committee, a part of the Judicial Administration Division, is hoping to develop "model" speeches on this subject for publication and use by federal and state judges.

Materials should be sent to Ernest Zavodnyik, American Bar Association, 1155 E. 60th Street, Chicago, Illinois 60637.

* * * * *

The First National Symposium on Court Management will be held this September in San Diego, California. The Conference, sponsored by five major national professional associations of court administrators, will address the relationship between court management and the effectiveness and independence of the judiciary. Participating will be judges and court managers from both the federal and state systems, academicians, students, and representatives of consumer and public interest groups.

For information about the symposium, contact Robert Zastany, National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185.

* * * * *

A three-year study of the 64,000 persons paroled during 1974 and 1975 has found that only 25 percent had their paroles revoked or were returned to prison before their paroles ended, the Bureau of Justice Statistics has announced. It was also reported that approximately 196,500 men and women were on parole from federal, state and local corrections institutions in the U.S. at the end of 1979, an increase of 11,400 parolees over the previous year. Also noted was the trend toward reduced discretion for both sentencing judges and paroling authorities; 29 jurisdictions in the country (55 percent) now have structured sentencing and/or parole decision-making.

The statistics are part of a report by the National Council on Crime and Delinquency, "Parole in the United States: 1979." Individual copies of the 48 page study may be obtained from the Bureau of Justice Statistics, Washington, D.C. 20531.

The Third Branch

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**Co-editors:**

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director Administrative Office, U.S. Courts

JUDICIAL CONFERENCE from p. 1

principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether the judge's membership in a particular organization might reasonably raise a question of the judge's impartiality in a case involving issues as to discriminatory treatment of persons on the basis of race, sex, religion, or national origin. Whether a particular organization practices invidious discrimination is often complex and not capable of being determined from a mere examination of its membership roll. Judges as well as others have rights of privacy and association. Although each judge must always be alert to the question, it must ultimately be determined by the conscience of the individual judge whether membership in a particular organization is incompatible with the duties of the judicial office."

In addition, in the second of a renewed series of regular appearances by members of Congress with specific responsibility for legislation directly affecting the judicial branch, the Conference heard from Senator Strom Thurmond, Chairman of the Senate Judiciary Committee. Senator Thurmond expressed his appreciation for the Conference's responses to his Committee's requests for comments on pending legislation that would have an impact upon the federal courts, and he expressed his intention to continue seeking the views of the Conference.

Senator Lowell Weicker, Chairman of the Senate Appropriations Subcommittee on Commerce, State, Justice, the Judiciary, and Related Agencies as well as representatives of Senator Robert Dole and Congressman Robert W. Kastenmeier, attended portions of the Conference. As is traditional, the Attorney General, William French Smith, also addressed the Conference.

## CVB INFORMATION PROCESSING TO BE EXPANDED

One of the applications of the Federal Judicial Center's Courtran computer system is CVB, an automated information system to assist the Central Violation Bureaus in federal district courts in monitoring the flow of petty offenses and traffic-ticket-like citations. Central Violation Bureaus are especially active in districts that include national parks or federal highways. The CVB program has been installed in six district courts. The present plans are to consolidate various individual CVB operations into collective centers, expanding the number of courts which can benefit from this time-saving computerized program.

**Background.** Under the automated CVB system, deputy clerks enter citation information into the computer as citations are received from the issuing agencies, such as the National Park Service. The automated system monitors all of the ticket information and generates a number of management and administrative reports. It also prepares warning letters, assists magistrates in scheduling hearings, provides support to other offices in the court, and gives timely feedback to the issuing agencies regarding ticket dispositions.

**Consolidation.** CVB consolidation centers enable the courts to handle an increased volume of tickets and citations with fewer personnel. Also, some of the courts have increased the amount collected from citations by reviewing unpaid tickets on a more timely basis. Although the benefits of the CVB system are extensive and are potentially applicable to virtually every district court, until recently it was not available to courts whose volume of citations was not sufficient to justify the expense of installing a complete automated system. The participating CVB courts and the Center, in conjunction with the Administrative Office, have now developed an approach to CVB management that extends the benefits of the system to many additional courts by consolidating the operational aspects of the CVB workload from a number of district courts into the clerk's office of a single court.

Under the consolidation approach to CVB management, participating courts no longer maintain a complete CVB unit. Instead, issuing agencies forward citations directly to the central (or "consolidating") court where CVB computer terminals are located. This consolidating court performs the data entry for all the participating districts. The CVB system not only leads to increased collection of fines and elimination of the backlog of outstanding citations, but it also generates JS45 reports for the Administrative Office, prepares magistrates' calendars, and assists the court in working with state motor vehicle authorities. Significant economies of scale are realized by replacing the manual efforts in several district courts with the consolidation of the CVB system in a single court. The system is sufficiently flexible to allow the tailoring of support given to a particular district to meet the individual needs of that court.

The District of Colorado was the first to act as a consolidation center for CVB, and major expansion of this successful program is being contemplated. Four CVB clerks in Denver are using computer terminals to support the CVB load of all the district courts in the Tenth Circuit, as well as several of the districts in the Eighth and Ninth Circuits. The Central District of California has begun to consolidate the CVB load for the remainder of the Ninth Circuit, and the Western District of Texas in San Antonio will serve as the point of consolidation for numerous district courts in the Fifth Circuit. The Eastern District of New York is likewise planning to consolidate the CVB cases of courts of the First, Second and Third Circuits that volunteer to participate in the project. Plans call for the Western District of Kentucky to act as the consolidating court for CVB applications in the Sixth and Seventh Circuits. It is expected that the automated CVB system will be processing over 80 percent of the national central violations bureau cases before the end of the 1982 fiscal year.

**Future Plans.** The Center is currently studying the feasibility of using the consolidated data processing approach in its Index Case Management System as well. The Index system, another well-known Courtran application, cross references all cases and parties and provides case management information to the clerk's office. Reports from the Index system show case and party relationships, judge caseloads, case category distribution, and other elements of case management. The Districts of Maine, New Hampshire and Rhode Island are now participating in a data input consolidation experiment in which all case information—openings, closing, parties, etc.—is forwarded to the District of Massachusetts. California Central is undertaking this service for the districts of Nevada and Hawaii. Index reports are produced every month for these three test courts just as if the data were input on a terminal physically located in the clerk's office of each court. If the experiment proves successful, the Center and the Administrative Office will consider using such consolidation to extend the availability of the Index system into districts having caseloads which taken alone, would be too low to justify the cost of equipment and telecommunications.

## REPORT ISSUED ON S.D.N.Y. VOLUNTEER MASTERS PROGRAM

A report has been issued on the results of an experiment in the Southern District of New York to assign volunteer attorneys as masters in civil litigation. The project was instituted two years ago upon the recommendation of the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation. The report, issued by the Committee on Federal Courts of the Association of the Bar of the City of New York, concludes that, though results of the project were somewhat negative, more study is required to fully evaluate the worth of such a program.

The program contemplated that in appropriate civil cases the attorneys would select a master from a roster of forty experienced attorneys who had volunteered to participate. The principal functions of the volunteer masters were to aid the attorneys in identifying and narrowing the issues, assisting in stipulating facts, and endeavoring to work out with the parties a plan for discovery and the filing of pretrial motions. The master was to meet with the parties within twenty days after the order of assignment, to schedule subsequent conferences, and to issue status reports to the judge every two months. At the conclusion of the assignment the master was to issue a final report to the judge describing the matters upon which the parties could and could not reach agreement.

The report found that a relatively limited number of cases had, in fact, been assigned to volunteer masters. In those cases the judge, instead of the attorneys, usually assigned the master and seldom was the first conference held within twenty days.

Interviews with individuals who served as masters revealed that the majority felt that they had had some positive effect on the progress of the litigation. Reactions of litigating attorneys were also positive. Most agreed that the masters had taken their role seriously and had assisted in the litigation by helping to narrow issues, formally resolving discovery disputes, and dealing with other procedural problems.

Reactions by the three judges who participated in the program, however, were decidedly mixed. Often, it was indicated, the court's follow-up on the volunteer masters' performance created additional work for the judge. Two of the judges were not sure that volunteer masters had any significant effect in encouraging settlement or reducing work for judges in those cases that were not settled. All three judges ceased references to the volunteer masters after the initial assignments were made at the beginning of the program.

The Committee on Federal Courts, due to the limited nature of the experiment, could offer only a preliminary assessment. Although the majority of the persons acting as volunteer masters found the work satisfying, the participating judges concluded that the program was not helpful. The scope of the experiment prohibited objective analysis, so the actual effectiveness of the program remains in doubt. Furthermore, the report suggests that while the program would not seem to be necessary in smaller, easily managed cases, the program could even be counterproductive in larger actions where the presence of a master would merely add another layer of ineffective bureaucracy. Finally, although some participants thought it disadvantageous that masters lack the authority to impose sanctions, the report stated that the granting of such authority would appear to make masters little different from magistrates. If this were the case, better use might be made of paid magistrates rather than volunteer masters.

The committee recommends that if serious study of the program is desired, a greater number of judges should participate and a greater number of cases should be assigned to volunteer masters. The committee also recommends that the program be administered by someone from the clerk's office to reduce the expenditure of time by the judges in the program. The masters should also have detailed guidelines concerning their responsibilities and functions. Mandatory status conferences should be held every three months with the court. In summary, the committee reported that although a preliminary assessment appears negative, this innovation should not be rejected without a proper study.

[The use of masters in other proceedings has also been evaluated. In a report to the Federal Judicial Center, for example, Vincent M. Nathan has explored masters' role in the post-judgment, or implementation phase of litigation. Nathan, *The Use of Masters In Institutional Reform Litigation,* 10 Toledo L. Rev. 419 (1979). Reprints of this article are available from the Center's Information Service Office.]

## JURY INSTRUCTIONS, OTHER MATERIAL ADDED TO BENCH BOOK

The Federal Judicial Center this month distributed several new chapters of the *Bench Book for United States District Court Judges.* The new material includes general jury instructions to be given at the beginning and end of both civil and criminal cases, procedures for the waiver of a jury trial, and a suggested outline for the conduct of naturalization proceedings. Because of the large amount of text now available, a second three-ring binder for *Bench Book* material was also included in the recent mailing.

The *Bench Book,* which is prepared under the direction of a committee of experienced district judges who have served on the Center's Board, is available only to district judges, magistrates and bankruptcy judges.

*Reports on Activities of State-Federal Judicial Councils*

# STATE-FEDERAL

The Ninth Circuit has recently undertaken efforts to invigorate the concept of state-federal council meetings. Herewith a report on some of these activities.

**Alaska.** Anchorage was the site for Alaska's state-federal council meeting last November. It brought together not only state and federal judges, but also a representative of the Alaska Bar and the Administrative Director of the Alaska courts.

Several cooperative agreements were reached, including: joint use of available courtrooms when necessary; the exchange of personnel with specialized technical skills for "discrete projects"; and the avoidance of jury service in both systems for a given period of time through cooperative use of juror lists.

A unanimous resolution of the council put on record their recommendation that the federal courtroom which served as the Territorial Courtroom until Alaska's transition to statehood be preserved as an historical site. It was additionally recommended that articles of historical importance be displayed in this courtroom.

Put over for a future meeting was the consideration of "joint trials and discovery where particular actions having common questions of law or fact nevertheless require trials in both the federal and the state court."

**Arizona.** Federal and state judges who constitute Arizona's state-federal council met in January with Chief Federal District Judge C. A. Muecke presiding as chairman. The meeting was held at the Supreme Court of Arizona in Phoenix.

A problem common to many of the states was discussed—conflicts between state and federal trial scheduling. In Arizona the issue is somewhat compounded in two urban counties (Pima and Maricopa) because in one county case assignments are designated by the use of the individual calendar system while in the other the master calendar is used. Final decision on an accommodation awaits further discussions and more information.

Another matter which was considered but not resolved relates to the certification of questions of state law from the federal judiciary to the Arizona Supreme Court.

**Nevada.** This state's council meeting was held last November at the National Judicial College on the University of Nevada campus at Reno.

Discussed by the group were: removal actions from the state trial court to the federal trial court, with a report on a statistical breakdown by counties; avoidance of dual jury service when possible; and the expanded jurisdiction of the U.S. Bankruptcy Court.

**Oregon.** Chief Justice Arno H Denecke, this council's chairmar presided at Oregon's meeting last October.

Discussed were matters of mutual concern such as: where and to what extent cases are being filed in the state and federal courts; diversity jurisdiction and legislative proposals to abolish it; prisoner petitions and overcrowded conditions in state jails; and certification of questions of state law from the federal court to the Supreme Court of Oregon.

U.S. District Judge Owen M. Panner reported on a meeting with the incoming Multnomah County District Attorney, which brought about an agreement that District Attorney Michael Schrunk would handle more bank robbery cases to relieve the federal prosecutor's heavy caseload.

BROOKINGS from p. 1

the decade of the 1970s, there has been increasing concern that the procedures by which federal procedural and evidence rules are developed and promulgated may be in need of review and reexamination. The seminar heard a description of the current rule-making process, and observations by those who have participated in the process from several vantage points on specific changes that might be desirable.

- **Peremptory Challenge Legislation.** There are before the Congress several proposals that would allow litigants, on a peremptory basis, to challenge the judge assigned to the case and compel the transfer of the case to another judge. The conferees considered the experience in several states with similar peremptory challenge statutes, and discussed whether the Judicial Discipline and Tenure Act of 1980 has relieved the need that some perceive for peremptory challenge legislation.
- **Federal Appellate Jurisdiction.** Proposals have been pendinc in the Congress for several years t restrict the mandatory jurisdiction of the Supreme Court of the United States, as well as to create additional appellate capacity at the national level through the creation of some form of panel of the existing appellate courts. The seminar's discussion of these various legislative proposals also took note of other proposals to restrict the federal courts' substantive jurisdiction in various areas.
- **Alternative Dispute Resolution.** The seminar considered the various proposals from private foundations for the creation and support of alternative methods of dispute resolution. The Minor Dispute Resolution Act of 1980 authorizes federal funding to assist such programs in the state and local courts, but to date that authorization has not been followed with an appropriation.
- **Impact of Regulator Reform on the Federal Courts.** A in past seminars, there was discus-

See BROOKINGS. p. 7

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ion of proposals, generally subsumed under the label of "the Bumpers Amendment," that would expand judicial review of agency rule making. The conference considered, among other things, the impact of such legislation on the courts.

- **Pretrial Services.** The conferees heard a description of the provisions of Title II of the Speedy Trial Act of 1974, authorizing pretrial services agencies in ten demonstration districts, and considered legislation currently pending to reauthorize pretrial services agencies and provide for their establishment in light of the conditions in local districts.
- **Other Topics.** There was also discussion of State Justice Institute legislation, means of better ascertaining congressional intent in statutes, and plans to celebrate the bicentennial of the Constitution.

* * *

Chief Justice Burger's comments on the need for greater communication among the branches of government was the stimulus for development of the seminars, which were brought into being primarily through the efforts of Mark W. Cannon, Administrative Assistant to the Chief Justice, and Warren I. Cikins, Senior Staff Member of the Brookings Advanced Study Program.

CIRCUIT INDEX from p. 2

to indicate the appellate court's procedural preferences. The opinions fell into four basic categories: (1) motions, including pretrial, trial, and post-trial motions; (2) jury instructions; (3) preliminary injunctions; and (4) miscellaneous advice in such areas as fees of masters and judgment orders.

Obviously, as Judge Rubin points out, the index itself cannot dicate whether the views expressed in the opinions still represent the views of the circuit court, but use of standard legal research tools could provide verification.

LEGISLATION from p. 1

**Criminal Code.** On February 4, Congressman Thomas Kindness introduced a bill that would completely revise the federal criminal laws. The latest in a long line of proposed code revisions, this bill is identical to the measure reported out of the House Judiciary Committee last year (H.R. 6915). No criminal code bill has yet been introduced in the Senate.

In a related area, several bills have been introduced both in the House and Senate which would establish criteria for the imposition of the death penalty. One of these, sponsored by Senator Dennis DeConcini, is nearly identical to a measure that cleared the Senate Judiciary Committee in the last Congress. The Senate has also received two bills that would restrict current bail practices and limit the availability of release on personal recognizance. Also of interest in the criminal area are two bills that would define and limit the exclusionary rule in federal criminal proceedings. Regarding post-conviction proceedings, Senate Judiciary Committee Chairman Strom Thurmond has introduced a bill which would modify federal habeas corpus procedures so as "to ameliorate," in Senator Thurmond's words, "the repeated abusive use of federal habeas corpus to attack state criminal convictions."

**Other Matters.** Several bills that did not gain final passage last year have been reintroduced into this session. The Federal Courts Improvement Act of 1981 has been introduced in the Senate. Like previous proposals, it would merge the Court of Claims and the Court of Customs and Patent Appeals into a Court of Appeals for the Federal Circuit. This measure would also create a new trial-level court called the United States Claims Court. A similar bill was introduced in the House by Congressman Robert Kastenmeier on March 10.

Fair housing civil rights bills have been introduced again in both chambers to create new enforcement mechanisms for violations of Title VIII of the Civil Rights Act of 1968. Such a bill passed the House last year, but a cloture motion to limit debate of the bill on the floor of the Senate failed by a small margin in the waning days of the 96th Congress.

Finally, Senator Thurmond has reintroduced legislation submitted during the final days of the last Congress, that, in acknowledgment of concerns expressed by the Chief Justice in a speech before the American Law Institute last spring, would establish a Federal Jurisdiction Review and Revision Commission.

## SUPPLEMENT TO PRISONERS' RIGHTS COMPENDIUM PUBLISHED

The Federal Judicial Center now has available a current supplement to the popular *Compendium of the Law on Prisoners' Rights.* That volume, which surveys the developing case law of prisoner litigation, was written by Magistrate Ila Jeanne Sensenich (W.D. Pa.) and published by the Center in April 1979. While no formal effort was undertaken to update the materials in the *Compendium,* Magistrate Sensenich continued to annotate her own notes to supplement the text as an aid to her own work and as a source for the lectures she gives as part of the Center's continuing education and training program.

Those notes and annotations have now been prepared and published as a supplement to the *Compendium.* Copies are available to judicial branch personnel from the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005; or by calling 202/FTS 633-6365. [Copies of the *Compendium* (027-000-00792-9) and the supplement (027-000-01093-8) are for sale to the public from the Government Printing Office.]

## ao oofjc calendar

Apr. 13-15 EEO Coordinators Workshop; Clayton, MO
Apr. 13-15 Basic Instructional Technology Workshop; Buffalo, NY
Apr. 27-29 Management Seminar for Chief Probation Clerks; Washington, DC
Apr. 28-May 1 Management Seminar for District Court Clerks; Ft. Worth, TX
Apr. 29-May 1 Workshop for Judges of the Third Circuit; Gettysburg, PA
Apr. 30-May 1 Judicial Conference Advisory Committee on Bankruptcy Rules; Pittsburgh, PA
May 3-6 Fifth Circuit Judicial Conference; Biloxi, MS
May 3-6 Seventh Circuit Judicial Conference; Chicago, IL
May 4-6 Regional Seminar for U.S. Probation Officers; Ft. Worth, TX
May 5 Workshop for Judges of the Seventh Circuit; Chicago, IL
May 7-10 Second Circuit Judicial Conference; Buck Hill Falls, PA
May 11-13 Workshop for Judges of the Sixth Circuit; Louisville, KY
May 13-15 Seminar for Bankruptcy Judges; Kansas City, MO
May 13-15 Sixth Circuit Judicial Conference; Louisville, KY
May 19-21 Management Seminar for Chief U.S. Probation Officers; St. Louis, MO
May 31-June 2 District of Columbia Circuit Judicial Conference; Williamsburg, VA

## PERSONNEL

### ELEVATION

Harrison L. Winter, Chief Judge, CA-4; April 6

### DEPUTY CLERK—ESTATE DIVISION, S.D. OHIO BANKRUPTCY COURT

**Position:** Deputy Clerk—Estate Administration of the United States Bankruptcy Court for the Southern District of Ohio, Columbus, Ohio. Salary is $18,585 to $32,048 depending upon qualifications.
**Duties:** Managing trustees in bankruptcy and providing appropriate liaison between the trustees and the court.
**Qualifications:** Undergraduate degree in law, business, court administration or similar discipline.
**To Apply:** Send resume to Personnel Office, United States Bankruptcy Court, 124 United States Courthouse, 85 Marconi Boulevard, Columbus, Ohio 43215.
Equal Opportunity Employer.

### POSITION AVAILABLE IN NINTH CIRCUIT

**Position:** Director, Santa Ana Divisional Office, United States Bankruptcy Court, Central District of California. Salary is $22,486 to $32,048 commensurate with qualifications.
**Duties:** Responsible for managing a geographically separate divisional Bankruptcy Court Clerk's Office. Reports directly to Clerk of Court in Los Angeles headquarters.
**Qualifications:** Seven years progressively responsible experience in administration or management. Strong background in court administration preferred.
**To Apply:** Submit application and resume to: Jack L. Wagner, Clerk, U.S. Bankruptcy Court, 906 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012.
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*THE THIRD BRANCH*
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# The Third Branch

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MAY, 1981


## AN INTERVIEW WITH CHIEF JUDGE BROWNING OF THE NINTH CIRCUIT

*Chief Judge James Robert Browning of Montana joined the Ninth Circuit Court of Appeals in*

*September 1961, almost 20 years ago. He became Chief Judge in 1976. He brought to the Circuit a broad background of experience in the law, including service in the Department of Justice and three years as the Clerk of the Supreme Court of the United States.*

*The Ninth embraces nine states, the Territory of Guam and the Northern Mariana Islands. It has 23 authorized circuit judgeships and 74 district court judgeships. When the Fifth Circuit is split next October, the Ninth will become the largest of the twelve circuits.*

*In the following interview Chief Judge Browning speaks out on a number of issues affecting the work of his Circuit and the management of its heavy caseload.*

**Next October the Fifth Circuit will be split into two circuits, the Fifth and the Eleventh. This will leave the Ninth Circuit as the largest circuit in the system. In a recent speech you expressed the view that attempts should be made to avoid a similar split of the Ninth Circuit. Could you explain the reasons for this view?**

In the first place, people of the western states, particularly the maritime states, have many interests—social, economic, and commercial—in common, and it is desirable that they be governed by a uniform body of federal law to contribute some stability and predictability to the law in those areas. One way to achieve uniformity is to have a single circuit court deciding

See INTERVIEW, p. 4

## NEW CHIEF JUDGE IN FOURTH CIRCUIT

On April 6 Judge Clement F. Haynsworth, Jr. took senior status after having served for 16 years as Chief Judge of the Fourth Circuit and one day after his 24th anniversary on the bench. Before stepping down, Judge Haynsworth was the most senior chief judge of a federal court of appeals (see his interview in *The Third Branch,* December 1980).

Judge Harrison L. Winter is the new chief judge. Judge Winter was appointed as United States Circuit Judge in 1966. Previously, he had served as United States District Judge for the District of Maryland. Judge Winter received his LL.B. degree from the

See CHIEF JUDGE, p. 3

## TWO FJC BOARD MEMBERS ELECTED

The Judicial Conference of the United States has elected Circuit Judges Cornelia G. Kennedy (CA-6) and John D. Butzner, Jr. (CA-4) to serve as members of the Board of the Federal Judicial Center.

Judge Kennedy is the first woman to serve on the Board. She was appointed to the appellate bench on September 26, 1979. Prior to that, she served as a U.S. District Judge for the Eastern District of Michigan from 1970-1979 and as Chief Judge of that court from 1977-1979. Judge Kennedy attended the University of Michigan, receiving her B.A. degree in 1945 and J.D. degree in 1947. She has also been awarded honorary LL.D. degrees from Northern Michigan University, Eastern Michigan University and Western Michigan University.

Judge Kennedy replaces Chief Judge John C. Godbold (CA-5) who became ineligible to serve on the Board when, as a Chief Judge, he became a member of the Judicial Conference of the United States. His term on the Board was

See FJC BOARD, p. 2

## *WILL* RULING APPLIED TO ALL NEW JUDGES

In what is likely to be one of the final chapters in the current chronicle of federal judges' pay litigation, District Judge Stanley Roszkowski on April 10 ruled that the pay freeze legislation at issue in *Will v. United States* could not be applied to newly appointed judges. The Supreme Court had earlier held that the legislation was unconstitutional as to sitting judges (see *The Third Branch*, January 1981).

In the litigation, the government had contended that although the pay limitations imposed in fiscal years 1980 and 1981 were unconstitutional as to sitting judges, Congress could and did intend to limit the salaries of judges appointed subsequent to such legislation. Specifically, it was maintained that lower salaries should be paid to judges appointed between October 12, 1979 and September 30, 1980 (the period in *Will II*) and to those appointed after October 1, 1980 (the period in *Will III*).

In rejecting this argument, Judge Roszkowski first noted that the statutes did not adjust the salaries of individuals, but rather affected the pay rates applicable to *positions*. Because those statutes were found to be unconstitutional, they were not lawful limitations on the positions held by federal judges, and persons appointed to the bench during fiscal years 1980 and 1981 assumed office without regard to any limitations. The legislative history of the statutes further revealed that Congress had no intention that the pay limitations, if found unconstitutional as to sitting judges, would nevertheless apply to subsequently appointed judges. Finally, Judge Roszkowski found it significant that, historically, all individuals serving in the same class of the federal judiciary have been paid at the same rate. He noted that under the government's theory of a tiered salary system, a veteran district judge elevated to the bench of the Court of Appeals next month would have to take a cut in pay. "To suggest that Congress intended to create a system under which District Judges make more than newly appointed Court of Appeals Judges, without the least expression of Congressional intent of any such desire, is unsupportable."

The holding will increase the salaries of the 93 district, circuit and CCPA judges appointed in fiscal year 1980 and all federal judges appointed thereafter.

## DISTRICT COURT EXECUTIVES TO BE TESTED IN FIVE COURTS

Five district courts have been selected to participate in a pilot project to test the feasibility of utilizing court executives in metropolitan district courts having ten or more judges. The five pilot courts are the Southern District of New York, the Eastern District of Michigan, the Southern District of Florida, the Northern District of Illinois, and the Central District of California.

At its March 1980 meeting, the Judicial Conference adopted a resolution specifying that these court executives would be "selected by and be subject to the direction of the district court for the relevant district." Furthermore, the Conference directed that any person selected must be on the list of persons certified by the Board of Certification, created by Congress in the Circuit Executive Act of 1971.

In approving funds for the five-district pilot project, the Appropriations Committees of the Congress noted the need for express statutory authority for these positions if this pilot project is to be extended beyond experimental status. The Director of the Administrative Office, with the approval of the Judicial Conference, will transmit during this session of Congress proposed substantive legislation to authorize such positions in the district courts.

FJC BOARD from p. 1

to expire in March 1981 in any event.

Judge Butzner was appointed to the Fourth Circuit on July 31, 1967. Previously, he had served as a U.S.

*Judges Kennedy (left) and Butzner.*

District Judge for the Eastern District of Virginia from 1962-1967. Judge Butzner also served as a Judge of the Thirty-ninth Judicial Circuit and as Associate Judge of the Fifteenth Judicial Circuit of Virginia. Judge Butzner is a graduate of the University of Scranton (B.A. 1938) and the University of Virginia Law School (LL.B. 1941).

Judge Butzner will fill out the approximately two years which remain in the term of former Circuit Judge William H. Mulligan (CA-2), who resigned from the bench on April 1, 1981.

## HONORARY TITLE FOR FORMER CHIEF JUDGES

At its recent meeting the Court Administration Committee unanimously authorized former chief judges of United States courts to use the term "emeritus" on non-official documents, such as individual stationery, in programs such as those prepared for circuit conferences or American Bar Association meetings, in introductory statements at testimonials, or in award ceremonies. The use of the term in official court documents associated with the performance of an official duty, such as signing an opinion or order, should not be permitted.

In essence, the term "emeritus" should be regarded as purely honorary, having no formal institutional recognition in any jurisprudential context.


***Nineteen bankruptcy judges*** *attended a seminar for newly appointed bankruptcy judges last month at the Federal Judicial Center. Bankruptcy Judge David A. Kline of Oklahoma (left) spoke on fees and allowances payable to professionals employed by a trustee or committee under the new bankruptcy code. Bankruptcy Judge Richard W. Hill of New Jersey (below, gesturing) led one of several small group workshops, this one on creditors' rights and remedies. Chairman of the seminar was Bankruptcy Judge Asa S. Herzog of Florida, retired.*



CHIEF JUDGE from p. 1

University of Maryland in 1944 and his undergraduate degree from Johns Hopkins University in 1942. He has served as a member of the Judicial Conference Committee on the Operation of the Jury System.

Judge Haynsworth has indicated that he wishes to relinquish only his administrative duties and that as senior judge he will be able to devote full time to case decision-making.

The Third Branch

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Joseph F. Spaniol, Jr., Deputy Director Administrative Office, U.S. Courts

## CENTER PUBLISHES REPORT ON PEREMPTORY CHALLENGE OF JUDGES

Proposals that would allow federal litigants to challenge, on a peremptory basis, the judge assigned to their case are explored in a new Federal Judicial Center report, *Disqualification of Federal Judges by Peremptory Challenge.* The Center undertook the report at the request of the Judicial Conference Advisory Committee on Criminal Rules.

Resolutions in favor of peremptory challenge of federal judges have been endorsed by the American Bar Association, and bills to permit such challenges have been introduced in the last two sessions of Congress. Such procedures now operate, by rule or statute, in seventeen state court systems.

The Center report discusses the proposals that have been offered on the federal level and analyzes the state procedures now in effect. The report also considers the possible administrative consequences of a federal peremptory challenge procedure and weighs the competing policy considerations that should properly precede a decision of whether to adopt such a procedure.

*Disqualification of Federal Judges by Peremptory Challenge* was prepared by Alan J. Chaset of the Center's Research Division. Copies are available from the Center's Information Service Office (202/FTS 633-6365) at 1520 H Street, N.W., Washington, D.C. 20005. Enclosure of a self-addressed mailing label (which need not be franked) will expedite shipment.

INTERVIEW from p. 1

issues of federal law. Dividing the circuit would inevitably increase the number of conflicting decisions. And, of course, this in turn would increase the burden upon the already overburdened Supreme Court.

It is useful to have a large pool of trial and circuit judges, particularly of trial judges, in a single circuit. It permits flexibility in moving judges wherever and whenever they are needed, free from the restraints that inevitably arise from jurisdictional divisions. In short, judicial manpower can be used more effectively in a larger circuit.

It is also a legitimate consideration, it seems to me, that we have over 90 years of tradition and history in the Ninth Circuit, adding to the institutional stability of both the court of appeals and the district courts.

Finally, and perhaps most important, if we can develop a method for making large circuits function effectively, it will provide an alternative to the fragmentation of the federal judicial system through multiplication of the circuits—a process with no foreseeable end.

**The Ninth Circuit has taken certain actions to deal with its extremely heavy caseload. One of these measures has been to divide the circuit into separate administrative units as authorized by Section 6 of the Omnibus Judgeship Act of 1978. Would you explain this plan?**

Section 6 of the Omnibus Judgeship Act provided that a court of appeals with more than 15 judges could constitute itself into administrative units, and could provide for the performance of its en banc function by less than all of its judges.

Two circuits qualified—the Fifth with 26 judges, and the Ninth with 23. The Ninth Circuit accepted the invitation extended by Congress through Section 6. We adopted a plan dividing the Ninth Circuit into three units for administrative purposes: Northern, Middle, and Southern.

The administrative staff is being reorganized along these geographic lines. An assistant circuit executive will be assigned to each unit to provide administrative assistance to the circuit judges in each unit, and to the district and bankruptcy courts and their support elements in each unit. The Court of Appeals clerk's office has established separate "teams" to process appeals from each of the three units and has set up small branch offices in Seattle and Los Angeles. Circuit libraries have been organized at metropolitan centers in each unit to provide local service to the federal bench and bar. We are working toward the physical decentralization of administrative personnel to the three administrative centers—Seattle, San Francisco, and Los Angeles.

Under the plan, most of the routine administrative work of the court is accomplished through an Executive Committee, consisting of the chief judge, the senior circuit judge from each of the three divisions, and, for a one-year term, the most junior circuit judge who has not yet served.

**What safeguards does the plan provide against intracircuit conflicts?**

Although administration is decentralized under the plan, adjudication is not. Cases are heard in the locale in which they arise, but the judges who hear them are drawn from all parts of the circuit. A common pool of judges, constantly rotated in their assignment to panels, will help maintain uniformity among panel decisions. We remain a single court for the purpose of deciding cases.

There *is* a greater chance for conflicting decisions but the cause is not the division of the circuit into administrative units, but simply the growing caseload. We now have about 40 panels of three judges a month hearing an average of five or six cases per panel. The increased number of decisions enhances the possibility of conflict.

We have taken several steps to meet that problem in addition to maintaining a common pool of judges. First, our staff attorneys inventory all incoming cases after they have been briefed, identifying and classifying the issues in each case. When assembling calendars, the staff, with the assistance of a computer, puts cases with the same issue before the same panel. We also try to bring cases that involve similar though not identical issues to the attention of the panel. Recently we have also been providing each panel with a list of cases that have been calendared but not yet decided that bear upon the issues before the panel.

**The Ninth Circuit has taken advantage of another provision of the Omnibus Judgeship Act that provides for less than full court en banc hearings. What is your en banc procedure?**

Under our limited en banc rule, all 23 active judges vote on whether to take a case en banc. If a majority of the 23 vote to en banc a case, a random drawing is held to select 10 judges to sit on the en banc panel. Those 10 judges and the chief judge make up the en banc panel. If a judge is not on an en banc panel for three successive drawings, he or she is automatically included in the fourth.

After the case is heard and decided by the en banc panel, there may be a petition for rehearing by the full court. Such a petition will be voted upon by the whole court. Thus, the court may order a rehearing by the full court following a hearing or rehearing by a limited en banc panel.

We have taken four cases en banc under these new procedures. We have decided one. The process seems to work well. The true test of the procedure will come when the entire court votes on whether to accept the decision reached by a limited en banc panel in a controversial case. I think the willingness of the full court to accept a decision of an en banc panel with which a majority of the full court

See INTERVIEW, p. 5

INTERVIEW from p. 4

disagrees will test whether the process will work.

**The Ninth Circuit has had several years' experience with CALEN-9, the Center-designed computer program which assists the staff attorneys' office in assigning cases to a three-judge panel. How does the system work? Has your court used any other automated information systems?**

We use the CALEN-9 computer program, developed with the aid of the Center, to make up case clusters for assignment to panels of judges for hearing and decision. As I have said, the staff attorneys inventory each case after the case has been fully briefed. In addition to identifying the issues, they also estimate the difficulty of the case, assigning each case a weight on a scale of 1 to 10. This information goes into the computer. The computer is then asked to produce each month the number of case clusters we need to supply the number of panels of judges available.

The computer selects the cases that are ripe for argument at the particular time, taking into consideration statutory priorities and other factors, such as age equalization, so that we hear cases of about the same age from the different regions of the circuit.

Each case cluster contains an agreed-upon number of points (now 18). For example, a case cluster assigned to a particular panel may have a 10, a 5, a 3; or five 3's and three 1's; or three 5's and three 1's; and so forth. The object is to give each panel a cluster of cases of about equal difficulty.

Also, as I have said, the computer searches back for six months in the backlog and the staff then puts cases having the same issue in the same cluster for assignment to the same panel.

We also have a new computer program—Appellate Records Management System, or ARMS—developed through the joint efforts of the Center and the court. Under this program, information ordinarily included on the docket sheet is fed into the computer for every appeal. The computer has all the data necessary to provide complete control at each stage of the appellate process from the time the appeal is filed until it is finally disposed of on a petition for rehearing. ARMS also enables us to furnish each judge with information necessary to manage the judge's own backlog.

We are trying to gain the maximum benefit from the use of word processing equipment. Our circuit judges are dispersed over a wide area—Juneau, Honolulu, Seattle, Portland, San Francisco, Sacramento, Los Angeles, San Diego, Phoenix, Reno, and Boise. They all now have word processing equipment, connected by telecommunication. We are only beginning to learn to use the system, but experience in the Third Circuit has demonstrated that it can result in very significant improvements in communications. Also, we now hold "hearings" on emergency motions by telephone conference call. In a circuit as widespread as ours, travel can be a great waster of judicial time. Improving communication is one of the ways we can better utilize valuable judge-time.

*"It is desirable that [the people of the western states] be governed by a uniform body of federal law to contribute some stability and predictability to the law in those areas. It is also a legitimate consideration, it seems to me, that we have over 90 years of tradition and history in the Ninth Circuit."*

Although not directly responsive to your question, I would like to mention that the Center is doing an in-depth study of the Ninth Circuit to find ways to improve our productivity. The Center has prepared a preliminary report making various recommendations that are now in the process of implementation. A second phase of the study will challenge more basic assumptions of the appellate process and perhaps come up with suggestions that can make a substantial difference.

**In a recent speech during the midyear meeting of the ABA, you reported on the progress of the Ninth Circuit committee to study the evaluation of judges. What is that project? Would you explain the two principal experiments in**

See INTERVIEW, p. 6

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**judicial evaluation being studied by the committee?**

A year and a half ago the Executive Committee of the Judicial Conference of the Ninth Circuit created an Ad Hoc Committee to Study the Evaluation of Federal Judges.

Polling lawyers to evaluate judges is commonplace. It is less usual for an agency dominated by the potential subjects of the poll to sponsor such activity. It is unique, I believe, for an official instrumentality of federal judges to undertake a study that may lead to an evaluation by lawyers of the performance of those federal judges.

The Ninth Circuit judges did not throw caution to the winds, however. The committee was not authorized to evaluate the judges, but only to evaluate the evaluation of judges, and report back to the conference. And, with fine even-handedness, and perhaps even a bit of a hint to be wary, the conference also created a second committee: the Committee to Study the Evaluation of Lawyers.

The Committee to Study the Evaluation of Federal Judges has surveyed the literature, interviewed district judges in each district in the circuit, and studied what the states are doing in this area. The committee is now formulating its report. If the committee can develop a procedure that would assist conscientious judges in improving their performance without the disadvantages common to past polling systems, I believe the committee will recommend its adoption.

The committee has given close consideration to two recent developments in the Northern District of California that may point in the right direction. In the first, the bar has appointed a committee to receive complaints from lawyers regarding the performance of particular judges. The complaints are screened by the lawyers' committee. If a complaint has sufficient merit to be called to the attention of the judge, the lawyers' committee passes it along to a committee of judges. If the judges' committee decides the complaint has merit, the committee calls upon the judge concerned and presents the complaint to him. In this way the lawyers are assured of anonymity and may be more willing to submit complaints. On the other hand, the judges may be more likely to respond affirmatively since the complaint will have been examined by fellow judges and will be submitted to the judge only if in their view it is something that should be called to his or her attention. Peer pressure, it is thought, may be a far more effective means of correcting judicial deficiencies than a poll.

The second experiment in San Francisco was initiated by one of our district judges. This judge developed a questionnaire that was circulated through the clerk's office to over 1,000 lawyers who had appeared before the judge in the preceding fours years. Their responses were returned to the clerk's office. Again, so the responding attorneys would have the benefit of anonymity, the clerk's office compiled the results of the questionnaire and passed them on to the judge. After it was over, the judge wrote to the participating lawyers, thanked them, indicated he had found the results useful and informative, and advised them he was taking steps to solve problems suggested by the responses.

The advantages of this system are clear. The timing of the questionnaire and the questions asked can be tailored to the needs of the particular judge. Only lawyers who have practiced before that judge, and so know whereof they speak, are polled. The judge alone receives the responses. There is no automatic public exposure to put the judge on the defensive and inhibit self-improvement. Since each poll is distinct in timing and in content, there can be no rankings to divide the judges and separate bench from bar.

**There is at the present time a committee of the Judicial Conference of the Ninth Circuit appointed to consider the problem of peremptory challenges to judges. Has that committee issued any reports on this question? What is your position on peremptory challenges to judges?**

We have two committees dealing with this problem. The first is a committee of the circuit conference created after a resolution supporting peremptory challenges was defeated at the 1979 meeting of the circuit conference. Though the resolution was defeated, the concerns expressed by the lawyers led to the creation of the conference committee to consider the problem. The committee is composed of both lawyers and judges, under the chairmanship of a leading law professor. A preliminary report of the committee was reviewed and hotly debated at the 1980 Conference. The committee will report again at the 1981 Conference.

A second committee was created by the district judges of the circuit. In the course of the discussion at the 1980 conference, many of the district judges became convinced that some change was necessary and announced the appointment of a committee of district judges to help in the search for a constructive solution to the problem.

The problem arises out of the fact that challenge for cause is not an effective way of getting judges to relinquish cases which for various reasons they ought not to handle. The statutory mechanism for disqualification for cause is ineffective. The statute has been interpreted narrowly. Motions for disqualification are seldom granted. Appeals from the denial of such motions are rarely successful. There is a need, but no effective remedy.

On the other hand, the proposal to authorize the peremptory challenge exceeds the legitimate need. A judge may be removed for no reason at all or for reasons that all would agree to be unworthy. The remedy is subject to abuse—judge-shopping, obfuscation and delay,

See INTERVIEW, p. 7

INTERVIEW from p. 6

manipulation of the system, and waste of judicial and administrative resources. And, perhaps most important, the chief judges of the larger districts in the Ninth Circuit are convinced that the peremptory challenge would undermine the individual calendar system which most of them feel has really been the key to keeping current in busy, metropolitan district courts. I hope we can avoid these difficulties by improving the means for disqualification for cause.

**The Ninth Circuit adopted procedures for handling complaints of judicial misconduct in advance of the passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. These procedures are, in substance, identical to the procedures required by the Act. What has been your experience?**

In the two-year period since the procedures were announced, we have received about a dozen complaints from the nine western states. Three remain pending. All but one of the remainder were clearly subject to dismissal, and were dismissed. We have yet to receive a complaint of substance.

As you might anticipate, the first complaint was filed by a lawyer who saw an opportunity to gain an advantage for his client. His complaint was that the judge had held his case under submission too long. There was no contention that the judge was generally delinquent in the performance of his duties—in fact, he was prompt in his dispositions and current in his work. Mandamus was available to compel the judge to perform his duty to decide that particular case. The complaint procedures were not intended to provide a tactical option for counsel in litigating a particular lawsuit. A brief order was entered rejecting the complaint, and admonishing counsel.

But the lawyer had his way nonetheless—as I suspect he had anticipated from the beginning. When he filed his complaint he sent a copy to the judge. The judge filed his opinion in the case before I could file the order rejecting the complaint.

Most of the other complaints came from lay persons representing themselves. The essence of each complaint was that the judge had decided the particular case against the complainant. As is commonly true, the pro se litigant equated an adverse decision with judicial bias.

One of the complaints was not dismissed. It related to a minor matter but seemed worth calling to the attention of the judge. That was done and the complaint was closed when corrective action was taken.

The paucity and triviality of the complaints filed during these two years does not mean that problems did not exist or that they were not solved. The handling of complaints should be kept in perspective. The process established by the Act is deliberately drawn to an administrative model rather than an adjudicatory one, and its primary purpose is to improve the functioning of the court by solving administrative problems, not to ferret out and punish offending judges. Yet complaints are not important in the day-to-day administration of the business of the federal courts. Problems have arisen and have been dealt with every day, but to my knowledge, in our circuit, no substantial problem has been brought to our attention initially by a complaint.

## ALASKA FREEZES PLEA BARGAINING

The National Institute of Justice has issued a report on Alaska's ban of plea-bargaining, the conclusions of which "contradict some entrenched views." The program went into effect on July 3, 1975, when the Alaska Attorney General ordered all District Attorneys and Assistant District Attorneys to "refrain from engaging in plea negotiations with defendants designed to arrive at an agreement for entry of a plea of guilty in return for a particular sentence to be either recommended by the state or not opposed by the state. . . ."

Comparing the year before and the year after the 1975 ban, the study found among other things that: court processes did not bog down but to the contrary they accelerated; defendants continued to plead guilty at about the same rate as before the ban; the rate at which cases were disposed by trial increased substantially, but it did not become unmanageable; and sentences were more severe for relatively less serious offenses and relatively "clean" offenders, but sentences for violent crimes appeared unaffected.

The ban was found to be successful in achieving its aim of reducing prosecutors' involvement in the sentencing process. Also, there was evidence that the discrepancy in sentencing between defendants who pled guilty and defendants who were convicted by trial was eliminated in burglary, larceny and receiving stolen property cases, but that offenders guilty of property theft, fraud, and drug crimes received substantially higher sentences after plea bargaining was prohibited.

"Most of our original hypotheses were disproven," said authors Michael L. Rubinstein, Stevens H. Clarke, and Teresa J. White. "We were frequently surprised by the discrepancies between our expectations and the actual effects of Alaska's prohibition. Perhaps some of these unanticipated findings will serve to open minds and lead to a reexamination of old beliefs about plea bargaining."

Copies of "Alaska Bans Plea Bargaining" are available at $7.50 per copy, prepaid, from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The stock number is 027-000-00976-0.

## ADMINISTRATIVE OFFICE RELEASES 1980 STATISTICS

The Administrative Office of the United States Courts has released Federal Judicial Workload Statistics for the twelve month period ending December 31, 1980. These statistics are similar to those in the workload analysis contained in the Administrative Office's Annual Report, but cover the calendar rather than the fiscal year.

The report shows that civil case filings were up 7.2 percent over 1979 but that the rate of increase in filings declined from 12.5 percent to 7.2 percent.

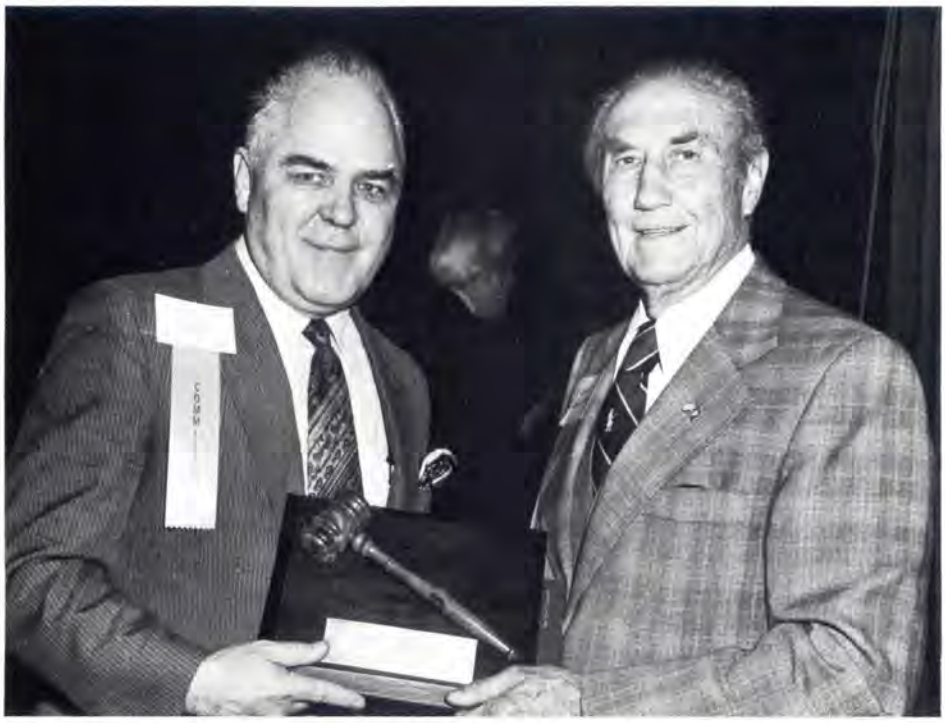
Criminal case filings continued to decline and were down 0.8 percent in 1980, but case terminations also decreased so that cases pending rose 7.3 percent.

The workload of the Court of Appeals continued to rise dramatically, with an 11.3 percent increase in appeals filed over 1979. But dispositions also rose and were up 20.1 percent over 1979. Nonetheless, given the increased number of cases filed, the pending appellate caseload rose 6.1 percent.

The Administrative Office has also released the 1980 edition of Management Statistics for United States Courts. This report contains statistics which reflect the workload of each federal circuit and district court. The statistics show the total number of case filings, terminations, and average disposition time for each court, and are also broken down for purposes of comparison into cases per panel or judgeship.

There are also national statistical profiles for the courts of appeals and district courts. These are contained in pages that may be folded out for ease of comparison with statistics for individual courts. The one-page statistical profile of each court supplies six years of data on the docket conditions of that court.

The data and format are approved by the Judicial Conference's Subcommittee on Judicial Statistics and provide the basis for the Biennial Judgeship Analysis conducted by the Subcommittee.



**Senator Strom Thurmond**, Chairman of the Senate Judiciary Committee, last month received a gavel from Chief Judge Howard T. Markey in appreciation for his address to the Judicial Conference of the U.S. Court of Customs and Patent Appeals. The Senator outlined his agenda for new legislation in the area of criminal law, antitrust law, and federal court reorganization.

## THE SOURCE

The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only that entry appearing in bold is available from the Federal Judicial Center.*

The American Jury: Symposium. 43 Law & Contemp. Prob. 1-168 (1980).

The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction. Frank R. Kennedy. 55 Am. Bankr. L. J. 63-91 (1981).

A Brief History of the United States Court of Customs and Patent Appeals. Giles S. Rich. Government Printing Office, 1980 (for sale by GPO; the stock number is 028-002-00039-4).

The Federal Magistrate Act of 1979. Kenneth J. Meyers. 69 [illegible] B. J. 404-7 (1981).

**Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation. Mark W. Cannon, Warren I. Cikens. XXXVIII Wash. and Lee L. Rev. 1-20 (1981).**

The Role of the Courts in Government Today. James L. Oakes. 14 Akron L. Rev. 175-186 (1980).

The Seventh Amendment Right to Jury Trial of Antitrust Issues. Thomas M. Jorde. 69 Calif. L. Rev. 1-79 (1981).

A Synopsis of the 1979 Amendments to the Federal Rules of Criminal Procedure. 5 U. Dayton L. Rev. 381-408 (1980).

Wingspread Conference Report on Contemporary and Future Issues in the Field of Court Management. Paul Nejelski and Russell R. Wheeler. Institute for Court Management (1980).

Women Judges Unite: A Repo[illegible] from the Founding Convention o[illegible] the National Association of Women Judges. Lynn C. Rossman. 10 Golden Gate L. Rev. 1237-65 (1980).

## JUDGES REFRESH THEIR KNOWLEDGE OF THE LAW BY USING COMPUTERS

Over the past 18 months, the Center's Continuing Education and Training Division has been evaluating the potential usefulness of computer technology for education and training purposes. An experimental project was developed to determine whether such computerized exercises would be helpful to judges who occasionally need short yet intensive refresher courses in select areas of the law.

Four phases of the computer assisted instruction project (CAI) have now been completed. In each phase, judges attending the Center's newly appointed judges seminar have had the opportunity to volunteer to proceed through a computer-generated exercise. From 50 to 65 percent of the judges attending each seminar opted to try this new method of instruction, and responses collated from evaluation questionnaires showed a strong enthusiasm for the computer as an instructor. In the first phase, conducted in June 1979, the exercise posed hypothetical cases on character evidence. Judges were placed in the appropriate role of deciding on questions of admissibility. Subsequent exercises in November 1979 and June 1980 dealt with the rules on hearsay.

*District Judge Myron H. Thompson (M.D.AL) participates in a computer-generated exercise on the hearsay rules at a recent seminar for newly appointed district judges held at the Federal Judicial Center.*

The exercises used in the first three phases had been designed mainly for law students and attorneys. Because enthusiasm for these exercises ran high, the Center contracted for the development of an exercise designed specifically for judges. Experienced in CAI course development, Professor Roger Park of the University of Minnesota Law School agreed to prepare an exercise on the rules governing hearsay and their exceptions. He completed it in time for the February 1981 newly appointed judges seminar, simultaneously the fourth phase of the project. Volunteers found the exercise helpful, and the majority of them recommended that the Center develop exercises in other areas of the law as well.

The Center has been encouraged by the judges' response to this new form of continuing judicial education. Use of computer technology promises to be economical because the exercises can be programmed onto the Center's COURTRAN system. Plans for that system call for the placement of computer terminals in all of the federal courts. Another advantage is ease of access; assuming the availability of a library of computerized exercises, a judge could access any one of them in a matter of minutes in the courthouse.

The Center intends to pursue this experiment and to expand its bounds to include course development in non-legal areas such as statistics and procurement for use by court operational staff.

## TASK FORCES ON CRIME APPOINTED

Two major efforts have been announced which will focus on the concerns expressed by the Chief Justice in his speech on crime delivered at the midyear meeting of the American Bar Association last February.

On March 31 the ABA announced the creation of a task force to study problems of crime in the United States. The task force chairman is Herbert S. Miller of Washington, presently chairman of the ABA's Criminal Justice Section.

Said Miller: "What we want the task force to do is thoughtfully examine some underlying assumptions of the speech . . [such as whether] money can solve the problems of crime; [and whether] public expectations of the criminal justice system are unrealistic."

Also, Attorney General William French Smith announced the creation of a Justice Department Task Force on Violent Crime. Cochairmen of this task force are former Attorney General Griffin Bell and Governor James Thompson of Illinois.

In making the announcement Attorney General Smith said: "There has been no comprehensive examination of the federal government's role in this area for many years. The climate of crime today makes such a review necessary."

# AO/FJC Calendar

May 11-13 Workshop for Judges of the Sixth Circuit; Louisville, KY

May 12-14 Sixth Circuit Judicial Conference; Louisville, KY

May 13-15 Seminar for Bankruptcy Judges; Kansas City, MO

May 19-21 Management Seminar for Chief U.S. Probation Officers; St. Louis, MO

May 31-June 2 District of Columbia Circuit Judicial Conference; Williamsburg, VA

June 1-2 Judicial Conference Subcommittee on Judicial Statistics; Bar Harbor, ME

June 2-4 Regional Seminar for U.S. Probation Officers; New York, NY

June 8-9 Judicial Conference Subcommittee on Supporting Personnel; Cape Cod, MA

June 15 Judicial Conference Subcommittee to Examine Possible Alternatives to Jury Trials in Complex Protracted Civil Cases; Washington, DC

June 16-19 Judicial Conference Committee to Implement the Criminal Justice Act; Martha's Vineyard, MA

June 18-19 Judicial Conference Committee on Rules of Practice and Procedure; Washington, DC

June 18-19 Judicial Conference Advisory Committee on Criminal Rules; Washington, DC

June 22-23 Judicial Conference Subcommittee on Judical Improvements; High Hampton, NC

June 22-24 Advanced Seminar for Full-time Magistrates; Ann Arbor, MI

June 22-24 Advanced Seminar for Part-Time Magistrates; Ann Arbor, MI

June 26-27 Fourth Circuit Judicial Conference; Homestead, VA

June 28-July 2 Ninth Circuit Judicial Conference; Jackson Hole, WY

June 30-July 1 Judicial Conference Subcommittee on Federal Jurisdiction; Colorado Springs, CO

July 7-10 Eighth Circuit Judicial Conference; Kansas City, MO

July 13-15 Judicial Conference Committee on the Judicial Branch; Los Angeles, CA

July 20-21 Implementation Committee on Admission of Attorneys to Federal Practice; Vail, CO

July 20-21 Judicial Conference Committee on Operation of the Jury System; Falmouth, MA

# PERSONNEL

## DEATHS

Phil M. McNagny, Jr., U.S. District Judge, N.D. IN, Mar. 28

Sylvester Ryan, U.S. District Judge, S.D. NY, Apr. 10

Albert C. Wollenberg, U.S. District Judge, N.D. CA, April 19




THE THIRD BRANCH

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# The Third Branch

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## NEW CHIEF JUDGE IN DISTRICT OF COLUMBIA CIRCUIT

Spottswood W. Robinson, III last month became the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit. He replaces Judge Carl McGowan, who reached the mandatory age limit for holding this position.

Chief Judge Robinson, a Virginian by birth, attended Virginia Union University and earned his LL.B degree in 1939 at Howard Jniversity School of Law in the District of Columbia. He graduated with the highest academic average in the history of the law school. He was one of the plaintiff's lawyers in the *Brown v. Board of Education* school desegregation case, and he was a member of the United States Commission on Civil Rights.

After two years on the U.S. District Court for the District of Columbia, Judge Robinson was appointed to the Circuit Court in 1966.

## INTERVIEW WITH ATTORNEY GENERAL WILLIAM FRENCH SMITH

*As seventy-fourth Attorney General of the United States, William French Smith heads the nation's largest "law firm" of more than 4200 lawyers. "Like most things federal," he has said, "the size of the Justice Department is staggering." The Department is organized into 27 operating divisions, bureaus and offices, with responsibilities ranging from civil rights to federal prisons to foreign counter-intelligence. In the last fiscal year, the Department prosecuted or defended approximately 124,000 civil cases, and more than 35,000 criminal prosecutions were filed. The new administration has only recently set forth its plans for running this Department.*

*In the following interview, Attorney General Smith, formerly a partner in the Los Angeles firm of Gibson, Dunn & Crutcher, outlines the Department's priorities for the coming years, and, among other matters, offers his views on how federal judges will be nominated by the Reagan administration.*

**In March you indicated that this administration will, where possible, look to Republican Senators to recommend nominees for federal district judgeships in their states. To what degree will the administration encourage Senators to use merit selection panels or other screening processes?**

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## A MESSAGE FROM THE CHIEF JUSTICE

Since the new Congress arrived in January, both Houses and the new administration have been necessarily giving priority to budget matters. The economic welfare will inevitably continue to be the most compelling business on the agenda for the next few months. Nevertheless, as progress is made in that area, time will become available for the consideration of other business. Judicial Conference committees—especially the Committee on the Judicial Branch chaired by Judge Irving Kaufman—as well as the Administrative Office, have been working closely with my office to insure that matters of concern to all judges will receive early consideration.

As you all know, on March 12, 1981, both the House and Senate disapproved any increases in salaries for government officials. While many Members expressed agreement with recommendations submitted by the most recent Quadrennial Commission on Executive, Legislative, and Judicial Salaries, they concluded that recommended increases in salary amounts should be delayed until

See CHIEF JUSTICE, p. 6

## WORK OF RUBIN COMMITTEE ON PROTRACTED CASES UNDERWAY

The Judicial Conference's Subcommittee on Possible Alternatives to Jury Trials in Protracted Court Cases has for many months been working from an active agenda, and the first products of its efforts are beginning to be realized. Formed early last year (see *The Third Branch,* February 1980), the subcommittee is chaired by Circuit Judge Alvin B. Rubin (CA-5). Other members are Judge John D. Butzner (CA-4), Chief Judge Ray McNichols (D. Id), Judge Earl E. O'Connor (D. Ks), and Judge Milton Pollack (S.D.N.Y.).

The Federal Judicial Center, through its Research Division, is undertaking a variety of assignments for the subcommittee, and as part of that effort two different studies of the use of juries in federal litigation were recently published (see accompanying box). The Division is currently engaged in four other projects at the request of the subcommittee.

First, the Center has analyzed long civil trials (defined as those lasting 20 days or more) according to case type, case weight, location, and percentage using jurors. The staff have also examined the relations between pretrial activity, especially discovery, and trial duration, and is currently examining data to compare the rates of appeal and the rates of reversal in jury and bench trials.

In a second project, 68 hour-long interviews were conducted with judges and lawyers who participated in long civil trials, both with and without juries. The interviews explored the problems experienced in conducting a long trial, the lawyers' efforts to present complicated facts and legal issues to the jury, and the bases upon which lawyers opted for jury trials and selected individual jurors.

The Center is also compiling data to determine whether jurors who have served on long trials differ in age, income, employment status or other characteristics from those who have served on short trials.

Finally, the Center recently entered into a contract for the conduct of 200 telephone interviews with persons who served as jurors in both long and short civil trials. The interviews are intended to gain deeper understanding of the burdens imposed by service on

See RUBIN COMMITTEE, p. 3

## JURY DECISION-MAKING AND "BLUE RIBBON" JURIES STUDIED IN TWO RECENT PUBLICATIONS

As part of its work for the Judicial Conference subcommittee studying alternatives to juries in protracted cases (see accompanying story), the Federal Judicial Center has announced the publication of two studies on the work of juries.

The first is *Small-Group Decision-Making and Complex Information Tasks,* written by Michael J. Saks of the National Center for State Courts. The FJC asked Dr. Saks to review all available social science literature touching on small-group decision-making. While virtually no work focusing directly on the subcommittee's area of interest was found, the review did provide information, by analogy, on the question of whether juries are capable of competently deciding complex or protracted cases.

Comparing various possible decision-making groups (individuals versus groups, judges versus juries, etc.), Dr. Saks concluded that the legal fact-finding task, especially in complex cases, seems to be one in which large heterogeneous groups perform better than individuals and that the jury task is one that benefits from group effort. He did caution, however, that his conclusions should be considered as "best available guesses" based upon imperfect information and that it is "absolutely necessary" that any seriously considered alternatives be empirically tested.

The second publication is *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation,* prepared under contract with the Center by University of Pittsburgh law professors William V. Luneburg and Mark A. Nordenberg. The paper, which will appear in this month's University of Virginia Law Review, is an exploration of the constitutionality and wisdom of using alternative fact-finding tribunals in selected civil cases in the federal courts.

The authors first review a plan in which a bachelors degree from an accredited college or university would be a prerequisite for service on specially empaneled juries. The authors maintain that such a special jury would be of significant value in those limited civil cases where the average jury seems unequal to its task. The paper also undertakes an extensive analysis of the legal and constitutional history of the creation of nonjury dispute resolution tribunals. Within the parameters of relevant Supreme Court decisions, the authors propose the creation of a special tribunal with jurisdiction to adjudge specifically identifiable "public right" cases that have peculiar needs for "expert" decision-making.

*Small-Group Decision-Making* is now available and *Specially Qualified Juries* will be available in July from the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005 or by calling 202/FTS 633-6365. Enclosing a self addressed mailing label (which need not be franked) will expedite delivery.

# Noteworthy

Chief Judge Donald P. Lay has announced the inauguration of a Preargument Conference Program for the Eighth Circuit, to "identify and dispose of cases without the need for briefs and argument." Professor Charles B. Blackmar, formerly of St. Louis University School of Law, has been appointed Director of the program. It will be administered by Robert D. St. Vrain, the Clerk of the Eighth Circuit Court of Appeals.

The program calls for selected cases to be scheduled for a conference shortly after the notice of appeal has been filed. Chief Judge Lay said that "The program is aimed at reducing the number of cases which run the full course of the appellate process. Until now, the court has had no mechanism to bring the litigating parties together to explore settlement, alternative means of resolving the dispute, or a reduction and refinement of the issues."

* * * * *

The Court of Appeals for the District of Columbia Circuit, in a per curiam order filed May 20, directed that the judges' salary litigation of *Foley v. Reagan* (vice Carter) be dismissed as to Article III judges on the basis that the Supreme Court's decision in *Will v. United States* mooted the controversy. With regard to issues affecting non-judicial personnel (see *The Third Branch,* February 1981), it was ordered that the case be remanded to the district court for further consideration in light of the *Will* opinion. "Many of the issues herein have been decided by the *Will* cases," said the court, "and . . . the District Court now has the guidance necessary to enable it to consider more fully these cases as they apply to non-Article III personnel of the judiciary."

* * * * *

The Administrative Office of the United States Courts has distributed to all United States District Court judges a copy of a model order relating to possible FOIA requests for disclosure of presentence reports that have been provided to the United States Parole Commission or the Bureau of Prisons. A model legend to accompany the presentence reports was distributed with the order. The model order and legend are as follows:

MODEL ORDER

Any copy of a presentence report which the court makes available, or has made available, to the United States Parole Commission or the Bureau of Prisons constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time it is in the temporary custody of these agencies. Such copy shall be lent to the Parole Commission and the Bureau of Prisons only for the purpose of enabling those agencies to carry out their official functions, including parole release and supervision, and shall be returned to the court after such use, or upon request. Disclosure of a report is authorized only so far as necessary to comply with 18 U.S.C. §4208(b)(2).

MODEL LEGEND

| CONFIDENTIAL |
| --- |
| PROPERTY OF US COURTS |
| SUBMITTED FOR OFFICIAL USE OF U.S. PAROLE COMMISSION AND FEDERAL BUREAU OF PRISONS. TO BE RETURNED AFTER SUCH USE, OR UPON REQUEST. DISCLOSURE AUTHORIZED ONLY TO COMPLY WITH 18 USC 4208(b)(2). |

* * * * *

In a brief order dated April 23, 1981, United States District Judge Miles W. Lord (D. Minn.) has found that "the delegation of authority in 28 U.S.C. §1471 to the bankruptcy judges to try a case which is otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority."

The ruling stems from the attempt by Northern Pipeline Construction Company to "piggyback" a breach of contract suit pending against Marathon Pipeline with Northern Pipeline's Chapter 11 reorganization proceeding in Minnesota Bankruptcy Court. The suit against Marathon involved a construction project dispute and had been filed in United States District Court in Kentucky. Northern Pipeline's action would have, in effect, shifted the breach of contract case from U.S. District Court in Kentucky to the U.S. Bankruptcy Court in Minnesota.

Notice of appeal has been filed by both Northern Pipeline and the United States.

RUBIN COMMITTEE from p. 2

long trials, and to discern, if possible, how jurors approach the task of understanding the evidence presented at trial. The interviews will relate only to cases in which all trial and appellate proceedings have been concluded, and have been authorized by the chief judges of the districts in which the jurors served.

**Future Plans.** Following completion of the Research Division's studies, the subcommittee will then present its findings to interested bar groups for reaction and comment. The aim, says Judge Rubin, is to ensure that the views of the bar—be they favorable or unfavorable—are included in the final report submitted to the Judicial Conference. The subcommittee hopes to complete its research this fall, but it is unlikely that any final report will be ready before 1982.

The Third Branch

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Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

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**Will you continue to take into consideration the evaluations made by the American Bar Association?**

In California, during President Reagan's tenure as Governor, I participated with him in judicial selection. We used informal advisory committees, each charged with the function of not only evaluating candidates who came to

them but also seeking out able people and encouraging them to take positions with the judiciary. We found that those committees worked very well and we think that to the extent that the senators use that kind of a device it would be to the benefit of all concerned. Accordingly, we certainly would encourage each of the Senators to use that kind of device; however, each has his own method of coming up with the recommendations that he submits, and some already have well functioning committees of this kind. Others I know are in the process of establishing them and still others may find alternate ways that are more satisfactory to them in generating candidates.

As for our procedures here, the President has always considered quality to be of the highest importance and we intend to follow through here. Whatever processes we use will, among other things, be designed to ensure that we obtain candidates of the highest quality. Once a Senator submits names to us—in most cases three names for each position—we will do our own independent research with respect to those names and possibly add names of our own. Once a final candidate for a given position is chosen, we will, in accordance with the usual procedures, submit the name to the American Bar Association for their screening and evaluation. The President then will make a nomination.

*"Our polls indicate that more people would prefer to expend money and effort to do something in the area of violent crime than in almost any other area, including the economy and defense."*

**Will this administration be instituting any merit selection procedures for the screening of nominees to the federal courts of appeals?**

We anticipate that we will be using a similar procedure for the circuit courts except that the role of the Senators is somewhat different with respect to these courts. We would anticipate having similar advisory committees for each of the circuits.

**Will efforts be made to continue the previous administration's policy of increasing the number of women and minorities on the federal bench?**

As I have said, the principal qualification will be the merit and quality of each candidate and selection will be made without regard to race, creed, color, sex, and so on. However, we certainly would anticipate that among that group many women and minorities would be appointed.

**The number of criminal filings in the federal courts has declined in recent years, due, in large part, to the deferral of many types of prosecutions to state authorities. What will be this administration's priority for federal criminal prosecutions in the coming years? Does your recent appointment of a Task Force on Violent Crime signal a special federal effort in this area?**

Yes, it does signal a special federal effort in this area which is in response to a concern of the citizenry which I think has reached an all time high, at least an all time high in my memory. More people than ever before are concerned about their personal safety. Actually, our polls indicate that more people would prefer to expend money and effort to do something in this area than in almost any other area, including the economy and defense. It is incumbent upon the federal government to respond to an issue that has reached the proportion that this one has reached. We are doing that with the Task Force that we have created to deal with this problem. This Task Force is different from the previous task forces in that it focuses directly on the question of violent crime. It is made up of people who have had eminent experience in this area and we intend to draw upon that experience in the recommendations which the Task Force will make. It has a very short time frame. This is not going to be a task force that will engage in heavy research and analysis and extend over long periods of time and then write a report that will just gather dust. The first phase will be concluded within 60 days, which is a remarkably short time for a commission of this kind. At that time the Task Force will make recommendations with respect to what should be done with the existing resources and under existing law. The second phase, which is due to be completed 60 days after that, will concern itself with recommendations for changes in the law and possibly for a change in the

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availability of resources.

All of this does not mean that we are neglecting other principal crime areas—where the federal government is better able to deal with the problem than state and local governments. Nor does it mean that the federal government is intending to encroach upon the traditional areas of state and local governments' responsibility. But I think that when we have a nationwide issue of this dimension, it is incumbent upon the federal government to focus on it and to see what it can and should do.

**You have indicated that bail-setting procedures have given you problems in that bail is not always set in an amount sufficient to assure the appearance of the defendant. What impact have bail practices of the courts had on your ability to successfully conclude some of your prosecutions, such as those which involve major narcotics traffickers?**

This area is a matter of major concern to us and I think perhaps what has just happened in the last few days is best illustrative of that. You may recall about a month ago we had the largest drug arrest in history. There were over 127 persons arrested in connection with 14 separate drug syndicate operations. One of the most important leaders in two of these organizations—the top man—had bail in his case set at $20 million, which seemed to be an appropriate amount for a major figure involved in this kind of an operation. When that matter came before a federal judge, he reduced that bail—over our strenuous objection—to $500,000, which is petty cash in terms of the sums that change hands in an operation like this. Of course, bail was immediately provided. The defendant then promptly fled and is now a fugitive. When you consider the lives of our agents that were at stake in connection with locating and breaking these drug rings, plus the damage that is done to the users of drugs, principally the young, and then consider that there is a major figure responsible for all of this, and you are able at great effort and expense to arrest him and have him in custody—only to have reduced bail practically give him a one way ticket out of jail—we just think that that is a situation that cries for redress.

**Several bills have been introduced in this session of Congress which would establish new procedures for the imposition of the death penalty in federal cases. Do you support capital punishment?**

Yes I do, in appropriate cases, and my opinion coincides with those who believe that that does constitute a deterrent.

**One of the more controversial pieces of legislation pending in this Congress is the proposed ten-year extension of the Voting Rights Act of 1965. What are your views on this measure, especially that part of the law which requires certain states—mostly in the South—to obtain Department clearance before changing their voting laws and procedures?**

We of course are strongly in favor of the underlying purpose of the Voting Rights Act, which is to ensure that every citizen has his right to vote protected. That is an underlying requirement which is not subject to being renewed. But, with respect to the Section 5 aspects, which are the ones you are refering to, we are now in the process of looking into that and we want to consider various alternatives which have been suggested to us. Also, we want to get as much input from groups, organizations and individuals who are interested in this area as possible. One thing we are looking at is whether or not those provisions are still necessary and required in order to preserve the right to vote in various areas. Also, we are exploring whether or not the states should have the opportunity to go into court and establish that their record is a good one and that they therefore should be released from the requirements of Section 5. Our records show that something over 98 percent of the preclearance requirements are approved with 1.5 percent rejected with changes required. After that analysis, then, in determining a position, it would be necessary to see whether or not in fact this preclearance procedure is necessary or desirable to ensure voting rights or whether, in order to protect that relatively small group of petitions or applications, the ordinary law enforcement procedures would suffice. We haven't come to any conclusion on that yet, but we are certainly looking into it.

**Budgetary cutbacks have been one of the hallmarks of the first days of this administration. Several programs within the Department of Justice, such as LEAA and the Office of Juvenile Justice and Delinquency Prevention, are slated for drastic funding reductions. What are the reasons that these particular programs have been selected for cuts?**

LEAA was being phased out before the new administration took over. That is a program that we really have not been concerned with from a budgetary standpoint, other than to continue on with what had been started before. Generally speaking, that program was not considered to be a success although there are certain aspects of that program which are considered to have been successful on their own. Presumably, the Task Force on Violent Crime will be looking into certain areas there and they might have some recommendations as to what parts of the old LEAA program might be continued.

As far as Juvenile Justice is concerned, that is a program which we think can best be carried out on a state and local basis and funded through block grants through the Health and Human Services Department, rather than as they are being handled now. It's also

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part of our overall effort to cut the budget and to increase the economic health of the country.

**Do you favor the State Justice Institute legislation that would make funding available to the states through that organization?**

I don't have any conclusions on that yet. That is possible, but I think that kind of program will be considered by the Task Force and hopefully we'll have some recommendations from that source.

**Recently, the Department announced that it will be rescinding the requirement, imposed by former Attorney General Bell, that government agencies show a demonstrable harm before refusing a Freedom of Information Act request. What are the reasons for this new directive?**

There are two reasons for the directive. First, we think each agency is much better able to judge those situations where they are exempt from the disclosure request than we are and, secondly, we see no reason to impose an additional requirement that is not imposed by the Freedom of Information Act itself. The prior order did augment the law in this way. Also, the entire Act is going to be reviewed. It has been, as you know, the subject of a great deal of criticism. The fact is that in various areas it is causing consequences that were never anticipated. The costs, of course, are way out of line. I think the highest estimate of cost to the government in Congress when the Act was being considered was $100,000. It turns out that in the FBI alone—one part of one Department—there are 300 people working full time at the cost of some $10 million a year to provide information. We don't think Congress ever contemplated that the Act would have the consequences that have in fact resulted from its enactment.

CHIEF JUSTICE from p. 1

progress had been made upon the overall governmental budgetary crisis. From conversations with Congressional leaders and key administration officials, I am reassured that some remedial action is not impossible. Congressional and administration leaders do recognize the need to act as soon as they can reasonably do so.

Upon recommendation of the Committee on the Judicial Branch, the Judicial Conference approved submission of a draft bill to establish a separate Judicial Salary Commission which would formulate recommendations on a biannual, rather than a quadrennial, schedule. On May 20, Mr. Foley formally transmitted that draft bill to Congress, and Senator Stevens, who chairs the appropriate Senate subcommittee, has assured us that that draft bill will be considered in conjunction with other proposals now being formulated to relieve the "salary compression crisis." The Committee on the Judicial Branch has also been active in developing a bill to improve benefits conferred under the Judicial Survivors Annuity Program. I believe that draft bill will be introduced soon, possibly by the time you receive this message. This is a crucial problem for many judges and presents many practical difficulties that must be worked out.

Another matter of vital concern to many judges is the effort being made to obtain additional judgeships for those courts which are in need of help. On March 5, Mr. Foley transmitted draft legislation to implement the Judicial Conference's recommendations for eleven permanent and three temporary courts of appeals positions and twenty-four permanent and six temporary district court positions. On March 19, Congressmen Peter Rodino and Robert McClory, Chairman and Ranking Minority Member of the House Judiciary Committee, introduced the draft bill (H.R. 2645). On April 24, the Senate Judiciary Committee's Subcommittee on Courts completed hearings on the draft bill, and is planning to report it in the next few weeks. The draft report which has been circulated to subcommittee Members approves all of the Conference's recommendations.

There are potential problems with respect to courtroom security and the service of private civil process by U. S. Marshals. I have met with the Attorney General, and we reached an agreement which insures that the U. S. Marshals Service will not discontinue providing such services for the next fiscal year. We are working together to accommodate necessary reductions while retaining for the present all necessary services. Now that an Administrator for the General Services Administration has been appointed, we will work with that department to prevent their scheduled budget reductions from exposing federal judges, court personnel, and others to danger.

## 1980 WIRETAP REPORT ISSUED BY ADMINISTRATIVE OFFICE

For the thirteenth year, the Administrative Office of the U.S. Courts has released its statutorily-mandated report on the interceptions of wire and oral communications authorized by federal and state judges in the last year. As has been common in recent years (see *The Third Branch,* May 1980 and June 1979), the vast majority of requests for interceptions were granted—564 out of 566. Most of the applications, 85 percent, were approved by state judges; interceptions authorized by state judges in New York and New Jersey accounted for 54.0 percent of the total. The 564 authorized interceptions represented a two percent increase over 1979. This reversed a six year declining trend.

The report indicated that there was a wide range of offenses

See WIRETAP, p. 7

## CENTER PUBLISHES REPORTS ON JUDGESHIP CREATION; ATTORNEYS' FEES

*Two new Center publications, summarized below, may be obtained from the Center's Information Service Office at 1520 H Street, N.W., Washington, D.C. 20005 or by calling 202/FTS 633-6365. Enclosure of a self-addressed, gummed mailing label, which need not be franked, will expedite delivery.*

* * * * *

The Center last month released *Judgeship Creation in the Federal Courts: Options for Reform,* by Carl Baar. This research report, written under contract with the Center, reviews the various procedures used by state legislatures and judiciaries to create judgeships and, in light of those procedures, analyzes the federal judgeship creation process and suggests alternatives to it.

The nature of the federal judgeship creation process is such that the need for judgeships grows more or less continuously, but omnibus bills typically add large increments of judgeships only after long intervals. The logistical problems associated with selecting, accommodating, and orienting large numbers of new judges have led various observers, including the Chief Justice, to wonder if alternative procedures might merit exploration.

Even though no change in the federal process appears imminent, there is value in studying the various options that appear practicable. This report considers several specific recommendations for the delegation of some portion of the judgeship creation authority to the judiciary, with appropriate checks to ensure judicial accountability.

* * * * *

Also published recently was *Attorney-Client Fee Arrangements: Regulation and Review,* by Professor Robert Aronson of the University of Washington School of Law. Written under contract with the Center, this research report analyzes both federal and state statutes, decisions, and rules concerning the awarding or setting of attorneys' fees.

The study focuses on the four problem areas that have engendered the greatest amount of interest and debate from within and without the judicial community and legal profession: valuation of legal services; division of fees between attorneys; contingent fee arrangements; and funding of public interest litigation through awarding of attorneys' fees.

This report is the second on attorneys' fees that the Center has published in recent months. Last October, the Center released *Attorneys' Fees in Class Actions,* by Professor Arthur Miller of Harvard Law School. Professor Miller's report is a thorough analysis of the law governing awarding of attorneys' fees in class actions and includes his recommendations for procedures, fixed early in the litigation, that are designed to avoid problems when the requests for fees are submitted.

WIRETAP from p. 6

specified in applications for court orders, and many applications specified more than one criminal violation. Narcotics violations were the most serious offense specified in one half the wiretap orders, and gambling offenses were under investigation in 35.3 percent of the cases. The authorized length of time for interceptions ranged from one to 180 days, and the average length was 24 days—the same as in 1979. A telephone wiretap was the electronic surveillance device used in more than 90 percent of the interceptions. For the fifth straight year, the cost of installing and maintaining intercepts increased. The average cost was $17,146.

Almost 30 percent of the conversational intercepts produced incriminating evidence. A total of 1,871 persons was arrested as a result of intercepts installed in 1980, and, of these, 259 (13.8 percent) have so far been convicted. This figure is likely to increase, however, for many of the intercepts installed in 1980 relate to cases that are still pending. Intercepts installed in 1979, for example, resulted in 424 convictions in 1980, compared to 368 convictions obtained in 1979.

## THE SOURCE

The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only that entry appearing in bold is available from the Federal Judicial Center.*

American Trial Judges: Their Work Styles and Performance. John Paul Ryan, et al. Free Press, 1980.

Could Judges Deliver More Justice If They Wrote Fewer Opinions? Charles M. Merrill, 64 Judicature 435, 471 (May 1981).

Pendent Jurisdiction Over Claims Arising Under Federal Law. William H. Theis. 32 Hastings L.J. 91-125 (Sept. 1980).

**Research in Judicial Administration: The Federal Experience. A. Leo Levin. 26 N.Y.L. Sch. L. Rev. 237-262 (1981).**

Sentencing Councils in the Federal Courts: A Question of Justice. Charles Phillips. D.C. Heath, 1980.

### FOR YOUR INFORMATION

Judges wishing copies of speeches and addresses by the Justices of the Supreme Court of the United States are invited to request them from Barrett McGurn, Public Information Officer, Supreme Court of the United States, 1 First St., N.E., Washington, D.C. 20543.

# PERSONNEL

## ELEVATIONS

Miles W. Lord, Chief Judge, D. MN, May 1

Spottswood W. Robinson, III, Chief Judge, CA-DC, May 7

Walter J. Cummings, Chief Judge, CA-7, effective July 1

## DEATH

Walter P. Gewin, U.S. Circuit Judge, CA-5, May 14

## JUDICIAL VACANCIES

As of May 31, there were 54 judgeship vacancies in the federal court system. They are:

| Courts of Appeals | Number of Vacancies |
|---|---|
| Second Circuit | 3 |
| Third Circuit | 1 |
| Fourth Circuit | 1 |
| Fifth Circuit | 1 |
| Sixth Circuit | 1 |
| Seventh Circuit | 1 |
| Eighth Circuit | 1 |
| TOTAL | 9 |

| District Courts | Number of Vacancies |
|---|---|
| Ark.—W.D. | 1 |
| Ala.—S.D. | 1 |
| Calif.—E.D. | 1 |
| Calif.—N.D. | 1 |
| Calif.—Central | 3 |
| Fla.—Middle | 1 |
| Fla.—N.D. | 1 |
| Ga.—N.D. | 1 |
| Hawaii | 1 |
| Ill.–N.D. | 1 |
| Ind.—N.D. | 2 |
| Ky.—E.D. | 1 |
| Maine | 1 |
| Md. | 1 |
| Minn. | 1 |
| Mo.—W.D. | 2 |
| Mo.—E.D. & W.D.* | 1 |
| Neb. | 1 |
| N.Y.—N.D. | 1 |
| N.Y.—E.D. | 2 |
| N.Y.—S.D. | 1 |
| N.Y.—W.D. | 1 |
| N.C.—E.D. | 1 |
| N.C.—W.D. | 1 |
| Ohio—N.D. | 2 |
| Ok.—E.D., W.D. & N.D.* | 1 |
| Pa.—W.D. | 1 |
| P.R. | 2 |
| S.C. | 1 |
| S.D. | 1 |
| Texas—W.D. | 1 |
| Texas—S.D. | 1 |
| Va.—E.D. | 2 |
| Va.—W.D. | 1 |
| Wash.—W.D. | 1 |
| Wisc.—W.D. | 1 |
| V.I. | 1 |
| TOTAL | 45 |

*Judgeship for combined districts.

# AO and FJC calendar

June 16-19 Judicial Conference Committee to Implement the Criminal Justice Act; Martha's Vineyard, MA

June 18-19 Judicial Conference Committee on Rules of Practice and Procedure; Washington, DC

June 18-19 Judicial Conference Advisory Committee on Criminal Rules; Washington, DC

June 22-23 Judicial Conference Subcommittee on Judicial Improvements; High Hampton, NC

June 22-24 Advanced Seminar for Full-time Magistrates; Ann Arbor, MI

June 22-24 Advanced Seminar for Part-time Magistrates; Ann Arbor, MI

June 26-27 Fourth Circuit Judicial Conference; Homestead, VA

June 28-July 2 Ninth Circuit Judicial Conference; Jackson Hole, WY

June 30-July 1 Judicial Conference Subcommittee on Federal Jurisdiction; Colorado Springs, CO

July 7-10 Eighth Circuit Judicial Conference; Kansas City, MO

July 13-14 Judicial Conference Committee on the Judicial Branch; Los Angeles, CA

*THE THIRD BRANCH*
VOL. 13 NO. 6 JUNE 1981

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# The Third Branch

**Bulletin of the Federal Courts**

VOL. 13 NO. 7 | Published by the Administrative Office of the U.S. Courts and the Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005 | JULY, 1981


## WALTER J. CUMMINGS IS NEW CHIEF JUDGE OF THE SEVENTH CIRCUIT

On May 26, 1981, Chief Judge Thomas E. Fairchild of the United States Court of Appeals for the Seventh Circuit retired as Chief Judge, effective July 1, 1981. He will remain an active Circuit Judge until August 31, at which time he has elected to take senior status. As the successor to the Chief Judge, Chief Justice Burger designated Judge Walter J. Cummings of Illinois. This was done pursuant to 28 U.S.C. §45(c), which provides that when a chief judge retires as chief judge but retains active status, the Chief Justice shall designate as chief judge the active judge next senior in service and willing to serve.

Judge Cummings has sat on the United States Court of Appeals since July 1966. He has served as Chairman of the U.S. Judicial Conference's Committee on the Disposition of Court Records and is a member of the Conference's Subcommittee on Judicial Improvements.

Judge Cummings was educated at Yale University and the Harvard Law School. He commenced his legal career in the office of the Solicitor General of the United States. Six years later he became associated with the Chicago law firm of Sidley & Austin, ultimately becoming a senior partner in that firm.

In 1953 President Truman appointed him Solicitor General of the United States. When his successor was named by President Eisenhower, he returned to the Sidley & Austin firm.

Judge Cummings is on the Board of Lay Trustees of Loyola University and on the Visiting Committees of the Harvard and Northwestern Law Schools. Formerly he served on the Visiting Committees of the Stanford and Chicago Law Schools. He was President of the Bar Association of the Seventh Circuit in 1964-65.

## COURTS INVOLVED IN LAW RELATED EDUCATION

In New York City, judges of the United States District Court for the Southern District of New York conduct mock trials in a program that involves students from almost half the high schools in that city. In Washington, D.C., judges of both the Superior Court and the United States District Court for the District of Columbia participate in the Mock Trial Program of the District of Columbia schools. Both of these programs and hundreds of others like them are parts of law related education programs that are becoming more and more popular in this country.

In 1970, the ABA Special Committee on Youth Education for Citizenship found approximately 40 programs in law related education; today, the same group estimates that there are nearly 500. An obvious explanation for this growth of programs is the increasing awareness that lack of

See EDUCATION, p. 4

## SECOND CIRCUIT RELEASES ANNUAL REPORT

The 1980 Annual Report of the Courts of the Second Circuit was recently released by the Circuit Executive. It provides both a statistical summary of the workload of the circuit and descriptions of several policy initiatives.

Reflecting national trends, the Report indicated that for the year July 1, 1979 through June 30, 1980 civil filings in the circuit's six district courts were up nine percent while criminal filings were down 22 percent. Although the number of civil terminations increased to 14,115 (seven percent greater than the previous year), and although the median time for processing cases was lowered from 24 to 21 months, the district courts' pending civil caseload rose to 18,351—the highest in the courts' history. On the criminal side, for the seventh consecutive year the district courts disposed of more cases than were filed.

The Court of Appeals experienced a one percent increase in civil filings and a 19 percent increase in criminal filings. Nevertheless, the court cleared its calendar for the seventh consecutive year, and its pending caseload stood at the lowest level since 1967. Through case management programs, 40 percent of all appeals were terminated without oral hearing or submission of briefs.

The Report also profiled the experimental Benchmark Project for sentences. Introduced last year, the pilot program seeks to preserve

See CIRCUIT REPORT, p. 3

# Noteworthy

Reflecting the increases in federal judges' salaries mandated by the Supreme Court's decision in *Will v. United States* (see *The Third Branch,* January 1981), the Administrative Office has paid approximately $90,000 in additional survivors benefits to widows and widowers of judges who were entitled to benefits between 1976 and 1979. Because benefits under the Judicial Survivors Annuity System (JSAS) are based on rates of pay, it was necessary to retroactively increase the amounts paid in benefits when the salary levels were adjusted. The sums received by individual survivors ranged from two to six thousand dollars.

The Administrative Office is still awaiting a decision from the U.S. District Court for the Northern District of Illinois, where the *Will* case originated, as to whether the court will order retroactive withholdings from the judges' recovery in the case for increased life insurance premiums and JSAS contributions. The court is holding 15 percent of the judges' recovery pending resolution of the Government's motion for reconsideration of an earlier ruling that such withholding would not be ordered by the court.

* * * * *

The Administrative Office has announced the selection of Fairfield Medical Laboratory of Bridgeport, Connecticut as the new contract laboratory to provide urinalysis of drug-dependent federal offenders under the supervision of the federal probation system. On this occasion, the Office of General Counsel is cautioning federal judges and probation officers to exercise care in using the results of urinalysis. Specifically, it is suggested that revocation or modification of conditions of probation or pretrial release be based on a pattern of positive test results corroborated by physical evidence, observed behavior, arrest information, or admission of drug use.

* * * * *

At its May meeting, the Executive Committee of the Association of American Law Schools voted to withdraw from circulation the Association's Guideline Timetable for Appointment of Judicial Clerks. The decision to discontinue distribution was made after a recent survey of federal judges disclosed widespread disregard of the timetable. The Association reports that the Executive Committee continues to believe in the rationale for the timetable, but it has concluded that it is not now achieving its purpose.

* * * * *

The University of Virginia's Graduate Program for Judges began its second resident summer session on June 22, when 28 state and federal judges returned to the University campus for a six week program of courses on courts and the social sciences, law and medicine, and other inter-disciplinary subjects. After completing their course work, the judges will submit a thesis in the fall to receive their LL.M degrees.

The University will begin accepting applications for the second two-year program this September. Brochures describing the program will be sent to all federal and state appellate judges, and others with interest may write Professor Daniel J. Meador, Director, Graduate Program for Judges, University of Virginia Law School, Charlottesville, VA 22901.

* * * * *

**Correction.** In the Noteworthy column of the June issue, it was erroneously stated that Professor Charles B. Blackmar was "formerly" of St. Louis University School of Law. In fact, Professor Blackmar is still an active member of the faculty, having taken only a partial leave for the 1981-1982 academic year to work on the Eighth Circuit's Preargument Conference Program. *The Third Branch* regrets the error.

## JUSTICE STEWART RECEIVES ACCOLADE FROM COLLEAGUES

Upon Potter Stewart's retirement from the Supreme Court, all the Justices sent him a letter of tribute which was made part of the journal of the Court's proceedings of July 2.

"Dear Potter:

"Your decision to retire from the Court took most by surprise and even after several weeks we are not fully reconciled. We respect your view that 'twenty-three years is enough' but you will be missed in the deliberations at the conference table where your close grasp of the cases decided during your long tenure—as well as those before—were a very valuable resource to the Court.

"You have had a long tenure on the Court, but we know that longevity is but one measure of the contribution of a Justice. You have combined more than two decades here with more than a quarter of a century of judicial service in a period of significant changes in the law and your important contributions are a matter of record.

. . . .

"All of us join in repeating to you and Andy our heartfelt wishes for continued good health and for many good years ahead."

Replied Justice Stewart; "Your kind letter has greatly touched Andy and me. The decision to retire was not easy, but it would have been much harder without the knowledge that in my retirement our friendship will continue unaffected. . . ."

The Third Branch

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THE SOURCE
The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only that entry appearing in bold is available from the Federal Judicial Center.*

Antitrust Civil Jury Instructions (1980). ABA Jury Instruction Subcommittee. ABA, 1981. 280p.

Antitrust Discovery Handbook. Michael M. Baylson, ed. ABA, 1981. 110p.

Antitrust Law Developments Third Supplement. James R. Loftis. ABA, 1981. 375p.

Disclosure of Presentence Reports in the United States District Courts. Philip L. Dubois. 45 Fed. Probation 3-9 (March 1981).

**A Practical Look at the Sentencing Provisions of S. 1722. Gerald Bard Tjoflat. 72 J. Crim. L. & Criminology 555-630 (Summer 1981).**

The Summary Jury Trial. Thomas D. Lambros & Thomas H. Shunk. 29 Clev. St. L. Rev. 43-59 (1980).

The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"? Philip Shuchman & Alan Gelfand. 29 Emory L.J. 195-230 (Winter 1980).

CIRCUIT REPORT from p. 1

judicial flexibility in sentencing while reducing and minimizing disparities. It established nonbinding recommended sentences based on a consensus of judicial opinion within the circuit. The benchmark sentences were drawn from 18 hypothetical cases which reflect recurring factual situations.

Copies of the Annual Report are available from the Circuit Executive, U.S. Courthouse, Foley Square, New York, N.Y. 10007.

## CENTER REPORT EVALUATES ARBITRATION EXPERIMENT

The Federal Judicial Center has recently published *Evaluation of Court-Annexed Arbitration in Three Federal District Courts,* by Allan Lind and John Shapard. This research report presents a study of experimental local-rule arbitration programs in the Northern District of California, the Eastern District of Pennsylvania, and the District of Connecticut. Cases eligible for arbitration were required to undergo a hearing before a panel of one or three experienced attorneys within a specified period after filing. Any party to the case could reject the arbitration award and demand a trial de novo.

The three district courts, in cooperation with the Department of Justice, designed pilot programs mandating pretrial arbitration of certain civil cases. At the request of the courts and the Department of Justice, the Center agreed to evaluate the programs. For two-and-one-half years, the Center monitored all cases eligible for the programs, surveyed counsel and arbitrators, observed hearings, and interviewed court personnel involved in administering the programs.

Drawing on data collected in these ways, the report addresses a number of questions: What types of cases are subject to arbitration? How long does it take cases to reach arbitration? How likely is it that the arbitration award will be accepted? Do the rules result in more rapid termination of cases? What are the characteristics of the arbitration hearings? What are the opinions of counsel about the programs? What problems have the courts encountered in administering the programs?

The study found that in two of three districts, the arbitration rules increased the likelihood of early termination of cases, apparently by providing a deadline and incentive for settlement. As to all three programs, it was found that parties in more than half of the cases that did go through an arbitration hearing rejected the arbitrators' award by requesting a trial de novo; however, an unknown number of those cases settled before the trial de novo took place. It was also found that counsel in cases subject to the program were moderately favorable in their opinions of it, and that difficulties were encountered in scheduling hearings within the period allowed by the rules. The report offers recommendations for improvement of the present pilot programs and for evaluation of additional experimentation with court-annexed arbitration in federal district courts.

Copies of the report are available from the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005; 202/FTS 633-6365. Written requests will be expedited if accompanied by a self-addressed, gummed label.

## NEW EDITION OF SENTENCING OPTIONS PAPER RELEASED

A new edition of *The Sentencing Options of Federal District Judges* has been published by the Federal Judicial Center.

The most recent revision of a work originally prepared in November 1979, the publication emphasizes the relationships between the judge's sentence and the probable treatment of an offender after sentencing, particularly by the Bureau of Prisons and the Parole Commission. It was written by Anthony Partridge, Alan J. Chaset, and William B. Eldridge of the FJC's Research Division. The new edition was prepared to bring the materials up to date as of February 1, 1981.

Copies of the work may be obtained from the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005; 202/FTS 633-6365.

EDUCATION from p. 1

knowledge about the law can result in confusion, exploitation, and, ultimately, alienation. As crime rates and especially juvenile crime rates spiral, more and more people have come to believe that some type of law related education could be beneficial early in the educational process.

**Goals.** Curricula, materials, and even the teachers vary widely from one program to another, but there are certain goals common to most programs. The most obvious goal is to provide information about the law. Students want and need practical legal information. Laws about crime, student rights, drugs, the family, the consumer, and the environment are particularly relevant to the lives of students. The goal here is not to create student lawyers but to provide students with the legal information they need to make informed decisions in their daily lives.

Just as important as teaching substantive law is providing the students with an understanding of our legal system. To the layman the system is frequently confusing and complex. Understanding the system, some educators believe, may engender respect and a willingness to use it when appropriate. Students are taught the roles of the various participants in the justice system: lawyers, judges, legislators, and citizens. Students are shown why the system is so complex and why it sometimes breaks down.

A possible by-product of the law related educational process is the development of analytical skills. By analyzing cases and hypothetical situations, students can develop problem solving skills and critical thinking abilities that can then be applied to other non-legal situations in their lives. Specifically, students are taught to determine the real point of controversy or the real issue in a case, to view both sides of a problem, to think of alternative ways controversies can be resolved, and to determine which resolution is most beneficial and the most legally correct. All of these advantages, of course, will arguably contribute to the development of more responsible citizens who will participate more knowledgeably in their community.

*United States District Judge Harold H. Green (D. D. C.) conducts a bench conference in a mock trial which was part of the Washington, D. C. public school system's annual National Street Law Mock Trial Competition held at the Georgetown University Law Center.*

**Programs.** The goals of law related education are achieved in many ways. In some programs, such as the "Law in a Free Society" program in California, teaching begins early in elementary school where students are taught such basic legal concepts as the functions of rules, authority, and the rights and responsibilities of those subject to authority. Others begin in high school. The National Street Law Institute, for example, works with law schools and the practicing bar to provide classroom instruction in our legal system and laws governing day-to-day matters such as family law, property law, landlord-tenant law and criminal procedure. Students may, in order to better understand the legal system, listen to experts in consumer law or other areas of interest, ride in police patrol cars, observe actual court proceedings, and participate in mock trials and appellate hearings.

Instruction is provided by lawyers, law students, judges and, in some programs, by regular teachers who have been instructed by lawyers or program personnel. It is generally believed that in order to be fully successful, as many community organizations as possible should be involved in the law related education process. Law students, bar associations, law enforcement and criminal justice agencies, courts, and ex-offender organizations help provide support for the programs. Programs have been quite active in using legal personnel to visit classrooms and provide opportunities for field trips, community action projects, and student internships.

It has been generally observed that there is a great deal of interest on the part of the students in these programs. Student participation is high and so is student enthusiasm.

**Information.** There are currently law related education programs in every state in the union. Any person connected with the justice system should not have difficulty in finding a program in which he or she may utilize their

See EDUCATION, p. 5

EDUCATION from p. 4

talents to assist in this movement. There are a number of excellent projects in the field that can be contacted for further information. Among these are:

- **The Special Committee on Youth Education for Citizenship of the American Bar Association.** Norman Gross, Staff Director, 1155 E. 60th Street, Chicago, Illinois 60637, (312) 947-3961. Since 1971, this committee has been a national clearinghouse and coordinator in law related education and has produced material on how to begin and maintain law related programs.
- **The National Street Law Institute.** Jason Newman and Edward O'Brian, Co-Directors, 605 G Street, N.W., Washington, D.C. 20001, (202) 624-8217. A pioneer in law-related education, this organization teaches about the practical effect of law on everyday lives. It works with law schools to sponsor law related programs in schools and adult education settings.
- **The Constitutional Rights Foundation.** Vivian Munroe, Executive Director, 1510 Cotner, Los Angeles, California 90025, (213) 473-5091. A private, non-profit corporation engaged in developing law and citizenship education programs, this foundation provides consulting assistance in developing law related programs.
- **Law in a Free Society.** Charles N. Quigley, Executive Director, 5115 Douglas Fir Drive, Suite 1, Calabasas, California 91302, (213) 340-9320. A civic education project of the State Bar of California, the project now operates in several parts of the country and has produced a comprehensive kindergarten through high school curriculum.
- **Phi Alpha Delta Law Fraternity International.** Robert Redding, Director of the Law Related Education Project, 910 17th Street, N.W., Suite 310, Washington, D.C. 20006, (202) 293-2181. The world's largest professional legal fraternity, PAD is involved in a number of activities to improve communication between the legal and education communities and boost law related education.

CALENDAR from p. 6

July 21-23 Judicial Conference Advisory Committee on Codes of Conduct
July 21-23 Judicial Conference Judicial Ethics Committee
July 22-23 Judicial Conference Committee on Administration of the Probation System
July 23 Judicial Conference Committee on Administration of the Magistrates System
July 23-24 Judicial Conference Committee on Operation of the Criminal Law
July 27-28 Judicial Conference Committee on Court Administration
July 27-28 Judicial Conference Committee on Intercircuit Assignments
July 27-31 Federal Judicial Center Seminar on Antitrust Law and Case Management
Aug. 10-12 Workshop for Magistrates' Staff

## VIDEOTAPES AVAILABLE ON CRIMINAL DEFENSE REPRESENTATION

Listed below are videotapes available for loan to federal court personnel by the Media Services Unit of the Federal Judicial Center. These tapes were produced in conjunction with a seminar, held October 31, 1980, on effective representation at sentencing and beyond.

It was sponsored jointly by the United States District Court for the Eastern District of Pennsylvania and the Philadelphia Bar Association. The purpose of the program was to provide defense counsel with legal education and practical information on sentencing in federal court.

This series of tapes is available on 3/4 inch and 1/2 inch videotape format from the Media Services Unit, 1520 H St., N.W., Washington, D.C. 20005. When requesting tapes, please indicate the following: catalog number; title; shipping address (post office box is not sufficient); your FTS number; videotape format (1/2 or 3/4 inch); specific date needed. Please try to avoid ordering more than two videotapes at a time. This will assist the Media Services Unit in filling a large number of requests.

## Media Library

VJ-845 Sentencing Alternatives and Sentencing Procedures
Judge Edward R. Becker

VJ-846 U.S. Parole Commission Guidelines and Procedures
Henry Sadowski
–and–
Role of Counsel Before the Parole Commission
Professor Peter Goldberg

VJ-847 Administrative Sentencing Matters
David Essig
Edgar Raynes

VJ-848 The Pre-Sentence Investigation Report
H. Richard Gooch
–and–
Disclosure of the Pre-Sentence Investigation Report
Judge Edward R. Becker

VJ-849 Role of Counsel Before, At and After Sentencing: Defense Perspective
Mark Schaffer
Thomas Colas Carroll
–and–
Prosecution Perspective
John Penrose

VJ-850 Effective Representation: A Panel Discussion
Donald Goldberg
Judge Alfred L. Luongo
Joel Friedman
Jean Wolf
Peter Goldberger
Judge Edward R. Becker, Moderators.

# PERSONNEL

## NOMINATION

Sandra D. O'Connor, Associate Justice of the Supreme Court, July 7

## ELEVATIONS

Frank A. Kaufman, Chief Judge, D. MD, June 12

Earl E. O'Connor, Chief Judge, D. KS, June 26

## RETIREMENT

Potter Stewart, Associate Justice of the Supreme Court, July 3

## RESIGNATION

John P. Crowley, U.S. District Judge, N.D. IL, June 30

## DEATH

Robert V. Denney, U.S. District Judge, D. NE, June 26

# AO and FJC Calendar

July 13-14 Judicial Conference Committee on the Judicial Branch

July 20-21 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice

July 20-21 Judicial Conference Committee on the Operation of the Jury System

See CALENDAR, p. 5

## SUPREME COURT ACCEPTING APPLICATIONS FOR DEPUTY CLERK

**Position**: Deputy Clerk, Office of the Clerk.

**Description**: Prepares the Court's Order List and the *in forma pauperis* case Conference List. Processes emergency applications and drafts orders at the request of Justices. Corresponds and consults with pro se litigants, counsel, and law clerks on Court practice and procedure. Other duties as assigned.

**Qualifications**: A law degree is required. At least two years experience in a court or in a management position is also required. Experience as a deputy clerk in an appellate court and supervisory experience or management training are desirable. Sound legal drafting skills and the ability to communicate effectively are essential.

**Salary Range**: SCP-12/1 ($26,951) to SCP-14/1 ($37,871).

**Closing Date**: August 28, 1981.

**To Apply**: Send Standard Federal Government Form 171 to: James A. Robbins, Personnel and Organizational Development Officer, Supreme Court of the United States, Washington, D.C. 20543; 202-252-3404.

## FIFTH CIRCUIT SEEKING DIRECTOR, STAFF ATTORNEYS' OFFICE

**Responsibilities**: Under the direction of the court and applicable rules, the Director is responsible for recruiting, coordinating, assisting and reviewing the work of 13 staff attorneys, in addition to administrative responsibilities incident to management of a research and drafting law office. Serves as the court's senior law clerk, advising the court in this capacity.

**Qualifications**: Proven management, legal and supervisory skills. Must be a graduate of an accredited law school, member of a State Bar or of the District of Columbia Bar, with a minimum of five years experience in the practice of law.

**Duty Station**: New Orleans, Louisiana.

**Salary**: $37,871 to $44,547 per year, commensurate with education and experience.

**To Apply**: Send resume with appropriate writing samples to Henry A. Politz, United States Circuit Judge, Box 2B04, 500 Fannin, Shreveport, Louisiana 71101, no later than **August 15, 1981**.

**Equal Opportunity Employer.**

*THE THIRD BRANCH*
VOL. 13 NO. 7 JULY 1981

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# The Third Branch

**Bulletin of the Federal Courts**

VOL. 13 NO. 8 | Published by the Administrative Office of the U.S. Courts and the Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005 | AUGUST, 1981


## DISTRICT JUDGE DECLARES SPEEDY TRIAL ACT UNCONSTITUTIONAL

The Speedy Trial Act of 1974 has recently been held unconstitutional as an impermissible legislative encroachment upon the powers of the judiciary. United States District Judge Joseph H. Young of Maryland denied a motion to dismiss an indictment even though, as the government conceded, the defendant's trial commenced ten days later than the Act required. The defendant was subsequently found guilty in a jury-waived trial on the basis of a stipulated set of facts. *United States v. Brainer,* Criminal No. Y-80-0253 (D. MD, decided June 4, 1981), appeal pending.

Judge Young noted that, following the defendant's initial appearance on January 30, 1981, the last date on which trial could have commenced without violating the terms of the Speedy Trial Act was April 10. The Judge pointed out that this trial could not begin until April 20, however, because of matters previously scheduled before the Court. The defendant made no allegation that he was denied his constitutional right to a speedy trial, but relied solely upon the literal terms of the Act in moving for dismissal of his indictment. Judge Young held that "[this] drastic result is not compelled because the Act itself constitutes an unconstitutional encroachment upon the Judiciary."

In a 23-page opinion, Judge Young offered a detailed analysis of the constitutional doctrine of separation of powers. Even assuming Congress could abolish all lower federal courts or remove their criminal jurisdiction, he wrote, once the courts were created, Congress could not unduly interfere with their purely judicial functions. Specifically, he held that Congress cannot constitutionally mandate the substantive outcome of cases pending before the courts. Numerous state court decisions were cited which held that the legislature cannot require judicial action in one case within a set period of time at the expense of another case. He further emphasized various federal authorities supporting the independence of judges to control their own dockets, concluding that the "institutional independence of the judiciary must obviously include the ability to adjudicate individual cases in an atmosphere that is without interference . . . [and] also necessarily embraces a certain

See SPEEDY TRIAL, p. 2

## 1981-1982 JUDICIAL FELLOWS ANNOUNCED

The Judicial Fellows Commission, which screens and selects the Judicial Fellows each year, has this year chosen Ronald K. L. Collins, Joyce Plotnikoff, and E. Keith Stott, Jr. Each of the three will work at the Supreme Court, the Federal Judicial Center, or the Administrative Office.

The Judicial Fellows Program, somewhat patterned after the White House and Congressional Fellows Programs, was started in 1973. At that time, Chief Justice Burger said:

"The program is directed toward attracting talented young people who will not only make a contribution during their year as Judicial Fellows, but who will continue to make a contribution to judicial modernization in future years.

See FELLOWS, p. 4

## *COURT HOLDS THAT A.O., NOT BANKRUPTCY JUDGES, HAS EXCLUSIVE AUTHORITY TO CONTRACT FOR COURT REPORTERS*

United States District Judge Stanley S. Brotman (D. NJ), sitting by designation in the Eastern District of Pennsylvania, on July 16 denied the claims of a Philadelphia bankruptcy judge and held that the Administrative Office, and not bankruptcy judges, has the exclusive right to contract for court reporting services or to authorize bankruptcy judges to appoint full-time employee court reporters for United States bankruptcy courts. It was also held, however, that in awarding a competitively bid contract for the Eastern District of Pennsylvania, the Administrative Office selected a reporting firm (the lowest bidder) that failed to meet mandatory experience requirements, as interpreted by the judge, which constituted arbitrary and capricious action. *Goldhaber v. Foley,* No. 81-0672.

The suit was brought by Bankruptcy Judge Emil P. Goldhaber and two judicially appointed official reporters who have served the Eastern District bankruptcy court for the past 23 years. The plaintiffs objected to the Administrative Office's solicitation of bids for con-

See COURT REPORTERS, p. 3

SPEEDY TRIAL from p. 1

degree of independence in the execution of those decision-making duties."

Comparing the constitutional basis of judicial power under Article III against the expressed interests of Congress in enacting the Speedy Trial Act, Judge Young found the Act unconstitutional in two respects. First, it "attempts to determine the substantive outcome of individual criminal cases whose disposition has been committed to the judicial process." Second, he found the Act violated the constitutional separation of powers by making an unwarranted intrusion into the administration of the judicial system. The Act, wrote Judge Young, neglects the interests of the courts in assuring quality justice, avoiding needless severance of cases, and performing their Article III duty to resolve civil cases. Furthermore, he stated, the Supreme Court has held that the constitutional right to a speedy trial under the 6th Amendment cannot be quantified into a specified number of days or months. Judge Young also commented that Congress had available less rigid alternatives, such as adopting presumptive rules that would establish fixed time periods but allow flexibility for the consideration of all relevant factors bearing upon the scheduling of a particular case. "Such an approach would have avoided unnecessary intrusion in the judicial process and would have been more in accord with Supreme Court interpretations of the constitutional right to a speedy trial."

Judge Young further relied on the facts of the underlying case to illustrate shortcomings of the Speedy Trial Act. Even though the defendant had been at large for more than six months following his indictment, the Speedy Trial Act would have compelled dismissal of his case simply because his trial began ten days late. Adhering to the Act's requirements was impossible for Judge Young because a complex antitrust case had long been scheduled for jury trial prior to April 20. "To require the Court to revamp the schedules of all those involved in such an important civil matter, for the momentary convenience of one former fugitive," said Judge Young, "would represent the height of judicial inefficiency and inequity." Finding that under applicable case law and the Federal Rules of Criminal Procedure defendant's right to a speedy trial must remain a "relative concept," Judge Young concluded that no "valid reason" existed to require dismissal of this indictment.

The defendant has filed an appeal to the Fourth Circuit.

COURT REPORTERS from p. 1

tract court reporting services for the court and to the awarding of a contract to the firm of Abovitz and Nitchie last February. The plaintiffs claimed (1) that the judges of the bankruptcy court have exclusive authority to appoint reporters under the Bankruptcy Reform Act of 1978, and (2), even if that authority does lie with the Administrative Office, it acted beyond the scope of its authority in awarding a contract to Abovitz and Nitchie.

Ruling on plaintiffs' motion for a preliminary injunction and defendants' motions for dismissal of the complaint or, in the alternative, summary judgment, Judge Brotman noted that the Bankruptcy Reform Act does imply that court reporters are to be appointed by bankruptcy judges. Nonetheless, he held, the Act also grants broad authority to the Judicial Conference of the United States to prescribe the means by which a record should be made of proceedings in bankruptcy courts. In accordance with that authority, the Judicial Conference in 1979 adopted a resolution directing the Administrative Office "not to authorize full-time court reporters until the need for their services is fully justified, and . . . that, until such need is established, contract reporters be authorized." Because plaintiffs introduced no evidence that full-time reporters were "fully justified" in the Eastern District, it was held the Administrative Office was warranted in utilizing contract reporting services in that court.

It was also found that the power to select the contract reporters did not lie with the bankruptcy court, but that exclusive authority to contract for government services on behalf of the judicial branch is vested in the Administrative Office under 28 U.S.C. § § 604(a)(10) and 753(g). The Court accordingly granted partial summary judgment to the defendants, holding that "the bankruptcy court has neither an unfettered right to appoint its court reporters nor a right to designate those reporters with whom the Administrative Office should contract."

Plaintiffs prevailed, however, in demonstrating that the Administrative Office acted arbitrarily and capriciously in awarding the contract to the Abovitz and Nitchie firm. The bid solicitation required that each reporter have four years of "prime court reporting experience," four years of reporting experience "of at least equal difficulty," or a certificate of merit from the National Shorthand Reporters Association. While the Abovitz and Nitchie firm was the lowest bidder, it was found that they failed to

See COURT REPORTERS, p. 3

*A Note To New Judges*

**LEGISLATIVE HISTORIES AVAILABLE**

Newly appointed judges and their supporting personnel are reminded that the Library of Congress can provide substantial support assistance in the area of legislation.

If legislative histories are not available through circuit libraries, contact Marlene McGuirl, Chief of the American-British Law Division of the Law Library of the Library of Congress. Her phone number is (202) 287-5081.

# Noteworthy

A federally-funded study has concluded that the average juror may understand only about 50 percent of the instructions of law presented by a judge prior to deliberations. The study, "Making Jury Instructions Understandable," states that there is little doubt that jurors often arrive at compromise verdicts in felony trials because they do not fully understand the judge's instructions. It suggests that by adopting a proposed methodology and simplifying the instructions, jurors' comprehension can be raised to 80 percent or higher. The study also recommends that jurors be given copies of at least some of the instructions before the trial begins and that they be allowed to take the written instructions with them when they begin deliberations.

The research project, carried out by members of the University of Nebraska Psychology Department, was funded jointly by the National Institute of Justice and the National Institute of Mental Health. The study will be published some time in September by Michie/Bobbs-Merrill Publishing Company as part of a series, "Contemporary Litigation."

* * * * *

Judge Damon J. Keith (CA-6) and Philadelphia attorney Harold Berger, chairmen of a newly created Federal Bar Association committee, have written to the House Judiciary Committee urging prompt enactment of H.R. 2645, the Omnibus Judgeship Bill. Its passage is necessary, they say, "to alleviate the delay, backlog and attendant pressures currently being experienced in and by the entire federal judicial system despite increased productivity and technological innovation."

The committee they chair, the FBA's new Standing Committee on the Federal and State Judiciary, was formed to help develop better working relations between federal and state judges; to study aspects of judicial administration procedure and compensation; and to seek close cooperation between the federal and state judiciaries, court improvement organizations, and local and national bar and trial lawyer associations.

* * * * *

Four judges in the Fifth Circuit are now serving this court alongside their former law school professors. Judge Alvin Rubin had in his classes at Louisiana State University Judges Albert Tate, Jr. and Henry Politz. Judges Sam Johnson and Thomas Gee were in classes taught by Judge Jerre Williams at the University of Texas.

The Third Branch

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**Co-editors:**

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

*A Reminder*

## PAIRED-CITY AIR FARES AVAILABLE

All judicial branch personnel are strongly encouraged, when scheduling official government travel, to take advantage of special discount fares available on flights between certain paired cities.

The General Services Administration (GSA) has contracts with numerous airlines to provide executive branch agencies with reduced fares between approximately 100 city-pairs around the country. These fares, which are designated YCA, are also available to judicial branch personnel. Use of the fares is not required of third branch employees (as it is for those of executive agencies), but is encouraged as travel costs continue to escalate. The Board of the Federal Judicial Center, for example, has asked all personnel attending Center-sponsored programs to make "every effort" to reduce their travel costs.

Current paired-city fares are listed in the Federal Contract Air Service and Travel Directory, pub-

See AIR FARES, p. 4

COURT REPORTERS from p. 2

meet any of these qualifications and therefore the Administrative Office acted beyond the scope of its authority in awarding them the contract. This finding, coupled with plaintiffs' showing of a threat of irreparable harm (termination of long-standing public service) and the demands of the public interest in securing qualified court reporters, led the District Court to enjoin the Administrative Office from awarding the contract to Abovitz and Nitchie or other unresponsive bidders. The Administrative Office was authorized to award the contract to the lowest responsible bidder or conduct a new solicitation for bids.

In what he characterized as "personal remarks," Judge Botman closed by saying," . . . I do hope that the Administrative Office, in its commendable zeal to guard the public fisc, will not sacrifice the needs of an effective system of justice. Some consideration should therefore be given to pursuing the goal of cost efficiency in the manner that will minimally interfere with the ability of the bankruptcy judges to maintain some control over the selection of their staff. Only if the judges have that authority will they be able to insist that the reporters make sacrifices, when necessary, to accommodate the needs of the court."

The plaintiffs have not yet indicated whether they will appeal. The Administrative Office has stated it does not plan to do so at this time.

FELLOWS from p. 1

Some may do this through careers in judicial planning and management, while those who pursue careers outside the judiciary can help the general public to understand the nature and needs of the judicial system."



*Collins, Plotnikoff and Stott.*

In making their choices, the Commissioners seek to select outstanding talent from fields such as public administration, the behavioral sciences, business management, operations research, and systems analysis, as well as law.

The Program is administered by the National Academy of Public Administration.

Ronald Collins received his B.A. degree from the University of California at Santa Barbara and his J.D. degree from Loyola University in Los Angeles. Mr. Collins has done extensive legal aid work in California and was a teaching fellow at Stanford Law School. His background also includes a law clerkship at the Supreme Court of Oregon. He is a prolific writer and has contributed articles to law reviews, magazines, and newspapers.

Joyce Plotnikoff is currently an attorney adviser in the Clerks Division of the Administrative Office of the United States Courts. Her educational background includes a diploma from the University of Paris, an LL.B. from the University of Bristol, England, and a graduate degree in Social and Administrative Studies from the University of Oxford. In addition to serving as a probation officer with the U.S. District Court in Chicago, she was employed as a social worker and probation officer in the United Kingdom.

E. Keith Stott will leave his post as Deputy State Court Administrator for the Colorado Judicial Department to join the Program. He is a graduate of Brigham Young University and the University of Utah College of Law. Presently he is completing his dissertation for a doctorate in public administration from the University of Colorado at Denver. Mr. Stott has practiced law in both the public and private sectors. While a staff member with the National Center for State Courts, he wrote on subjects such as the evaluation of judges and the administration of justice in rural courts.

## ESTATE ADMINISTRATOR POSITION AVAILABLE

The United States Bankruptcy Court, Southern District of Florida, currently has a position opening for an Estate Administrator. This quasi-legal position is responsible for all matters related to managing trustees and trustee related activities.

**Minimum Requirements:** A law degree, or a degree in business administration, court administration, or a related discipline plus two years of specialized experience.

**Salary Range:** $18,585 to $32,048.

Contact the Clerk of Court for job announcement and application procedure at 305/FTS 350-5216.

**Closing Date:** August 20, 1981.

**Equal Opportunity Employer**

AIR FARES from p. 3

lished monthly by GSA. No issue was published in July, however. This Directory also lists hotels, motels and ground transportation providers that offer reduced government rates in the paired cities. All federal offices which receive one or more copies of the Official Airline Guide (OAG) should automatically receive one copy of the Directory. (If your office has not received this Directory, send an inquiry, together with the mailing label from the OAG, to Marlene Sherman, GSA Transportation and Public Utilities Service-T.T.M., 425 Eye Street, N.W., Room 3210, Washington, D.C. 20406.) Additional copies of the Directory may be purchased for 25 cents each by submitting GPO Standard Form No. 1 (Open Rider Requisition), Reference No. B-0719, to: U.S. Government Printing Office, Planning Service, Room C-836, Washington, D.C. 20401. Requests should state how many copies are desired and for how long the subscription is needed.

In addition to paired-city rates, travelers are also urged to investigate all other forms of discount fares such as supersavers or YDG fares, which are reduced fares offered privately by the airlines to government employees traveling between certain cities. Such rates change often, so it is worthwhile to compare the prices offered by several airlines before each flight. Where discount fares are cheaper than the paired-city rates, judicial branch personnel are permitted to take advantage of them. However, if a discount rate is nearly equivalent to the paired-city fare, the travel office of the Administrative Office encourages use of the latter fare to promote the paired-city program.

A final note, YCA and YDG tickets must be paid for with a Government Transportation Request (GTR). Because travel agents typically do not volunteer the availability of these fares, travelers should specifically inquire about government rates when making their reservations.

## *COMPUTER-AIDED TRANSCRIPTION ANALYZED*

The Federal Judicial Center last month released a staff paper entitled *Computer-Aided Transcription: A Survey of Federal Court-Reporters' Perceptions.* Authored by J. Michael Greenwood of the Center staff, the paper summarizes the experiences of 58 of the 60 official federal court reporters who used computer-aided transcription (CAT) in 1980.

CAT employs a computer to translate specially recorded electronic stenotype symbols into English narrative. The staff paper notes that, contrary to the beliefs of many, CAT is not a completely automated package that functions without significant human intervention and control. While CAT shifts the initial translation and typing burden from the court reporter to a computer, the court reporter or assigned personnel must still be actively involved in editing the electronically-produced final draft of the transcript.

The benefits of using CAT were reported to be mixed. Interviews with federal court reporters who used CAT revealed that 40 percent obtained significant improvements in transcript production time using CAT, but that more than half—60 percent—found no appreciable improvements. Twenty percent, in fact, found their transcript production time increased. Additionally, 76 percent reported that CAT was more expensive than other transcription devices.

The paper explains why court reporters feel that it would be unwise for the federal courts to directly subsidize CAT and/or acquire CAT technology, and why they assert that CAT will not, by itself, eliminate existing transcript delay problems in the federal courts. Presented as well are court reporters' suggested alternatives for both using CAT in the federal system and for improving court reporting services in general.

This paper is available from the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005; 202/FTS 633-6365. Enclosing a self-addressed mailing label, which need not be franked, with written requests will expedite delivery.

## LIFE INSURANCE AND ANNUITY DEDUCTIONS TO BE MADE FROM *WILL* PAYMENTS

Judge Stanley J. Roszkowski (N.D. Ill.) ruled on July 6 that deductions should be made from plaintiffs' recovery in the salary litigation of *Will v. United States* for extra life insurance and annuity premiums (see *The Third Branch,* July 1981, p. 2).

All parties agreed that, had Congress not unconstitutionally withheld appropriations sufficient to pay the full salaries of Article III judges, the members of the plaintiff class would have been paid at a higher rate and that those participating in the annuity and life insurance programs accordingly would have had higher amounts deducted from their pay. The plaintiffs maintained, however, that it was not required or appropriate to make such deductions from a damage fund otherwise ready for distribution to class members. They asserted that the Office of Personnel Management (OPM) could withhold installments from future annuity payments where there had been an annuity overpayment, or that OPM could establish a withholding schedule to recoup past deductions if such payments were in fact due.

The Court, however, agreed with the government's position that the annuity fund would be adversely affected if deductions for the extra annuity were not made. Failure to collect all contributions, for example, could lead to an actuarial deficiency in the fund to pay adjusted annuity benefits. Moreover, the Court noted that allowing for deductions at this time, which would be "minimal," would avoid future litigation and the consequent delay in distributing the funds due the plaintiffs.

The Administrative Office reports that, after deductions for annuities, life insurance, and attorneys' fees, approximately $937,000 remained in the fund for class members. This sum was distributed on July 24.

## CONGRESS, OPM PURSUING CHANGES IN FEGLI LAW

The Senate Committee on Government Affairs has been considering a bill (S. 820) that would permit employees to make an "irrevocable assignment of the incidents of ownership" of their Federal Employee Group Life Insurance (FEGLI) policies. An irrevocable assignment would take the proceeds of the policy out of the employee's gross estate for federal estate tax purposes. Such an assignment is not permissible under the present FEGLI law, but is generally available under other employer-sponsored insurance plans. This change would apply only to policies purchased after the date of enactment of the bill, but the insurer could agree to make it applicable to prior-existing policies.

Meanwhile, the Office of Personnel Management (OPM) has reversed a long standing position, and will now permit the designation of a trust account as a beneficiary under a FEGLI policy.(Federal Personnel Manual Letter 870-33, June 4, 1981.) In the past, a trust account was not considered a "person surviving the decedent" as required by the FEGLI law. OPM has established recommended formats for furnishing the information to identify the entitled party. The trust may be one created during the insured's lifetime or created by a will at his or her death. OPM advises, however, that a trust account may only be designated on the same basis as any other beneficiary; thus, in the absence of the legislation described above, a policy may not be assigned irrevocably to a trust account.

# aoo of JC calendar

Aug. 11-12 Basic Instructional Technology Workshop for New Training Coordinators
Aug. 13-14 Judicial Conference Advisory Committee on Bankruptcy Rules
Aug. 18-20 Advanced Video Production Workshop for Training Coordinators
Aug. 16-29 Judicial Conference Committee on the Budget
Aug. 31–Sept. 1 Management Seminar for Chief Probation Officers
Sept. 1-3 Third Circuit Judicial Conference
Sept. 2-4 Advanced Seminar for Full-time Magistrates
Sept. 9-12 Tenth Circuit Judicial Conference
Sept. 10-11 Judicial Conference Advisory Committee on Bankruptcy Rules

## SOUTHERN DISTRICT OF ILLINOIS ACCEPTING APPLICATIONS FOR CLERK

**Position:** Clerk of the U.S. District Court for the Southern District of Illinois with court cities in East St. Louis, Benton, and Alton. A high level management position functioning under the Chief Judge. Salary up to $44,547 per year.
**Qualifications:** Ten years experience of which three must have been in substantial management responsibility. Some other experience and education equivalents may be substituted. Advanced degree desirable.
**To Apply:** Send resume by August 17 to Clerk, U.S. District Court, P.O. Box 249, East St. Louis, Illinois 62202.
**Equal Opportunity Employer**

## NINTH CIRCUIT SEEKING CLERK

**Position:** Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California. Under the direction of the Judges of the Court, the Clerk has administrative responsibilities for all aspects of Clerk's Office operations. Salary up to $50,112 per year.
**Qualifications:** Proven management and administrative skills. Undergraduate degree in management or related field with experience in judicial administration. Advanced graduate degree and/or legal training desirable.
**To Apply:** Send resume as soon as possible to Chief Judge James R. Browning, U.S. Court of Appeals, Box 547, San Francisco, California 94101. For further information contact Richard H. Deane, Clerk of Court, at the above address or at (415) 556-7340. Applications will be accepted until the position is filled.
**Equal Opportunity Employer:** Members of minority groups, women and the handicapped are encouraged to apply.

# PERSONNEL

## NOMINATIONS

William C. Lee, U.S. District Judge, N.D. IN, July 1
D. Brook Bartlett, U.S. District Judge, W.D. MO, July 9
John R. Gibson, U.S. District Judge, W.D. MO, July 9
Joseph E. Stevens, Jr., U.S. District Judge, E.D. & W.D. MO, July 9
William W. Wilkins, Jr., U.S. District Judge, D. SC, July 9
Robert F. Chapman, U.S. Circuit Judge, CA-4, July 16
Roger J. Miner, U.S. District Judge, N.D. NY, July 28
Joseph M. McLaughlin, U.S. District Judge, E.D. NY, July 29
John E. Sprizzo, U.S. District Judge, S.D. NY, July 29

## CONFIRMATIONS

William W. Wilkins, Jr., U.S. District Judge, D. SC, July 20
William C. Lee, U.S. District Judge, N.D. IN, July 27

## ELEVATION

Frank J. McGarr, Chief Judge, N.D. IL, Aug. 13

## DEATH

Harold P. Burke, U.S. District Judge, W.D. NY, July 18

THE THIRD BRANCH

VOL. 13 NO. 8 AUGUST 1981

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# The Third Branch

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## ABA RESOLUTIONS RELATING TO THE FEDERAL JUDICIARY

Several matters of interest to the federal judiciary were acted upon when the American Bar Association's House of Delegates held its annual meeting last month. The following are some of the highlights:

- **Davis-Bacon Act.** Before the House was a resolution which would call for repeal of the Davis-Bacon Act and related acts which require the application of Davis-Bacon wage rates to federally assisted construction by state and local agencies as well as the Copeland Anti-Kickback Act which requires weekly payroll reporting. The Board of Governors recommended a substitute resolution

See ABA RESOLUTIONS, p. 7

## TASK FORCE ON CRIME RELEASES REPORT

The Attorney General's Task Force on Violent Crime has released its final report, with 64 recommendations for change in the federal criminal justice system. The eight-member Task Force was appointed March 5 to study the problem of violent crime and to develop specific proposals "on ways in which the federal government can improve its efforts to combat violent crime without limiting its efforts against organized and white collar crime."

The first fifteen recommendations were issued in June and dealt with measures the Department of Justice could undertake within the existing statutory framework and with existing resources. The second set of recommendations, which contain measures that require changing statutes, funding levels and allocation of resources, was released August 17. The recommendations were developed after four months of hearings in seven cities around the country. Nearly 80 witnesses were heard and written testimony was provided by thousands of federal, state and local criminal justice practitioners and scholars as well as by members of the general public.

Some of the more notable recommendations:

- **Prisons.** Provide $2 billion in federal funds over four years for construction of state correctional facilities. Permit the states to use abandoned military bases as correctional facilities. Provide adequate resources for the National Corrections Academy to provide training for state and local corrections personnel (see box, page 6).
- **Bail.** Amend bail statutes to permit courts to deny bail to defendants found by clear and convincing evidence to present a danger to the community; to deny bail to persons accused of serious crimes who have previously, while on pretrial release, committed serious crimes for which they were convicted; to abandon, in the case of serious crimes, the presumption in favor of pretrial release; and to provide the government the right to appeal bail decisions.
- **Exclusionary Rule.** Establish a rule, by legislation or by urging its adoption in court proceedings, that would permit use of evidence if "obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution."

See TASK FORCE, p. 6

*News from the Center*

## FOREIGN VISITORS SHARE EXPERIENCES, LEARN ABOUT U.S. COURTS

Among the varied services it provides, the Federal Judicial Center acts as a clearinghouse of information about the federal courts. One of the ways the Center staff fills that role is to receive foreign visitors on government-sponsored tours of the United States. Visitors have come from literally every corner of the world, from Argentina to Zambia, and from a wide range of professional offices, from the president of a human rights association in Spain to the Chairman of the Supreme Court of the Soviet Union. Most are judges, but visi-

See FOREIGN VISITORS, p. 4

*The Grand Mufti of North Yemen.*

## FJC SPONSORS SEMINAR ON ANTITRUST LITIGATION

Late last July, the Federal Judicial Center convened on the campus of the University of Michigan a week-long seminar on both substantive and procedural aspects of antitrust litigation. It was the first extended FJC seminar to focus exclusively on one topic. One hundred and thirty-seven judges—district and circuit— were in attendance.

The concept of a pilot seminar was approved by the Center Board in 1979 and planning has been underway since then. A special Antitrust Planning Committee, composed of members of the Center's Board, developed the seminar program with logistical support from the Center's Continuing Education and Training Division. The committee was chaired by District Judge Donald S. Voorhees, and included then-Circuit Judge William H. Mulligan and Bankruptcy Judge Lloyd D. George.

The entire seminar was chaired by District Judge Milton Pollack.

Harvard Law Professor Phillip Areeda, a noted authority on antitrust law, lectured for eighteen hours during the first three days of the seminar. Prior to the seminar, the participating judges received for review a syllabus, developed by Professor Areeda for the seminar, as well as his comprehensive text. Professor Areeda also prepared a monograph on antitrust law in connection with the seminar.

The last two days of the program were devoted to presentations on various aspects of complex case management. Speakers included, in addition to Judge Pollack, District Judges William W. Schwarzer, Edward R. Becker, Sam C. Pointer, John F. Grady, Patrick E. Higginbotham, and Harold H. Greene. This aspect of the program also treated the inter-relationship of substantive knowledge of antitrust law and case management tech-

See ANTITRUST, p. 3

## *DATA BEING COMPILED FOR RUBIN COMMITTEE*

The Federal Judicial Center's work for the Judicial Conference Subcommittee on Possible Alternatives to Jury Trials in Complex Protracted Civil Cases is continuing, and information is being gathered in preparation for the submission of a final report to the subcommittee at its next meeting on November 9. (For an earlier report, see *The Third Branch,* June 1981.) The subcommittee is chaired by Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals.

Among other things, the subcommittee is interested in comparative information on the experiences of jurors who served on long trials (defined as those exceeding 20 days) with those who served on short trials (less than nine days). How, for example, does the burden of service differ between the two groups of jurors; how does the difficulty of their tasks differ; and how, if at all, do various techniques for evidence presentation and juror instruction assist in overcoming any special difficulties that arise in long trials?

The Center's Research Division, working with a contractor, designed and completed a survey of jurors who had served on trials up to four years prior to the study. One hundred and eighty jurors were finally contacted and provided information to the interviewers. This group was fairly evenly divided between long-trial and short-trial jurors. The interviewees were assured that participation in the interviews was entirely voluntary.

Full analysis of the information gained from the interviews will have to await completion of other Center projects undertaken for the subcommittee. However, a preliminary analysis of the survey data presents a picture of jurors who took their service seriously and tried earnestly to understand the case, but who sometimes found the evidence difficult to understand, the trial sometimes frustrating and bothersome, and who experienced some disruption of their lives in meeting the demands of jury service.

"In the context of recent debate about the effect of protracted trials on jurors," the contractor's report said, "the overall results of this study suggest the metaphor of a glass that can be said to be half full or half empty, depending on one's perspective. What the study has accomplished is to give an empirical basis for the debate."

The Center will provide the results of this and other studies to the subcommittee at its November meeting. Thereafter, the subcommittee will prepare a schedule for the completion of its final report to the Judicial Conference.

### "BLUE-RIBBON" JURY REPORT AVAILABLE

Reprints of *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation,* by Professors William V. Luneburg and Mark A. Nordenberg, are now available from the Center's Information Service. This study, prepared for the Center in connection with its work in support of the Judicial Conference Subcommittee on Possible Alternatives to Jury Trials in Protracted Civil Cases, appears in the June issue of the University of Virginia Law Review. See *The Third Branch,* June 1981.

Enclosure of a self-addressed gummed mailing label, which need not be franked, will expedite shipment.

The Third Branch

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# Noteworthy

Administrative Office Director Wiliam E. Foley announced last month that Ms. Debbie Kirk, previously an attorney advisor in the Legislative Affairs Office, has been appointed Chief of the Division of Management Review. She commenced her new duties in the first week in September.

* * * * *

Attorney General William French Smith in June outlined a new program to improve federal assistance and coordination with state and local law enforcement agencies. Speaking at the dedication of the FBI Forensic Science Research and Training Center in Quantico, Virginia, the Attorney General said the Department of Justice will seek to reverse the trend wherein "United States Attorneys and federal law enforcement entities have taken an elitist approach to their role in enforcing the law."

He will be instituting a program to require U.S. Attorneys and other federal law enforcement officers to coordinate with local officials in identifying their community's most important crime problems and determining which of those can best be addressed within the federal jurisdiction. He also called for greater federal assistance in training state officers, in providing technical assistance such as fingerprint identification, and in apprehending violent offenders. Finally, he suggested that the federal government make federal lands and abandoned military facilities available to state and local jurisdictions to help them alleviate their overcrowded prisons.

* * * * *

In San Diego, California, the Federal Court Clerks Association (FCCA), at its 53rd annual conference, amended its by-laws to establish a Clerks Council. The primary objective of the Clerks Council is to consider problems of the federal judiciary with which Clerks of Court are officially concerned and to propose economical and efficient solutions designed to improve the administration of justice.

The FCCA is an organization composed of Clerks, Deputy Clerks, and other employees of the clerk's offices of the United States Courts, both present and past. Since its inception, the FCCA has striven to improve the efficient administration of the courts and increase the professionalism of those serving the courts.

The newly formed Clerks Council will be headed by Wallace J. Furstenau, Clerk, Room 6218, United States Courthouse, 230 North 1st Avenue, Phoenix, Arizona 85025. Inquiries or suggestions about the work of the Council should be sent to Mr. Furstenau.

* * * * *

The Federal Judicial Secretaries Association will have its 1981 Conference in Washington, D.C. on October 10-11. For information, contact Shirley J. Cooke, president, at FTS-242-6814.

ANTITRUST from p. 2

niques, illustrating the cost effectiveness that can be achieved if a judge is able to identify, early in the pretrial process, the issues on which the case will turn and thus focus discovery on those issues while directing attention away from irrelevant issues.

A special evening session entitled "Practicing Lawyers' Views of Certain Procedural Pretrial and Trial Issues in Antitrust Cases" featured private practitioners and was organized by the American Bar Association's Antitrust Law Section.

(Professor Areeda's monograph on antitrust law is being reprinted and will soon be available for distribution to all federal judges on request.)

## SEMINARS CONDUCTED FOR INTERPRETERS

Following passage of the Court Interpreters Act of 1978, certification examinations were given to translators seeking employment in the federal courts. The Act mandates that in any action brought by the United States in federal courts, any party or witness in such proceedings, whose primary language is not English, or whose hearing is impaired, is to be provided a certified interpreter when one is available. Certified interpreters are either hired on a full-time basis or are paid by an established fee schedule (for further information, see *The Third Branch,* December 1980).

In furtherance of this program, the U.S. District Court for the Central District of California has developed and conducted special training seminars for certified English-Spanish interpreters.

The general plan is to conduct five-hour seminars on Saturdays. Covered in the meetings are forms, such as the Statement of Defendant's Constitutional Rights, a glossary of terms used in the federal courts, and a separate compilation of selected English/Spanish terminology used during trial.

Sofia Zahler, the supervising interpreter in this district, who has also done similar work for the state courts, explained the differences between the dual court systems in this country, and answered inquiries from the participants. Edward M. Kritzman, Clerk of Court, has explained that similar seminars will be held as the need arises.

In addition to the scheduled seminars for certified interpreters, a two-day seminar was recently held for noncertified interpreters, jointly sponsored by the Superior Court of Los Angeles County and the Central District of California. With about 60 in attendance, at least eight languages were covered, including instructions by those proficient in Southeastern Asian dialects.

FOREIGN VISITORS from p. 1

tors have also included legislators, public prosecutors, government ministers, private attorneys and even the Grand Mufti of the Yemen Arab Republic (North Yemen).

Most travelers received by the Center are brought to this country through the International Visitors Program, a government-funded program which brings prominent, professional-level foreigners to the United States for approximately 30 days of cross-country business touring. The visitors program is administered through the United States International Communication Agency (ICA), which oversees the selection of the visitors and contracts with a private agency, such as the African-American Institute or the Institute for International Education, to prepare a detailed itinerary and address the day-to-day needs of the visitors while they are in this country. Where necessary, the ICA arranges for the appointment of escort/interpreters, who are part-time employees of the Department of State. The Federal Judicial Center also receives visitors brought by other sponsors, such as the American Bar Association's International Legal Exchange Program.

Under the International Visitors Program, each United States embassy or mission selects those individuals who would most benefit from an introduction to their professional counterparts in the United States. The ICA stresses that invitation is not predicated upon an individual's prior record of support for the United States. Rather, the aim of the program is to broaden professional horizons and make new friends for this country.

*Marsha Carey, the Center's Assistant Information Specialist, demonstrates the use of an on-line bibliographic data base for members of the Council of State of the United Arab Republic of Egypt.*

Most briefings at the Center are devoted to providing information about the federal court system and its administration, but the personal interchanges frequently are as informative for Center staff as for the visitor. Several themes come up repeatedly. Plea bargaining, for example, is an utterly alien concept in most nations, and a number of visitors have questioned the desirability of the practice. The United States appears to be equally unusual in retaining the jury system, especially for civil cases, and many have debated just how well private citizens can resolve complicated questions of fact. Many visitors are fascinated with our system of separation of powers and are surprised, for example, that federal judges play a passive role in establishing the guilt of criminal defendants. Foreign jurists have been particularly interested in our process of appointing federal judges, and Center staff have learned that a large number of countries use a quite different system in which a judicial career is a completely separate track from that of other attorneys following completion of law school. Salaries of judges and lawyers are subjects of perennial interest, and it is quite beyond the experience of most foreigners to learn that federal judges sued in federal court here to resolve a salary dispute.

Visitors' recitations of the legal and economic conditions in their countries frequently prompt renewed appreciation for the benefits and protections of our system. For example, Dhanessar Jhappan the Chief Justice of Guyana, told how his country could barely provide his court with any law books or office supplies. (His State Department escort promised to see if spare copies of American case reporters, which are accepted as persuasive authority in Guyana, could be obtained.) Kapila Hingorani, an advocate before the Supreme Court of India, related her recent success in obtaining the release of thousands of prisoners who had been in jail for over six months awaiting trial. She explained that her current concern is the alleged practice of police in certain districts of blinding prisoners. Center staff were saddened to learn from a recent Italian visitor that a prominent Roman professor who had been to the Center in 1979 was assassinated in his home country by political terrorists.

Most of the benefits of the visitors program are intangible—increasing knowledge by exchang-

See FOREIGN VISITORS, p. 5

FOREIGN VISITORS from p. 4

.ng information; broadening understanding through the simple act of conversation. But some more practical gains have also been realized.

*Sir Nigel Bowen (above), Chief Judge of the Federal Court in Australia, makes a point during a meeting with Center staff. Below right, Indian advocate Kapila Hingorani discusses with Center attorney David Adair some of her work in the field of human rights.*

Officials from the Ministry of Justice in Ottawa received a detailed breakdown of our federal courts' retirement and annuity system to refer to while drafting revisions of Canadian statutes. Sir Nigel Bowen, Chief Judge of the Federal Court in Australia, received a first-hand look at Courtran, an automated case management system of the kind which the courts of Australia hope to soon introduce. And a delegation of state attorneys general from Nigeria recently opened discussions on the possibility of sending some of their representatives to educational seminars offered judges here.

For more information about the Center's role in the visitors program contact Alice O'Donnell, Director of the Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

## NEW DRAFTS OF MODEL RULES OF PROFESSIONAL CONDUCT PUBLISHED BY A.B.A.

It has been 12 years since the American Bar Association published its updated Code of Professional Responsibility. There have been many changes in the legal profession since then—the role of lawyers has changed as new law has come about and there were vast changes in other disciplines and business. Recognizing this, the ABA in 1977 appointed a 14-member Commission on Evaluation of Professional Standards charged with undertaking "a comprehensive rethinking of the ethical premises and problems of the profession of law." Robert J. Kutak of Omaha was named chairman.

The Commission's task was not an easy one and quite naturally there was much disagreement among the members. For example, decisions had to be made as to what language to use to describe "competence" as it relates to lawyers; whether all or some fee arrangements must be reduced to writing; and what responsibilities a lawyer has when aware that there are acts of corporate wrongdoing being committed by a client.

After four years of study, public hearings, and drafting the Commission on May 30, 1981 released two drafts, a Proposed Final Draft and an Alternative Draft of their recommended Model Rules of Professional Conduct. The first draft consists of substantive proposals for 50 "black letter" rules followed by explanatory comments, similar to the format of the Restatements of Law compiled by the American Law Institute, as well as notes that provide supporting authority.

The second volume consists of the same substantive proposals but published in a format similar to the 1969 ABA Model Code of Professsional Responsibility which consists of canons, ethical considerations, and disciplinary rules. The Commission does not recommend adoption of the second format, but prepared it for the convenience of those who may want to make comparisons of the two formats.

At the ABA's annual meeting last month a seven-member panel discussed the work of the Commission and responded to inquiries

See CODE OF CONDUCT, p. 7

THE SOURCE
The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only that entry appearing in bold is available from the Federal Judicial Center.*

Bureaucratic Justice: An Early Warning. Wade H. McCree, Jr. 129 U. Pa. L. Rev. 777-797 (April 1981).

Communicating With Juries: Problems and Remedies. William W. Schwarzer. 69 Cal. L. Rev. 731-769 (May 1981).

**Court Shoppers: And They're Off and Running. Abner J. Mikva. Speech at ABA Annual Meeting, August 12, 1981. 19 p.**

The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition. Robert F. Peckham. 69 Cal. L. Rev. 770-805 (May 1981).

The Future of Civil Litigation. Seth Hufstedler. 1980 Utah L. Rev. 753-764.

Judicial Administration in the United States Court of Appeals for the Ninth Circuit. Richard H. Deane & Valerie Tehan. 11 Golden Gate U.L. Rev. 1-20 (Spring 1981).

Oral Argument in the Ninth Circuit: A View From Bench and Bar. Stephen L. Wasby. 11 Golden Gate U. L. Rev. 21-79 (Spring 1981).

Recommendations on Major Issues Affecting Complex Litigation. American College of Trial Lawyers. ACTL, 1981. 37 p.

Setting Standards: The Courts, the Bar, and the Lawyers' Code of Conduct. Thomas Lumbard. 30 Cath. U. L. Rev. 249-271 (Winter 1981).

Toward More Effective Handling of Complex Antitrust Cases. Maxwell M. Blecher & Candace E. Carlo. 1980 Utah L. Rev. 727-752.

Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge. Sandra D. O'Connor. 22 Wm. & Mary L. Rev. 801-819 (Summer 1981).

TASK FORCE from p. 1

- **Insanity Defense.** Create by legislation a verdict in federal criminal cases of "guilty but mentally ill" and establish a federal commitment procedure for defendants found incompetent to stand trial or found not guilty by reason of insanity.
- **Habeas Corpus.** Establish a three-year statute of limitations on habeas corpus petitions and prevent federal district courts from holding evidentiary hearings on facts which were fully "expounded and found" in state court proceedings.
- **Gun Control.** Establish a mandatory sentence for the use of a firearm in the commission of a federal felony. Amend the Gun Control Act of 1968 to require the reporting of the theft or loss of a handgun, to establish a waiting period for the purchase of handguns, and to prohibit the importation of certain unassembled handgun parts.
- **Attacks on Federal Officials.** Revise the federal criminal code to extend federal jurisdiction to include murder, manslaughter, maiming, aggravated and simple assault, kidnapping and menacing and terrorizing committed against federal officials, including federal judges.
- **Juvenile Crime.** Amend the Juvenile Justice and Delinquency Prevention Act to give original jurisdiction to the federal government over a juvenile who commits a federal offense. The Act currently provides that if a juvenile commits a federal crime, he is to be surrendered to state authorities for prosecution *unless* the state does not have, or refuses, jurisdiction, or does not have appropriate programs for the juvenile.
- **Sentencing and Parole.** Enactment of the sentencing provisions of the proposed Criminal Code Reform Act of 1979. This legislation would phase out the United States Parole Commission and create a Sentencing Commission to establish sentencing guidelines for the imposition of sentences in all federal offenses. Sentences under the Act would all be determinate sentences, with possibility for early release for "good time" only. Courts would retain discretion in sentencing but a defendant could appeal a sentence above the guidelines and the government could appeal a sentence below.
- **Narcotics.** Implement a foreign policy to insure the interdiction and eradication of illicit drugs wherever cultivated, including the use of responsible herbicides. Enlist military assistance to detect and intercept the illegal importation of narcotics.

The task force was co-chaired by former Attorney General Griffin B. Bell and Governor James R. Thompson of Illinois. Other members were James Q. Wilson, a professor of government at Harvard University; David L. Armstrong, Commonwealth Attorney of Louisville; Frank G. Carrington, Executive Director of the Crime Victims Legal Advocacy Institute;

See TASK FORCE, p. 7

## NATIONAL CORRECTIONS ACADEMY TO OPEN

At a commencement address at the George Washington University Law School in May, the Chief Justice called for the establishment of a single, central facility for training corrections personnel. Recently, Attorney General William French Smith announced that the National Corrections Academy will open on October 1, 1981 in Boulder, Colorado.

The Academy will be operated by the National Institute of Corrections and will principally train managers and agency trainers, as well as some line personnel from across the country. It is expected that close to 2,500 individuals will be trained the first year in subjects ranging from food service administration to disturbance control.

ABA RESOLUTIONS from p. 1

which was adopted. This resolution gives authorization to the Section of Public Contract Law to express that Section's views and urge repeal of the Act before the U.S. Congress and federal executive agencies.

- **Proposed Model Grand Jury Reform Act.** After considerable debate with Judge Floyd R. Gibson (CA-8) and Chief Judge Frank A. Kaufman (D. MD) speaking in opposition, the matter was deferred to the January 1982 midyear meeting. A representative of the National Association of Attorneys General also spoke against the proposal. Judges Kaufman and Gibson both stated their view that there were parts of the proposed act which could be helpful but that, as presently drafted, it would serve to cause another layer of hearings and unnecessary delay.

- **Voting Rights Act.** A resolution was adopted by the House which (1) supports an extension of the Act of 1965, as amended; (2) supports an amendment to the act "to permit states and political subdivisions covered by the preclearance provisions of the Act to 'bail out' when there has been a history of compliance with the Act. . .;" (3) supports an amendment to the Act which would allow the U.S. Attorney General "to exempt annually certain limited Section 5 jurisdictions where the minority population is so minimal that no potential for discrimination exists;" and (4) "supports an amendment to the Act to prohibit any election practice which results in a denial or abridgement of the right to vote on account of race or language minority status."

TASK FORCE from p. 6

Robert L. Edwards, Director of the Division of Local Law Enforcement Assistance of the Florida Department of Law Enforcement; William L. Hart, Police Chief of Detroit; and Wilber F. Littlefield, the Public Defender for Los Angeles County.

CODE OF CONDUCT from p. 5

from those in the audience. It is apparent there will be many disagreements before a final draft has the imprimatur of the Association. Nevertheless work continues, particularly with the state bar associations, and the drafters hope that something can be considered by the Association's House of Delegates when it meets in January 1982. If this schedule is followed, it would still be August 1982 before final approval could come about.

- **Law School Programs.** There were two resolutions in this area, both approved. The first recommended that ABA Standard 302 (c) relating to approval of law schools be amended to require that "law schools offer to all students at least one rigorous writing experience and to offer instruction in professional skills". The second recommended that law schools "undertake to impart to their students the knowledge and skills needed to provide the public competent legal service by: (a) emphasizing prelegal education in communications skills; (b) offering instruction in professional skills—to the extent possible by each school's resources—such as oral and written communication, trial and appellate advocacy, counseling, negotiation, drafting, and the duties and responsibilities of the legal profession; and (c) provide counseling before graduation to any student who has not received instruction in skills and knowledge needed for the competent practice of law of the advantages of acquiring such skills and knowledge.

- **Committee on Federal Judiciary.** A resolution was adopted which will increase the membership of the Committee to a total of 14. Change will permit two representatives from the Ninth Circuit and an additional representative for the new Eleventh Circuit.

- **Judgeships.** A resolution was adopted to support the Judicial Conference's recommendations for additional federal judgeships. The Conference's recommendations were for eleven permanent and three temporary judgeships in the U.S. Courts of Appeals and 24 permanent, six temporary, and one temporary to be made permanent in the U.S. District Courts.

A resolution before the Assembly calling for changes in retirement benefits, the appointment process, and terms of office of U.S. Bankruptcy Judges was deferred.

In addition to meetings of the House of Delegates, there were committee meetings, panel discussions, and speeches by three members of the U.S. Supreme Court (Justices White, Powell and Stevens), Attorney General William French Smith, Deputy Attorney General Edward Schmults, and other representatives of the incumbent Administration. Copies of formal addresses are available in the FJC Information Service Office.

## BOARD OF CERTIFICATION TO INTERVIEW IN N.Y.C.

The Board of Certification is a five-member panel that certifies individuals as qualified to serve as Circuit Executives. The Board will be interviewing applicants for certification in New York City on November 10.

Congress created the Board in 1971 in the statute establishing the position of Circuit Executives. The Judicial Conference last year provided that the Board must also certify persons selected to serve as executives in the district courts, under the five-court experimental program approved by the Conference (see *The Third Branch,* May 1981).

Applicants seeking an interview should apply as soon as possible so that preliminary consideration can be completed and a schedule established. Forms of application and other information may be obtained by writing: Board of Certification, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

# ao ousfjc calendar

Sept. 10-11 Judicial Conference Advisory Committee on Bankruptcy Rules
Sept. 14-16 Workshop for Magistrates' Staff
Sept. 15 Videoteleconference for Pretrial Services
Sept. 21-23 Workshop for Training Coordinators
Sept. 22-24 Regional Seminar for U.S. Probation Officers
Sept. 23 Implementation Committee of the Judicial Conference of the United States on Admissions of Attorneys to Federal Practice.
Sept. 23-25 Parole Revocation Seminar for U.S. Probation Officers
Sept. 24 Judicial Panel on Multidistrict Litigation
Sept. 24-25 Judicial Conference of the United States
Sept. 24-26 Federal Criminal Practice Clinic for Federal Defenders
Sept. 28-29 Regional Seminars for U.S. Probation Officers
Sept. 28-30 Regional Seminars for U.S. Probation Officers



Oct. 14-16 Conference of Metropolitan District Chief Judges
Oct. 19-20 Workshop for Judges of the Seventh Circuit

# PERSONNEL

## NOMINATIONS

John C. Coughenour, U.S. District Judge, W.D. WA, Aug. 11
Conrad K. Cyr, U.S. District Judge, D. ME, Aug. 11
Henry R. Wilhoit, Jr., U.S. District Judge, E.D. KY, Aug. 11
Sandra D. O'Connor, Associate Justice, Supreme Court of the United States, Aug. 19 (previously listed incorrectly as July 7)

## ELEVATIONS

Marion J. Callister, Chief Judge, D. ID, July 1
William B. Hand, Chief Judge, S.D. AL, July 15

Oct. 26-28 First Circuit Judicial Conference
Oct. 29-31 Seminar for Full-Time Magistrates

Nov. 12-13 Sentencing Institute for the Second Circuit
Nov. 18-20 Seminar for Bankruptcy Judges
Nov. 18-21 Seminar for Defender Investigators
Nov. 19-20 Judicial Conference Advisory Committee on Bankruptcy Rules


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## INTERVIEW WITH NATIONAL INSTITUTE OF CORRECTIONS DIRECTOR ALLEN F. BREED

*Allen F. Breed, a recognized national authority in the field of juvenile and criminal justice, has been the Director of the National Institute of Corrections since 1974.*

*A professional in the corrections field for 35 years, Mr. Breed has held a variety of positions, including Director of the California Department of the Youth Authority, the Chairman of the Youth Authority Board for that state, a visiting fellow with the United States Department of Justice, and Special Master to the United States District Court for the District of Rhode Island in litigation involving the corrections system of the state of Rhode Island. In addition, he has been the Chairman of the Task Force on Corrections and member of the Joint Commission on Juvenile Justice Standards of the American Bar Association and the Institute of Judicial Administration. He has also been a member of numerous committees, task forces, and commissions concerned with juvenile and criminal justice.*

**Mr. Breed, it has been some time since an interview was printed in *The Third Branch* with the first Director of the National Institute of Corrections (NIC). Would you please explain the present goals and policies of the organization?**

The National Institute of Corrections is a national center of assistance to state and local corrections. The goal of the agency is to aid in the development of a more effective, humane, safe, and just

See INTERVIEW, p. 6

## JUDICIAL CONFERENCE OF U.S. HOLDS FALL MEETING

The Judicial Conference held its Fall meeting last month and was "honored by the presence of Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, Congressman Robert K. Kastenmeier, Congressman Neal Smith, Attorney General William French Smith and Solicitor General Rex E. Lee. . . ."

The Chief Justice on September 24 announced two Conference actions. These were:

- Approval of amendments to the Federal Rules of Criminal Procedure, technical in nature and generally considered non-controversial. The amendments in part update the rules to conform to amendments to the Federal

See CONFERENCE, p. 3

## FEDERAL JUDGES RECEIVE 4.8% SALARY INCREASE

Because the continuing resolution for FY 1982 that froze senior-level government salaries was not enacted prior to the end of September 30, the Administrative Office has administratively determined, pursuant to *Will v. U.S.*, that the freeze does not apply to Article III judges. The A.O. will soon be paying new judicial salaries at the following rates: the Chief Justice, $96,800; Associate Justices, $93,000; Circuit Judges, $74,300; and District Judges, $70,300. The salaries of U.S. Bankruptcy Judges and Magistrates will not be increased.

**Sandra Day O'Connor** was sworn in September 25 as the first woman Justice on the Supreme Court of the United States by Chief Justice Warren Burger in the Court's Conference Room. At center, holding two family Bibles, is her husband John O'Connor. On October 5, the newly constituted Court commenced the October Term, 1981. As they have done for the previous six years, the Justices assembled a week before the Term to consider the cases which had accumulated during the summer. The long agenda of 1,060 cases was the second largest in the 191-year history of the Court. *Photo by Michael Evans, The White House*

## CONGRESS BEGINS CONSIDERATION OF CRIMINAL CODE REVISION; OTHER MATTERS

Although the 97th Congress has not yet devoted a great deal of attention to matters affecting the administration of the federal courts, a number of proposals in the field of criminal law and sentencing, as well as other areas, are under consideration. Current bills of interest are summarized below.

**Bail.** A number of bills have been introduced in both chambers to amend the Bail Reform Act of 1966. The most significant change proposed is to authorize pretrial detention of defendants found to pose a "danger to the community." This provision is modeled on a ten-year old statute from the District of Columbia which was recently held to be constitutional by the D.C. Circuit sitting en banc. Other proposals in this area call for the elimination of money bail and restriction of the availability of personal recognizance. Both the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice and the Senate Subcommittee on the Constitution have recently conducted hearings on bail reform proposals. Judge Gerald Tjoflat (CA-5), Chairman of the Judicial Conference Probation Committee, was among the witnesses appearing before the House Subcommittee.

**Criminal Law and Sentencing.** Continuing efforts begun more than ten years ago, members have introduced a large number of bills in both chambers to revise the federal criminal code. Proposals call for both wholesale revisions of the code as well as amendments in limited areas.

On the comprehensive side, Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, has introduced S. 1630, the Criminal Code Revision Act of 1981, which he describes as a "joint bipartisan endeavor" that is a "careful balance between liberal and conservative points of view." A product that has evolved from years of hearings on previous proposals, the bill in large part constitutes a restatement of existing federal law, he said. Where provisions — such as the death penalty — have become too controversial to be passed as a part of the code reform package, they have been dropped. (A separate death penalty bill, S. 114, cleared the Senate Judiciary Committee on June 9.) Senate Judiciary Committee hearings on the criminal code revision began on September 28. Judge Tjoflat presented the Judicial Conference's views on sentencing provisions.

In the House, Representative Thomas Kindness has reintroduced as H.R. 1647 the bill that was reported out of the House Judiciary Committee last year (formerly H.R. 6915). His hope, he said, is "that we will pick up where we left off last year, making such corrections as are necessary and proceeding to enactment in this Congress."

Particular attention is being paid to the field of sentencing. Representative Kindness, for example, introduced in July S. 1555, the Criminal Sentencing Reform Act of 1981. This measure cleared the Senate in 1978 as part of a comprehensive criminal code revision and cleared the Senate Judiciary Committee in 1980. The bill would create a sentencing commission to set comprehensive sentencing guidelines for each category of offense. Judges would be required to impose sentences within the guidelines unless aggravating or mitigating circumstances exist, and they would have to state on the record their reasons for going outside the guidelines. Appeals of sentences would be available to both defendants and the government (with the approval of the Attorney General or the Solicitor General), but only when the sentence imposed was outside the guidelines. The bill would also abolish parole after a five year phase-out period and limit "good time" credit to ten percent of the sentence imposed.

Congressman John Conyers, Chairman of the House Subcommittee on Criminal Justice, last month introduced H.R. 4492, the Criminal Code Sentencing Act, which, with modifications, is Chapter III of the broader criminal code bill H.R. 1647. This bill would not establish sentencing guidelines, but would change current procedures by establishing separate sentences of conditional discharge, probation, fine, restitution and imprisonment. A separate sentencing hearing is called for under the bill. When imposing sentences, judges would be required to chose the least restrictive alternative necessary to achieve the purpose of sentencing and to state on the record the reasons for choosing a particular sentence. Hearings before the Subcommittee began in late September, with Judge Tjoflat presenting the views of the Judicial Conference.

**Exclusionary Rule.** Bills have been introduced in each chamber to repeal or modify the exclusionary rule. Senator Dennis DeConcini, for example, has introduced S. 101, which would call for exclusion of evidence only when it was obtained through an intentional or substantial violation of law. Senators Orrin Hatch and Strom Thurmond have sponsored S. 751, which would eliminate the exclusionary rule but provide, as an alternative, tort claims proceedings with recoveries up to $25,000. Hearings on these measures began earlier this month. The Judicial Conference has not yet been asked to testify.

**Court of Appeals for the Federal Circuit.** Similar to measures actively considered at the end of the 1980 session, bills have been introduced in both the House and the

See LEGISLATION, p. 9

# Noteworthy

Further action has occurred in the Minnesota case in which District Judge Miles Lord held that the Bankruptcy Reform Act's delegation of trial authority to bankruptcy judges was unconstitutional (see *The Third Branch,* June 1981).

Judge Lord's original holding of April 23 was in the form of a brief order without an accompanying opinion. On July 24, that order was supplemented by a 20-page memorandum of findings of fact and conclusions of law. In that memorandum, Judge Lord held that Congress exceeded its constitutional power when it authorized bankruptcy judges to try cases and otherwise exercise the jurisdiction and power of district judges without at the same time vesting them with the tenure and salary protections given Article III judges. While acknowledging that Congress may delegate some judicial power under non-Article III tribunals, Judge Lord found that the Act's "wholesale" transfer of Article III powers exceeded the proper limits of such delegation.

The case has been appealed directly to the Supreme Court under 28 U.S.C. §1252, *Northern Pipeline Construction Company v. Marathon Pipeline Company,* No. 81-150. The United States became a party in the litigation when, under 28 U.S.C. §2403(a), it was notified of the challenge to the constitutionality of the Bankruptcy Act.

* * * * *

October 15, 1981 is the effective date for the Convention on Abolishing the Requirement for Legalization of Foreign Public Documents. Public documents from the other 37 signatory countries, when properly certified under the terms of the Convention, will be admissible as to form in the federal courts without additional formalization. In addition, all clerks of court and deputy clerks will be authorized to certify court records under the Convention by affixing a special certification form which is known as an "apostille."

Questions concerning the admissibility of documents certified under the Convention or issuance of the apostille by the clerks or courts can be directed to the General Counsel's Office at the Administrative Office.

* * * * *

The General Services Administration has announced new procedures for distribution of the directory of reduced-cost paired city air fares (for background, see *The Third Branch,* August 1981). The name of the publication has been changed to "Federal Travel Directory," and, beginning January, it will no longer be provided free to government subscribers of the Official Airline Guide. Thus, the Administrative Office has arranged to purchase copies of the Directory for each Circuit Executive and Clerk's office in the federal courts. Copies of the new Directory should be received by those offices in November.

Information about hotels and motels offering reduced rates to government employees will be listed in a new semiannual publication, "Federal Hotel/Motel Discount Directory." Including rates from over 1200 establishments in all 50 states, the District of Columbia and Puerto Rico, the next issue of the Directory will be available in January. For copies write: General Services Administration, Transportation and Public Utilities Service, T.T.M., 425 Eye Street, N.W., Room 3210, Washington, D.C. 20406. At this time, GSA anticipates that the Directory will be available without charge.

## NEW CIRCUIT ASSIGNMENTS ANNOUNCED

The Supreme Court has revised the assignment of Circuit Justices for the twelve circuits of the United States courts.

The assignments, effective October 1, are: District of Columbia Circuit, the Chief Justice; First Circuit, Justice Brennan; Second Circuit, Justice Marshall; Third Circuit, Justice Brennan; Fourth Circuit, the Chief Justice; Fifth Circuit, Justice White; Sixth Circuit, Justice O'Connor; Seventh Circuit, Justice Stevens; Eighth Circuit, Justice Blackmun; Ninth Circuit, Justice Rehnquist; Tenth Circuit, Justice White; Eleventh Circuit, Justice Powell.

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Magistrates Act of 1979. The amendments will now be transmitted to the Supreme Court for its consideration, with a recommendation that they be approved and transmitted to Congress.

- Approval of a recommendation from its Committee on the Operation of the Jury System which calls for "district courts to be advised to treat certain judicial proceedings related to grand jury matters as closed hearings." This "advice" is only a recommendation and not binding upon the courts. Included in the recommendation was language which states that "an exception to the practice of closure should be made in the case of contempt trials against recalcitrant witnesses or others before the grand jury, since such proceedings are similar to a criminal trial which should be open to the public, absent a judicial finding of some overriding interest in support of closure."

As he has done in the past, the Chief Justice again urged that judges exert greater efforts to avoid waste of juror time.

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**Co-editors:**

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Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

## *FOLEY V. REAGAN* RETURNED TO DISTRICT COURT

The Court of Appeals for the D.C. Circuit has remanded the salary litigation of *Foley v. Reagan* to the district court for resolution of issues regarding the salary adjustments due U.S. Bankruptcy Judges, U.S. Magistrates, and other non-Article III personnel in Fiscal Year 1980. Although the D.C. Circuit in May had remanded the case to the district court and dismissed as moot that part of the case pertaining to Article III Judges (see *The Third Branch,* June 1981), the subsequent filing of several motions delayed the implementation of that order.

After resolving the outstanding motions, the D.C. Circuit on August 21 vacated the original judgment of the district court "insofar as it adjudicated claims of Article III Judges who have now received the salary increases in issue [as a result of the Supreme Court's decision in *Will v. U.S.*]." The remaining issues were remanded to the district court "for further consideration in light of *Will, et al. v. United States.*"

The case is now in much the same posture as it was in May. Specifically left unresolved by the Court of Appeals were motions previously filed by each side seeking summary disposition of the case. Mr. Foley had alleged that a supplemental appropriation for FY 1980, dated July 8, superseded the earlier freeze of salary increases. Attorneys for the President had maintained that the case became moot at the end of the fiscal year because the limitations on salary adjustments expired and, as a result, Director Foley no longer faced a legally recognized "injury" under the 1980 Pay Act. A supplemental motion seeking summary reversal and dismissal for mootness was based upon the Supreme Court's intervening *Will* decision.

All of these motions, said the Court of Appeals in its August 21 order, ". . . present issues not yet considered and decided by the District Court. We decline to address these issues until they have been aired before and resolved by that court."

In a recent memorandum to the District Court, Mr. Foley again asserted that the July 8, 1980 supplemental appropriation repealed and superseded the earlier freeze. He also maintained that, in any event, the statutory freeze on salary increases lapsed by its terms at the end of the fiscal year 1980. In the event these arguments are rejected, Mr. Foley suggested that the freeze violated the prohibition against impairment of contracts incorporated into the Fifth Amendment, because it was imposed after judicial branch personnel had become otherwise entitled to the adjustment. No response to this memorandum has yet been filed.

*News from the Center*

## CONSOLIDATED DATA ENTRY PROCEDURES ALLOW EXPANSION OF COURTRAN INDEX AND CVB SYSTEMS

The Center's Courtran system allows courts to store and process their case and court management information in the central Courtran computers in Washington through data entry and telecommunications equipment installed in the courts.

Many courts do not have sufficiently large caseloads to justify the installation of data entry and telecommunications equipment. So that these courts may receive automated support, the Center has developed "consolidated data entry procedures" for them. Under these procedures a single court with data entry equipment not only enters data from that court into the Courtran System, but also enters similar information sent to it from one or more nearby districts. (See *The Third Branch,* April 1981, p. 4.) Consolidation increases utilization of data entry terminals, expands the number of courts receiving automated services, and minimizes the costs of training personnel to use the Courtran system.

Continued expansion of these consolidated data entry procedures is bringing the benefits of automated case management to an increasing number of courts. For example, the Western District of Texas provides the services of the Center's automated Central Violations Bureau (CVB) application to the other three districts in Texas, as well as to both Mississippi districts and the Northern District of Georgia and by the end of the year will provide it to four other states.

Equipment in eight district courts is currently allowing CVB data entry and reporting for twenty-four additional districts and processing approximately two thirds of all CVB tickets issued annually. By the end of fiscal year 1983, the current CVB data entry courts will be able to provide the data entry service to all other district courts that want to participate.

The Courtran Index system has also been expanded through consolidation. Index replaces the case indexing functions done in the Clerk's office and simultaneously provides a variety of case management reports. Index shares many of the characteristics of the CVB system. Based upon the experience gained in the CVB system, the Center has begun to implement the consolidated approach for Index data entry in three district courts. The District of Massachusetts enters data for all First Circuit districts, as reported earlier in *The Third Branch,* and has now expanded the service to four Second Circuit districts. The Central District of California and the District of South Carolina are providing the service to four additional districts.

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## ANNUAL REPORT OF ADMINISTRATIVE OFFICE SHOWS CIVIL & CRIMINAL CASELOADS INCREASING

The 1981 annual report of the Administrative Office shows a marked increase in bankruptcy filings as well as a continued upward trend in appeals and in civil case filings, and a reversal of a three year downward trend in the filing of criminal cases. The *Annual Report of the Director of the Administrative Office of the United States Courts* was released last month pursuant to statute. It covers the 12-month period ending June 30, 1981 and reports on the entire range of activities of the federal court system, from the workload statistics of the circuit and district courts to the implementation of the Speedy Trial Act of 1974.

The growth in the appellate caseload is reflected in a 13.6 percent increase in filings over 1980. There were 26,362 appeals commenced in 1981, or 599 cases per panel, the highest number of cases per panel in any year. The increased number of appeals was due primarily to an 18.4 percent rise in appeals of private civil actions, though appeals from administrative agencies also rose sharply. There were 25,066 terminations last year—a 20 percent increase over 1980 and the highest number of terminations recorded in a year—but due to the number of appeals commenced, the pending caseload on June 30, 1981 was 21,548, another record high.

In the district courts, civil case filings rose 7 percent over 1980 to 180,576 new cases, or an average of 350 cases per judgeship. Though terminations rose 10.9 percent over 1980, the number of pending cases rose by 1.4 percent. A 15.6 percent increase in the number of diversity of citizenship cases filed constituted the greatest single contributing factor in the overall increase. There was also a significant increase (26 percent) in the number of prisoner civil rights actions filed. In the face of these increases, the total civil filings would have been higher but for a 53 percent drop in land condemnation cases. The median time from filing to disposition for civil cases increased during 1981 from eight to nine months.

Criminal cases filed in the district courts increased for the first time since 1977. A total of 31,287 cases were filed for an 8.2 percent increase over 1980. This number, however, was still 28 percent below the number of cases filed in 1975 when 43,282 cases were filed. Criminal terminations were up 3.2 percent but there were 15,850 pending cases on June 30, 1981, the highest number since 1977. These increases in the criminal caseload are the result of increased prosecutions in almost all major offense categories. Leading these was a 40 percent increase in weapons and firearms prosecutions, an 18 percent increase in embezzlement cases, and a 16 percent increase in prosecutions for drug related offenses.

Statistics compiled to monitor the implementation of the Speedy Trial Act show that the district courts improved the net time for processing a defendant within the first and second speedy trial intervals. Last year, 94.2 percent of defendants were brought to indictment within the 30 days from arrest to indictment, compared to 96.8 percent in the year ending June 30, 1981. In the second interval, the 70 days from indictment to trial, 93.4 percent of defendants were brought to trial, dismissal, or plea within the time period, compared to 88.3 percent in fiscal year 1980. Eighteen defendants had their cases dismissed pursuant to the Speedy Trial Act.

Bankruptcy filings increased to 360,329 cases representing 518,152 estates. Including 911 cases (estates) originally filed under the Bankruptcy Act prior to October 1, 1979 that were reopened during the year, the total of estates filed was 519,063, the largest number ever filed in one year. The number of estates terminated rose by 62.1 percent. Nonetheless, the pending caseload increased 46.9 percent to 617,896 estates in 1981.

### S.D.N.Y. SEEKING CHIEF PROBATION OFFICER

**Position:** Chief Probation Officer/Chief Pretrial Services Officer, U.S. District Court for the Southern District of New York. The officer is responsible to the district court, the Judicial Conference, the Administrative Office, and the U.S. Parole Commission for the probation, pretrial services, and parole programs in the district. Salary up to $50,112.50.

**Qualifications:** Four year degree in one or more of the social sciences appropriate to the position. Advanced degree preferred. Four years of current experience in personnel work for the welfare of others with at least one of those years at the level of a supervising or chief probation officer, JSP-13 or equivalent. This experience should have been gained in a correctional setting at the federal, state or local level.

**To Apply:** Employees within the Federal Probation System send a resume, others send a SF 171, to: Judge Morris E. Lasker, U.S. District Court, U.S. Courthouse, Foley Square, New York, NY 10007. Position closes November 13, 1981.

**Equal Opportunity Employer**

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Courts for which Index system data are entered by another court regularly forward case and party information to the consolidating district, where docketing clerks enter it into the computer. Reports are produced at the end of each month listing all case and party information entered into the system. The reports include pending case list and statistical information for each judge, lists of all cases by case type, and a complete cross-referenced case and party report. The reports are produced on microfiche and are sent directly to the participating courts, which thus receive substantially all of the Index system's benefits and reports available, just as if they had performed the data entry locally.

Districts interested in participating in the Index system consolidation effort should contact the Director of the Center for further information.

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correctional system. The Institute is both a direct service and a funding agency serving in the field of corrections with five legislatively mandated activities: training, technical assistance, research and evaluation, policy and standards formulation, and clearinghouse services. The basic objective of the Institute's program is to strengthen state and local correctional agencies.

**It has been announced that a new organization, the National Corrections Academy, has been created to centralize efforts to train prison officials. Would you describe this organization? Will it assume the training functions previously conducted by the NIC and the Federal Bureau of Prisons?**

First, I want to make clear that the National Institute of Corrections is an organizational part of the Federal Bureau of Prisons. The Bureau will continue to provide all training for Bureau personnel and, in addition, during this next year in a cooperative effort with the Institute, will be making available about 10 percent of all of its training resources for state and local corrections personnel. The establishment of a National Academy of Corrections, long called for by the Chief Justice, actually became operational on October 1 of this year and is a subunit of the Institute.

What we will do at the Academy is centralize all of the existing training that we have been carrying out around the country and hope through that centralization to develop a degree of consistency and to assure a sequential pattern that will be more effective than has been the case. The Academy will be located on the grounds of the University of Colorado at Boulder.

**What kinds of training will the Academy offer?**

Well, with our limited resources, we felt that the highest priority should be to provide training to those corrections individuals who could have what we call a multiplier effect. That means that their training could be passed on to others. So we selected out top administrators, managers, mid-managers and trainers, and we will be carrying out training for a little over 2,000 individuals this year who fall into those categories.

In addition we will be providing specialty training in subjects of great concern to people in corrections. Some examples of that would be security and custody issues, fire control training, riot control, and matters dealing with violence in prisons and jails.

*"In spite of improvements, I still see the general conditions at the state and local level in corrections as being substandard."*

**You have written that *Bell v. Wolfish,* [441 U.S. 520 (1979)], could signal a new "hands-off" policy of the federal courts towards conditions in state prisons. The federal courts have been very activist in recent years—overly activist in the view of some states—and much improvement has been accomplished. Is there still a need for judicial intervention in the conditions and practices in the state prisons? Why?**

Well, there is no question that there was a "hands-off" policy that the courts adhered to for many years and then there seemed to be a period when there was a "hands-on" policy, and as one chief federal judge recently stated, maybe we're experiencing partial resurrection of the "hands-off" policy. Certainly one can read that in the recent Supreme Court decision *Wolf v. Chapman.* Unfortunately, a lot of legislators and governors around the country, I think, have wrongly interpreted that decision. In no way has the Court turned its back on unconstitutional conditions; in no way has it rejected the concept of the totality of conditions.

Please understand that the way corrections operated 10 years ago and the way they're operating today is as different as night and day. Many of the inmates' complaints and concerns that were expressed then, and have since been expressed over and over again and recorded in prison litigation, concerned such issues as religion, censorship, visiting, clothing, sanitation, overcrowding, personal appearance and a number of other things. Many of these concerns have been met.

In addition, for the first time professional standards have been developed by the American Corrections Association, by the Depart-

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ment of Justice, by the ABA, and a host of other groups that have studied these areas and have been concerned.

Additionally, there is an accreditation commission now which can certify correctional institutions and programs that do meet these standards. Without question much of the leverage for these developments has come from court decisions dealing with conditions of confinement.

Also, people coming into corrections today are certainly better trained and more highly motivated. We are able to attract into the field young people with vision and creativity in larger numbers than we ever have been before and this gives us great hope in terms of leadership for the tomorrows.

But in spite of these improvements, I still see the general conditions at the state and local level in corrections as being substandard. Whether those conditions are unconstitutional will be decisions for the courts. Even with the strength of standards and previous case law, I would suggest that if at any time we lose the overview, monitoring, and leverage that the federal district courts have historically provided, the field of corrections is going to miss the impetus that it needs to continue to bring about positive, constructive change.

**Is there any indication that state courts will be receptive to these kinds of cases?**

Unfortunately, state courts have shown a strong reluctance to address any prison issues, and they have left to their federal brethren the responsibility for this necessary claim to judicial review and action. I think it is most unfortunate because in many cases that need judicial attention there is not a constitutional issue, but a violation of state law, so we should see far more cases going into the state courts than we do.

I am sure that you are aware too that there is a lot of history that goes into the way cases not only come into the courts but the way they are handled—history that is not in the nature of case law but is almost a tradition. The hands-off policy that the federal courts adhered to for 100 years didn't allow any case, regardless of its nature, to move into the federal process until some very daring and courageous federal judges, primarily in the southern part of our country, began to take stands. As they did, it seemed to be a kind of movement that spread throughout the federal system. One of the hopes that I have is that in the state courts we are now seeing a few daring, courageous judges that are standing up and saying in effect, "It's not just the federal court that has the responsibility to uphold the Constitution. I swore to do that same thing when I became a state judge and I have a responsibility to see that it's adhered to." My guess, and that is all it is, about what the future might be, is that we will see far more activity in the state courts around conditions of confinement, particularly at the jail level, than we have in the last ten years.

**Prior to your serving as Director of the NIC, you were appointed a special master by Chief Judge Raymond Pettine (D. RI) in a conditions-of-confinement case in Rhode Island. Although the court has retained jurisdiction of that cause, you are no longer the master. Could you comment on your role in the case and, generally, on the use of masters in this kind of litigation?**

When I was appointed as a special master there was little or no information in the literature as to what the duties and responsibilities were. There isn't a great deal today although many of us are looking forward to the work that is being developed by the Federal Judicial Center's Research Division in a complete case history of what occurred in Rhode Island. I think that's going to be very helpful to special masters in the future and helpful to federal judges who are considering the use of a master or monitor.

I have been able to use my own experiences in work that we are doing at the National Institute. We have taken a very active role in providing technical assistance to the courts on correctional issues and to monitors or special masters appointed by the courts.

In terms of training, we have developed a handbook for special masters and have periodic training sessions for current masters. As to the continued use of special masters we see the need of someone who can act as a neutral monitor or mediator and one who can provide encouragement and assistance to the defendant in complying with the orders of the court. Another very important task is that, when the defendants do not comply, the special master is able to prepare a well documented case that the court can review and make further decisions regarding disposition.

**You were the first corrections specialist who was appointed in this kind of case. Is that becoming more common now?**

No, there is still a good deal of debate—and I consider it to be a very healthy debate—as to whether or not a special master should be an attorney or whether the master should be a corrections specialist. My own opinion is that if the special master is an attorney, then he needs a colleague working with him who has correctional expertise that will allow him to bridge that very difficult role of not only monitoring but assisting in the implementation of a court order regarding prison conditions. On the other hand, if the special master is a corrections specialist then without question he needs an attorney to assist him in working through the very involved court processes in which he has to participate. I found that more and more the role of the master

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becomes one of a mediator as the master works through the various compliance problems. Anything a master does is generally appealed and this is why a master, though versed in correctional problems, sometimes needs to work in conjunction with a lawyer who is skilled in guiding a case through both the trial and appellate process.

**Writers in the field of corrections have indicated that in the face of the reality of inadequate resources and high rates of recidivism, we must—and, in fact, have—abandoned the rehabilitation model of corrections in favor of a punishment and deterrence model. Do you agree?**

There can be no question that the general response of the field of corrections today is to reject what is known as the medical model in favor of the punishment and deterrence model. I think that's realistic because that's what we do when we send offenders to prison. We hopefully deter them and others and certainly we punish them while their liberty is taken from them. But I don't reject the concept of rehabilitation, although I hope we will never again return to the day when we make judgments about readiness for release on the basis of inmates' attitudes or adjustment to so-called treatment programs.

I think we have an obligation in a democratic society that if we do take people's liberties away from them as a sanction for their violating laws, then we also have a responsibility to provide them opportunities so that when they return to society, they can return with more knowledge, and more ability to cope with society than they had when they came in.

**A goal of the NIC has been to work towards reducing prison overcrowding. One of the means to accomplish this end is to rely on alternatives to incarceration. Recently the Administration's Task Force on Violent Crime recommended that the federal government spend $2 billion to help states build new prisons. Do you think the motivation for the Task Force's recommendation is to relieve prison overcrowding or is this recommendation a rejection of alternatives to incarceration?**

Without question, the Task Force's recommendation in this regard was to relieve prison over-

*"My guess . . . is that we will see far more activity in the state courts around conditions of confinement, particularly at the jail level, than we have in the last ten years."*

crowding and to provide additional space to incarcerate more violent offenders. I don't think that position was in any way a rejection of the concept of alternatives to incarceration. The Task Force was justifiably concerned, however, that many serious violent offenders are not being incarcerated because in the minds of the judges there is a feeling that they simply couldn't put any more human beings in already overcrowded jails and prisons.

I feel that every jurisdiction, and I am specifically now speaking of the states, has a right to determine its public policy regarding incarceration. I also feel that the federal government certainly has a role in providing some resources to do something about the deplorable conditions of jails and prisons which currently exist, as well as providing resources for those jurisdictions where the decision has been made to incarcerate a larger percentage of offenders. I think it would be most unfortunate if, should the federal government provide some subvention for prison construction, it were construed as in any way opposing the responsible use of alternatives to incarceration.

**One thing federal judges are very concerned about is the continual stream of prisoner petitions in the federal courts. Many of these are condition-of-confinement cases. Do you see any remedies, any proposals, to curb the volume of litigation caused by prisoners?**

There is no question that there is a remedy—and it has been demonstrated in a number of different jurisdictions—and that is the use of a good, well constructed and well managed administrative grievance procedure. Effective grievance procedures are currently being used in the U.S. Bureau of Prisons, in New York, South Carolina, and are now being adopted in Maryland and a number of other states and local jurisdictions. A grievance procedure must have certain elements in order for it to have credibility in the eyes of inmates. One of the most important elements is inmate and line staff participation in the process. The second is outside advisory review. Where grievance procedures have contained these elements, the number of petitions filed in the federal courts has been dramatically reduced.

Unfortunately, most of the grievance procedures that are operating currently have little or no credibility in the eyes of inmates. Therefore, they turn to the federal courts which have been responsive,

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enate which would merge the ourt of Claims and the Court of Customs and Patent Appeals into a United States Court of Appeals for the Federal Circuit. In hearings before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Chief Judge Daniel M. Friedman (Court of Claims) and Chief Judge Howard T. Markey (Court of Customs and Patent Appeals) testified in favor of the proposal, while representatives of the American Bar Association spoke in opposition. On September 10 the House Subcommittee sent a clean version of the bill to the full Judiciary Committee. On September 28, the Senate Subcommittee on Courts sent a clean bill to the full Judiciary Committee.

**Other Matters.** On July 2, Senator Howell Heflin introduced a package of bills, S. 1529 through S. 1532, designed to modify the federal courts system and improve the administration of justice. One of these bills is intended to ease the workload of the Supreme Court by establishing a National Court of Appeals to resolve inter-circuit conflicts.

Hearings have continued on the numerous proposals which would eliminate federal court jurisdiction in controversial areas such as abortion, school prayer, and busing. One anti-abortion bill, S. 158, cleared the Senate Subcommittee on Separation of Powers in July. Other measures are set for further hearings this fall.

Finally, The Senate Judiciary Committee on July 21 approved the State Justice Institute Act. Identical to a measure which passed the Senate last year, the bill would create a non-profit corporation "to provide technical and financial assistance to further development and adoption of improvements in the administration of justice in state and local courts throughout the country." The measure is before the House as H.R. 2407.

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prompt, and, in cases where there is a constitutional issue, have ken action.

**Who sits on the grievance boards?**

Every model, if it's a responsible constructive kind of model, is one which has been tailored according to the particular needs of that jurisdiction or that correctional system. As I've indicated, one of the elements that I consider to be necessary is staff-inmate participation. Therefore, on the first level there should be a small committee of two or three inmates, chosen by other inmates, and two or three correctional officers chosen by the union or the association of correctional officers. It is their responsibility not to find a yes-no, right-wrong kind of response to the problem but to find a solution to which they could agree. When this occurs then, for the first time, you find that correctional officers and inmates are sitting down together o try to find an agreeable solution a problem with which they have to live every day, instead of getting the keeper-kept kind of dichotomy that works always in conflict.

## MONOGRAPH AVAILABLE ON "RULE OF REASON" IN ANTITRUST ANALYSIS

Last July the Center sponsored a week-long seminar on antitrust law and case management. Three days of the seminar featured a series of lectures on antitrust law by Professor Phillip Areeda of Harvard Law School. In connection with that presentation, Professor Areeda prepared a monograph on "The 'Rule of Reason' in Antitrust Analysis: General Issues," which was provided to attendees.

The monograph has now been reprinted in the Center's Education and Training Series and is available for general distribution. The 44-page monograph traces the evolution of various standards for antitrust analysis and explains how, in Professor Areeda's view, the dichotomy between "per se unlawful" and "rule of reason" treatment is "usually overstated and can confuse the unwary."

Copies of the monograph may be obtained from the Center's Information Service, 1520 H Street, N.W., Washington, D.C. 20005-1081; 202/FTS 633-6365. Enclosing a self-addressed, gummed label (which need not be franked) will expedite shipment.

**Audiotapes.** In addition to the monograph, audiocassette recordings of all presentations made at the seminar are also available for circulation through the Center's Media Services Unit. Included are the lectures delivered by Professor Phillip Areeda during the first three days of the program.

Interested judges and other parties should write the Media Services Unit at 1520 H Street or call 202/FTS 633-6415. To expedite shipment of the cassettes, please refer to the tapes by the numbers listed below.

| Catalog No. | Presentor | Title |
|---|---|---|
| AJ-450-1–450-11 | Professor Phillip Areeda | Antitrust Matters (eleven separate tapes) |
| AJ-451-1–451-2 | Harvey M. Applebaum, E. William Barnett, David Foster, and W. Donald McSweeney | Practicing Lawyers' Views of Certain Procedural Pretrial and Trial Issues in Antitrust Cases (two separate tapes) |
| AJ-452 | Hon. William W. Schwarzer | Overview of the Subject |
| AJ-453 | Hon. Harold H. Greene | Issue Management |
| AJ-454 | Hon. Patrick E. Higginbotham | Discovery |
| AJ-455 | Hon. Edward R. Becker | Organizing for Trial |
| AJ-456 | Hon. Sam C. Pointer, Jr. | Structuring for Trial |
| AJ-457 | Hon. John F. Grady | Management of the Trial |
| AJ-458 | Hon. Sam C. Pointer, Jr. | Settlements |

# PERSONNEL

## NOMINATIONS

H. Franklin Waters, U.S. District Judge, W.D. AR, Aug. 28
Lawrence W. Pierce, U.S. Circuit Judge, CA-2, Sept. 8
William L. Garwood, U.S. Circuit Judge, CA-5, Sept. 17
Hayden W. Head, Jr., U.S. District Judge, S.D. TX, Sept. 17
James R. Nowlin, U.S. District Judge, W.D. TX, Sept. 17
Paul A. Magnuson, U.S. District Judge, D. MN, Sept. 28

## CONFIRMATIONS

Robert F. Chapman, U.S. Circuit Judge, CA-4, Sept. 16
D. Brook Bartlett, U.S. District Judge, W.D. MO, Sept. 16
John R. Gibson, U.S. District Judge, W.D. MO, Sept. 16
Joseph E. Stevens, Jr., U.S. District Judge, E.D. & W.D. MO, Sept. 16
Sandra D. O'Connor, Associate Justice, Supreme Court of the United States, Sept. 21
Conrad K. Cyr, U.S. District Judge, D. ME, Sept. 25
John C. Coughenour, U.S. District Judge, W.D. WA, Sept. 25
Roger J. Miner, U.S. District Judge, N.D. NY, Sept. 25
Joseph M. McLaughlin, U.S. District Judge, S.D. NY, Sept. 25
John E. Sprizzo, U.S. District Judge, S.D. NY, Sept. 25
Henry R. Wilhoit, Jr., U.S. District Judge, E.D. KY, Sept. 25

## APPOINTMENTS

Sandra D. O'Connor, Associate Justice, Supreme Court of the United States, Sept. 25
D. Brook Bartlett, U.S. District Judge, W.D. MO, Oct. 1
Joseph E. Stevens, Jr., U.S. District Judge, E.D. & W.D. MO, Oct. 1
John R. Gibson, U.S. District Judge, W.D. MO, Oct. 2

### CLERK VACANCY IN SOUTHERN DISTRICT OF INDIANA

**Position:** Clerk of the U.S. District Court for the Southern District of Indiana. A high level management position, the clerk is responsible for managing the administrative activities of the clerk's office and overseeing the performance of the statutory duties of that office. Salary up to $50,112.50.

**Qualifications:** Minimum of ten years of administrative or appropriate professional experience in public service or business which provided a thorough understanding of the organizational, procedural, and human relations aspects in managing an organization. Some educational equivalents may be substituted. Personal characteristics such as unquestioned integrity, leadership ability, and the ability to supervise and to understand and apply management knowledge and techniques must be demonstrated.

**To Apply:** Direct application by November 15, 1981 to Chief Judge William E. Steckler, U.S. District Court, 204 U.S. Courthouse, 46 East Ohio, Indianapolis, IN 46204.

**Equal Opportunity Employer**

## ELEVATION

John L. Smith, Jr., Chief Judge, D. DC, Sept. 18

## DEATHS

William W. Knox, U.S. District Judge, W.D. PA, Aug. 30
Axel J. Beck, U.S. District Judge, D. SD, Sept. 2

# AO/FJC calendar

Oct. 19-20 Workshop for Judges of the Seventh Circuit
Oct. 20 In-Court Seminar on Group Dynamics
Oct. 21 In-Court Probation Staff Training
Oct. 21-22 In-Court Seminar on Crisis Intervention
Oct. 26-28 First Circuit Judicial Conference
Oct. 29-31 Advanced Seminar for Full-Time Magistrates
Nov. 12-13 Sentencing Institute for the Second Circuit
Nov. 16-18 Workshop for Circuit Court and Special Court Clerks
Nov. 18-20 Seminar for Bankruptcy Judges
Nov. 18-21 Seminar for Developing Evidence in the Defense of Criminal Cases

FIRST CLASS MAIL

THE THIRD BRANCH

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NOVEMBER, 1981


## INTERVIEW WITH SENATE JUDICIARY COMMITTEE CHAIRMAN STROM THURMOND

*Strom Thurmond of South Carolina was first elected to the Senate as a Democrat in 1954. He switched to the Republican party in 1964, and became Chairman of the Senate Judiciary Committee at the beginning of this Session of Congress.*

*Admitted to the South Carolina bar in 1930, he has previously served as city attorney, county attorney, state senator, circuit judge, and Governor of South Carolina from 1947 to 1951. In 1948 he was the States Rights Democratic candidate for President, and he received 39 electoral votes, carrying four states.*

*In the following interview, Senator Thurmond expresses his views on such subjects as crime, the exclusionary rule, bail reform, and states' rights.*

**Despite clear philosophical differences, your working relationship with the Democratic members of the Senate Judiciary Committee has been described in the past as very good. Has this good working relationship continued with the change of leadership in the Committee?**

Yes, I try to be fair to all sides.

**What do you regard as the most important item on the Judiciary Committee's current legislative agenda?**

S. 1630—the Criminal Code Reform Act of 1981.

See THURMOND, p. 5

## CENTER TO SUPPORT 60 TO 80 FEDERAL JUDGES AT 1982 HARVARD SUMMER PROGRAM

At its October 19 meeting, the Board of the Federal Judicial Center voted to meet the travel and subsistence expenses of federal circuit and district judges selected to attend Harvard Law School's Summer Program of Instruction for Lawyers, July 19-31, 1982, in Cambridge, Massachusetts. Professor Louis Loss, Director of the Harvard Program, has indicated that Harvard will waive the tuition for federal judges. Because the Center will not present a national seminar in the summer of 1982,

See HARVARD, p. 3

*Measuring the Impact of Innovations*

## CONTROLLED EXPERIMENTATION IN THE LAW ANALYZED IN NEW FJC REPORT

The Federal Judicial Center has recently published *Experimentation in the Law*, a report by the Center's Advisory Committee on Experimentation in the Law. The Committee, chaired by Chief Judge Edward D. Re of the Court of International Trade, includes federal judges, practitioners, and members of the academic community (see photograph). The report is being provided to key personnel within the federal judiciary and is also for sale from the Government Printing Office (GPO stock # 027-000-01148-9, $4.25, softcover).

The Chief Justice, as Chairman of the Center's Board, appointed the Committee early in 1978, and asked it to address the ethical issues that judges and administrators face when they wish to institute a new program or procedure but realize, as is often the case, that they cannot be certain that the innovation will achieve its goals, and at what cost. The controlled experiment is perhaps the most reliable means of determining whether changes may legitimately be attributed to an innovation. Such determination is important in avoiding the serious

See EXPERIMENTATION, p. 9

# Noteworthy

Chief Judge Robert F. Peckham (N.D. CA) has reported highly successful results from the use of teleconferences, with both clients and the court realizing great savings in time and money.

His experiments with this technique began in 1979 with nondispositive motion hearings and status conferences conducted via telephone rather than calling for personal appearances by counsel in open court.

After two and a half years of experimentation, Chief Judge Peckham reports that Clerk of Court William L. Whittaker has given him some impressive figures that suggest to him that "if this simple technique were to be widely utilized throughout the judiciary the savings to litigants would be many millions of dollars every year."

To cite specifics: During 1980 Chief Judge Peckham held 122 telephone conference call hearings in 86 cases, with 241 attorneys participating, 47 from outside the Bay Area. Computing costs by adding coach air fares, other travel expenses allowed federal employees, fees allowable under the Criminal Justice Act (obviously very conservative figures compared with private practice fees), and estimated travel time for both local and out-of-town counsel, the demonstrated savings to clients came to a total of $28,500.

Costs involved in teleconferencing are minimal, computed at $531.31 for the Northern District of California in 1980. This figure mainly reflects charges for a leased portable telephone and expanded use of the FTS lines.

* * * * *

In the first half of 1981 the prison population in the United States grew by more than 20,000, an annual rate of 13 percent. This is a greater increase than in the whole year of 1980. A Bureau of Justice Statistics report shows that there were 349,118 offenders incarcerated in federal and state prisons on June 30, 1981. If this upward trend continues, the report states, the rate of prison popula-

See NOTEWORTHY, p. 8

## CENTER EXPERIMENTS WITH SATELLITE VIDEOTELECONFERENCING

On September 15, the Federal Judicial Center conducted a third videoteleconference, which brings seminars to participants in their home cities, avoiding the need for costly travel to a central seminar site. Faculty members appeared for the three-hour program before cameras and a small audience at the WETA Public Broadcasting System studio in Arlington, Virginia. From there, their presentations were telecast by satellite to participants in PBS studios in eight cities: New York, Los Angeles, Chicago, Detroit, Dallas, Atlanta, Kansas City, and Philadelphia.

Faculty for the teleconference, which addressed current legislation, administration, and other subjects in the field of pretrial services, were members of the Pretrial Services Branch of the Administrative Office's Probation Division. Participants used FTS telephone lines to question the faculty on various issues raised in their presentations.

*Daniel Ryan, of the Pretrial Services Branch of the Administrative Office, goes before the cameras as part of a recent videoteleconference on pretrial services conducted among participants in eight cities across the country.*

The Center is exploring teleconferencing as a cost-saving alternative to its regular seminars. For example, had the Center held a similar one-day seminar in Cincinnati for the same participants from the same cities, it would have cost approximately three times the amount expended for the videoteleconference. That increased amount does not include hidden costs such as clerical time to arrange travel and lodging, nor participants' time while in transit. Program costs were also reduced through use of the FTS telephone network, made possible by special authorization from GSA telecommunications network officials. Use of the commercial networks would have cost up to ten times the amount that GSA charged.

The Center is planning additional videoteleconferences to explore their value in cost savings.

The Third Branch

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**Co-editors:**

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

HARVARD from p. 1

such as its 1981 antitrust seminar, the Center hopes to accommodate a substantially larger number of judges at Harvard than it has done previously.

**Application Procedures.** To apply for Center support for the Harvard Program, judges should write as soon as is convenient to Kenneth C. Crawford, the Center's Director of Continuing Education and Training. In any event, letters should be received by January 22, 1982. Judges who received Center support to attend the Harvard Summer Program in 1979 and 1980 will not be eligible for such support in 1982.

**Other Summer Programs.** The Board also decided to encourage similar cooperative programs for federal judges with other law schools in other parts of the country. *The Third Branch* will carry details on such programs that may develop for 1983. Finally, as noted, in light of budgetary constraints and logistical considerations, the Board voted not to present in 1982 a single subject, national seminar such as the 1981 antitrust seminar that the Center sponsored on the campus of the University of Michigan Law School.

**Harvard Program Curriculum.** The 1982 session will mark Harvard's fourteenth Summer Program. It consists of more than 40 one-week and two-week courses (five hours per day, six days a week). Courses are offered by over 30 members of the Harvard Law School faculty and include such topics as Antitrust Law, Banking Regulation, Constitutional Law, Federal Jurisdiction, Negotiation, Securities Regulation, and Tax Law. There will also be several afternoon colloquia on law-related subjects.

The Center has arranged with Harvard that if federal judges enroll in sufficient numbers in particular subject matter areas, the Center will present separate instructional modules relating to problems of trial and management of cases in those areas.

**The United States Court of Appeals for the Eleventh Circuit** was created out of the 90-year old Fifth Circuit on October 1 and 2, as its Chief Judge John G. Godbold (left), formerly Chief Judge of the Fifth Circuit, passes the gavel to Chief Judge Charles Clark of the newly aligned Fifth.

The Eleventh Circuit, headquartered in Atlanta, will hear appeals arising from Alabama, Georgia and Florida. It is composed of 12 active and six senior judges.

The Fifth Circuit, still based on New Orleans, now embraces the states of Louisiana, Mississippi, Texas and the Canal Zone, and it retains 14 active judgeships and currently has five senior judges.

Among others speaking at ceremonies in both New Orleans and Atlanta were Justice Lewis Powell, Solicitor General Rex E. Lee, and former Attorney General and Judge of the Fifth Circuit, Griffin Bell.

*Photo by Burt Steel, New Orleans Times-Picayune*

## STAFF PAPERS AVAILABLE ON SENTENCING COUNCILS AND JURY SELECTION

The Center has recently published two short staff papers, *The Effects of Sentencing Councils on Sentencing Disparity* and *A Comparative Study of Jury Selection Systems.*

To determine whether sentencing councils have had the anticipated effect of reducing unwarranted variation in criminal sentences, the Federal Judicial Center undertook a project to measure the effects of sentencing councils on sentencing disparity in the federal courts. *The Effects of Sentencing Councils on Sentencing Disparity* summarizes the background, design, and outcome of that research project.

*A Comparative Study of Jury Selection Systems* compares four systems of juror selection: the one currently in use by the district courts and three alternative systems. The two variables that define these systems are one-step versus two-step delivery of the summons and qualification questionnarie and first-class versus certified mail for service of the summons. Based on an empirical analysis of the clerical efficiency of the four systems in eight district courts, the author recommends that the courts be allowed to use a one-step procedure for qualification and summoning and first-class mail for service of the summons.

Copies of these staff papers are available from the Center's Information Service, 1520 H Street, N.W. Washington, D.C. 20005; (202) 633-6365 (also FTS). Enclosing a self-addressed gummed label, which need not be franked, will expedite shipment.

## CIRCUIT ROUNDUP: THE 1981 CIRCUIT JUDICIAL CONFERENCES

This year's round of judicial conferences is complete and, by all reports, all of the conferences were very successful. The conferences are convened each year pursuant to 28 U.S.C. §333 "for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit."

This year, the diversity of subjects treated by the various circuits was as broad as the geographical areas they represented. Apart from the traditional "state of the circuit" address given by the chief judge in most circuits, there were few common subjects.

However, several conferences (7th, 8th, and 10th) were concerned with the proposals in Congress to limit the jurisdiction of the federal courts. A number of other circuits (4th, 5th, 9th, and 10th) presented programs on the new Bankruptcy Act or other bankruptcy issues. Two circuits (5th and 9th) presented programs on the function of the magistrate. Four circuits (4th, 6th, 7th and 8th) reviewed recent Supreme Court decisions. Various aspects of the relationship between the press and bench were discussed in the First, Third and District of Columbia Circuits.

The guest speakers at the conferences included some of the most prominent scholars and practitioners in the country. Not surprisingly, Harvard professor Arthur Miller was the most active speaker, appearing at four circuit conferences. He spoke on several aspects of civil case management and the Federal Rules of Civil Procedure in the First, Third, Sixth and Ninth. Professor Miller's colleague, Charles Alan Wright, gave a review of Supreme Court decisions at the Fourth and a talk on the "Trials of Litigation" in the Fifth.

Former United States Circuit Judge and Solicitor General Wade H. McCree gave the Supreme Court review at the Sixth, discussed opinion writing in the Third, and appeared at the Second to discuss improving the work of the courts with, among others, former Assistant Attorney General Maurice Rosenberg and Dean Paul Carrington of Duke. Former Solicitor General Robert H. Bork, now in private practice, appeared at the Seventh Circuit to discuss the proposed limitations of federal jurisdiction. Former Circuit Judge and Attorney General Griffin Bell spoke at the Fifth on alternate dispute resolution.

Other speakers included Senator Paul Laxalt of Nevada (9th) and Congressman Harold L. Volkmer of Missouri (8th), Supreme Court Justices, law school professors, private practitioners and judges from other circuits.

Other subjects of interest that were taken up at the conferences ranged from judicial discipline to civil rights actions to observations about present-day China.

## DISTRICT COURTS CUT SERVICE OF PRIVATE PROCESS

In 1980, the Carter Administration proposed that the United States Marshals Service eliminate the service of private process, and in anticipation of acceptance of that proposal, no monies or manpower were allocated for that purpose. Congress did not enact the necessary legislation, however, and the USMS retained responsibility for the service of over 500,000 pieces of private process in FY 1981. Reimbursements for the service of private process amounted to only 16 percent of the costs incurred in administering the function.

Realizing the fiscal and manpower hardship confronting the Marshals Service, several District Courts have recently issued court orders relieving the Marshals Service of responsibility for the service of private process, except under certain exigent circumstances. To date, the following 25 districts have issued such orders, and additional District Courts are expected to follow suit: Arizona; Eastern and Western Arkansas (the Eastern District is also precluded from serving government civil process); Northern, Eastern and Central California; Northern Florida; Eastern, Middle and Western Louisiana; Eastern and Western Michigan; Nevada; New Jersey; New Mexico; Southern New York; North Dakota; Oregon; South Dakota; Northern, Eastern and Southern Texas; Vermont; and Eastern and Western Washington.

*Reprinted from the September/October issue of* The Pentacle *through the courtesy of the United States Marshals Service.*

## CIRCUIT JUDICIAL COUNCILS RESTRUCTURED

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (P.L. 96-458), sets forth not only that the councils must be restructured, but outlines in specific terms how they shall be constituted. The Act, passed into law October 15, 1980, became effective October 1, 1981.

As specified in the Act, the councils shall consist of:

- The chief judge of the circuit
- The number of circuit judges fixed by majority vote of all such judges in regular active service
- District judges of the circuit, fixed by majority vote of all circuit judges in regular active service; except that, if the number of circuit judges on the council is less than six, the number of district judges shall be no less than two; and, if the number of circuit judges is six or more, the number of district judges shall be no less than three. All district judges so designated must also be in regular active service.
- Members of the council shall serve for terms established by majority vote of all circuit judges in regular active service.
- No more than one district judge from any one district shall

See COUNCILS, p. 7

THURMOND from p. 1

**What are some of the major changes in federal criminal law you would like to see emerge from this session of Congress?**

As indicated in my answer to your previous question, I believe the first order of business is to modernize and reform the total federal criminal code.

Any solution to our crime problem must place a heavy reliance upon the deterrence of criminal activity. But to deter, criminal laws and the criminal justice process must be—and must be publicly perceived to be—sensible, certain, effective and impartial. The laws themselves must be reformed and organized in a more concise manner before any major improvements can be made in the effectiveness of the criminal justice system.

Specifically, I think we need to bring about major reform in the following areas: bail, sentencing, international extradition, and provisions governing federal habeas corpus review of state criminal convictions. Also, I would like to see the abolition of the exclusionary rule coupled with an alternate civil remedy for unlawful police conduct.

**What changes in particular do you favor in the area of bail reform legislation?**

Bail reform should include provisions to permit the trial judge to take into account danger to the community in determining whether to release a person before trial, and—if release is permitted—in determining the conditions of release. This is a fundamental and important change.

Other things can be done to deal with those persons who continue to commit crimes while on release. For example, the sentence for crimes committed while on pretrial release should run consecutive to any sentence for the original crime.

Also, procedures should be provided for summary revocation of pretrial release upon the commission of another crime.

**Senator, you have co-sponsored legislation which would modify the application of the exclusionary rule. Your bill would replace the rule with a tort remedy. The Attorney General's Task Force on Violent Crime recommended adoption of legislation which would create an exception to the rule if an officer acted in "reasonable good faith" in securing evidence. Would you consider supporting such legislation?**

I have an open mind on how to deal with the exclusionary rule.

However, my current view is that it would be better to permit relevant evidence to be used in a criminal trial regardless of the actions of the law enforcement officer in obtaining it. Coupled with that, though, I think we need to fashion effective civil and administrative alternatives to deter the officer from engaging in illegal conduct.

I do not think it makes sense to free the guilty person in order to deter the investigative officer. On the other hand, I agree with the Attorney General that evidence obtained by an officer acting in reasonable good faith that his conduct is lawful should not be excluded as evidence in a criminal trial. If the officer believes he is acting lawfully, then excluding the evidence will not serve as a deterrent to unlawful activity, which is the rationale the courts use for the exclusionary rule. You cannot deter reasonable good faith conduct.

At least one circuit court already has ruled to that effect, and I hope others will follow without legislation.

**S. 653, a bill you introduced last March, would amend Sections 2244 and 2254 of Title 28 of the United States Code affecting habeas corpus procedures. Under current statutory provisions, do you feel that the federal courts have been overly active in habeas corpus review of state criminal convictions? And a related question, is this legislation your answer to statements you have made that federalism too often is an encroachment on states' rights?**

I do not think the federal courts should be interfering with state criminal convictions by habeas cor-

See THURMOND, p. 6

*"To deter crime, criminal laws and the criminal justice system must be—and must be perceived to be—sensible, certain, effective and impartial."*

*Reese Transfers to CA-11*

## NEJELSKI NAMED CIRCUIT EXECUTIVE FOR CA-3

Paul Nejelski on November 2 took office as the Circuit Executive for the Third Circuit, filling a vacancy created by the death of William A. (Pat) Doyle last year. The Third's second Circuit Executive, Mr. Nejelski has been staff director of the ABA's Action Commission to Reduce Court Costs and Delay since its inception in 1979.

Since graduating from Yale College (magna cum laude 1959) and

Yale Law School (1962), Mr. Nejelski has pursued an active and varied career in positions ranging from trial attorney to court administrator.

He clerked for a year in the Appellate Division of the New Jersey Supreme Court. From 1964-1970 he served in several different capacities in the U.S. Department of Justice, including, at age 30, management of the government's representation in all immigration and citizenship litigation. While at the Justice Department in 1969, he also earned a masters degree in public administration from American University. He has also worked in academia, serving as assistant director of the Center for Criminal Justice at Harvard Law School from 1970-71, directing the Institute of Judicial Administration at New York University Law School from 1973-76, and teaching on different occasions at the University of Connecticut and University of Maryland law schools.

Mr. Nejelski was deputy court administrator for the state of Connecticut from 1976-77, and from 1977-79 he returned to the Department of Justice as Deputy Assistant Attorney General in the Office for Improvements in the Administration of Justice. There he had special responsibility for proposals relating to civil litigation and court reform, as well as administration of the Federal Justice Research Program.

Mr. Nejelski has written extensively on civil, criminal and juvenile justice as well as a variety of subjects related to judicial administration. He co-authored *Where Do Judges Come From?* (1976), describing and analyzing the 1973 election for Chief Judge of New York state. In addition, he has authored several articles on the legal and ethical problems of social science research, and he has edited a collection of essays on *Social Research in Conflict with Law and Ethics* (Ballinger, 1976).

See NEJELSKI p. 9

THURMOND from p. 5

pus unless the issue involves a constitutional matter fundamental to the guilt of the individual involved. I also feel that some time limit should be placed on these matters.

I introduced S. 653—a proposal submitted by the National Association of Attorneys General—to use as a basis for hearings. The Attorneys General tell me there is a frustrating problem here that needs to be solved. Attorney General Smith's Task Force on Violent Crime agrees. I intend to examine the matter with an open mind in hearings.

This is just one example of federal encroachment on matters that should be left to the states. Therefore, I hope we can provide one answer to federal encroachment, and others along the way.

**The Judicial Conference of the United States has in the past taken positions on several bills before the Committee. Do you feel the views of the federal judiciary make a real impact on members of Congress? Would you like to see the Judicial Conference play a greater or lesser role in speaking out on pending legislation?**

Yes, the views of the Judicial Conference have a real impact on members of Congress. The Conference should continue to actively speak out on pending legislation of concern to it.

**Do you have any special message for the federal judiciary?**

Yes. I would like to see them get tougher on criminals. They are too soft-hearted on criminals. They should think more about the victim and the community. I have introduced a dozen bills on this and at least a half dozen others I have co-sponsored.

## FEDERAL PUBLIC DEFENDER, W.D. WASHINGTON

The Federal Defender maintains offices in Seattle and Tacoma, Washington, with a full-time staff of seven. The office is operated under the authority of 18 U.S.C. §3006A(h)(2)(A) in the District's Criminal Justice Act plan.

Qualifications must include 5 years' practice of law and membership in the Washington State Bar Association. Salary to $46,350.

Application forms, available through the Clerk, will be received until December 18, 1981. Mail to: Bruce Rifkin, Clerk, United States District Court, United States Courthouse, Seattle, Washington 98104.

Equal Opportunity Employer.

## DISTRICT COURT IN VIRGIN ISLANDS SEEKING FEDERAL PUBLIC DEFENDER

The Federal Public Defender maintains offices in St. Thomas and St. Croix, Virgin Islands, with a full-time staff including three attorneys, two investigators, and two secretaries.

The office is operated under the authority of 18 U.S.C. §3006A(h)(2)(A) and the District's Criminal Justice Act Plan.

Candidates for the position of Federal Public Defender should have five years of trial experience, and be admitted to the Bar of the highest court of any state or territory or federal district court.

Applications should be directed to: Honorable Almeric L. Christian, Chief Judge, United States District Court, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00801.

Equal Opportunity Employer.

## VIDEOCASSETTES OF SEMINARS ON 1978 BANKRUPTCY ACT AVAILABLE

Since the passage of the 1978 Bankruptcy Reform Act, the Federal Judicial Center has sponsored a series of seminars to familiarize bankruptcy judges with the Act's provisions. It has been suggested that videocassettes of these lectures, which are available from the Center, may also be useful to federal appellate judges called upon to interpret the Act.

For a list of the cassettes and their subjects, please contact Robert Tune, Director of the Center's Media Services Unit, 1520 H Street, N.W., Washington, D.C. 20005.

## YCA INSTITUTIONS DESIGNATED

Pursuant to a decision by the Tenth Circuit Court of Appeals in *Watts v. Hadden*, 651 F.2d 1354 (10th Cir. 1981) and four U.S. District Court decisions (including the lower court decision in *Watts*), the Bureau of Prisons has designated the Bureau's facilities at Englewood, Colorado and Morgantown, West Virginia as institutions that will house only offenders sentenced under the Youth Corrections Act (YCA). Previously, YCA inmates had been placed in separate housing units at institutions around the country. The court decisions noted above held that the YCA required completely separate institutions for persons sentenced under that Act.

Englewood will house all male YCA offenders whose release residence is west of the Mississippi River. Female YCA offenders will go to Morgantown, as will minimum security males from east of the Mississippi. If the number of 'CA inmates requires a third institution, Otisville, New York will also

See YCA, p. 9

COUNCILS from p. 4

serve simultaneously, unless at least one district judge from each district within the circuit is already serving on the council.

Listed below is a brief outline of the new membership of the councils and how they are designated.

| Circuit | Composition of Council* | Designation |
|---|---|---|
| 1 | All circuit judges and three district judges | One district judge from Massachusetts, one from Puerto Rico, and one to be rotated among the other three districts (Maine, New Hampshire and Rhode Island) beginning with the most senior in service. |
| 2 | All circuit judges and four district judges | One district judge from the Southern District of New York, one from the Eastern District of New York, one to alternate between the Western and Northern Districts of New York, and one to alternate between the districts of Vermont and Connecticut. |
| 3 | All circuit judges and five district judges | One district judge each from the districts of Delaware, New Jersey, the Eastern District of Pennsylvania, the Middle District of Pennsylvania, and the Western District of Pennsylvania. |
| 4 | The circuit chief judge, four circuit judges and four district judges | One circuit judge is to be from each of the states within the circuit (other than the state in which the chief judge is officially stationed), the first judges to serve being those with the greatest seniority. Following their initial terms the offices shall rotate in order of seniority. There will be four district judges (no two of whom shall be from the same district) selected or designated by election or otherwise as may be determined by a majority of the district judges in the circuit. |
| 5 | All circuit judges and three district judges | To be designated by the district judges with one district judge from each of the three states encompassed within the circuit (Texas, Louisiana, Mississippi). |
| 6 | All circuit judges and five district judges | Of the five district judges serving, four of them shall be chief judges, senior in date of commission, who have not previously served as a member of the council, from each of the four states in the circuit (Michigan, Ohio, Kentucky and Tennessee). The other district judge is to be chosen by the District Judges Association of the Circuit, but this judge cannot be from the same district already represented by one of the other four. |
| 7 | All circuit judges and four district judges | Of the four district judges, one shall be the district court representative to the Judicial Conference of the United States and the other three are to be from a district in each of the three states in the Circuit (Illinois, Wisconsin and Indiana). In each state the district court representative will rotate from district to district, and will be selected by the district judges of that district. |
| 8 | All circuit judges and three district judges | One of the district court judges shall be the district court representative to the Judicial Conference of the United States. The other two district judges are to be selected by the active circuit judges. |
| 9 | Five circuit judges and four district judges | The circuit judge members shall be (a) one circuit judge from each of the three administrative units serving in turn on the basis of seniority, beginning with the first judge junior to the judge most senior presently serving on the Executive Committee of the court from the particular administrative unit; and (b) one of the three judges representing the administrative units on the Executive Committee serving in turn on the basis of seniority; and the Chief Judge of the Circuit.<br><br>The district judge members will consist of two members of the Conference of District Court Chief Judges, to be selected in order of their seniority in service as chief judges; the Ninth Circuit district representative to the Judicial Conference of the United States; and the President of the District Judges Association. |
| 10 | Five circuit judges and two district judges | The circuit judges shall be the Chief Judge of the Circuit, the active circuit judge most junior in service, the active circuit judge second senior in service, the active circuit judge next senior to the circuit judge most junior in service, and the active circuit judge third senior in service. The two district judges shall be the active district judge senior in service among all of the active district judges of the circuit and the district judge most junior in service among all such judges, who have not previously served on the council. |
| 11 | All circuit judges and three district judges | The district judge membership shall be on a geographical basis, with one member from each of the states (Georgia, Florida, Alabama). The district judge judicial council member from each state shall be designated by the chief district judge in that state. The district judge member may be, but is not required to be, a chief district judge. |
| D.C. | All circuit judges and six district judges | The six district judges are to be designated by agreement among all the active district court judges currently in service on this Court. |

* "All" judges signifies all those in regular, active service.

## MONOGRAPH ON "BLACK LUNG" ACT'S LEGAL ISSUES AVAILABLE

The Center has recently published "The Black Lung" Act: An Analysis of Legal Issues Raised Under the Benefit Program Created by the Federal Coal Mine Health and Safety Act of 1969 (as Amended)." This Education and Training Series monograph by Professor Ernest Gellhorn of the University of Virginia Law School analyzes the issues that may arise on judicial review, medical evidence that may be presented, "proof of total disability," and various causation issues. Professor Gellhorn also considers the act's legislative history and possible changes that may be indicated by recent developments. The administrative procedures established under the legislation are also analyzed.

To receive a copy, please contact the Center's Information Service, 1520 H Street, N.W., Washington, D.C. 20005-1081 or call 202/FTS 633-6365. Enclosure of a self-addressed gummed label, which need not be franked, will expedite shipment.

## THE SOURCE

The Information Service of the Federal Judicial Center

*The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only those entries appearing in bold are available from the Federal Judicial Center.*

Congress v. The Court. Irving R. Kaufman. New York Times Magazine, September 20, 1981.

Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and D.C. Circuits. J. Woodford Howard, Jr. Princeton University Press. 1981.

The Developing Concept of an Administrative Court. Ronald Marquardt and Edward M. Wheat. 33 Ad. L. Rev. 301 (Summer 1981).

The Economics of Justice. Richard A. Posner. Harvard University Press. 1981.

The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is The "Clearly Erroneous' Rule Being Avoided? John S. Nangle. 59 Wash. U. L. Q. 409-429 (1981).

The Expanding Influence of the Federal Magistrate. Thomas J. Platt. 14 J. Mar. L. Rev. 465-489 (Spring 1981).

How Courts Govern America. Richard Neely. Yale University Press. 1981.

Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Edward D. Re. 8 N. Ky. L. Rev. 221 (1981).

**The Speedy Trial Act of 1974 Title I—Time Limits and Exclusions: Testimony before the House Judiciary Subcommittee on Crime. Kenneth A. Caruso. U.S. Department of Justice. October 6, 1981.**

**The View From An Inferior Court. Carl McGowan. Speech before the California State Bar Association. October 12, 1981.**

NOTEWORTHY from p. 2

tion growth in 1981 will exceed the record set in 1975. The report also shows that the number of female inmates rose 22 percent by midyear 1981.

The Bureau of Justice Statistics has also announced that there were more people on death row at the end of last year than at any time since recordkeeping began in 1930. Last year 187 defendants were sentenced to death in the United States and on December 30th, 30 states were holding 714 prisoners who had been sentenced to death. Thirty-six states had a death penalty law at the end of 1980. The Bureau noted that 76 percent of the prisoners on death row were held in southern states; 192 of the total were held in Florida and Texas alone. It also was noted that 90 percent of all those executed since 1930 were black.

* * * * *

Bills to create a new federal appeals court to hear both patent cases and claims against the government cleared both the House and Senate Judiciary Committees last month. On October 14, the House Committee approved H.R. 4482 and on October 20 the Senate Committee cleared S. 1700; both bills would merge the appellate division of the Court of Claims with the Court of Customs and Patent Appeals to create a new U.S. Court of Appeals for the Federal Circuit. The court would have nationwide appellate jurisdiction of Patent and Trademark Office decisions and district court decisions in patent and trademark cases as well as of cases involving tort, contract and other claims against the United States. Additionally, the bills would replace the current trial division of the Court of Claims with a new Article I tribunal, the U.S. Claims Court. The new body would be empowered to grant injunctive and declaratory relief.

* * * * *

The Administrative Office has announced that Michael Remington has joined the staff of its Legislative Affairs Office. Mr. Remington is thoroughly familiar with the federal judiciary, having served for the last four years as Counsel to Congressman Kastenmeier's Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee.

* * * * *

**Correction.** Last month it was reported that the D.C. preventive detention statute which forms the basis of proposed federal bail legislation was held constitutional by the federal D.C. Circuit sitting en banc. In fact, that statute was upheld by the Court of Appeals of the District of Columbia sitting en banc, *United States v. Edwards*, 430 A.2d 1321 (1981).

YCA from p. 7

be designated a YCA facility.

The target date for implementation of the separate facilities and for the transfer of current YCA inmates is May 1, 1982. Those minimum security YCA offenders who are serving sentences as of May 1 will be asked to state a preference as to whether they wish to be transferred to a YCA institution or whether they wish to remain where they are. The sentencing court will also be consulted before a decision is made to transfer those inmates.

## INQUIRY ON FEDERAL RULEMAKING PROCESS PUBLISHED

The Center has recently published *Federal Rulemaking: Problems and Possibilities*, by Winifred R. Brown. This report builds upon several years of Center inquiry into the federal court rulemaking process, an inquiry begun at the suggestion of Chief Justice Burger in his 1979 State of the Judiciary address. At that time, the Chief Justice briefly reviewed the history of the federal rulemaking process, noting the various items of controversy surrounding it, especially the continued involvement of the Supreme Court. He said that "perhaps the time has now come to take another look at the entire rulemaking process. There is much to be said, pro and con, concerning the present involvement of the Supreme Court as a court," and he thus requested the Center and the Judicial Conference "to study this problem in light of 40 years of experience."

In light of that request, this report is not an overall assessment of the rulemaking process. Rather it is an effort to identify those aspects of the process that have been subject to criticism and to review the proposals advanced to improve them. These areas include, in addition to the role of the Supreme Court, the openness and efficiency of the process, the degree of congressional involvement, the availability of information on how and why specific rules are proposed, and the opportunity for public participation in the rulemaking process.

Copies of the report are available from the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005-1081; 202/FTS 633-6365. Enclosure of a gummed, self-addressed label (which need not be franked) will expedite shipment.

EXPERIMENTATION from p. 1

harm or waste of resources that can come from "reforms" whose impact is never carefully assessed. Especially when human subjects are involved, however, the differential treatment necessary for a controlled experiment presents problems of fairness, which are compounded in legal institutions with their promise of equal protection.

The Committee's report analyzes various factors involved in such experiments, including disparity of treatment, privacy and confidentiality of research data, problems of necessary deception of participants, and the dilemma faced by those who feel they must either adopt a program without resolving uncertainties about its consequences, or forgo a program that might have improved the operation of the system.

In addition to the standard distribution to federal court and law school (government depository) libraries, the report is being sent to the chief judges of the federal circuit and district courts. Other judges and United States Magistrates may request a copy from the Center's Information Service. Copies are also being sent to the offices of the circuit executives, clerks of court, and chief probation officers. As noted above, the report is also for sale by the Government Printing Office. In requesting a copy, please reference the stock number provided above.

*Members of the Center's Advisory Committee on Experimentation in the Law: front row (left to right), Alexander M. Capron, Alvin J. Bronstein, Chief Judge Edward D. Ree (Chairman), Dean Norman Redlich, Chief Judge Wilfred Feinberg, and Professor Paul A. Freund; back row (left to right), Professor Gerald Gunther, Jane Frank-Harman, Jerome J. Shestack, Professor June Louin Tapp, Professor Alasdair MacIntyre, and Judge Joseph T. Sneed. Missing is Judge Abraham D. Sofaer.*

NEJELSKI from p. 6

Thomas H. Reese, the Circuit Executive in the Fifth Circuit since 1972, is now the Circuit Executive for the newly created Eleventh Circuit with headquarters in Atlanta, Georgia.

The vacancy in the Fifth, caused by this transfer, was filled by C. Raymond Judice; however, health reasons compelled Mr. Judice to return to Texas, leaving this position vacant. Lydia G. Comberrel is acting Circuit Executive in the Fifth.

# PERSONNEL

## NOMINATIONS

Richard J. Cardamone, U.S. Circuit Judge, CA-2, Oct. 1
Robert D. Potter, U.S. District Judge, W.D. NC, Oct. 1
Emmett R. Cox, U.S. District Judge, S.D. AL, Oct. 14
Cynthia H. Hall, U.S. District Judge, C.D. CA, Oct. 14
Clarence A. Beam, U.S. District Judge, D. NE, Oct. 14
Jesse E. Eschbach, U.S. Circuit Judge, CA-7, Oct. 20
John B. Jones, U.S. District Court, D. SD, Oct. 20
James C. Cacheris, U.S. District Judge, E.D. VA, Oct. 20
Richard A. Posner, U.S. Circuit Judge, CA-7, Oct. 27

## CONFIRMATIONS

H. Franklin Waters, U.S. District Judge, W.D. AR, Oct. 21
William L. Garwood, U.S. Circuit Judge, CA-5, Oct. 21
Hayden W. Head, Jr., U.S. District Judge, S.D. TX, Oct. 21
James R. Nowlin, U.S. District Judge, W.D. TX, Oct. 21

## APPOINTMENTS

Roger J. Miner, U.S. District Judge, N.D. NY, Sept. 28
John C. Coughenour, U.S. District Judge, W.D. WA, Sept. 28
Robert F. Chapman, U.S. Circuit Judge, CA-4, Oct. 2
Conrad K. Cyr, U.S. District Judge, D. ME, Oct.2
Henry R. Wilhoit, Jr., U.S. District Judge, E.D. KY, Oct. 23
Hayden W. Head, Jr., U.S. District Judge, S.D. TX, Oct. 27
Joseph M. McLaughlin, U.S. District Judge, E.D. NY, Oct. 30
H. Franklin Waters, U.S. District Judge, W.D. AR, Oct. 31

## CA-9 SEEKING DIRECTOR, OFFICE OF STAFF ATTORNEYS

**Position:** Director of the Office of Staff Attorneys in the United States Court of Appeals for the Ninth Circuit, to be filled in Summer 1982. The Director recruits, trains and supervises the work of the Court's 30 attorney legal staff (including law clerks), acts as counsel to the court on a variety of legal and administrative matters, and participates in the planning, implementation and evaluation of court administration programs.
**Qualifications:** Five or more years of progressive legal or administrative responsibility and familiarity with the federal appellate process. Law degree and bar admission required. Clinical teaching or litigation experience desirable. Law Professors on leave preferred.
**Terms:** The appointment is for a limited term of two to three years. Starting salary up to $46,685, depending on experience.
**To Apply:** Send resume, references and brief analytical writing sample to Chief Judge James R. Browning, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 547, San Francisco, CA 94101. For further information, write Prof. Eric Neisser, Director, Office of Staff Attorneys at the above address or call him at (415) 556-7361.
**Equal Opportunity Employer:** Minority, female and handicapped applicants actively recruited.

James R. Nowlin, U.S. District Judge, W.D. TX, Nov. 6
William L. Garwood, U.S. Circuit Judge, CA-5, Nov. 9
John E. Sprizzo, U.S. District Judge, S.D. NY, Nov. 10

## SENIOR STATUS

James B. Parsons, U.S. District Judge, N.D. IL, Aug. 30
Thomas E. Fairchild, U.S. Circuit Judge, CA-7, Aug. 31
Carl McGowan, U.S. Circuit Judge, CA-DC, Aug. 31
Newell Edenfield, U.S. District Judge, N.D. GA, Sept. 1
R. Dixon Herman, U.S. District Judge, M.D. PA, Sept. 25

# AO/FJC calendar

Nov. 12-13 Sentencing Institute for the Second Circuit
Nov. 16-18 Workshop for Circuit Court and National Court Clerks
Nov. 18-20 Judicial Conference Advisory Committee on Bankruptcy Rules
Nov. 18-20 Seminar for Bankruptcy Judges
Nov. 18-21 Defender Investigators Seminar on Developing Evidence in the Defense of Criminal Cases
Dec. 2-5 Workshop for Chief Deputy Clerks of District Courts

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*Foley Litigation Concluded*

## BANKRUPTCY JUDGES, MAGISTRATES AND OTHERS FOUND ENTITLED TO NO MORE THAN 5.5 PERCENT RAISE FOR FY '80

What is likely to be the final chapter in the salary litigation of *Foley v. Reagan* closed on November 16th when Chief Judge John Smith ruled that FY '80 salary adjustments for U.S. Bankruptcy Judges, Magistrates and other senior judicial branch personnel could constitutionally be reduced from an original level of 7.02 or 12.9 percent to 5.5 percent. Although these non-Article III personnel lost their claim for the greater increase, the resolution of *Foley v. Reagan* (originally captioned *Foley v. Carter*, civil action #79-3603 (D. DC)) means they will now receive in a lump sum all the previously withheld increases attributable to the 1980 Fiscal Year.

**Background.** The controversy began at the commencement of FY 1980 on October 1, 1979. Under the pay adjustment statutes, government workers became entitled to a 7.02 percent adjustment proposed by the President when Congress failed to disapprove this proposal. Bankruptcy Judges and Magistrates became entitled to this increase on October 1. Other judicial branch personnel in addition became entitled to a 5.5 percent increase suspended from the previous fiscal year. For those personnel, the compounded overall increase of 12.9 percent went into effect at the beginning of the first applicable pay period on October 8, 1979.

On October 12, 1979, however, Public Law 96-86 was enacted, reducing this increase to 5.5 percent for senior government officials, including Bankruptcy Judges, Magistrates, Clerks of Court and Circuit Executives. This law additionally stated that any employee's acceptance of the 5.5 percent increase would be "in lieu of the 12.9 percent due." Later, two bulletins issued by the President through the Office of Personnel Management attempted to give retroactive effect to P.L. 96-86 for the period beginning October 1.

To avoid any invocation of this forfeiture provision, Administrative

See LITIGATION, p. 7

## REVISED POLICY OF CENTER SUPPORT FOR INSTITUTE FOR COURT MANAGEMENT COURSES

The Board of the Federal Judicial Center has approved a revised policy of Center support for federal court employees who wish to take Institute for Court Management courses that comprise the various components of ICM's Court Executive Development Program (CEDP). The Board adopted the new policy in the hope of encouraging federal court employees with clear management potential to gain high-level management training by completing the CEDP.

Henceforth, and subject always to the availability of funds, the

See ICM, p. 6

*Legislative Update*

## COURT OF APPEALS FOR THE FEDERAL CIRCUIT PASSED BY HOUSE; CRIMINAL CODE REVISION APPROVED BY SENATE JUDICIARY COMMITTEE; OTHER ACTION

Despite the time and attention spent by Congress on the federal budget, several bills of interest to the judiciary have been introduced and there has been some action on pending bills.

**Court of Appeals for the Federal Circuit.** On November 18, the House passed H.R. 4482 merging the Court of Claims and the Court of Customs and Patent Appeals into a single, 12-judge appellate court, the Court of Appeals for the Federal Circuit. The bill also creates a new trial court, the U.S. Claims Court, to handle cases now heard by the trial division of the U.S. Court of Claims. A similar bill (S. 1700) has been reported out of the Senate Judiciary Committee (S. Rept. No. 97-275) and awaits further action.

**Criminal Law and Sentencing.** The Senate Judiciary Committee has approved The Criminal Code Revision Act of 1981, introduced by Senator Strom Thurmond, to revise and update the federal criminal laws. This bill (S. 1630) is the third criminal code bill ap-

See LEGISLATION, p. 3

## INDIVIDUAL RETIREMENT ACCOUNTS NOW AVAILABLE TO ALL JUDICIAL BRANCH EMPLOYEES

*The following item has been prepared by the General Counsel's Office of the Administrative Office in response to the many questions it has received on a matter of interest to all Judicial Branch employees.*

Effective January 1, 1982, any individual who is receiving salary or wages will, pursuant to the Economic Recovery Tax Act of 1981, be allowed each year a deduction from his or her gross income for contributions to an individual retirement account (IRA). This includes judges and all Judicial Branch employees.

An IRA is a special trust fund which can be established only with a bank or certain other kinds of financial institutions (26 U.S.C. §408). It requires execution of a trust agreement - and that agreement must be one approved by the Internal Revenue Service.

You cannot take the deduction on your tax return for 1981. This new provision affects only tax years commencing in 1982.

There are some significant limitations with respect to these accounts. First of all, an individual who has attained age 70 1/2 before the close of the taxable year is not eligible to take such a deduction. The second limitation is that the yearly deduction may not exceed $2,000. (If, however, you received wages or salary of less than $2,000, you will be able to deduct the full amount of the compensation *if* it is all placed in an individual retirement account.)

If your spouse works, he or she can establish his or her own IRA. If your spouse does not work, you may set up a spousal IRA as well as your own. But the total yearly deduction for both cannot exceed $2,250 and you have to put at least $250 of the total into yours or your spouse's account.

There are numerous alternative vehicles for the individual retirement accounts. The most common are banks, federally insured credit unions, savings and loans, and some mutual funds. A third alternative would be a special trust account with a brokerage firm. One may also use the funds to buy an individual retirement annuity from an insurance company. The United States Government issues special retirement bonds, but they yield low interest rates.

There is one additional significant limitation on IRA's: the investment of individual retirement accounts in collectibles is now allowable. Collectibles are defined as art, rugs or antiques, metals, gems, stamps, coins, alcoholic beverages, or any other tangible personal property specified by the Secretary of the Treasury.

When the funds have been placed in the individual retirement account, the earnings of such monies are not taxed to you until the monies are withdrawn. In the event that the money is withdrawn before the individual reaches the age of 59 1/2 years, a 10 percent penalty tax must be paid. In addition, any funds withdrawn are classified as ordinary income and are taxed as such. If you become permanently disabled, and cannot work, the penalty is not applicable.

When you reach retirement age (59 1/2 or later), it is not necessary to withdraw all of the amounts at once, although you can do so. But there is a requirement that withdrawals *must* begin by age 70 1/2 on a schedule that provides for withdrawal over one's life expectancy and the life expectancy of one's spouse, if any.

There are special rules for the tax treatment of these sums upon the death of the individual who has made the contributions to the individual retirement account. These amounts are not includible in the estate of the decedent unless your account names your estate as beneficiary. Under that circumstance estate taxes could be payable if the total estate is large enough. Normally the amount in the IRA will be distributed to the beneficiary either as a lump sum or as an annuity and will be taxed to that beneficiary as ordinary income, since tax was not paid on the amounts contributed. The beneficiary may elect, however, to treat it as his or her own IRA.

Since an individual must begin receiving the amounts in the individual retirement account by age 70 1/2 and cannot thereafter make contributions to the account, there are certain disadvantages to these arrangements for judges who continue to receive the salary of the office. Municipal bonds and capital gains could result in a more beneficial tax situation. However, any such decision must be examined carefully in light of all the individual's goals and needs. This is particularly true in view of the fact that you may set aside $2,000 each year, and the earnings of those amounts compound free of tax. The beneficiary receives these funds without their being included in one's estate. This could be a significant estate-planning tool, but very careful attention must be given to all the factors involved, including the other sources of income of the beneficiary. For further information call Diane P. Cole at the General Counsel's Office of the Administrative Office of the United States Courts, FTS/(202) 633-6127

The Third Branch

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts

## A HOLIDAY MESSAGE FROM THE CHIEF JUSTICE

As 1981 comes to a close, it is perhaps time to reflect on some of the problems we have faced in the performance of our Constitutional duties during the year. Our record is always subject to review by others - as it should be - but we may, I think, point to some positive accomplishments this past difficult year.

The year started with a new Administration and a good working relationship with the Executive Branch continues to our mutual benefit. There has been increasing momentum in filling judicial vacancies. As of early December, 34 new judges had been confirmed in 1981. An additional six were going through the Senate confirmation process, and 21 more were under review for Presidential nomination. Recruitment was underway to fill the 3 additional vacancies.

Congress is giving careful and thoughtful consideration to our needs. We have been invited and encouraged to provide comments from the Judicial Conference of the United States with a view to bringing about more effective administration of justice, and the Committees on the Judiciary have given careful attention to our views. Although history shows the Third Branch and the political branches have not always agreed on problems of administration, history also shows that, once Congress has spoken through legislation, the courts have responded with adjustment and compliance.

The fourth Brookings Institution-sponsored seminar was held in March 1981, bringing together key leaders of the three branches of government to discuss current and future issues affecting judicial administration. Thoughtful comment and suggestions from Members of both Houses at these meetings evidence a deep concern that the federal courts continue to function with sound procedures, with the most efficient technology available, and with well-trained personnel to bring this about, and that judges' efforts to improve procedures are acknowledged.

As for the Judicial Branch, all judges and supporting personnel are to be commended for continued dedicated service, even as we face increasingly heavy caseloads. A special note of appreciation is in order for the many Senior Judges who continue to serve. Without their dedication over many years, the federal courts may well have foundered under abnormal dockets and long delay in providing additional judges to meet constant enlargement of our jurisdiction. All judges and staffs are putting in long hours and hard work at personal sacrifice.

To each of you — and to our colleagues in the state courts — I express my personal thanks. As Chairman of the Judicial Conference I again welcome the many new judges who have come into the system. They join a corps of individuals committed to the cause of justice, who are making a history that will reflect high credit upon an institution now almost 200 years of age.

Mrs. Burger and my colleagues on the Court join me in extending to each of you our warm and sincere wishes for a happy Holiday Season.

Merry Christmas
The Chief Justice

LEGISLATION from p. 1

proved by the committee since 1977. However, it omits many of the more controversial issues such as the death penalty, gun control and federal prosecutions during labor disputes, that its sponsors feared would complicate its chances for passage. See *The Third Branch,* October 1981.

Two criminal code revision bills are now pending in the Criminal Justice Subcommittee of the House Judiciary Committee. One (H.R. 1647) is identical to the bill (H.R. 6915) that was approved last year by the House Judiciary Committee. A similar bill (H.R. 4711) is also pending. Hearings have continued on those bills.

In addition to the comprehensive criminal code revision legislation, several other bills dealing with criminal law and procedure have been introduced. Congressman Harold S. Sawyer has introduced the Violent Crime Control Act of 1981 (H.R. 4898), which seeks to implement many of the recommendations of the Attorney General's Task Force on Violent Crime. See *The Third Branch,* September 1981. The bill includes provisions for changes in the law regarding assassinations, insanity defense modifications, exclusionary rule modifications, the creation of a U.S. Sentencing Commission to set sentencing guidelines, restrictions on habeas corpus filings and grants to assist the states in improving corrections facilities.

The bill also provides for mandatory sentences for the use of firearms in the commission of a felony, with the provision that the charge is not subject to plea bargaining, that no probation or parole may be given and that the sentence must run concurrently with that for the underlying felony. This is similar to legislation introduced by Congressman Sawyer earlier in the session in the form of

See LEGISLATION, p. 4

LEGISLATION from p. 3

two bills (H.R. 1444 and H.R. 4874).

Finally, the Violent Crime Control bill contains provisions that would amend the Bail Reform Act of 1966 to permit the court to consider a defendant's "danger to the community" when deciding to impose bail or pretrial detention. This proposal is similar to other bills introduced earlier. Of particular interest is S. 1554 which has been approved by the Subcommittee on the Constitution and is now ready for consideration by the full Senate Judiciary Committee.

**Judicial Salaries.** A bill to avoid the situation whereby judicial salaries are raised because of any belated freeze on senior-level government salaries, such as occurred earlier this year (see *The Third Branch,* October 1981), has been introduced by Senator Jesse Helms. The Federal Judiciary Salary Control Act of 1981 (S. 1847) requires that the appropriation for the federal judiciary, including judicial salaries, be specifically authorized by Congress. The Supreme Court would be excluded from this process, in the words of Senator Helms, "not because it would be unconstitutional, but because it would obviate the possibility of undue congressional influence over fundamental judicial policy and decisions." The bill also specifically provides that judges, of the Supreme and other courts of the United States, shall receive no increase in compensation during their service or retirement except as specifically provided by separate Act of Congress authorizing the increase and stating the amount thereof.

**Judicial Survivors Annuities.** The "Judicial Survivors Annuities Reform Act of 1981" was introduced by Congressman Robert W. Kastenmeier on October 15 (H.R. 4763) and by Senator Strom Thurmond on November 19 (S. 1874). Although not identical, both bills would make more equitable the benefits to children and spouses of deceased federal judges. Both bills would increase the factor used to compute spouses' benefits and raise the ceiling on maximum amounts of annuities. Both bills also create a minimum annuity of 30 percent of the judicial salary, which will vest after 18 months of creditable service.

Children's benefits will also increase depending upon the salary of the office. The judicial contribution to the plan would increase under both bills to 5 percent of the salary. The plan would continue to be voluntary.

**Bankruptcy.** Senator DeConcini has introduced S. 1788, the Bankruptcy Judges Retirement Act of 1981, to provide improved retirement benefits to bankruptcy judges. The bill provides that a bankruptcy judge may retire at age 70 after 10 years of service; at age 65 after 15 years; if not reappointed after a term expires and the judge has 14 years of service; or at any time if permanently disabled. The compensation formula is based on different evaluations of service before and after enactment of the new Bankruptcy Code. A bankruptcy judge would receive a fourteenth of the salary of the office for each year he has served as bankruptcy judge after September 30, 1979, the effective date of the code, and one twenty-eighth of the salary of the office for each year served before October 1, 1979.

In introducing the bill, Senator DeConcini remarked that he hoped it would "serve as a catalyst for discussion and action on the retirement needs of our other federal judicial officials who are equally worthy."

Congressman Billy Lee Evans of Georgia has introduced legislation to amend the Bankruptcy Reform Act of 1978 to give the bankruptcy court power to dismiss a Chapter 7 proceeding in cases where the debtor has the ability to pay a reasonable portion of his debts from anticipated future income. The bill also introduces standards for repayment in Chapter 13 proceedings and includes provisions "to reduce inefficiency occurring under the new code."

**Judicial Organization and Filing Fees.** Congressman Robert W. Kastenmeier has introduced two bills of interest to the judiciary. The first is a bill (H.R. 4762) to establish an intercircuit tribunal of the United States Court of Appeals. The bill is cosponsored by Congressmen Rodino, Railsback and Butler and is described as an alternative to a National Court of Appeals. The tribunal would consist of between 14 and 22 circuit judges in active service or senior status who would be designated by the Chief Justice. This tribunal would have reference jurisdiction from the Supreme Court. All petitions for review would be routed to the Supreme Court and after a decision by the tribunal, a petition for certiorari could again be filed in the Supreme Court. The tribunal, in the view of its sponsors, "would be of enormous assistance to the High Court, especially in the area of resolving circuit conflicts and insuring national uniformity of the laws," without replacing the Supreme Court as the "ultimate tribunal."

Congressman Kastenmeier's second bill is to reduce the civil filing fees in federal court from $60 to $30. The fees were raised several years ago from $15 to $60 as part of the Bankruptcy Reform Act of 1978. In his remarks accompanying the introduction of the bill, Congressman Kastenmeier stated that he believed the increase to $30 over the 1978 fee of $15 was a more realistic reflection of the actual filing costs in civil actions and more accurately paralleled the rate of inflation.

**Other Matters.** On October 5, the House voted overwhelmingly

See LEGISLATION, p. 5

*King Committee Pilot Courts Active*

## COURTS PARTICIPATING IN CONTINUING LEGAL EDUCATION

In September 1979, the Judicial Conference endorsed recommendations stemming from the work of its Committee to Consider Standards for Admission to Practice in the Federal Courts, chaired by Judge Edward J. Devitt of Minnesota. One recommendation called for the courts to "support continuing legal education programs on trial advocacy and federal practice subjects and encourage practicing lawyers to attend." (See *The Third Branch,* October 1979.) At least eleven district courts are currently sponsoring continuing legal eduction programs on trial advocacy, including at least seven of the pilot courts for the Judicial Conference's Implementation Committee on Admission of Attorneys to Federal Practice. (This does not include the many federal judges who teach trial advocacy courses in law schools or other forums.)

Below is a status report on continuing legal education programs in these courts:

**Northern District of California.** A training program on federal practice, to commence this fall, is being developed by the Hastings College of Law in coordination with the court. Professor Barbara Caufield is currently interviewing judges to identify problem areas that should be included in the program; Chief Judge Robert Peckham expects that there will be significant emphasis on subjects relating to pretrial practice and procedures. The district court is also developing a peer counseling panel; attendance at the federal practice seminar will likely be one of the counseling options available to the panel.

**Southern District of Iowa.** Instead of the trial experience requirement recommended by the Devitt Committee, the court will require that, once admitted, an attorney complete at least six hours of continuing legal education in the federal practice area every two years. Additionally, an attorney seeking admission to the court can be excused from taking the federal practice examination, as recommended by the Devitt Committee, if he or she has completed six hours of continuing legal education in the preceding two years.

**Nebraska and Iowa Districts.** The federal courts in Nebraska and the Northern District and Southern District of Iowa (the latter a pilot court) this August sponsored together their first annual federal practice seminar. Developed by the courts' federal practice committees in cooperation with the Creighton University School of Law, the program covered both civil and criminal matters, such as civil procedure, grand jury practice, bankruptcy, evidence, and representing a criminal defendant. Lecturers included several U.S. Magistrates and Bankruptcy Judges, as well as two U.S. Attorneys and members of the local bar. Chief Judge Donald Lay of the Eighth Circuit addressed a luncheon gathering on "Advocacy: A View from the Bench."

**Northern District of Illinois.** This court has four continuing legal education programs to enhance attorney advocacy. First, to increase student awareness of federal procedures, several judges will be conducting criminal trials at each of the area law schools; seminars will follow each class's observation of a trial. Second, to expose practitioners to court processes in general, twenty-five lawyers at a time are introduced to the various court offices, and are walked through the "life of a civil case" from initial docketing in the Clerk's Office through the decision at the court of appeals. Third, the court and the Bar Association of the Seventh Federal Circuit will co-sponsor late in October a one-day sentencing seminar for defense counsel and Assistant U.S. Attorneys. Finally, courtrooms are being made available to individual law firms on weekends so that they may conduct simulated trials in actual settings as part of their own trial experience training.

**Western District of Michigan.** This court will sponsor a program of advocacy training. The Univer-

See EDUCATION, p. 6

LEGISLATION from p. 4

to extend the Voting Rights Act. The Senate bill extending the Act has been placed directly on the Senate calendar.

- The Senate Judiciary Subcommittee on the Constitution has concluded hearings on S. 1730 and S. 1751 amending the Freedom of Information Act.
- The House has passed H.R. 3963, amending the Contract Services for Drug Dependent Federal Offenders Act of 1978, to extend the period for which funds are authorized. This Act provides for a mechanism to examine convicted federal offenders who are released on parole or sentenced to probation to determine if they are drug users. It also provides for the monitoring and treatment of such users.
- Two bills have been introduced to provide for attorneys' fees in certain proceedings. H.R. 4839 would amend the Social Security Act to allow attorneys' fees in appeals following claims for supplementary security income benefits on the same basis as currently provided in the case of appeals involving claims for old age, survivors, and disability insurances. Another bill (H.R. 4857) would amend the Internal Revenue Code of 1954 to award court costs and certain fees to prevailing attorneys in civil tax actions.

EDUCATION from p. 5

sity of Michigan's Institute of Continuing Legal Education has agreed to develop and present a two-day program in early December on a pilot basis. The workshop will include a walk through the courthouse to introduce prospective practitioners to the various offices and activities in the court. Additionally, they will participate in small groups in moot trial performances (direct examination, motion argument, etc.). These performances will be videotaped and followed by a critique session.

**Eastern District of Michigan.** This court for some time has had an active continuing legal education program. For about four years, members of the local bar association, in coordination with the Institute for Continuing Education, have sponsored a two-day program on federal court practice and procedures for all applicants for admission to the court. Subjects include such topics as representing a client before a federal grand jury and "Where Does Plaintiff's Lawyer Sit and Other Courtroom Mysteries." The court alerts all attorneys who pass the state bar examination of the program's availability. Attendance is not a prerequisite to admission, but is considered desirable for prospective practitioners. Clerk John Mayer reports that about fifty percent of the applicants for admission participate.

**Northern District of Ohio.** The Western Division of this district has since 1979 required that those seeking admission to the court attend a one-day seminar on federal practice. Taught by volunteers from the local bar, the seminar is designed to acquaint attorneys with federal litigation procedures, especially the local rules of the court, and to assuage any fears that new practitioners may have about practice in the national courts. Although attendance is mandatory, there is no examination or other test, and participants are sworn into the court immediately following completion of the seminar. Magistrate James Carr, who helped initiate the program when he was a law professor at the University of Toledo, reports that the seminar has received a universally enthusiastic response.

**Middle and Western Districts of Pennsylvania.** In June, the Pennsylvania Bar Institute sponsored a one-day federal practice and procedure course for attorneys in both the Middle and Western Districts of Pennsylvania. Taught by federal judges, magistrates, and local practitioners, the seminar addressed topics such as federal jurisdictional issues, procedures before U.S. Magistrates, summary judgment, and the conduct of jury trials. Also prepared was a course manual reflecting current Pennsylvania and Third Circuit law on procedure and practice.

**Eastern District of Pennsylvania.** The Eastern District this June sponsored a one-day seminar on basic civil practice. The program included presentations by Clerk Michael Kunz, a description of the district's involvement in the pilot arbitration program, and lectures by several members of the court and local practitioners on issues such as management and control of discovery, motion practice, and conduct of jury trials.

The district had earlier presented a seminar on effective representation at the sentencing stage, designed primarily for federal defenders and other lawyers representing the indigent.

**District of Rhode Island.** This court administered a federal practice examination on June 13 to thirteen candidates for admission to the district court. It is not the first court to give an exam as a prerequisite for admission, however; the Southern District of Ohio and two divisions in the Western District of Texas have long imposed such a requirement. The Rhode Island court requires that all applicants attend a course on federal practice subjects given at night over a two-week period preceding the examination. The course and exam will be given twice a year—following the state bar examination, and after the admission of successful candidates to the Rhode Island bar.

**Appellate Training.** The appellate practice committee of the Tenth Circuit, the state bar of New Mexico, and the Litigation Section of the ABA last month sponsored a one-day program on federal appellate practice and procedure. The seminar discussed procedural and practical steps in filing both civil and criminal appeals, and included discussions on special motions and petitions as well as interlocutory appeals. A panel discussion on "Briefs, Oral Argument and the Kitchen Sink" concluded the program.

The Federal Judicial Center welcomes information about continuing legal education programs in other federal courts. Descriptive brochures, course outlines, or other materials should be sent to Alan Chaset, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

ICM from p. 1

Center will meet federal court employees' tuition costs for ICM workshops (five of which constitute Phase I of the CEDP) and for the research project and seminars that constitute Phase II of the Program. Moreover, the Center will meet CEDP participants' travel costs for the Phase II residential seminar, and both travel and subsistence costs for the final graduation seminar. As was previously the case, applicants for Center support at ICM must have their supervisor's certification that attendance would benefit the work of the office and the federal courts generally.

These new provisions continue

See ICM, p. 7

LITIGATION from p. 1

Office Director William E. Foley paid no salary increase to these officials during FY 1980. He did pay a 5.5 percent increase in FY 1981 because the forfeiture provision had expired with the end of the prior fiscal year. Adjustments for fiscal year 1980, though, had to await resolution of this suit.

**Holding.** In December, 1980, the Supreme Court in separate litigation ruled that the reduction of already effective salary increases was unconstitutional as to Article III judges. *Will v. United States,* 449 U.S. 200 (1980),(see *The Third Branch,* January 1981). Having had the *Foley* suit remanded from the District of Columbia Circuit for a ruling in light of the *Will* decision, Judge Smith then had to rule on the legality of such a reduction as to non-Article III personnel.

In a 16 page opinion, Judge Smith preliminarily rejected the President's contention that, following the expiration of FY 1980, Director Foley lacked standing to maintain the suit. He also rejected Mr. Foley's contention that Congress' passage of a supplemental appropriation for FY 1980 repealed P.L. 96-86. The earmarking by Congress of approximately $4.6 million to pay the full 12.9 percent increase should it become due, he said, "was an act of fiscal prudence during the pendency of this litigation, not a comment on its merits."

Judge Smith then ruled that the reduction did not violate the impairment of contracts clause (Article I, section 10), as incorporated into the Fifth Amendment. Unlike Article III Judges, he said, the rights of non-Article III personnel to sustained salary increases were purely statutory. He cited case law which established that, absent contractual or other guarantees, a statutory entitlement may be prospectively reduced without infringement upon due process. Thus, although the reductions were "troublesome," there was no constitutional entitlement to more than a 5.5 percent adjustment after October 12, 1979 through the balance of the fiscal year.

Judge Smith noted, however, that a different rule governed the attempted *retroactive* reduction of the adjustments. Citing several cases, he concluded, that "The right to a salary for work performed at the rate admittedly effective during the period when the work was performed is a right or property interest, a legitimate entitlement which qualified for protection against governmental interference under the Due Process Clause of the Fifth Amendment." He therefore held that the affected employees were entitled to the full increases for the period October 1 or 8, whichever was applicable, through October 12.

It is not expected that Director Foley or the Department of Justice, on behalf of the President, will appeal Judge Smith's decision.

The Administrative Office in the near future will be distributing checks paying in a single sum the larger adjustments due for the first few days of October 1980 as well as the 5.5 percent adjustment for the remainder of the fiscal year.

PERSONNEL from p. 8

John B. Jones, U.S. District Judge, D. SD, Nov. 18
Jesse E. Eschbach, U.S. Circuit Judge, CA-7, Nov. 24
James C. Cacheris, U.S. District Judge, E.D. VA, Nov. 24
Richard A. Posner, U.S. Circuit Judge, CA-7, Nov. 24
John H. Moore, II, U.S. District Judge, M.D. FL, Nov. 24
David V. O'Brien, U.S. District Judge, D. VI, Nov. 24
Clyde H. Hamilton, U.S. District Judge, D. SC, Nov. 24
Edward R. Becker, U.S. Circuit Judge, CA-3, Dec. 3
Jackson L. Kiser, U.S. District Judge, W.D. VA, Dec. 3
Robert G. Doumar, U.S. District Judge, E.D. VA, Dec. 3

ICM from p. 6

the basic Center policy that employees who receive Center support to attend unusually costly continuing education programs, especially if they lead to a certificate or diploma, must be expected to meet some portion of the costs themselves.

The Board, however, approved this change from the policy announced in the October 1978 *The Third Branch* in order to provide greater incentive for individuals to complete the Court Executive Development Program. Under the new policy, the Center's proportion of support for any CEDP participant increases as the participant moves through the program. Moreover, those for whom the Center provides tuition for ICM courses can take advantage of special reduced airfares and seek other ways of reducing their portion of the cost of attending the courses.

## APPOINTMENTS

Richard J. Cardamone, U.S. Circuit Judge, CA-2, Nov. 13
Paul A. Magnuson, U.S. District Judge, D. MN, Nov. 16
Robert D. Potter, U.S. District Judge, W.D. NC, Nov. 25
Lawrence W. Pierce, U.S. Circuit Judge, CA-2, Nov. 30
Emmett R. Cox, U.S. District Judge, S.D. AL, Dec. 2
John B. Jones, U.S. District Judge, D. SD, Dec. 5

## ELEVATIONS

Ben Krentzman, Chief Judge, M.D. FL, Oct. 19
Elsijane T. Roy, Chief Judge, W.D. AR, Oct. 31

## SENIOR STATUS

George C. Young, U.S. District Judge, M.D. FL, Oct. 19
Lansing Mitchell, U.S. District Judge, E.D. LA, Nov. 3
Paul X. Williams, U.S. District Judge, W.D. AR, Oct. 31

# PERSONNEL

## NOMINATIONS

John H. Moore, II, U.S. District Judge, M.D. FL, Nov. 4
Jackson L. Kiser, U.S. District Judge, W.D. VA, Nov. 4
John C. Shabaz, U.S. District Judge, W.D. WI, Nov. 4
Robert G. Doumar, U.S. District Judge, E.D. VA, Nov. 5
David V. O'Brien, U.S. District Judge, D. VI, Nov. 5
Clyde H. Hamilton, U.S. District Judge, D. SC, Nov. 13
Edward R. Becker, U.S. Circuit Judge, CA-3, Nov. 16
Alvin I. Krenzler, U.S. District Judge, N.D. OH, Nov. 17
Ralph K. Winter, Jr., U.S. Circuit Judge, CA-2, Nov. 18
Israel L. Glasser, U.S. District Judge, E.D. NY, Nov. 23
J. Owen Forrester, U.S. District Judge, N.D. GA, Nov. 24
Sam A. Crow, U.S. District Judge, D. KS, Nov. 24

## CONFIRMATIONS

Paul A. Magnuson, U.S. District Judge, D. MN, Oct. 29
Richard J. Cardamone, U.S. Circuit Judge, CA-2, Oct. 29
Robert D. Potter, U.S. District Judge, W.D. NC, Oct. 29
Lawrence W. Pierce, U.S. Circuit Judge, CA-2, Nov. 18
Emmett R. Cox, U.S. District Judge, S.D. AL, Nov. 18
Cynthia H. Hall, U.S. District Judge, C.D. CA, Nov. 18
Clarence A. Beam, U.S. District Judge, D. NE, Nov. 18

See PERSONNEL, p. 7



# AO/FJC calendar

Dec. 10-11 Judicial Conference Advisory Committee on Bankruptcy Rules
Dec. 14-19 Training Course in Investigative Techniques for Federal Defender Investigators
Jan. 4-5, 1982 Judicial Conference Subcommittee on Judicial Improvements
Jan. 7-8 Judicial Conference Subcommittee on Supporting Personnel
Jan. 7-8 Judicial Conference Advisory Committee on Civil Rules
Jan. 9-17 Trial Advocacy Training for Assistant Federal Defenders
Jan. 20-22 Judicial Conference Committee on Judicial Ethics
Jan. 20-22 Workshop for Judges of the Eighth and Tenth Circuits
Jan. 21-22 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 25-26 Judicial Conference Committee on Court Administration
Jan. 25-26 Judicial Conference Committee on the Judicial Branch
Jan. 25-27 Judicial Conference Committee on Administration of the Probation System

*THE THIRD BRANCH*

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