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THE THIRD BRANCH

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Operation of Parole Guidelines Explained By Commission Chairman Benjamin Baer

Benjamin F. Baer has spent more than forty years in the corrections field, serving in numerous and varied capacities. He began his career as a probation officer in Los Angeles and later served the state of California as associate warden of San Quentin Prison. He was also director of corrections for the state of Iowa and was appointed chairman of Minnesota's Youth Conservation Commission, the paroling agency for juvenile and youthful offenders. In 1972, Mr. Baer became a hearing examiner for the, then, U.S. Board of Parole and, ten years later, was appointed by President Reagan as a member (and as vice-chairman) of the U.S. Parole Commission. On March 24, 1982, he was designated by the president as chairman of the U.S. Parole Commission.

In the following interview, Chairman Baer provides an overview of the operation of the Parole Commission and discusses the role of the sentencing judge in the paroling process. Further, he relates Parole Commission efforts to reduce sentencing disparity and prison overcrowding.

Benjamin F. Baer

Please briefly describe the functions and operation of the Parole Commission.

The United States Parole Commission was created by Congress with the passage of the Parole Commission and Reorganization Act of 1976 (PCRA). That legislation replaced what had been the U.S. Board of Parole. There are now nine commissioners, appointed by the president and confirmed by the Senate for six-year terms. The president designates one of the commissioners as chairman, and, I might say, I'm proud that President Reagan designated me as the chairman in the early part of 1982. The chairman and the National Appeals Board—consisting of three commissioners, including the vice-chairman of the commission—are located in Chevy Chase, Maryland. Each of the other five commissioners is in charge of a regional office. The PCRA provides for five regions, which are headquartered in Philadelphia, Atlanta, Dallas, Kansas City, and San Francisco.

The Parole Commission has two basic functions. The first is to set

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1984 Summer Program: A Reminder

As explained in the December issue of *The Third Branch*, the Center's 1984 summer program for district and circuit judges will deal with the problems judges confront in the litigation of economic issues. Judges interested in attending the seminar, to be held July 9-13 on the campus of the University of Wisconsin Law School in Madison, should write to Kenneth C. Crawford, Director of Continuing Education and Training, Federal Judicial Center, 1520 H Street, N.W., Washington DC 20005. Letters should be received by January 30.

The seminar will feature small-group discussion of such matters as expert witnesses and taking judicial notice, and will give special attention to problems of statistical proof.

Workshop on Curtailing Discovery Abuse Sponsored by Center

Strong judicial management was a recurring theme when a small group of judges and lawyers met in November at the Federal Judicial Center to compare perspectives on discovery abuse, its effect on the cost of litigation, and what can be done to curtail it. Participants included thirteen federal judges, a state judge, several corporate counsel, a number of lawyers from large law firms and from the public interest bar, and several law professors. The Center videotaped the nine hours of proceedings and plans to produce one or more special video programs from these tapes.

In opening remarks to the workshop, the Chief Justice said that a common theme he hears in discussions about the courts is "the negatives that come out of abuse of pretrial procedures." The Chief Justice noted the utility of sanctions, where appropriate, to ensure compliance with the rules of procedure.

The workshop—designed to promote wide-ranging discussion—featured brief presentations and commentary on the recent amendments to the Federal Rules of Civil Procedure that took effect last

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national parole policy. Congress mandated that we do this, and provided that all nine commissioners meet at least once every quarter. Congress also mandated that we develop explicit parole policy guidelines. We have done that and we now revise those guidelines from time to time, as appropriate.

Let me explain the guidelines a bit if I might. They are made up of two major dimensions. On one dimension, we rate the offense on a severity scale from 1 to 8—1 being the least serious and 8 the most serious. On the other dimension, we evaluate the offender as to risk of recidivism. To do this, we developed an actuarial device called the "salient factor score." This device consists primarily of the person's prior criminal history. When we combine these two dimensions, the guidelines indicate a range of months, which represents the customary time to be served prior to parole for such offenders.

Our second function is to make parole release, supervision, and revocation decisions. We conduct parole hearings at the various federal institutions using hearing examiners, who work in panels of two. Before meeting with the prisoner, the panel reviews a great deal of information. The primary document considered is the presentence report that the probation officer has prepared for the court. Further, we may consider information and recommendations from the sentencing judge (AO form 235) or from the U.S. attorney (form 792).

At the hearing itself, the prisoner may have a representative of his or her choice. It may be a relative, a member of the prison staff, or retained counsel. After the hearing, the prisoner is excused and the two examiners confer and determine the panel's recommendation. They then call the prisoner back in and explain their recommendation and the reasons for it. They explain to the prisoner that the recommendation will be reviewed in the regional office by a regional commissioner who has the responsibility for making the actual decision. The prisoner is told that after review by the regional commissioner, a written notice will be sent providing the official decision and giving the reasons for that decision.

Included in that notice will be an explanation of the prisoner's appellate rights—a two-step process. The first appeal (actually a reconsideration) goes to the regional commissioner. If the decision is affirmed, the prisoner can then appeal to the National Appeals Board in Washington.

As evidenced at recent sentencing institutes and other seminars and workshops, resistance among judges as to the role of the commission and the function of the guidelines seems to be decreasing. Do you get the same impression? And if you do, to what do you attribute this change?

Yes, I do get the same impression. I attribute the change to a better understanding of the role of the commission as specified in the Parole Commission and Reorganization Act. The sentencing institutes and the seminars conducted by the Federal Judicial Center, particularly for new judges, have been most helpful. In these institutes and seminars, the "faculty" judges, such as Gerald Tjoflat and Jon Newman, have made clear the division of responsibilities between the courts and the Parole Commission. This has helped a great deal. Also, since the act has been in existence for seven years, there is now a significant amount of case law that makes clear the Parole Commission's responsibilities.

What role should your guidelines play for the judge when he or she is fashioning a sentence?

I think that the judge would like to know what our guidelines are likely to be before he or she makes a final decision. Knowing this may enable the judge to fashion an appropriate sentence. He or she must keep in mind that when Congress passed the

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CALENDAR

Jan. 5-6 Judicial Conference Committee on Administration of the Bankruptcy System
Jan. 9-10 Judicial Conference Committee on the Operation of the Jury System
Jan. 12-13 Judicial Conference Committee on Administration of the Probation System
Jan. 16-17 Judicial Conference Committee on the Administration of the Criminal Law
Jan. 18-19 Judicial Conference Advisory Committee on Civil Rules
Jan. 18-20 Workshop for Judges of the Eighth and Tenth Circuits
Jan. 19-20 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 23-24 Judicial Conference Committee on Court Administration
Jan. 23-24 Judicial Conference Committee on Intercircuit Assignments
Jan. 25-27 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 25-27 Judicial Conference Committee on Judicial Ethics
Jan. 27 Judicial Conference Ad Hoc Committee on the Media Petition (Cameras in the Courtroom)
Jan. 30-31 Judicial Conference Committee on the Budget

Court Security and Probation Chiefs Appointed

William A. Cohan, Jr. (r.) is the new chief of the AO's Office of Court Security; Donald L. Chamlee (l.) has been named chief of the Probation Division.

William A. Cohan, Jr. retired from his position as chief of probation on November 30, 1983, and has assumed, effective December 1, 1983, a new post as chief of the Office of Court Security in the Administrative Office of the United States Courts. In that capacity, he will focus on security issues, coordinating the AO's relations with the U.S. Marshals Service and overseeing the services provided by that agency.

Mr. Cohan has been in federal service since 1955, first as a U.S. probation officer in Cleveland, Ohio, and then, beginning in 1963, as assistant chief of the Division of Probation in Washington. He was appointed chief of probation on March 1, 1980. He has a bachelor's degree in social sciences from Ohio State University and has done graduate work in social administration.

Donald L. Chamlee has been selected to succeed Mr. Cohan as chief of the Probation Division. He has been with the federal probation service since 1961, serving as a U.S. probation officer in Sacramento, California, and then as assistant to the chief, assistant chief, and deputy chief of probation at the Administrative Office. Mr. Chamlee holds bachelor's and master's degrees in criminology from the University of California, Berkeley. He was a criminal justice fellow at Harvard University Law School from 1971 to 1972 and a visiting fellow at Yale Law School from 1974 to 1975. ■

University of Virginia Seeking Applicants For Graduate Program for Judges

The University of Virginia Law School is now accepting applications for the third class of its Graduate Program for Judges, which leads to the degree of Master of Laws in the Judicial Process. The program involves attendance at two six-week residential sessions in successive summers and completion of a thesis meeting law review standards of scholarship. The third class will enroll this summer.

The program is designed primarily for appellate judges of state and federal courts. The curriculum is interdisciplinary, comparative, and jurisprudential. According to Professor Daniel J. Meador, the program director, the overall objective of the program "is to equip American judges to deal more effectively with legal problems in the late 20th century."

The Board of the Federal Judicial Center has agreed to provide the program with funds to meet a portion of the expenses of up to six federal judges for the 1984-85 class; the program will meet the balance of their expenses. Covered expenses include travel, lodging, meals, tuition, and instructional materials.

Judges who wish to apply for the program or receive further information about it should call or write Professor Daniel J. Meador, University of Virginia Law School, Charlottesville, VA 22901; (804) 924-3947. The deadline for applications for the 1984-85 class is February 29, 1984.

Third Circuit Rules Magistrates May Enter Judgments

The United States Court of Appeals for the Third Circuit recently held that 28 U.S.C. § 636(c) does not violate Article III of the Constitution by authorizing a magistrate, on consent of the parties, to conduct trials and enter judgments in civil cases (*Wharton-Thomas v. United States*, No. 82-5555 (3d Cir. Nov. 23, 1983)). The court declined to follow the recent decision of a panel of the United States Court of Appeals for the Ninth Circuit, which held that section 636(c) is unconstitutional (*Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983), *argued en banc*, Nos. 82-3152, 82-3182 (Nov. 15, 1983)). The decision *en banc* of the Ninth Circuit is pending.

In *Wharton-Thomas* the Third Circuit panel disagreed with the *Pacemaker* panel's reading of the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which addressed the Article III issue with respect to bankruptcy judges. Noting the distinctions between the federal magistrates system and the bankruptcy court system, the court in *Wharton-Thomas* said that the analysis of *Northern Pipeline* was not applicable. The court found that unlike a bankruptcy judge, "the magistrate does not function independently of the district court but as an integral part of it."

The court in *Wharton-Thomas* reached its conclusion that section 636(c) does not violate Article III on the grounds that the reference to a magistrate is consensual; the district judge has the power to vacate the reference; the magistrate is appointed by the district judges, is a part of the district court, and is specially designated to try cases; and the parties have a right of appeal to a district judge or the court of appeals.

The issue raised in this case and in the *Pacemaker* case is pending in several other circuits. ■

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Parole Commission and Reorganization Act of 1976, it mandated the commission to set a national parole policy. A judge, by knowing what the commission's guidelines are likely to be, will not inadvertently set a term that is too long or too short. Thus, the guidelines can be used by the court as a reference point for the amount of time most prisoners are required to serve. If the judge still wishes to set a shorter sentence or a longer sentence, this is within his or her authority.

To what extent, if any, does fashioning of sentences by judges thwart your mission?

Each of us has a role to play. We believe it is significant that of the 9,000 initial hearings that we conducted in fiscal 1982, only about 6.5 percent had sentences with parole eligibility dates higher than the top of our guidelines. Recently, the commission has established a rule (28 C.F.R. § 2.62) under which certain cases may be recommended by us to the Bureau of Prisons for a possible petition to the court to reduce a minimum term (under 18 U.S.C. § 4205 (g)). In this connection, during the last several months, the Parole Commission has reviewed a large number of these cases (approximately 1,200). In approximately half of them, we agreed that there were good and sufficient reasons not to request any modification. Thus, at the present time the Parole Commission and court would appear to disagree as to minimum term very infrequently (in approximately 3 percent of all cases). So, in answer to your question, I do not think it thwarts our mission in any way. I think the system is working quite well.

A great deal has been written about the disparity in the sentences handed down by our courts. One of the commission's goals is to reduce such disparity. Could you explain how that is accomplished?

Promoting "equity" in sentences is one of our legislative mandates. This is accomplished by establishing the guidelines—guidelines that apply to prisoners sentenced in each of the ninety-four federal districts—so that a person who commits an offense in one part of the country is treated the same way as another person in another part of the country, assuming that his or her "risk potential" (that is, his or her parole risk) is the same. It is clear to us that the Congress, in directing us to establish guidelines and set a national parole policy, wanted us to promote equity. I believe that our guideline system, combined with the way the courts and the commission operate, has accomplished this goal to a large degree. In practice, the cooperation of the courts and the commission, and the results produced in terms of equitable prison terms, are much better than is frequently recognized.

"Promoting 'equity' in sentences is one of our legislative mandates."
—Parole Commission Chairman Benjamin F. Baer

What role does Administrative Office form 235 play in the Parole Commission process? Do you see many of these forms?

Unfortunately, these forms have not played as much of a role as we

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Positions Available

Chief Deputy Clerk, U.S. District Court for the Northern District of Texas (Dallas). Salary from $36,152 to $50,252. To apply, send form 171 and resume, including salary history, to Nancy Hall Doherty, Clerk, United States District Court, U.S. Courthouse, 1100 Commerce Street, Room 15C22, Dallas, TX 75242, by January 17, 1984. Address application to the attention of Pat Spears.

* * *

Director, Staff Attorneys' Office, U.S. Court of Appeals for the Fifth Circuit (New Orleans, Louisiana). Salary from $42,928 to $63,800. Requires degree from accredited law school with standing in upper third of class or law review experience. Also requires at least five years of legal experience and some management or demonstrable interpersonal skills. To apply, send resume and law school transcript to William E. Marple, Director, Staff Attorneys' Office, 600 Camp Street, New Orleans, LA 70130.

* * *

District Court Executive, U.S. District Court for the Northern District of Georgia (Atlanta). Serves as chief administrative officer of the court, responsible for management of nonjudicial functions and activities. Salary from $56,945 to $63,800, depending on education and experience. Requires proven management and administrative skills. Undergraduate degree required; graduate degree and/or legal training desirable. Appointment is subject to certification by the Board of Certification, U.S. Circuit Court of Appeals, Circuit Executive. To apply, send cover letter (not to exceed three pages) and resume to Hon. Charles A. Moye, Jr., Chief Judge, United States District Court, 75 Spring Street, S.W., Atlanta, GA 30335, by February 1, 1984.

* * *

Clerk of Court, U.S. District Court for the District of Minnesota (Minneapolis). Salary from $48,000 to $57,000, depending on education and experience. Requires ten years of administrative experience in public service or business; equivalencies of undergraduate, postgraduate, or law degree and experience may be substituted. To apply, send six copies of resume to Hon. Miles W. Lord, Chief Judge, United States District Court, Room 684, U.S. Courthouse, 110 S. Fourth Street, Minneapolis, MN 55401, by February 1, 1984.

EQUAL OPPORTUNITY EMPLOYERS

1983 Annual Report and Catalog of Publications of the FJC Available

The Federal Judicial Center has recently published its *1983 Annual Report* and its *1983 Catalog of Publications.*

The *Annual Report* summarizes the Center's activities during the past fiscal year and attempts to relate current projects with the work that has preceded. It is organized according to the various constituent units of the federal judicial system that the Center serves. The *1983 Catalog of Publications* lists reports of research and analysis done by or for the Federal Judicial Center and products of Center workshops and seminars. It is organized for ready reference by subject matter.

To receive a copy of these publications, write to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005, enclosing a self-addressed, gummed mailing label, preferably franked.

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August, the use of special masters to supervise discovery in massive cases, several particular proposals to stimulate disclosure of information and to enhance incentives to attorney cooperation in discovery, and, finally, steps that might be taken to further joint efforts by bench and bar in this area.

There was a general sense that the recent amendments to the rules of civil procedure and the reasons underlying their adoption are not well understood. Those amendments—primarily to rules 7, 11, 16, and 26—increased lawyers' responsibilities in significant pleadings, motions, and discovery requests, and broadened judges' responsibility to take early control of cases, to mitigate excessive and unproductive discovery activity—as well as discovery avoidance—and to channel discovery into alternative, more productive methods. "Federal practice committees" of lawyers and judges in a

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Fifth Circuit Appoints Circuit Executive

The Fifth Circuit Court of Appeals has appointed Lydia G. Comberrel as its circuit executive. Mrs. Comberrel is the first woman to serve as a circuit executive in the federal court system.

Before coming to the Circuit Executive's Office as first assistant in 1978, Mrs. Comberrel was a member of the circuit clerk's staff for sixteen years, where she was chief of the Administrative Support Division. She was sworn in to her new position by Chief Judge Charles Clark on September 19, 1983.

Mrs. Comberrel and her husband, Vincent, reside with their son, Chris, in Metairie, Louisiana. ■

Lydia G. Comberrel

President Signs Bill Establishing Commission On Bicentennial of the Constitution

A bill establishing a Presidential Commission on the Bicentennial of the Constitution was signed by President Reagan on September 29, 1983, becoming Public Law 98-101.

In anticipation of September 17, 1987, the 200th anniversary of the approval of the Constitution of the United States by the Constitutional Convention of 1787, the act contemplates a bicentennial celebration that will enable the citizenry to become educated in, to evaluate, and to rededicate itself to the principles enunciated by the founding fathers.

While the commission will initiate a limited number of projects itself, its more significant role will be to devise a master plan for the anniversary celebrations, to coordinate planned activities, and to advise other organizations and government entities wishing to participate in the bicentennial.

Senator Orrin G. Hatch (R-Utah), prime mover of the legislation to establish the commission, has said that the bicentennial celebration envisaged by this legislation will comprise more than "a series of pyrotechnic displays and parades." While these types of activities are useful in rekindling national pride, he said, the bicentennial described in the legislation "presents a once in a lifetime opportunity to correct...dire educational deficiencies" in the population regarding the nature and structure of our government.

The commission is to consist of twenty-three members, twenty of whom are to be appointed by the president. He will select four members from recommendations submitted by the Speaker of the House, four from recommendations of the president pro tem of the Senate, and four from recommendations of the Chief Justice. The Chief Justice, the president pro tem, and the Speaker, or their designees, will also be members. President Reagan will designate a chairman of the commission, and the commission will select a staff director.

Within two years of the effective date of the act, the commission is to submit to the president, both houses of Congress, and the Judicial Conference a comprehensive report with its specific recommendations for commemoration and coordination of the bicentennial and related activities.

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would like. These forms are not submitted very often and, frequently, when they are submitted, the court makes no comment in the space provided. I think that they could be helpful if a judge would tell us about any aggravating or mitigating factors in the case. If a judge has a recommendation with reference to our guidelines and suggests that we depart from those guidelines—as the law permits us to do—we need specific reasons for such recommendation. Also, if the offender has cooperated with the government, it would be helpful for the court to let us know whether that fact was taken into consideration when the judge meted out his or her sentence. We are looking for specifics, and I guess you will just have to ask the judges why they don't submit the forms more often. It is my opinion, however, that the current wording of the form could be substantially improved to facilitate such communication.

How do you handle the requests and suggestions articulated on this form? Do you adjust your decisions to accommodate judges' requests?

Serious consideration is given to the requests or suggestions made by the courts. We may adjust a decision and possibly deviate from our guidelines, but it is required that we have specific reasons for departing. On this matter, I would refer your readers to 28 C.F.R. § 2.19(d). That section states, among other things, that we welcome comments and recommendations from judges, defense attorneys, prosecutors, and other interested parties. It goes on to say that in evaluating these recommendations, we must consider "the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole . . . and the application of the Commission's guidelines." The section concludes by noting that no recommendation may be considered as binding upon our discretionary authority to grant or deny parole.

The commission, like many federal agencies, has had to adjust to budget cuts and austerity programs. What have the consequences been for you?

The consequences have been quite severe. All of our people have had to work very, very hard. I can tell you that many of our staff are really overworked. Also, we have had to request services from the probation service, which has been kind enough to help us with some local revocation hearings and dispositional revocation hearings (which are held in state institutions). We appreciate this help, but we should be conducting hearings with our own staff. We are requesting a supplemental appropriation in our 1984 budget as well as additional resources in our 1985 budget. Additional staff is needed because the number of hearings has increased substantially as the prison population has gone up rapidly.

Could you expand a bit on the use of probation officers to conduct parole revocation hearings? What problems, if any, have you encountered?

From time to time, probation officers—but not the one supervising the case—have been requested to conduct certain parole revocation hearings. We have been pleased both with their cooperation and with the quality of the hearings conducted. In the future, we may experiment in one or two districts with a procedure whereby a hearing examiner would conduct a combined preliminary interview and revocation hearing from the commission's regional office

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The report will include recommendations for publications, scholarly projects, conferences, films, libraries, exhibits, ceremonies, competitions, awards, and a calendar of major activities and events of the bicentennial. Each year thereafter, until the commission terminates on December 31, 1989, an annual report will be prepared. ■

PERSONNEL

Nominations

Elizabeth V. Hallanan, U.S. District Judge, S.D. W.Va., Nov. 8
James H. Wilkinson III, U.S. Circuit Judge, 4th Cir., Nov. 10
John R. Hargrove, U.S. District Judge, D. Md., Nov. 10

Confirmations

Thomas G. Hull, U.S. District Judge, E.D. Tenn., Nov. 9
Stanley S. Harris, U.S. District Judge, D.D.C., Nov. 14
Lenore C. Nesbitt, U.S. District Judge, S.D. Fla., Nov. 15
G. Kendall Sharp, U.S. District Judge, M.D. Fla., Nov. 15
George E. Woods, U.S. District Judge, E.D. Mich., Nov. 15
Jane A. Restani, U.S. Court of International Trade Judge, Nov. 15

Appointments

John P. Vukasin, Jr., U.S. District Judge, N.D. Cal., Sept. 26
Lenore C. Nesbitt, U.S. District Judge, S.D. Fla., Nov. 22
Thomas G. Hull, U.S. District Judge, E.D. Tenn., Nov. 23
George E. Woods, U.S. District Judge, E.D. Mich., Nov. 23
W. Eugene Davis, U.S. Circuit Judge, 5th Cir., Dec. 9

Elevation

Walter K. Stapleton, Chief Judge, D. Del., Dec. 23

Senior Status

Eugene A. Wright, U.S. Circuit Judge, 9th Cir., Sept. 15
Philip Nichols, Jr., U.S. Circuit Judge, Fed. Cir., Oct. 1
Morris E. Lasker, U.S. District Judge, S.D.N.Y., Oct. 3
James L. Latchum, U.S. District Judge, D. Del., Dec. 23

Death

Sherman E. Unger, Nominee, U.S. Circuit Judge, Fed. Cir., Dec. 3

No man in civil society can be exempted from the laws of it.

—John Locke

FILMS & TAPES

The Center has prepared for loan from its Media Services Library audiotapes of the opening session of the first meeting of the Ad Hoc Committee of the Judicial Conference on the American Inns of Court, held on October 26 and 27, 1983. Included on the tapes are welcoming remarks by Mark W. Cannon, administrative assistant to the Chief Justice, and presentations by Senior Judge A. Sherman Christensen (D. Utah), chairman of the ad hoc committee, Judge J. Clifford Wallace (9th Cir.), and Solicitor General Rex E. Lee. Additionally, the tapes contain informal comments by Chief Justice Warren E. Burger, who met at length with the committee.

The ad hoc committee has been asked to evaluate present Inns of Court programs as a means for improving the quality of advocacy, to encourage the establishment of additional Inns to broaden experimentation with the program, and to consider and make recommendations concerning long-range structuring for a national Inns of Court program.

These cassettes will be of interest both to judges presently participating in Inns programs as well as to those contemplating the establishment of new organizations. For further information about the Inns of Court program, readers should contact Judge Christensen, P.O. Box 11485, Salt Lake City, UT 84147-0485 (FTS 588-5164).

To order the tapes, call or write John Hawkins, Media Services, 1520 H Street, N.W., Washington, DC 20005 (FTS 633-6216). Please refer to identification number AJ-0586.

Employment Discrimination Monograph Published

Major Issues in the Federal Law of Employment Discrimination, a monograph and annotated bibliography prepared for the Center by George Rutherglen, professor of law at the University of Virginia, is now available.

In this publication the author provides an in-depth examination of the substantive and procedural provisions of title VII of the Civil Rights Act of 1964, the principal federal statute prohibiting discrimination in employment. Topics covered include claims of disparate treatment and of disparate impact and preferential treatment. Other federal statutes relevant to the concerns of title VII, such as the Reconstruction Civil Rights Acts, the Equal Pay Act, and the Age Discrimination in Employment Act, are also discussed.

The monograph also contains a 150-page bibliography of books, articles, comments, and notes concerning employment discrimination. This work complements Judge Charles R. Richey's *Manual on Employment Discrimination and Civil Rights Actions in the Federal Courts* (FJC rev. ed. 1983).

To receive a copy of this monograph, write to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked.

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by speakerphone with a probation officer (other than the one supervising the case) participating in the local facility as a second panel member.

The populations in our state and federal correctional facilities are growing rapidly; each month seems to bring new record highs. What are the consequences of this for the commission?

The consequences of this population increase for the commission are increased numbers of hearings, which create additional workload for the commissioners and staff—I've mentioned that before. The U.S. Parole Commission accepts some responsibility for dealing with the overcrowding problem. While parole boards in some states have declined to consider this problem, we feel strongly that a paroling authority is in a strategic position to help address the overcrowding problem. We believe the statutory mandate of the commission is broad enough to encompass this role. In the federal system, we have the information and the knowledge relative to risk and other factors that enable us to be selective and to protect the public, while at the same time taking into consideration prison overcrowding. I know from past experience the serious consequences that can develop in an institution when serious overcrowding exists. Given the critical nature of the problem, a coordinated effort on the part of all criminal justice decision makers is the only responsible course of action.

In reference to what we have done, I might begin by explaining that the commission was asked by the Bureau of Prisons and the Department of Justice to see if we could do something to help the overcrowding problem. That was last spring. We have done several things, one of which was to establish what is called a 4205(g) referral process. That section of the law permits the director of the Bureau of Prisons to petition the court to reduce an inmate's parole eligibility date. In the past, that has been used very sparingly.

There will be four steps involved in this process. First, the commission reviews the cases that have already received initial hearings. In the future this will be done as part of the initial hearing process. Second, cases that the commission believes can be safely released earlier than their minimum parole eligibility date will be referred to the Bureau of Prisons. Third, the bureau must then decide whether to refer the case to the sentencing judge. By law, Director Norman Carlson [of the Bureau of Prisons] must make the referral decision. Fourth, the case will go through the U.S. attorney to the court. While there will be a lot of people looking at these cases, we believe there is substantial potential for a considerable

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district—as established several years ago in the Eighth Circuit, for example—were suggested as one mechanism to promote understanding.

The diversity of the participants resulted in a range of perspectives rather than a settled consensus about each facet of discovery behavior and abuse. There was a general view that firm judicial control, which the recent rules amendments seek to promote, is appropriate and that the type of control should vary with the type of case. Overly intrusive judicial involvement serves neither the judge's calendar nor the best interests of the parties.

To the extent that there is more discovery than is needed, there was general agreement that its causes are systemic in some significant degree. Overextensive discovery can be seen as a product in part of law school teaching and, as some participants noted, a product in part of lawyers doing what they think is expected of them. Remedying such behavior may require changes in law school education. Judges, moreover, must make clear, on the bench and off, the behavior they expect of lawyers. Lawyers at the workshop pointed out that at least some elements of the bar are becoming aware of the growing concern over costly discovery and recognize that cost-conscious clients will not tolerate it.

A frequent point of reference was the effect of firm judicial control on clients' interests. One attorney observed that judges are becoming the allies of clients in protecting against unnecessary and costly discovery by their attorneys. Another attorney asserted that the threat of sanctions could disproportionately deter litigation by impecunious parties because a monetary sanction, albeit remote, would have a devastating impact.

The FJC Board had previously endorsed such a workshop, and the Chief Justice appointed U.S. District Judge Albert Bryan, Jr. (E.D. Va.) to chair a planning committee, on which Judges Robert Keeton (D. Mass.) and Albert Schatz (D. Neb.) also served. ■

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reduction in prison population, without undue risk to the public, as well as for increased equity at the same time.

Have any such recommendations gone through all those hurdles?

We have just begun the process. Last month we sent a number of cases to the wardens at various institutions. None of them, as far as I know, has yet come up to the headquarters of the bureau.

I might add that before we adopted this provision, the commission published it for public comment in the *Federal Register*. The vast majority of the public comment received was favorable. Of the seven judges that replied, six responded favorably to the idea. The replies of the probation officers were also generally favorable. I think there was only one probation officer who didn't like the idea. We adopted the rule at our July 1983 meeting and published it as a final rule, effective October 1, 1983.

You have had experience as both a hearing examiner and a commissioner. Do things look different from the two vantage points?

Yes. It's different. As most persons who have shifted roles in this business know, those things that appear simple and self-evident from a distance often turn out to be more complicated from close up.

Permit me to add, just generally, that from my perspective of having worked in several states as well as in the federal system over the past many years, I believe that the coordination among the courts, the prisons, and the paroling authority generally works very well. On the whole, we have an excellent system. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Chief Justice Highlights Needs and Achievements In Year-End Report

Chief Justice Warren E. Burger in his annual Year-End Report on the Judiciary highlighted actions necessary for the "judicial system to meet the needs of the country in the late 20th century and beyond." He also directed attention to the significant achievements designed by the judicial system in 1983 to streamline services and to decrease costs.

Resolution of many of the judicial system's most confounding problems remains outside the province of the judiciary. Some issues have awaited congressional decision making for a very long time; and now, the Chief Justice warned, several of these situations require Congress's immediate attention. The most urgent legislative needs include determining the future of the bankruptcy system, permanently removing the threat of imposition of social security taxes on senior judges' pay, reducing the Supreme Court's caseload, authorizing new judgeships, and reversing statutory disincentives to meaningful employment for prison inmates.

See CHIEF JUSTICE, page 4

Seminar for Newly Appointed U.S. District Court Judges

FJC Director A. Leo Levin and FJC Continuing Education and Training Division Director Kenneth C. Crawford have announced April 2-7 as the dates for the next Seminar for Newly Appointed U.S. District Court Judges. All sessions will be held at the Dolley Madison House in Washington.

The traditional reception for the new judges and their families will be held on the Sunday preceding the opening of the seminar (April 1). The program also calls for a black-tie dinner at the Supreme Court.

Federal Court Security Detailed by U.S. Marshals Service Director Morris

Stanley E. Morris was sworn in as the fourth director of the U.S. Marshals Service on October 25, 1983. A graduate of San Jose State College with a master's degree in public law and government from Columbia University, Director Morris served as associate deputy attorney general before his appointment to the Marshals Service. Additionally, Mr. Morris was director of operational planning in the Office of the Secretary of Health, Education and Welfare and spent seven years in the Office of Management and Budget, first as deputy associate director for economics and government and then as deputy associate director for regulatory agency regulatory activities. He left government service for a year in 1980 to serve as a senior fellow and lecturer at the Center for Business and Public Policy at the University of Maryland.

Director Morris met with The Third Branch *to discuss security for the federal judiciary and to highlight recent Marshals Service activities and accomplishments. In the following interview, he describes the security configuration for a typical court and details plans for the immediate future.*

Stanley E. Morris

Please briefly describe your responsibilities as director of the United States Marshals Service.

The job of director is to set the policies of the service and see that they are implemented. The U.S. marshal in each of the ninety-four judicial districts reports to me, as do the various components of our headquarters organization. I oversee, therefore, the gamut of responsibilities that the Marshals Service conducts, including the movement of prisoners, the protection of the judicial process, the supervision of the witness security program, and the tracking down of the majority of federal fugitives. Furthermore, the service will now act as the custodian for all seized assets forfeited to the United States.

While those are specific responsibilities, there are a number of other things that I am interested in trying to accomplish. The first is to ensure that the critical role that the marshal and the Marshals Service play is better understood. We have a lot of very able, energetic people carrying out functions that are as critical as any other in the criminal justice process. But outside of the court family, the public does not understand our role. Often the Congress does not, and I believe sometimes—at least our limited resources would suggest—that the Office of Management and Budget doesn't always understand.

Another thing I have set as a personal goal is to attract the best possi-

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ble people to the service. We have to make the jobs as interesting and as challenging as we can and make sure we don't lose our quality personnel to other organizations. I think that that goal should be important to the courts particularly. And the third area of interest is to further improve the relationships we have with the courts.

In March 1982 Chief Justice Burger and Attorney General Smith entered into an agreement on court security which provided that the U.S. Marshals Service would assume primary responsibility for providing security to the judiciary, so that the judges in each district would have one individual—a local U.S. marshal—to whom they could look for all security matters. What has been accomplished pursuant to that agreement?

While I have been in office only a brief time, I inherited a lot of progress.

We have established court security committees in each district. The simple establishment of these committees, I think, has had a very important effect because it gets the marshal, the United States attorney, the clerk, and the chief judge working together on security problems. We cannot simply provide security measures to the courts if the courts are not prepared to use or understand them. The court security committee provides us with the opportunity to sit down and explain our view on the needs of the courts and allows the judge and the court family to describe their concerns. We can then work on solutions together.

I have visited about eight or ten different courts since I've been director and have met with chief judges in the Eastern and Southern Districts of New York, New Jersey, the Southern District of Florida, Chicago, the Southern, Central, and Northern Districts of California, and the District of Columbia. The impression I have is that there is a real commitment on the part of all parties to enhance the level of security in a way that's sensible.

Further, while we're still sorting out problems that go along with any major new program, I do think that we have made quite extraordinarily good progress with our court security officer program. From all that I have seen and heard, the court security officers who are already in place are respected by all of the court personnel and respected by the judges. We have worked very hard to make sure that the quality of the people we have in this program is the very highest, because not only do they play an important function in court security, but they will also be perceived by the public as representatives of the United States marshal even though they are being funded by the courts. These officers receive an intensive week's orientation at the federal law enforcement training facility at Glynco, Georgia. We are going through careful procedures to identify the very best people, and we are working hard on maintaining their morale.

Has the "fractionalization of responsibility" among the Marshals Service, the GSA, and the Postal Service, to which the Chief Justice and the Attorney General referred in their agreement, been eliminated?

First, we have a lot fewer fractions than we had before we set off on this program. What the courts want is one person to whom they can turn with security problems. That was clear to me in my discussions with [Chief] Judge Clark recently and with the Chief Justice early on. We have provided that the United States marshal is responsible for *all* court security issues. The fractionalization concern occurs when you try to define what the role of court security is in relation to general building security. That is a particular problem when you have multiuse buildings—buildings that house the courts, the Department of Justice, the IRS and Secret Service, Social Security, etc. General building security is the responsibility of GSA. The protection of the courts and each element of the court family (bankruptcy judges, magistrates, probation officers) is ours. You can see that there is a gray area that may still need to be worked out.

See MORRIS, page 3

Amendment to Criminal Jury Instructions

An amendment has been issued to Instruction No. 9, entitled "Standard Introduction to the Charge," of the Center's *Pattern Criminal Jury Instructions*, published in June 1982 and distributed in early 1983.

The revised language, which includes an appropriate reference to the presumption of innocence, has been approved by the members of the committee that developed the original instructions.

Replacement pages for the loose-leaf edition of the instructions are being distributed to all district and circuit judges, public and community defenders, and federal court libraries, and have been given to the Department of Justice for distribution to federal prosecutors. Others within the judicial branch can obtain the replacement pages by writing to Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope).

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.

Stanley E. Morris is sworn in as director of the Marshals Service by Chief Justice Burger. Attorney General Smith and former director William E. Hall (center) look on.

BJS Report Provides Comprehensive Data on Crime and Justice

A comprehensive document providing important facts and figures about crime in the United States and the government response to criminal activity was published recently by the Bureau of Justice Statistics. Relying heavily on graphics and a nontechnical format, the *Report to the Nation on Crime and Justice* brings together a wide variety of data from BJS's own statistical series, the FBI Uniform Crime Reports, the Bureau of the Census, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and many other research and reference sources.

The BJS report looks at crime and justice from the citizen's perspective as victim, witness, juror, and taxpayer. It attempts to answer such questions as: How much crime is there? Whom does it strike? When? Where? Who is the typical offender? What happens to him or her? What are the costs of justice? Who pays for the criminal justice system?

While noting that statistics show a drop in most criminal activities in recent years, the report confirms that crime is an enormous threat to our lives and property. It points out, for example, that 41 million people were victims of crime in 1981, accounting for almost a third of all households in the United States, and that violent crime affected about 6 percent of households. More than 2 million deaths or injuries resulted from crime in 1980, and during that year, the losses from personal and household crime exceeded $10 billion, with reported commercial robberies, nonresidential burglaries, and shoplifting accounting for more than $1 billion in losses.

The report gives an overview of criminal justice at all levels of government—federal, state, and local. It contains information about the key stages of the criminal justice process: entry into the system, prosecution and pretrial services, adjudication, and sentencing and correction. Further, it provides data on such issues as the defense of indigent persons, court delay, the insanity defense, criminal appeals, prison overcrowding, and the death penalty.

Among the report's findings are the following:

- The probability of arrest declines sharply if a crime is not reported to police within minutes after the confrontation between victim and offender.

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In multiuse buildings, who is responsible for working out problems that arise in this gray area?

In buildings that are run by GSA, a GSA representative is a member of the court security committee. The judges have not wanted to try to figure out who is on first and who is on second. They didn't want a situation in which they had to decide what was building security and what was court security. What we have worked out is that the judges can call the marshal and the marshal will be responsible for dealing with those questions regardless of whether the funding or staffing should be GSA or the Marshals Service. We are not asking the judges to make that decision. The marshal will be responsible for working out those relationships with GSA.

Nearly $16 million dollars in appropriated funds will be transferred by the Administrative Office to the Marshals Service for court security in the current fiscal year. On what are you going to spend the money?

Together with the Administrative Office, we are looking at what we can spend effectively and intelligently. Our agreed-upon plan allows us to target fifty-five different judicial district contracts for a total of 517 court security officers. In addition, we will fund various system support services to the courts. We are talking about a major increase in the number of people involved in court security.

You mentioned that approximately 500 court security officers will be hired during this fiscal year. According to your plans, how many more court security officers will be hired and when will they be in place?

Our current thinking, as we review the court security plans, is to have contracts for approximately 1,000 such officers. These 1,000 court security officers are in addition to the existing 1,700 deputy U.S. marshals already on board. Our target is to

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Bankruptcy. During 1983 bankruptcy cases were handled in accordance with an interim bankruptcy rule recommended by the Judicial Conference of the United States. To date Congress has not responded to the need to correct a jurisdictional defect in the Bankruptcy Reform Act of 1978 held to be unconstitutional in 1982. Experience with the interim rule has shown that it works well, the Chief Justice said, and the system has been functioning smoothly, with bankruptcy judges serving as adjunct officers within the district court structure. He referred to Administrative Office statistics announcing that in 1983 only about one-half of 1 percent of bankruptcy cases were referred to district judges and that 80 percent of these were disposed of expeditiously without being returned to bankruptcy judges. Also, the Chief Justice pointed out, bankruptcy filings can reasonably be expected to decline. Thus, he stated, referring to proposals to change the status of bankruptcy judges, "No extravagant, long-range expansion of the bankruptcy system is justified, and there is no need whatever to create 300 or more Article III 'lifetime judgeships' to deal with a passing problem."

The Senate last spring passed a bill that would legislate the procedures now used under the interim rule. In the House, a similar bill has been introduced by Representatives Robert W. Kastenmeier (D-Wis.) and Thomas N. Kindness (R-Ohio). With the interim rule due to expire April 1, 1984, "[f]inal congressional action on the Senate or Kastenmeier-Kindness bills is imperative to eliminate continuing apprehension concerning the operation of the bankruptcy system," the Chief Justice cautioned.

Senior judges. The Chief Justice praised Congress for its wise deferment for two years of the legislative provision that would have required social security tax deductions from senior judges' pay. At the same time, he urged Congress to find a permanent solution to this situation. On a related matter he called on the legislature to raise benefits for surviving spouses and dependent minors of judicial officers.

Reducing federal court caseloads. The members of the Supreme Court unanimously support congressional action that would remove the remaining mandatory appellate jurisdiction of the Court. In the 1982 term, the Chief Justice pointed out, 30 of the 151 cases that had signed opinions were mandatory cases.

The Chief Justice once again urged establishment of a temporary intercircuit tribunal to resolve intercircuit

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- More than half of all homicides are committed by someone known to the victim. Three of every five of all other violent crimes are committed by strangers to the victim.
- Younger people are much more likely than the elderly to be victims of crime. But the elderly have a greater fear of crime and may restrict their lives in ways that minimize their chances of being victimized.
- While blacks constituted 12 percent of the population in 1980, the proportion of blacks in local jails was 40 percent and in state prisons, 47 percent.
- Women accounted for just 4 percent of the inmate population in state and federal prisons in 1981. The number of women institutionalized increased more than 150 percent from 1970 to 1981, in contrast with a 78 percent rise for men.
- Lack of sufficient physical evidence and witness problems—such as reluctance to testify—are the key reasons for dismissals of criminal cases.
- Chronic repeat offenders (those with five or more arrests by age 18) account for 23 percent of all male offenders, but they commit 61 percent of all crimes.
- More than 1 percent of the U.S. population is under some form of correctional sanction, with three of four of these being supervised in the community.
- Within a year of being released on parole, 12 percent of prisoners are likely to be back in prison; within three years of release, 24 percent of parolees are likely to be back.
- Only 15 percent of American adults have ever been called for jury duty.
- In 1981, slightly less than 3 percent of all federal and state government spending was for criminal and civil justice; four-fifths of state and local justice dollars go for payroll.

Copies of the BJS report, number NCJ-87068, may be ordered from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850. ■

PERSONNEL

Appointments

Jane A. Ristani, U.S. Court of International Trade Judge, Nov. 25

Elizabeth V. Hallanan, U.S. District Judge, S.D. W.Va., Nov. 30

Stanley S. Harris, U.S. District Judge, D.D.C., Dec. 2

G. Kendall Sharp, U.S. District Judge, M.D. Fla., Dec. 14

Thomas J. Curran, U.S. District Judge, E.D. Wis., Jan. 21

Elevations

W. Earl Britt, Chief Judge, E.D.N.C., Oct. 8

Tom Stagg, Chief Judge, W.D. La., Jan. 1

Senior Status

William P. Copple, U.S. District Judge, D. Ariz., Nov. 30

Bernard Newman, U.S. Court of International Trade Judge, Dec. 31

Deaths

George B. Harris, U.S. District Judge, N.D. Cal., Oct. 18

Mary Anne Richey, U.S. District Judge, D. Ariz., Nov. 25

Robert W. Hemphill, U.S. District Judge, D.S.C., Dec. 25

New Appointees at Parole Commission, NIC

In December, President Reagan and Attorney General Smith made a number of significant appointments to the U.S. Parole Commission and the National Institute of Corrections. The NIC has acquired a new director, and the Parole Commission has three new commissioners.

Vincent J. Fechtel, Jr., has been appointed commissioner by the president; he will serve on the National Appeals Board of the Parole Commission. Mr. Fechtel, a former Florida state legislator as well as a businessman and community activist, takes the position on the appeals board most recently occupied by Audrey Anita Kaslow.

The new commissioner for the Southeast Regional Office in Atlanta is Paula Tennant, who replaces Cecil C. McCall. Ms. Tennant was a member of the U.S. Board of Parole, the predecessor of the commission, from 1970 to 1974 and was director and commissioner, successively, of the western region from 1974 to 1977. She has also served as assistant U.S. attorney in Alaska, district attorney of Lassen County, California, and most recently, assistant district attorney and head of the family support division of San Mateo County, California.

Helen G. Corrothers, who spent fifteen years in the U.S. Army, was, before becoming commissioner for the Parole Commission's Western Regional Office in Burlingame, California, a warden for the Arkansas Department of Corrections at Pine Bluff. Ms. Corrothers, the first woman to become treasurer of the American Correctional Association, is the first black woman to serve on the Parole Commission.

Before being appointed director of the NIC by the attorney general, Raymond C. Brown held several important positions in the criminal justice system. He is also a twenty-five-year veteran of the Oakland, California, Police Department, having retired in 1972. In that year he was named to the California Governor's Select Commission on Law Enforcement. Later he held successive appointments to the California Adult Authority Commission, the California Community Release Board, and the California State Board of Prison Terms. ■

On January 3, 1984, The Washington Post *published an editorial commenting on the Chief Justice's Year-End Report for 1983. With what we hope is pardonable pride, this editorial is reprinted below because it draws on at least three Federal Judicial Center and Administrative Office reports that precipitated recommendations from the Judicial Conference of the United States and their subsequent implementation by the federal courts.*

Saving Big Money in the Courts

The chief justice of the United States has earned a reputation as a court manager, a jurist personally dedicated to making the courts work in a more modern, more efficient and less costly manner. In his annual report on the judiciary, out today, he draws attention to some cost-saving steps that have been taken by federal court administrators and he goes on to encourage a more fundamental change that could save American taxpayers really big money.

Three reforms have already been started that sound simple but over time will cut costs measurably. Reducing the size of a jury service notice so that it can fit into a standard-size envelope, for example, saves 9 cents' postage on every piece of mail. Sending juror summonses by first-class instead of certified mail saves a quarter-million dollars a year. Gradually phasing out court stenographers and replacing them with recording systems will save tens of thousands of dollars in each courtroom.

These steps, however, pale into insignificance when compared with the billions—yes, billions—that could be saved by "alternative dispute resolution," as the chief justice explains.

In 1982, the public spent $4 billion processing criminal cases. That's pretty much a fixed cost that can only be controlled by reducing crime or refusing to prosecute. But the public cost of processing civil litigation is also substantial. Eight million suits were filed in state and federal courts in 1982, and the public spent $2.2 billion to process them. A jury trial in a tort case in California costs the taxpayer $8,300, for example—often more than the amount at stake in the suit.

The chief justice believes that many of these cases could be settled by alternative means—pretrial conferences, arbitration and mini-trials before neutral third parties. He's right. In Allegheny County, Pa., for example, where 60 percent of all civil cases are sent to arbitration, settlements increased dramatically and the average cost of processing a civil case plummeted to $65.

The federal courts are experimenting with alternative methods of dispute resolution such as arbitration. Many local courts, including those in this area, have had success, especially in domestic relations cases, by using pretrial mediation and negotiation. These methods save the litigants time, money and emotional energy. They should also be encouraged because they reduce public costs and free up tax money for more urgent and productive uses.

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have the court security officer program fully in place by the end of fiscal year 1985.

How did you decide where to go first—where to place the first 500 officers?

We based those decisions on our assessments of the court security plans, the needs of the courts, the potential security threats, and the extent of the problems that resulted from withdrawing GSA's federal protective officers from various court facilities. It should not be surprising that courts in New York City, Brooklyn, Miami, New Orleans, Los Angeles, and Chicago, for example, have been of high priority. The smaller jurisdictions, where the problems are less acute, will come on line as we proceed.

Who will provide security in the courtroom?

The routine services in the courtroom—security for the judges, the movement of prisoners, the oversight of juries—will be the responsibility of the deputy U.S. marshals, not the responsibility of court security officers. The court security officer's job is to provide an enhanced level of protection to the total judicial environment. The security within the courtroom and for the normal court processes will be, as it has always been, the responsibility of the marshals.

How do you determine the number and the mix of officers and marshals who are assigned to each court?

Probably one of the most difficult management responsibilities that we have at headquarters is to assess needs and to apply resource levels necessary to meet those needs. This would not be a problem if we had adequate resources. But in fact we, like many of the other components of the federal government, have to do more work than we really are staffed to do and, therefore, we have to make very difficult choices. We have developed a set of criteria which includes the numbers of prisoners moved and the numbers of court days held—a range of things like that—to try to come up with some consistent formula.

Obviously, the problems in the Northern District of Iowa, the Western District of Texas, and the Southern District of New York are so different that trying to apply a standard cookbook solution to their resource needs is subject to some criticism. Therefore, we need to add to the formula a blend of common sense and an understanding of what those problems are. One of the things I have been trying to do, and hope to continue to do, is to visit with our offices around the country and to talk with the chief judges and the U.S. attorneys, as well as with our own people. I can then make my own judgments as to where the resources should be increased or decreased. This is a very difficult area.

"Security is often a burden; it changes the habits of people. If the courts are not prepared to change habits, acquiring the equipment is a useless expense."

—Marshals Service Director Stanley E. Morris

In addition to court size, what factors would contribute to increasing the number of officers and marshals assigned?

The nature of the cases that a jurisdiction has been having or will be having is an obvious concern. Cases involving terrorism and major drug trafficking present problems. Another area, one of deep concern to me, is the jail problem—the availability of jail space. It impacts the marshals very directly because, in most jurisdictions, we have to contract with local sheriffs for space. In some cases, because of overcrowding and because of other reasons, we have to go long distances to bring the prisoners to and from the courtroom. That is very expensive, not just in terms of gasoline. You've got deputy marshals who have to spend six or seven hours a day in a vehicle just simply moving the prisoners in and out.

You have mentioned personnel, but what about security equipment? Who will have the responsibility in this area?

There is a phase-in process here. In the past, we have had some responsibilities for equipment; GSA had responsibility for most of the major systems. Equipment responsibilities now have been transferred to the Marshals Service.

It is very important that all members of the court security committee understand what it is that is being acquired. There is nothing more devastating—both to the taxpayer and in terms of the level of security—than to go out and acquire a lot of fancy gadgets that are then immediately unplugged or defused. I will tell you that I know of several jurisdictions where that is precisely what is happening. We have made major expenditures in new courthouses that are being circumvented by court personnel because they either were not involved in understanding what the systems required or simply don't want to be bothered.

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THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, preferably accompanied by a self-addressed, gummed mailing label (franked or unfranked), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, D.C. 20005.*

Blasi, Vincent J., ed. *The Burger Court: The Counter Revolution That Wasn't.* Yale University Press, 1983.

✓Bork, Robert H. "Styles in Constitutional Theory." Speech to the Supreme Court Historical Society, May 6, 1983.

Burbank, Stephen B. "The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?" 67 *Judicature* 183 (1983).

✓Burger, Warren E. "1983 Year-End Report on the Judiciary." January 3, 1984.

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Spaeth, Harold J. "Distributive Justice: Majority Opinion Assignments in the Burger Court." 67 *Judicature* 299 (1983).

Spaniol, Joseph F., Jr. "Making Federal Rules: The Inside Story." 69 *American Bar Association Journal* 1645 (1983).

Tauro, Joseph L. "Sentencing: A View from the Bench." 9 *New England Journal on Criminal and Civil Confinement* 323 (1983).

State-Federal Judicial Councils Explore Broad Range of Issues

In 1983, state-federal judicial councils provided a forum for state and federal judges to discuss matters of mutual concern and to seek solutions to problems common to both judicial systems. Significant issues discussed at these meetings are highlighted below.

Certification of state law questions. The procedures for and problems with certifying questions of state law to high state courts was the most popular council topic. The September 1983 endorsement by the Judicial Conference of the American Bar Association's resolution urging that all states adopt certification procedures, coupled with the publication of the Federal Judicial Center's report *Certifying Questions of State Law: Experience of Federal Judges,* sparked interest in several jurisdictions. Approximately one-half of the states now provide for certification of state law questions in state constitutions, statutes, or rules of court.

Federal Rules of Procedure. Amendments to the Federal Rules of Civil and Criminal Procedure and changes to the bankruptcy rules became effective on August 1 of last year. These changes and their consequences were discussed by a number of councils. Rules pertaining to civil discovery were of particular interest.

Death penalty cases. Problems generated by multiple appeals and last-minute motions in death penalty cases concerned the councils. As noted by Chief Judge John Godbold of the Eleventh Circuit, "These cases present the federal judiciary in this circuit with the most difficult situation we have had to face since the most pressing days of school desegregation."

As an effort to resolve problems related to death penalty cases, the Georgia State-Federal Judicial Council and the Georgia Institute of Continuing Judicial Education

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In those cases, we need to sit down with the judges and explain to them what the various security mechanisms are and why they are desirable.

Security is often a burden; it changes the habits of people. If the courts are not prepared to change those habits, acquiring the equipment is a useless expense. It needs to be understood that in many cases and in many circumstances security equipment is not only less expensive but more effective than people. Even if we could provide people constantly to walk the halls, the fact is that a camera and an intercom system are a much more effective assurance of security to a judge's chambers.

Will maintenance and new equipment purchases come out of the same $16 million budget?

Yes. About 20 percent of the resources in the first year will be for those items.

Please describe the security configuration in a typical courthouse once all current plans are in place.

In a single-use building—where only the court family is involved—the protection of the building itself is the responsibility of GSA. If somebody goes out and tears the sign down or saws a flagpole down or breaks a window, that's GSA's responsibility. They are setting up a new form of roving guard patrol to watch the exterior of the buildings and to provide security when it is vacant and over weekends.

Is that called perimeter security?

Yes. The Marshals Service, then, has responsibility for court security. Court security officers would provide general security throughout the building.

Finally, the movement of prisoners, protecting the normal operations of the courts, the survey of security needs at the courthouse, and the like would be the responsibility of deputy U.S. marshals.

More difficulties arise when you have a multiuse building where the main entrance is used to get into a number of government offices. If GSA runs the building, then GSA has the responsibility for entry controls into the building, into the garage areas, and the like. Here is where you get into the gray areas. In those circumstances, we will try to build up a security perimeter for the courts and the immediate court environment.

What is the role of the court security committee in making up the security plans?

The committee's responsibility is to identify the security needs of the court and to decide how to respond to those needs. The marshal, based on those needs, comes up with a plan. That plan includes equipment requirements, court security officer deployment, etc. The plan is submitted for approval to the committee and then is sent to our headquarters, where we take into account any resource constraints.

It is important to note that the work of the court security committees does not end with the completion and submission of the plan; security issues are ongoing. Security needs change; problems continue to arise. To the extent that we can keep the component parts of this system working together in advance of problems and crises, the better off we will be. I would encourage the committees to still get together and to make sure that things are going the way they are supposed to be going. They should make sure that if people are unhappy with the systems, those problems are communicated to us for solution.

What should a judge do if he or she has complaints about or problems with the security being provided in the court?

As a matter of routine, he or she should contact the U.S. marshal. I would hope that a judge would call or write me if there is a problem that cannot be resolved by the marshal. If the marshal is not doing his or her job, or if the Marshals Office is not doing its job, then judges should let me know. I have an open line to the judiciary as well as to all U.S. marshals. And I don't particularly like surprises. I like to be on top of what's going on. I'm aware that there are problems—a number of judges have already spoken to me on the subject of the need for additional resources. I also intend to meet with judges whenever I'm in a specific area, and I hope that they will take the opportunity to tell me what's "broke" and what's working. ■

COUNCILS, from page 7

cosponsored a two-day seminar on habeas corpus for Georgia's federal circuit and district judges and the state judges of the Georgia Superior Court, Court of Appeals, and Supreme Court. The Center arranged for Professor Ira Robbins of American University to lecture to the seminar on "Federal Habeas Corpus and the State Trial Judge: Problems, Pitfalls, and Prognosis."

Georgia Chief Justice Harold Hill called the seminar a "historic occasion," which brought federal and state judges together to consider one of the major sources of friction between the two systems.

Restitution and victim compensation. There are many unresolved questions regarding the application of the federal Victim and Witness Protection Act of 1982 (effective in 1983) as well as of similar statutes in many of the states. Common problems regarding these statutes were recurrent themes at the council meetings.

In addition, state-federal councils met to explore judicial immunity, voir dire, sentencing, case management, and the use of state judicial officers to issue federal search-and-arrest warrants or to set bail for federal defendants.

For further information on state-federal judicial council meetings, including suggested subjects and literature, write or call Alice O'Donnell at the Federal Judicial Center (FTS or 202-633-6359). ■

CHIEF JUSTICE, from page 4

conflicts and to allow the Supreme Court to turn its attention to cases that more clearly merit its review. In each of the last three terms, Chief Justice Burger said, the Court dealt with an average of forty-two cases involving intercircuit conflicts. The Chief Justice is confident that the intercircuit panel proposed in current bills can potentially remove forty to fifty cases a year from the Court's calendar. With two sittings annually of two weeks each, an intercircuit tribunal could hear a minimum of twelve cases each week. Thus circuit judges on the tribunal would not need to be away from their regular duties more than three or four weeks a year. "Any thought," the Chief Justice assured, "that the reduction of the Supreme Court calendar by 40-50 argued cases is of no great help is not accurate; nor is it true that the Temporary Panel will impose a significant burden on courts of appeals."

Additional judgeships. During the last decade, the district courts' caseload has risen 90 percent, but the number of judgeships authorized by Congress has increased only 29 percent. And although judges have improved case management tools, these "tools are ineffective if we are constantly 'short-changed' on judicial personnel," remarked the Chief Justice. While he noted that the Judicial Conference of the United States "has determined that 51 district court judgeships and 24 circuit court judgeships are needed immediately," the Chief Justice stressed his preference that Congress not create a massive increase in judgeships all at once, such as occurred with the 1978 Omnibus Judgeship Act; rather, a better way for Congress to respond to judicial system needs would be to authorize judgeships when the Judicial Conference makes its periodic estimates of judgeship needs.

Prisoner employment. The recent repeal by Congress of the prohibition on the use of prison-made products in federally funded highway projects was a significant move in the right direction. But Chief Justice Burger exhorted Congress and the states to pass further legislation aimed at providing meaningful employment for inmates while in prison that will give them marketable skills upon their release. Pilot programs indicate that moneys earned by prisoners also generate tax dollars, reimburse states for prison operating costs, and assist in providing for prisoners' families and for victims' compensation.

As to other matters, the Chief Justice gratefully acknowledged several developments within the judiciary to facilitate case processing and to reduce costs. Noteworthy among such internal improvements in judicial administration during 1983 were the amendments to the federal rules of procedure, particularly the civil rules, that became effective August 1, 1983. Referring to a pilot bench-bar workshop sponsored recently by the Federal Judicial Center that brought a small group of judges, attorneys, and scholars together to explore means to curtail discovery abuse, he noted that the newly amended rules provide "important tools for making discovery more relevant and efficient." The Chief Justice observed further that the amendments will help to limit attorney abuses in discovery and motion practice, as well as help judges to acquire early and firm control over litigation. Nevertheless, the Chief Justice said, "Significant changes in the discovery system will come only if judges are prepared to reward attorney actions that expedite action on cases, and to penalize actions that delay cases needlessly."

The 1983 amendments are not sufficient, moreover, to control the interrelated calamities of high litigation costs and excessive delays. Additional changes will be needed. "The

See CHIEF JUSTICE, page 10

NOTEWORTHY

FBA Judiciary Section. The first substantive act of the newly formed Judiciary Section of the Federal Bar Association was to sponsor a resolution urging the repeal of the Social Security Amendments of 1983 as applied to the salaries of retired federal judges. The resolution was adopted overwhelmingly by the FBA's governing body, the National Council.

The Judiciary Section is chaired by Chief Judge Robinson O. Everett of the U.S. Court of Military Appeals and includes committees on Judicial Administration, U.S. Magistrates, Administrative Law Judges, U.S. Bankruptcy Judges, and Military Judges.

* * *

New concept for CLE. The University of Pennsylvania Law School, in an effort to "get lawyers to think," has begun offering a continuing legal education (CLE) plan for Philadelphia law firms.

The program is like CLE plans available in many parts of the country except for two important elements. First, the classes will be similar to regular law school courses rather than being practice oriented. According to Dean Robert H. Mundheim, the courses are designed to make lawyers "generalists." Second, the program is being marketed directly to law firms and other employers, who can pay for their lawyers to take any of the offered courses.

* * *

Opinion publication rule. After a one-year experiment with a "partial publication" rule applicable to their courts of appeals, the California Supreme Court has now made the rule permanent. The new rule authorizes a court of appeals to certify only part of an opinion for publication when the part being published meets the same criteria applied to full opinions.

CHIEF JUSTICE, from page 9

rule designed to encourage settlements and to avoid protracted litigation, for example, should contain stronger and fairer incentives for settlement." Furthermore, the Chief Justice asserted, "Claimants who do not clearly improve their position in a trial verdict over settlement offers should be taxed with costs and fees for their failure to settle."

The Chief Justice also called for increased use of arbitration. Referring to a 1983 Federal Judicial Center report that analyzed court-annexed arbitration in the federal courts, he said that new data published this year "clearly demonstrate that court-annexed arbitration substantially reduces the proportion of cases that ultimately go to trial." In commending procedures calling for arbitration, he noted that in at least two federal courts where cases were referred to arbitration, trials were reduced 50 percent. In the Eastern District of Pennsylvania, fewer than 2 percent of the cases referred to arbitration reached trial. Arbitration has also received the attention of Congress. Last July, Congressman Robert Kastenmeier introduced a bill in the House (H.R. 3692) which includes a provision that diversity cases must first be submitted to arbitration. The bill further provides that if the party bringing the action obtains a substantially less favorable result from the judgment of the court than from arbitration, that party will have to pay to the opposing litigant "all costs and reasonable fees and other expenses. . .including interest accruing from the date the action is brought."

Prebriefing conferences, which help to promote the settlement of cases by counsel or to aid counsel in case preparation, are being undertaken in at least six courts of appeals. Evaluations of these programs, including the Center's reevaluation of the Second Circuit's Civil Appeals Management Plan (CAMP), indicate significant reductions in the number of appeals going forward in the courts and improvement in the quality of briefs and arguments in cases that do not settle.

The Chief Justice had praise for several economizing initiatives undertaken within the court system that promise to save taxpayers significant amounts of money in this and coming years. The one having the greatest cost-saving potential is the regulation adopted this past September by the Judicial Conference that allows use of electronic sound recording by individual judges as an alternative to more traditional court-reporting methods. The regulation, based on the results of a study by the Center, went into effect on January 1, 1984.

Chief Justice Burger observed that 1984 marks the 350th anniversary of the founding of Williamsburg, site of many historic events and also of the Brookings Institution seminars on the administration of justice. He announced that those meetings, which have proved fertile grounds for discussion of both new and old problems facing our justice system, will now be held biennially.

And the Chief Justice looked forward to another notable anniversary, that of the bicentennial of the Constitution in 1987. Now that President Reagan has signed into law a bill establishing a bicentennial commission, plans will soon be going forward for bicentennial activities across the country. "The Bicentennial," Chief Justice Burger noted, "is a unique opportunity to examine our impressive constitutional achievements, and the personal integrity, individual responsibility and accountability, the traditions of home and family, strong religious beliefs, and tolerance for the rights of minorities and the unorthodox that make our system of free government work." ■

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THE THIRD BRANCH

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Trial Court Representatives Meet to Discuss Decentralized Automation Project

At a recent meeting of representatives from forty-seven federal trial courts, the plan to decentralize automation in the U.S. district courts—the District Court Automation Project—was discussed in depth.

During the February 13-15 meeting held in Washington, D.C., Gordon Bermant, director of the Federal Judicial Center's Innovations and Systems Division, and Fred McBride, director of the Systems Services Division of the Administrative Office, described the sweeping change from centralized, large mainframe processing in Washington to decentralized processing on small, powerful computers located in federal courthouses throughout the country. This change follows the direction described in the *Five-Year Plan for Automation in the United States Courts* (see *The Third Branch*, September 1983). The plan was triggered in part both by the desire to take advantage of newer, less expensive technology and by the need to terminate dependence on the aging centralized computer system that currently supports more than 300 terminals. Background work on this effort has been under way since the fall of 1982.

The project is the combined effort of the Federal Judicial Center and the Administrative Office, with substantial assistance from the District Courts Users Group. The users group consists of representatives—mostly clerks of court—appointed by the chief judges of forty-seven trial courts; small-, medium-, and large-sized courts are represented. The members of the users group will work closely with the FJC and the AO to define and review the computer systems that will be installed in their courts.

The users group was informed that since existing systems will be reprogrammed for the new hardware, those systems can be redesigned to better serve the courts in ways that had not been possible in the

See AUTOMATION, page 4

Administrative Office, Marshals Service Sign Agreement on Court Security

A memorandum of understanding between the United States Marshals Service and the Administrative Office of the United States Courts regarding federal court security programs has been signed. It establishes guidelines and procedures for implementing the recommendations of the Attorney General's Task Force on Court Security announced in a joint statement by Chief Justice Warren E. Burger and Attorney General William French Smith before the Judicial Conference in March 1982.

The memorandum defines and details the Marshals Service's court security programs and expresses the terms and conditions under which funds appropriated to the federal judiciary are to be transferred to the Marshals Service for use in providing security to the federal courts. Among the items discussed are courtroom, personal, and judicial facility security, court security surveys, district court security plans, and the installation and maintenance of security systems and equipment.

With the signing of the memorandum, AO Director Foley transferred to the Marshals Service the $18,690,000 appropriated by Congress for court security in fiscal year 1984.

Copies of the memorandum have been distributed by the Administrative Office. Questions and comments should be directed to the AO's Office of Court Security (FTS 786-6003).

Use Prisons as Factories To Produce Marketable Goods, Says Chief Justice

Speaking recently at the Safer Foundation banquet in Chicago, Chief Justice Warren E. Burger stated that the prison and correction systems in the United States "were failing even to approach, let alone accomplish, reasonably supportable objectives."

He analogized the situation to repeated attempts of a repair shop to fix faulty brakes on an automobile. "When we send a convicted criminal to prison," he said, "and that prisoner comes out and repeats, and goes back in, comes out and repeats again, it is reasonable to conclude that the 'brakes' society and the courts tried to put on his conduct are not working." There is a limit to the number of times one should go back to the same "garage" for repairs and a limit to the trust that should be placed in the present correction system's ability to deal with criminal offenders.

While confessing that he did not know precisely what should be done, and noting that he had not yet found anyone who possessed the complete solution to this intractable problem, the Chief Justice proposed some changes in and new standards for our approach to prisons.

First, prisons should be converted from existing patterns—often only

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Inside . . .

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warehouses—into places of education, training, and production. Penal institutions should become factories and shops for the production of marketable goods, in the process of which inmates will learn marketable skills and acquire positive work habits. "If the work ethic is good for the taxpayers, it ought to be encouraged in prisoners." Next, statutes that limit the amount of prison industry production and the markets for prisoner-produced goods should be repealed. Necessary also is the repeal of laws that restrict the sale or transportation of prison-made goods. Finally, leaders of business and organized labor must work cooperatively to permit the wider use of productive facilities in prisons.

As examples, Chief Justice Burger pointed to the Scandinavian prisons, where inmates have been producing usable products for over a century, and to a penal institution he visited in the People's Republic of China that produces men's socks and casual shoes, functioning like "a factory with a fence around it." He noted an important development in Minnesota, where prisoners trained at private expense are engaged in assembling computers for Central Data Corporation; these inmates have been promised jobs in the corporation when they leave prison.

While noting that the recent repeal by Congress of the prohibition on the use of prison-made products in federally funded highway projects is a significant move in the right direction, the Chief Justice argued that additional steps can be taken at all levels of government. Markets for prison-made products can be expanded. A good place to start, the Chief Justice suggested, would be to have prisons supply at least some of the needs of city and state governments for "machine parts for lawnmowers, automobiles, washing machines or refrigerators."

Though the Chief Justice acknowledged that his suggestions for developing prison production programs and for expanding the markets for prisoner-produced goods would affect the private sector, he feels that the impact on the GNP would be infinitesimal and urged that business and labor leaders cooperate in this venture. "I cannot believe for one moment," he noted, "that this great country of ours, the most voracious consumer society in the world, will not be able to absorb the production of prison inmates without significant injury to private employment or business. With the most favorable results, the production level of prison inmates would be no more than a tiny drop in the bucket in terms of our Gross National Product."

With the country about to embark on a multibillion-dollar prison construction program, and with 450,000 inmates costing $17 million per day, it is critically important to begin the exploration and implementation of these suggestions. "Just more stone, mortar and steel for walls and bars" will not change, he said, "the current melancholy picture of escalating costs, increasing inmate populations, and high rates of recidivism."

The Chief Justice concluded that we are faced with the choice of building more "human warehouses" or striking out on a new course to construct institutions with education, training, and production programs. The models and patterns for changes are there; the needed improvements, he believes, "will cost less in the long run than failure to make them."

He urged that states look to the example of the Federal Bureau of Prisons, whose leaders from Sanford Bates and James V. Bennett to the present director, Norman Carlson, have successfully applied many of the practices of the northern European countries. Last summer the Chief Justice headed a team of American leaders who visited prisons in Sweden and Denmark for ten days. Frank Considine, president of National Can Company, Steven Hill, director of Weyerhaeuser Corporation Personnel & Training, Senator Mark Hatfield, Congressman Robert Kastenmeier, J. Albert Woll, general counsel of AFL-CIO, and Norman Carlson were members of the American team. ■

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

PERSONNEL

Nominations

Pauline Newman, U.S. Circuit Judge, Fed. Cir., Jan. 30

James H. Wilkinson III, U.S. Circuit Judge, 4th Cir., Jan. 30

John R. Hargrove, U.S. District Judge, D. Md., Jan. 30

Elevation

Gordon Thompson, Jr., Chief Judge, S.D. Cal., Jan. 22

Resignation

Fred Shannon, U.S. District Judge, W.D. Tex., Jan. 1

Senior Status

Franklin T. Dupree, Jr., U.S. District Judge, E.D.N.C., Dec. 31

Robert H. Schnacke, U.S. District Judge, N.D. Cal., Dec. 31

Frederick Landis, U.S. Court of International Trade Judge, Dec. 31

Howard B. Turrentine, U.S. District Judge, S.D. Cal., Jan. 22

James S. Holden, U.S. District Judge, D. Vt., Jan. 29

Death

Robert Firth, U.S. District Judge, C.D. Cal., Jan. 4

Hearings Held on Proposed Changes to Civil Rules

Reviewing the proposed amendments are (l. to r.) Judge Edward T. Gignoux, chairman of the Committee on Rules of Practice and Procedure, and Prof. Arthur R. Miller, reporter to, and Judge Walter R. Mansfield, chairman of, the Advisory Committee on Civil Rules.

Judge Walter R. Mansfield (2nd Cir.) and Judge Edward T. Gignoux (D. Me.) were joint chairmen of public hearings on proposed amendments to the Federal Rules of Civil Procedure that convened in Washington on January 18. Hearings were also held before the Advisory Committee on Civil Rules in Los Angeles on February 3. The rules for which amendments have been proposed are civil rules 5, 6(a), 45, 52(a), 68, 71A, and 83 and admiralty rules B, C, and E. (For a summary of significant proposed amendments, see the October 1983 issue of *The Third Branch.)*

Drafts of the proposed amendments, together with explanatory notes prepared by the advisory committee, were widely distributed to the bench and bar and the general public following their publication in August 1983; comments and requests to testify in open hearing were invited at that time. ■

Center Publishes Revised Edition of Handbook For Federal Judges' Secretaries

A revised edition of the Center's *Handbook for Federal Judges' Secretaries* was published last month. The present edition reflects developments since publication of the first edition in March 1980 and includes statutory changes. The loose-leaf format of the handbook, and its dated pages, are designed to accommodate the addition of future updates and other supplementary material.

A reference aid for both new and experienced secretaries to federal judges, the handbook describes office procedures that judges' secretaries have found useful. It treats such subjects as record keeping, maintenance of chambers calendars and office files, correspondence, and protocol. Also included in the handbook are sections on case management, the organizational structure of the court system, and the language and process of litigation.

Copies of the handbook are being distributed to all appellate, district, and bankruptcy judges and to all full-time magistrates. A single copy is available to each clerk's office and probation office on request to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked (but do not send an envelope). ■

Committee to Monitor Audio Recording Appointed

As reported earlier in *The Third Branch* (November 1983), the Judicial Conference of the United States has adopted regulations, pursuant to statute, that authorize district judges to use audio recording equipment as a means of producing the official record of proceedings required by law or by rule or order of court.

These regulations, which became effective on January 1, 1984, were based on an experiment conducted by the Federal Judicial Center which concluded that given appropriate management and supervision, electronic sound recording can provide an accurate record of district court proceedings at reduced cost, without delay or interruption, and can provide the basis for accurate and timely transcript delivery. Electronic recording equipment has greatly improved since a study done in the early 1960s under the direction of Warren Olney III, then director of the Administrative Office. Courts that have used the equipment now available find that it overcomes the difficulties encountered in the AO study of two decades ago.

The Judicial Conference also resolved that the Chief Justice appoint an ad hoc committee of members of the Conference to monitor, on its behalf, the implementation

See AUDIO, page 8

CALENDAR

Mar. 5-6 Judicial Conference Committee on the Judicial Branch
Mar. 8-9 Judicial Conference of the United States
Mar. 22-23 Judicial Conference Advisory Committee on Civil Rules
Mar. 30 Judicial Conference Advisory Committee on Bankruptcy Rules
Apr. 1-7 Seminar for Newly Appointed District Judges
Apr. 9-11 Workshop for Judges of the Fourth Circuit

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past. The users group will have a major role in defining the requirements for these new systems and in pilot testing them in their own courts.

The UNIX operating system will be the standard for all future systems. UNIX, a powerful, state-of-the-art software base, can be used on a number of different computers without significant reprogramming, thus providing the additional benefit of portability. Portability is crucial to achieving independence from a single hardware vendor. Although hardware costs have decreased dramatically relative to increased performance, software development and maintenance costs have not—a result of their labor-intensive nature. With the use of the UNIX system, the courts will be able to take full advantage of the competing products of different computer vendors.

Also as part of the meeting, some of the applications now under development on supermicrocomputers were demonstrated to the group. These included Civil Case Management, Jury Management, Property Inventory, Attorney Admissions, and Financial Management. The New Appellate Information Management System (New AIMS), which features electronic docketing and is in prototype development in the Ninth and Tenth Circuits, and the Probation Information Management System (PIMS), which is under development in the Northern District of Ohio, were both described.

The group was informed that certain significant changes in court operations will be occasioned by the installation of the new computer systems. Responsibility for systems administration—the "care and feeding" of computer hardware and software—will accompany decentralization and will have profound implications for staffing and training in the courts. In addition to the new skills required for systems administration, some reorganization of paper flow and procedures will be necessary to make effective use of the new systems. This will place an additional demand on the courts during the transition from centralized to decentralized systems. Philip B. Winberry, clerk of the Ninth Circuit, related the pros and cons of being a pilot court in the systems development process and the challenges it has presented to his office.

The members of the users group were assigned to subcommittees in each of five areas of application: jury management, financial management, civil case management, criminal case management, and administrative support. The subcommittees will meet again during the annual Clerks Conference in Chicago at the end of April. ■

AO Reports on Juror Usage, Court Workloads, and Equal Employment Released

Three new editions of standard Administrative Office publications have appeared in recent weeks.

The *1983 Annual Report on Equal Employment Opportunity in the Federal Courts* is a two-volume publication recording efforts and achievements made last year by each federal court in implementing equal opportunity plan resolutions adopted by the Judicial Conference. The main volume of the set provides the hard data in the form of statistics on minorities' and women's employment and promotions in each court.

The second, or appendix, EEO volume compiles narrative reports supplied by each court's EEO officer on that court's recruiting efforts, hiring achievements, areas needing improvement, inhibiting factors, and complaint records. Detailed descriptions in the narratives for some circuit and district court reports have provided other court administrators with useful ideas for attaining their own EEO objectives.

The AO's annual report on federal juror usage, *1983 Grand and Petit Juror Service in United States District Courts*, has also recently become available. Data, presented mainly in tabular form, cover grand jury and petit jury activities by national averages and by individual circuits and districts. Shown in these measurements are jury selection ratios, jury usage statistics, and estimated costs of juries. Historical data for a five-year period are also provided.

The current grand jury statistics continue to be based on a reporting system that was begun in 1974. The 1983 data for petit juries, however, represent a marked change, in accordance with a new basis of reporting begun in July 1982. In prior years the Juror Usage Index had been calculated by dividing the total number of available jurors by the total number of jury trial days. Following its 1981 examination and analysis of jury management practices, the General Accounting Office recommended a change to a more efficient juror usage measurement. The House Appropriations Committee agreed, and subsequently, the Committee on the Operation of the Jury System of the Judicial Conference directed use of a revised reporting form that would distinguish activity on jury selection days from activity on days other than the initial day of selection. Hence, "first-day" juror usage days are now highlighted.

With the potential for distortion caused by lengthy trials removed

See AO REPORTS, page 8

LAW DAY—U.S.A. May 1, 1984 Law Makes Freedom Work

Annual Index Published

Distribution of the 1983 edition of the annual index to *The Third Branch* will occur this month. The new index covers all issues of Volume 15, from January through December 1983.

Readers can obtain back issues of the *Third Branch* by writing to the Federal Judicial Center's Dolley Madison House offices.

S.D.N.Y. Sponsors Innovative Internship Program For Local Law Students

As part of its response to the rapid escalation in *pro se* filings and in an effort to provide meaningful opportunities for law students to work with the courts, the Southern District of New York last year initiated a Student Internship Program that differs significantly from other federal court internships.

Rather than working directly for individual judges and being assigned to whatever tasks those judges deem appropriate, about ten well-qualified law students work at the court for twelve to fifteen hours a week, their time spent solely on *pro se* matters. During their first semester the students work in the Pro Se Staff Attorney's Office; in the next semester, if they are deemed qualified, students work directly with district judges or magistrates. In chambers the students concentrate on the same types of cases they worked on for the *pro se* attorneys: social security disability review cases, prisoner rights cases, employment discrimination actions, and other civil rights cases.

Students in the program receive course credit for the work they perform, which consists mainly of researching and developing the issues in each case, and also entails drafting orders and memorandums and performing administrative tasks. A seminar is offered to the students each week, usually led by a guest professor or local practitioner who guides discussion on aspects of their *pro se* assignments. Videotapes of the seminars have been made available to another court interested in the Southern District of New York's program.

Six institutions now participate by recommending one or two of their top students for the court's consideration. They are the Brooklyn Law School, Benjamin Cardozo School of Law, Columbia University School of Law, Fordham University Law School, New York Law School, and New York University School of Law.

Sentencing Institute to Be Held April 30-May 2

A sentencing institute for circuit judges, district judges, and chief probation officers of the First, Third, and District of Columbia Circuits will be held at Lake Kiamesha, New York, April 30-May 2. Registration for the institute will begin the afternoon of April 29.

The agenda for the institute includes discussion of the appropriate uses of incarceration, fashioning sentences that afford alternatives to incarceration, and the obligations of the sentencing judge under the Victim and Witness Protection Act of 1982. In addition to a tour of the Federal Correctional Institution at Otisville, New York, workshops will be conducted by members of the U.S. Parole Commission on the policies and procedures of the commission. A number of newly appointed judges from outside the participating circuits have also been invited to attend the institute.

A joint workshop for district court judges from the three circuits is scheduled to begin immediately upon adjournment of the institute.

Two additional sentencing institutes are being planned—one for the Fifth and Seventh Circuits, the other for the Ninth Circuit. Dates and locations have not yet been set.

Growth Seen in Number of Alternative Dispute Resolution Publications

The inaugural issue of *Dispute Resolution Forum*, a newsletter to be published several times a year by the National Institute for Dispute Resolution, appeared in December 1983. The issue features a wide-ranging discussion of the values of alternative dispute resolution mechanisms and the potential benefits of dispute resolution for our society. Included are the comments of Howard S. Bellman (Secretary, Wisconsin Department of Industry, Labor, and Human Relations), Marc Galanter (Professor, University of Wisconsin Law School), and A. Leo Levin (Director, Federal Judicial Center).

The *Dispute Resolution Forum* joins a growing list of publications that aim to increase the awareness of both policymakers and the general public of the advantages of methods of settling disputes without litigation. Other newsletters receiving wide distribution and attention include *Alternatives to the High Cost of Litigation*, a monthly supported by the Center for Public Resources and published by Harcourt Brace Jovanovich; *Conflict Resolution Notes*, by the Conflict Resolution Center in Pittsburgh; *Prospec-*

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1984 Circuit Judicial Conferences

First Circuit	Oct. 15-17	Martha's Vineyard, Mass.
Second Circuit	Sept. 13-14	Hartford, Conn.
Third Circuit	Sept. 16-18	Pittsburgh, Pa.
Fourth Circuit	June 28-30	White Sulphur Springs, W. Va.
Fifth Circuit	May 29-June 1	New Orleans, La.
Sixth Circuit	May 15-18	Cincinnati, Ohio
Seventh Circuit	May 13-15	Indianapolis, Ind.
Eighth Circuit	July 22-25	Kansas City, Mo.
Ninth Circuit	Aug. 12-15	Seattle, Wash.
Tenth Circuit	Aug. 22-25	Jackson Hole, Wyo.
Eleventh Circuit	May 6-9	Mobile, Ala.
District of Columbia	May 20-22	Williamsburg, Va.
Federal Circuit	April 26	Washington, D.C.

NOTEWORTHY

New rules for Bureau of Prisons. The Bureau of Prisons has adopted final rules on progress reports for inmates and on classification and program review of inmates, and has promulgated proposed rules on inmates' religious practices, searching and detaining of noninmates, arresting authority over prison visitors, and marriages of inmates. These new and proposed rules are published at 49 *Fed. Reg.* 190 et seq. (1984).

The progress reports, whose contents will be changed by the new rules, are regular reviews of an inmate's status, summarizing information relating to the inmate's adjustment during confinement, program participation, and readiness for release. Changes regarding classification and program review are intended only to refine and clarify existing rules.

The bureau intends, however, to amend and republish its entire set of rules on religious beliefs and practices. "Religious activity" under the proposed rules encompasses religious diets, services, ceremonies, meetings, and apparel. These rules will provide inmates with reasonable opportunities to pursue their religious beliefs and practices, provided these are within budgetary constraints and do not hinder the secure and orderly operation of the institution and the bureau. Rules pertaining to religious diets, including allowance of a once-a-year ceremonial meal for inmate religious groups, are new additions to the federal regulations.

To prevent the introduction of contraband into, and the illegal removal of items from, Bureau of Prisons institutions, another proposed rule authorizes bureau staff to subject all persons entering or leaving a bureau installation to a search of their persons and effects. Metal detectors, pat or visual searches, and breathalyzer and urine tests may be used. But with the exception of metal detection, searches and tests may not be conducted unless there is reasonable suspicion that a person has contraband or is under the influence of a narcotic drug or intoxicant. This rule also describes bureau policy on detaining and/or arresting a noninmate.

* * *

Sexual bias in the courts. A New Jersey task force, formed by the state's chief justice in 1982 to find out whether gender bias exists in the state's judicial system, concluded recently that women in the state are adversely affected by "stereotyped myths, beliefs and biases" regarding women. Following a thirteen-month investigation of numerous aspects of state court operations, the Task Force on Women in the Courts presented a report on its findings to the state's 1983 Judicial College and announced that women receive unequal treatment as lawyers, as litigants, and as criminal defendants.

Among the panel's findings: Judges "sometimes appear" to give less credence to female lawyers, witnesses, experts, and probation officers. A majority of female lawyers questioned by the task force said male lawyers receive more fee-generating court appointments than they do; 86 percent claimed their male counterparts made demeaning references and jokes about women, and two-thirds said judges did as well.

According to Lynn Schafran, executive director of the National Judicial Education Program, the problem of gender bias in the courts is nationwide and not uniquely New Jersey's. New Jersey may be unique, however, in instituting an education program that aims to make judges more sensitive to the situation.

* * *

Inmate employment. On October 31, Federal Prison Industries, often called UNICOR, employed 35.9 percent (or 8,047) of the federal inmate population, a record high. Estimates of employment of state prisoners vary, ranging from about 10 percent of prisoners to approximately 36 percent. The practice of inmate employment is radically different in certain other countries, notably Japan and the People's Republic of China, where nearly all prisoners are employed.

* * *

Alternative dispute resolution. To encourage law schools to integrate nonlitigious dispute resolution concepts and materials into mainstream legal education, the National Institute for Dispute Resolution has announced a $250,000 program to assist in funding "several focused exploratory efforts" in this direction. Among other efforts, the program will award small matching grants to schools and students who wish to explore dispute resolution subjects, help to develop dispute resolution curriculum materials, and promote interuniversity and practitioner cooperation and interest in dispute resolution.

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Abrams, Robert H. "Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts." 58 *Indiana Law Journal* 1 (1983).

Administrative Conference of the United States. *A Guide to Federal Agency Rule-Making.* GPO, 1983.

American Bar Association Section of Litigation. *Emerging Problems Under the Federal Rules of Evidence.* 1983.

Ames, Nancy L., and Lindsey Stellwagen. *A Survey of Bankruptcy Practice Under the Emergency Rule.* Abt Associates, 1983.

Atwood, Barbara A. "State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit." 58 *Indiana Law Journal* 59 (1983).

✓ Bazelon, David L. "The Dilemma of Criminal Responsibility." Remarks delivered at University of Kentucky College of Law, November 11, 1983.

Burbank, Stephen B. "Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980." 131 *University of Pennsylvania Law Review* 283 (1982).

California Judicial Council. *Report and Recommendations on Effectiveness of Judicial Arbitration.* 1983.

Duffy, Kevin T. "The Civil Rights Act: A Need for Re-evaluation of the Non-exhaustion Doctrine Applied to Prisoner Section 1983 Lawsuits." 4 *Pace Law Review* 61 (1983).

Fourteenth Annual Administrative Law Issue. Articles by Martin H. Redish, Marsha N. Cohen, Peter Raven-Hansen, and Ronald M. Levin. 1983 *Duke Law Journal* 197.

Freilich, Robert H., and Richard G. Carlisle, eds. *Sword and Shield, Section 1983; Civil Rights Violations: The Liability of Urban, State, and Local Government.* ABA, 1983.

Friedman, Daniel M. "Advocacy in Patent Cases Before the Court of Appeals for the Federal Circuit." 65 *Journal of the Patent Office Society* 217 (1983).

Greenstein, Richard K. "Bridging the Mootness Gap in Federal Court Class Actions." 35 *Stanford Law Review* 897 (1983).

Griswold, Erwin N. "Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts." 32 *Catholic University Law Review* 787 (1983).

Hatch, Orrin G. "The Freedom of Information Act: Balancing Freedom of Information with Confidentiality for Law Enforcement." 9 *Journal of Contemporary Law* 1 (1983).

Misner, Robert L. *Speedy Trial: Federal and State Practice.* Michie, 1983.

National Center for State Courts. *State Court Caseload Statistics: Annual Report 1978.* 1983.

Nejelski, Paul, and Andrew S. Zeldin. "Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story." 42 *Maryland Law Review* 787 (1983).

New Jersey Supreme Court, Task Force on Women in the Courts. *Summary Report.* 1983.

Note, "Sentencing of Youthful Misdemeanants Under the Youth Corrections Act: Eliminating Disparities Created by the Federal Magistrate Act of 1979." 51 *Fordham Law Review* 1254 (1983).

Redden, Kenneth R. *Federal Special Court Litigation.* Michie, 1982.

Research & Forecasts, Inc. *The American Public, the Media and the Judicial System: A National Survey on Public Awareness and Personal Experience.* Hearst, 1983.

Schrinel, Thomas. "Court Records Management: Evaluate Before You Automate." 8 *Justice System Journal* 102 (1983).

U.S. Courthouse at Foley Square, New York City

Schwarzer, William W. "Review of *Court Reform on Trial* by M. Feeley." 71 *California Law Review* 1572 (1983).

Second Circuit Review—1981-82 Term. 49 *Brooklyn Law Review* 659 (1983).

Special Project—An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation. Participants: John P. Burns, G. Edward Cassady III, Kenneth B. Cole, Jr., Timothy R. Dodson, Philip E. Holladay, Jr., Paul C. Ney, Jr., Drew T. Parobek, Kimberly Payne, D. Blaine Sanders, and L.D. Simmons II. 36 *Vanderbilt Law Review* 573 (1983).

The Supreme Court, 1982 Term. 97 *Harvard Law Review* 1 (1983).

Symposium on Reducing Court Costs and Delay. Participants: Joy A. Chapper, Paul R. J. Connolly, William H. Erickson, Leonard S. Janofsky, A. Leo Levin, Daniel J. Meador, and Joseph R. Weisberger. 16 *Michigan Journal of Law Reform* 465 (1983).

Symposium on State Prisoner Use of Federal Habeas Corpus Procedures. Contributions by Lawrence Herman, Daniel J. Meador, Frank J. Remington, Ira P. Robbins, Max Rosenn, Stephen A. Saltzburg, and Larry W. Yackle. 44 *Ohio State Law Journal* 269 (1983).

AUDIO, from page 3

of the regulations. The Chief Justice has appointed Chief Judge Collins J. Seitz of the U.S. Court of Appeals for the Third Circuit as chairman of this committee and Judge Robert R. Merhige (E.D. Va.) and Judge Albert G. Schatz (D. Neb.) as committee members.

The committee has completed a review of the "Guidelines for Recording Proceedings before United States District Judges and Judges of Territorial District Courts by Electronic Sound Recording," issued by the director of the Administrative Office. These guidelines, which are also effective as of January 1, 1984, address matters relating to the procurement and installation of equipment, the training of audio operators, the source and availability of transcription services, and the reproduction and sale of duplicate recordings to litigants, as well as other procedural and logistical matters concerning implementation of the regulations. ■

ALTERNATIVE, from page 5

tus: Conflict Resolution in the Community, by the Community Board Program in San Francisco; *Resolve*, a quarterly on environmental dispute resolution published by the Conservation Foundation; and, probably the longest running of these newsletters, the quarterly *Dispute Resolution*, by the ABA's Special Committee on Alternative Dispute Resolution.

On the American Arbitration Association's list of publications are two quarterly periodicals concentrating on voluntary arbitration in various commercial spheres, *Arbitration Times*, a newsletter, and *The Arbitration Journal*.

The *Harvard Negotiation Journal*, produced by the Harvard Program on Negotiation, will make its maiden appearance early this summer. And to this burgeoning list will soon be added *The Journal of Dispute Resolution*, to be published by the *Missouri Law Review* and the University of Missouri Law School's Center for Dispute Resolution. ■

AO REPORTS, from page 4

from the calculations, the new reporting methodology results in a markedly lower percentage in the category termed "jurors selected or serving" (21.3 percent using "first-day" numbers, compared with 55.7 percent under the old system).

Data on cases commenced, terminated, and pending in the U.S. district courts and courts of appeals for the twelve-month period ending September 30, 1983, are provided in the newly released 1983 edition of *Federal Judicial Workload Statistics*. This volume includes the first annual summary of the workload of the U.S. Court of Appeals for the Federal Circuit, which was inaugurated October 1, 1982. The volume also includes statistics on activities in the U.S. bankruptcy courts.

The AO's Statistical Analysis and Reports Division produced both the juror usage and the workload volumes. The EEO report was prepared by AO's Equal Employment Opportunity Office. ■

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THE THIRD BRANCH

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Judge Mazzone Elected to Center Board

At its March 1984 meeting, the Judicial Conference of the United States elected U.S. District Judge A. David Mazzone of the District of Massachusetts to a four-year term on the Board of the Federal Judicial Center. Judge Mazzone fills the position on the Board previously held by Chief Judge William S. Sessions (W.D. Tex.), whose term expired last month.

Judge Mazzone was appointed to the federal trial bench on February 10, 1978. Earlier, he had served as assistant district attorney for Middlesex County (1961) and as assistant U.S. attorney for the District of Massachusetts (1961-1965). Before moving to the federal court system, he spent several years (1975-1978) as associate justice of the Superior Court of the Commonwealth of Massachusetts.

Judge A. David Mazzone

Judge Mazzone received his undergraduate degree from Harvard College and his J.D. from DePaul University School of Law. ■

Perspectives from the Federal Trial and Appellate Bench: Judge Cornelia G. Kennedy

Judge Cornelia G. Kennedy has been a member of the federal bench for nearly fifteen years, serving as U.S. district judge for the Eastern District of Michigan beginning in 1970 and as chief judge from 1977 until her appointment to the United States Court of Appeals for the Sixth Circuit in September 1979. She was a Michigan state circuit court judge before moving to the federal system.

In addition to her undergraduate and law degrees from the University of Michigan, Judge Kennedy was awarded honorary LL.D. degrees from Northern Michigan University, Eastern Michigan University, and Western Michigan University. She has served on the Judicial Conference Advisory Committee on Judicial Activities, the Advisory Committee on Codes of Conduct, and the Judicial Fellows Commission and has been a member of the Board of the Federal Judicial Center since 1981.

Judge Kennedy is the daughter of a prominent Michigan lawyer (now deceased), is married to Charles S. Kennedy, Jr., and is the sister of Judge Margaret G. Schaeffer, a judge of the 47th District Court for the State of Michigan. A son, Charles S. Kennedy III, is currently enrolled in his third year at the University of Michigan.

During your term as chief judge of the Eastern District of Michigan, were there great administrative demands on your time, and if so, how did you cope with this and still carry your caseload?

There were significant administrative demands. They varied from demanding approximately 25 percent of my time—that was the usual requirement—to demanding almost total attention. Some particular concerns were facilities for newly appointed judges, administrative matters in the Clerks Office, the probation department, pretrial services, and

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Chief Justice Stresses Lawyers' Professional And Public Obligations

Chief Justice Warren E. Burger, in his traditional State of the Judiciary address at the American Bar Association midyear meeting in Las Vegas, called upon American lawyers to adhere to their highest standards by regarding the practice of law as a "profession of service with high public obligations." The Chief Justice addressed a variety of concerns that he suggested account for the decline in public esteem for the legal profession.

The Chief Justice commended the ABA for its support of past proposals —citing as examples the Institute for Court Management, the National Center for State Courts, the study on Standards for Criminal Justice, and the 1976 Roscoe Pound conference on the judiciary. But he went on to say that the association, with 300,000 members, has a continuing obligation to do whatever might be possible to see that the estimated 650,000 lawyers in this country meet their obligations to the public and the profession. These obligations, he said, should be directed to cure such things as the slow pace of justice and to more vigorous attempts to deal with incompetent

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Inside...

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space requirements. Also, we had speedy trial problems and problems regarding the housing of prisoners.

Our court provided for a reduction in caseload for the chief judge, but the reduction was only in the assignment of new cases and began only when I became chief judge. So it took approximately a year to feel the effect of that reduction. When I went on the court of appeals, one of my recommendations to the district court was that the district chief judge's existing caseload, as well as new assignments, be reduced the day that person became chief judge.

Would you have preferred waiting for a few years before taking on the task of being a chief judge in a busy metropolitan district?

No, I had then been on the court seven years. I think that I had an adequate understanding of the job. The new chief judge's manual that the Center is to publish will be very valuable. We didn't have anything comparable when I became chief judge. I found out what many of my duties were when a problem arose. They weren't set out anywhere; all I could do was contact the former chief judge. He, too, learned his duties as he went along. I understand that a new chief judge now goes to Washington and has an opportunity to talk to the people at the Administrative Office and the Federal Judicial Center about their duties. This, too, is a fine innovation.

THE THIRD BRANCH

BULLETIN OF THE FEDERAL COURTS

Published monthly by the Administrative Office of the U.S. Courts and the Federal Judicial Center. Inquiries or changes of address should be directed to 1520 H Street, N.W., Washington, D.C. 20005.

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.

When you were appointed to the United States Court of Appeals for the Sixth Circuit in 1979, did you leave the trial bench with mixed feelings?

Very much so. I really enjoyed trial work. I enjoyed it as a trial lawyer and I enjoyed trying cases as a judge, particularly cases with two good lawyers. Good lawyers on both sides and an interesting case are the most enjoyable part of being a judge. I enjoyed the affiliation with my colleagues on the district court. They had welcomed me warmly when I came to the district court. Later when I was chief judge, and I was senior to all of them in years of service, they supported me as chief judge. I'm still in the same building, so of course I still see my former colleagues. I appreciate that they still include me in their Christmas party.

Some federal appellate judges feel they derive a great deal from oral argument, while others believe heavy workloads give them no alternative but to cut back on the time allotted for oral argument. What are your views on this issue?

If I had my "druthers" I think I would have oral argument in any case in which there are attorneys. Oral argument in a case in which there are *pro se* litigants is not of much value as a rule. But I don't think oral argument needs to be long. I think that a well-prepared argument can be given in a relatively short time. I notice that when we give additional time for argument, we seldom get any more substance than we get from the shorter time. But we cannot hear all our cases orally because of the volume of appeals, so we have to be selective.

Some lawyers prefer that judges not read the briefs prior to argument and would rather gain their points through oral argument. What do you think about this preference?

Before oral argument I read all of the briefs in all of the cases. I also try to read the opinions of the United States Supreme Court and those of our court on the major issues involved. Unless one is going to spend a whole day on oral argument for each case, I don't see how a judge can really do justice to the case if that judge has not read the briefs and become thoroughly familiar with the issues.

This preference represents the "hot court" versus the "cold court," and I have heard that there are judges who feel that they might make up their minds on the wrong basis if they have read the briefs before hearing counsel's arguments. But it seems that a good argument is not going to be weakened or changed by the fact that one has become familiar with it. Some aspects of law are very complicated. You can't think everything through in two or three minutes or even the fifteen minutes allotted for oral argument. You have to have given some thought to the case beforehand. There are many different aspects of the law that all focus on a set of facts and you have to weigh them. If we heard only one or two cases, it might be all right to wait until argument to learn about the case, but when we hear forty-two cases in a two-week period that is a lot of sets of facts and a lot of issues, and most cases have several. I could not do justice to a case if I depended solely on thirty minutes of oral argument. If I read the briefs after the argument, I wouldn't have

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Announcement

The Second Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit is set for Thursday, April 26, 1984, at the Washington Hilton Hotel, 1919 Connecticut Avenue, N.W., in Washington, D.C.

The conference will be composed of the judges of the Federal Circuit, the Court of International Trade, and the U.S. Claims Court; members of the Patent and Trademark Office Boards, the International Trade Commission, and the Merit Systems Protection Board; and officials of Treasury, Justice, and the Customs Service; and is open to all members of the bar of the Federal Circuit.

Summary of Judicial Conference Actions At March Meeting

In addition to electing Judge A. David Mazzone to the Board of the Center, the Judicial Conference of the United States took a number of other initiatives at its March 1984 meeting. The Conference—

- Expressed its continued, strong opposition to two bills, S. 386 and S. 677, that would amend both the criminal rules and the civil rules to require, rather than merely permit, counsel to conduct the voir dire. The Judicial Conference has consistently opposed similar legislation for twenty years, but believes it important to reassert its views on the matter because of significant activity on the current bills in the Senate.
- Amended guidelines previously circulated by the director of the Administrative Office for the use of electronic recording equipment as a means of providing the official record of proceedings. The guidelines address, among other things, the procurement and installation of equipment, the training of audio operators, and the source and availability of transcription services. Also included is a requirement that any reduction of court-reporting staff be only by attrition.
- Accepted the recommendation of the Committee on the Operation of the Jury System to adopt as a national goal that all district courts limit the percentage of jurors not selected, serving, or challenged on voir dire/orientation day to 30 percent of the venire. Although the committee recognized that individual circumstances in some courts might prevent achievement of this objective, it felt this goal would be attainable in most district courts.
- Agreed with the recommendation of the Committee to Implement the Criminal Justice Act that the *Guidelines for the Administration of the Criminal Justice Act* should be amended to include minimum qualification standards for federal public defenders, so as to guide the courts and encourage the selection of qualified, capable individuals as federal public defenders.
- Adopted the same committee's proposals for amending the *Guidelines* to establish effective procedures for collecting, recording, and monitoring payments of court-ordered reimbursements for attorneys' fees by persons provided representation under the Criminal Justice Act. Performance of this function is to be centralized in the office of the clerk.
- Decided to oppose the inclusion of federal public defenders in the centralized salary-setting plan proposed for Article I judges and other supporting judicial officers in S. 443. The Judicial Conference believes that the current salary-setting authority,

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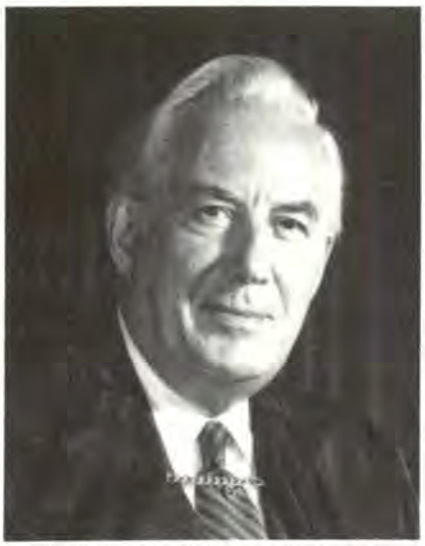
Judge Hoffman, Chief Justice Receive Devitt Awards



Chief Justice Warren E. Burger

Judge Walter E. Hoffman

Judge Walter E. Hoffman (E.D. Va.) has been named recipient of the annual Devitt Distinguished Service to Justice Award. Judge Hoffman was recognized for his outstanding work in judicial education and for his service as director of the Federal Judicial Center. Judge Hoffman, "one of the most active and best known federal trial judges," also was commended for his service as chairman of the Judicial Conference Committee on Criminal Rules and of the Conference of Metropolitan District Chief Judges.

The Devitt Award was established in 1982 by the West Publishing Company "to bring public recognition to the contributions made by federal judges to the advancement of the cause of justice" and is named for Judge Edward J. Devitt of the United States District Court for the District of Minnesota. Judge Devitt served on the selection committee along with Justice Byron R. White of the U.S. Supreme Court and Judge Gerald B. Tjoflat of the Eleventh Circuit.

* * *

A special Devitt Distinguished Service to Justice Award was presented to Chief Justice Warren E. Burger in honor of his longtime leadership in improving the administration of justice. Among his numerous accomplishments, the Chief Justice was cited as "a persistent advocate of the courts and of prison facilities" and for his efforts on behalf of the Institute for Court Management, the National Center for State Courts, and the National Institute for Trial Advocacy. The Chief Justice announced he will contribute the $10,000 honorarium to the Supreme Court Historical Society. ■

ADDRESS, from page 1

and dishonest lawyers, absurd and frivolous lawsuits that clog the courts, and undignified advertising in a profession that once "condemned champerty and maintenance and drove ambulance chasers out of the profession." Singled out as urgently needing reform were inexcusable abuses of the discovery process.

Expressions of discontent with the legal profession are "not casual or irresponsible," noted the Chief Justice. Many responsible critics of the profession, even from within it, have publicly criticized the enormous expense and inefficiency of our legal system. The Chief Justice quoted President Derek Bok of Harvard, who last year said, "The . . . inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world."

What sets the service professions of law and medicine apart from and above the rough-and-tumble of the marketplace, Chief Justice Burger pointed out, is the restraint historically observed by their members. The claim of those who say that civilized society's preservation depends upon its members' willingness to forgo some rights can be even more appropriately applied to the legal and medical professions, he indicated. Some journalists believe the public's low opinion of the media derives in part from certain other journalists' abuse of their First Amendment rights. Could it be found that the public's corresponding low esteem for the legal profession results from some lawyers' "exercising their First Amendment rights to the utmost?" the Chief Justice asked. Of course, not all attempts by lawyers to attain greater public visibility are undesirable, the Chief Justice observed. As an example the Chief Justice cited the efforts of lawyers who in a dignified manner promote the availability of their storefront or street-level legal clinics and thereby help to provide low-cost legal services to lower income citizens who might otherwise be denied access to legal assistance.

Referring again to a need for curtailment of discovery abuse, the Chief Justice discussed the recent Bench-Bar Workshop on Discovery Abuse held at the Federal Judicial Center in the fall of 1983. (For a complete summary of the workshop agenda, see *The Third Branch*, January 1984.) Expressing their dismay over current discovery excesses, members of the workshop (including two former federal judges) referred to abusive discovery tactics as a breakdown in professional standards and said they would have to conclude that many of these tactics could only be interpreted to mean lawyers were enriching themselves at the expense of their clients.

The Chief Justice also called upon judges to play a greater role in eliminating certain excesses in litigation, saying that the amended Federal Rules of Civil Procedure now place upon judges specific responsibilities, especially the trial judges at the pretrial management stage. Moreover, these responsibilities "direct the judges to impose sanctions directly on attorneys who abuse the court's processes."

The Chief Justice announced that he would ask the Judicial Conference of the United States to consider educational programs on the new rules in each federal circuit and district. These programs would be aimed at a better understanding of how the new rules can be applied, of how to make them work as they were intended to work and thus cure existing problems. Such programs would include a study of cost-shifting techniques and how to direct and control them to ensure they are equitably applied. He asked for the cooperation of local and state bar associations as well as judges in carrying out these educational programs. To assist in this endeavor the Discovery Task Force will provide blueprints that can be adapted to specific needs in each of the districts.

In closing, the Chief Justice also urged lawyers to stop being "slaves" of precedent, in the sense of doing "things in a certain way 'because we have always done it that way.' " For the benefit of society, lawyers need to become "healers of conflicts" and to cease being "mesmerized with the stimulation of the courtroom contest." ■

PERSONNEL

Nominations

Sarah Evans Barker, U.S. District Judge, S.D. Ind., Feb. 14

Edward J. Garcia, U.S. District Judge, E.D. Cal., Feb. 14

Harry L. Hupp, U.S. District Judge, C.D. Cal., Feb. 14

Neal B. Biggers, U.S. District Judge, N.D. Miss., Mar. 1

Robert R. Beezer, U.S. Circuit Judge, 9th Cir., Mar. 2

H. Russell Holland, U.S. District Judge, D. Alaska, Mar. 6

Edward C. Prado, U.S. District Judge, W.D. Tex., Mar. 6

Confirmations

John R. Hargrove, U.S. District Judge, D. Md., Feb. 9

Pauline Newman, U.S. Circuit Judge, Fed. Cir., Feb. 27

Sarah Evans Barker, U.S. District Judge, S.D. Ind., Mar. 13

Edward J. Garcia, U.S. District Judge, E.D.Cal., Mar. 13

Appointment

John R. Hargrove, U.S. District Judge, D. Md., Feb. 17

Elevation

Robert D. Potter, Chief Judge, W.D.N.C., Jan. 26

Resignation

James P. Coleman, U.S. Circuit Judge, 5th Cir., Jan. 31

Senior Status

Joe J. Fisher, U.S. District Judge, E.D. Tex., Jan. 30

Deaths

Anthony Julian, U.S. District Judge, D. Mass., Jan. 18

Sterry R. Waterman, U.S. Circuit Judge, 2d Cir., Feb. 6

Albert V. Bryan, Sr., U.S. Circuit Judge, 4th Cir., Mar. 13

Ninth Circuit En Banc Upholds Magistrates' Authority To Conduct Civil Trials, Enter Judgments

Reversing an earlier panel decision, the United States Court of Appeals for the Ninth Circuit sitting *en banc* recently held that "in light of the statutory precondition of voluntary litigant consent and the provisions for the appointment and control of magistrates by Article III courts," the authority granted to magistrates under 28 U.S.C. § 636(c) to conduct trials and enter judgments in civil cases is constitutional. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, Nos. 82-3152, 82-3182 (9th Cir. Feb. 16, 1984), *rev'g* 712 F.2d 1305 (9th Cir. 1983).

In so holding, the court expressed agreement with the Third Circuit's conclusion in *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983), that consent of the parties under § 636(c) cures any constitutional defects. (See *The Third Branch*, January 1984.) The opinion points out that the Supreme Court has allowed criminal defendants to waive fundamental rights such as the right to be free from self-incrimination, the right to counsel, the right to be free from unreasonable searches and seizures, the right to a speedy trial, the right to a jury trial, and even—by pleading guilty—the right to trial itself. The court, therefore, refused "to reach the anomalous result of forbidding waiver in a civil case of the personal right to an Article III judge."

Further, the court noted that the Federal Magistrate Act of 1979, as amended, invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system. Moreover, the act permits Article III control over specific cases by the resumption of district court jurisdiction on the court's own initiative.

Therefore, the court reasoned, "[t]he power to cancel a reference, taken together with the retention by Article III judges of the power to designate magistrate positions and to select and remove individual magistrates, provides Article III courts with continuing, plenary responsibility for the administration of the judicial business of the United States." Such responsibility "sufficiently protects the judiciary from the encroachment of other branches to satisfy the separation of powers embodied in Article III."

The constitutionality of a magistrate's consensual civil trial jurisdiction under 28 U.S.C. § 636(c) has also been upheld in *Goldstein v. Kelleher*, No. 83-1411 (1st Cir. Feb. 29, 1984), and in *Collins v. Foreman*, No. 83-7938 (2d Cir. Feb. 22, 1984).

Center Publishes Report on Magistrates' Roles

The Center this month published *The Roles of Magistrates in Federal District Courts*, a research report by Carroll Seron.

Based on a survey of 191 full-time magistrates located in eighty-two federal court districts, the report analyzes the extent to which magistrates are now performing the duties authorized by the Federal Magistrate Acts of 1976 and 1979. These duties include conducting civil and criminal pretrial conferences, developing reports and recommendations on dispositive motions, deciding nondispositive motions, and conducting civil trials upon consent of the parties. The survey also asked magistrates to describe the procedures their districts have developed for assigning duties to magistrates, as well as the frequency with which judges actually assign them such duties.

The survey found that most districts have certified magistrates to perform the duties authorized by 28 U.S.C. § 636(b) and (c). The findings also reveal, however, that there is variation among districts in the extent to which magistrates have actually been assigned those duties. Among the various civil and criminal matters magistrates are now handling, they are most commonly responsible for the disposition of prisoner petitions and social security cases.

The survey identified five fairly

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ICM Merges with National Center for State Courts

The Institute for Court Management and the National Center for State Courts recently merged, with the ICM now operating as a unit within the NCSC and retaining its identity as the Institute for Court Management of the National Center for State Courts. The arrangement between the merging groups requires no staff changes and provides for the continuation of ICM's present board, as well as the addition of Edward B. McConnell, executive director of NCSC, and another NCSC board member as ex-officio members of that board. ICM will remain in Denver, Colorado.

Because of the financial stability and resources assured ICM as a result of the merger, ICM's training and education services to justice system personnel will be broadened, Harvey E. Solomon, ICM's executive director, announced in a press release. The Court Executive Program, the Court Management Education Program, the Advisory Council of ICM Fellows, and the publication of *Justice System Journal* will continue. "ICM's research, technical assistance, and court studies programs will be integrated with those of the National Center," the release said.

The agreement signed by the two organizations is effective for an initial three-year period, with provision for a review of the arrangement after two years. If that review called for it, the merger could be dissolved after three years.

Both the ICM and the NCSC were founded at the urging of Chief Justice Warren E. Burger, who has continued his support for each institution. ICM began in 1970; the National Center was founded one year later. ICM has concentrated its efforts on improving court management through a series of seminars and workshops for key administrative personnel in the courts. These programs have been "designed to keep court managers

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any opportunity to ask counsel about unanswered questions.

Some judges say nothing is more irritating than to have counsel say in answer to a question from the bench, "I'll come to that later."

I think when judges ask a question, the time to answer it is *then*, at least briefly—even if it is something one is going to cover later. One might add, "I'd like a chance to develop this point more fully a little later in my argument." In the judge's reasoning, the answer to that point is needed at that time. And he or she is not going to go on in favor of the lawyer's position unless the point is resolved.

I think when a judge is asking questions, that means one still has a chance, because the judge still is not certain; that's why I think questions are so important and answering questions is so important.

Filings increased in the Sixth Circuit during the year ending September 30, 1983, yet the circuit terminated more cases in that time period than they did the prior year. What procedures are used by the circuit that have been particularly effective in expediting cases to conclusion?

The reason our court was able to terminate more cases last year was because of additional service from the district judges in our circuit. Every panel on our court has a senior judge, a district judge, or a visiting senior judge. I'm not sure that I commend that procedure to other circuits because I think you lose something in the development of the law of the circuit to have so many judges who are not part of the court itself participate in its decisions. I don't include our own senior judges, who are, of course, an important part of our court.

The court of appeals really does appreciate their service. All of them have very busy dockets of their own, but they recognize that until you can get the case out of the system—conclude the appeal—the litigants haven't had a resolution of their case. So it seems to me that by asking the district judges to assist us in disposing of appeals we are using judge power in an effective way.

Do you think some of the judges on the district level like to do it for a change of pace?

I think district judges for the most part do enjoy sitting occasionally on the court of appeals. And it's a valuable experience for them because it gives them an opportunity to see firsthand what our court is doing and sometimes to see the mistakes district judges can make. I know this is true because I sat on the court of appeals when I was a district judge. You can see things that are being done which could be done better, see changes that would help appellate review. And I think it's very good for the court of appeals to have district judges sitting with them because there is a personal exchange with these judges that helps one to understand the problems they face. We ask every one of our district judges to serve one week a year on the court of appeals.

One week of sittings also requires time for preparation. Our policy is therefore not to assign them more than one full opinion. If they want to volunteer to write more than one, they may. Because cases are being filed the week they are sitting with us, they have to write these opinions,

"Judges have to insist that lawyers argue cases more succinctly and with shorter, more-to-the-point briefs."
—Judge Cornelia Kennedy

by and large, in the evening. But I find I have to work evenings, too. All federal judges do.

If a judge from outside your jurisdiction comes to sit on a panel in your circuit, do you and other members of the court do anything to make that judge feel welcome and to show that you appreciate his or her contribution?

Yes, our court does make an effort to welcome visiting judges. First, our chief judge tries to call that judge Sunday night when he or she gets into Cincinnati, the only city in which our court sits. If the chief judge is not sitting, another judge on the court assumes that responsibility each week to be sure that the visiting judge's accommodations are all right and that he or she knows, for example, places to eat Sunday night. During the week our court eats lunch together every day, so we make sure the visiting judges are aware of that and somebody stops by their chambers to walk to lunch with them. We also try to be sure that visitors have some arrangements for dinner, either with one of us or friends in town, so they are not left on their own unless they really want to be. Also, we give them a little packet of materials listing places to

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eat as well as the procedures we follow.

Do you feel that there is much to be gained by more affiliation, in an official way, with the district and circuit judges? Would you include the workshops?

I think the Center's workshops are extremely valuable to the judges of the courts of appeals, because it gives us another opportunity to be with the district judges in a study atmosphere. Even the programs that deal with procedure and with the operation of the district court are valuable to the circuit judges. We have to know what the district judges' problems are and recognize them even though we may not be in a position to help them. When one is reviewing appeals, one is reviewing the product of the district court judge and one doesn't know the problems that the district judge faced when he or she made the decisions. Now that doesn't mean that the district court's response can always be legally justified, but at least it ought to be understood.

What screening procedures are followed in the Sixth Circuit?

I think ours are similar to those of most circuits. Our staff attorneys screen all the *habeas* cases and *pro se* cases. In prisoner *pro se* cases, unless they are not to be decided without oral argument, we have to appoint counsel. So, of course we have to screen for that purpose. I would say the only thing that's lacking in our screening procedure is that we don't have the staff to screen all cases. So we screen just in limited areas. Staff attorneys also have a lot of work to do with respect to motions. I don't think people realize that our court had 6,000 motions last year. Staff attorneys prepared memos on over 700 of these. The clerk's office handled over 5,000. That number does not include motions related to argued cases. These motions have to be handled on a regular basis month in and month out.

We do one thing in our court that I think is different from some other circuit courts. Our nonargued cases, that is, the cases that have been screened and will not be argued orally, are added to the calendar of argued cases, and we discuss these nonargued cases at a conference, either before or following a conference on argued cases. We find that's very valuable. If we have disagreement on the disposition of a case on the nonargued calendar, it is put on the argued calendar for argument.

What policy or rule does the Sixth Circuit follow on the publication of opinions?

Judge Cornelia G. Kennedy

The Sixth Circuit's rule presumes that opinions will be published. However, they are not published where they follow settled law or depend on the resolution of the particular facts in that particular case. Any judge on the panel or on the court may ask that an opinion be published, and it will be. Or the parties can ask that an opinion be published if it hasn't been.

With the volume of cases that the courts of appeals are deciding these days, I think there is some need not to publish everything. And yet I personally feel that the litigants should, if at all possible, get a reasoned disposition from the court of appeals. That's the first appeal they have had. It's a lot different from the Supreme Court's denial of certiorari. Those cases have already had a review. I know there are other opinions on that matter, and I recognize the problems in having decisions of the court which are not precedent. We have a very difficult problem and there are arguments on both sides of the issue.

The Administrative Office in California recently released a statement saying that they will now authorize partial publication in cases in which a portion of the opinion might be helpful to counsel and to judges. Would you approve of a partial publication policy?

Well, I haven't given that any

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New Search and Seizure Rules

Pursuant to rules recently adopted by the U.S. Parole Commission, federal probation officers are now authorized to seize contraband (i.e., drugs or firearms) observed in plain view in a parolee's residence, place of business, or vehicle, or on his or her person. Further, probation officers are now permitted to examine the arms, legs, and eyes of parolees released under drug aftercare conditions for any indication of drug use.

These new search and seizure procedures, effective as of April 1, are intended as a significant supervision tool for early detection of parole violations and for crime prevention. "Resort to drug activity by a parolee is very often a sign of imminent failure on parole," according to the Parole Commission, "and early discovery of drug use enhances prospects of salvage of the releasee through prompt treatment." While drug aftercare parolees already must submit to urinalysis, the searching now authorized will be an additional and much quicker means of detecting drug use.

In both the search and the seizure provisions, use of force is not permitted. The parolee's refusal to cooperate or to permit a reasonable examination, however, could be used in considering revocation of the parole release.

The new procedures are published at 49 *Federal Register* 6716 (1984).

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which is vested in the various courts of appeals, should be maintained.

• Following the recommendation of the Committee on Court Administration, decided to take the following actions to ensure greater enforcement of discipline taken against attorneys and improved reporting of public disciplinary actions to the ABA National Discipline Data Bank: urge the courts of appeals and the district courts to adopt the Model Rules of Disciplinary Enforcement unless they already have more effective and efficient rules for the implementation of attorney discipline; urge all courts to report *all* private and public discipline of attorneys to all licensing authorities with jurisdiction over the attorneys; request state courts to report to the respective federal courts all disciplinary actions taken against attorneys who are members of the bars of federal courts; and recommend reporting of all public discipline imposed by all state and federal courts (including actions taken over the last five years) to the ABA National Discipline Data Bank.

• Pending the outcome of the pilot district court executive program, rejected a proposal to institute the position of administrative aide to a chief judge of a district court having five to ten judgeships.

• Decided to oppose a proposed amendment to rule 704 of the Federal Rules of Evidence that would prohibit an expert witness from stating an opinion as to whether a defendant in a criminal case had a mental state constituting an element of the offense charged or of a defense to it. The Conference also declared its opposition to a proposed amendment to those rules that would prohibit an expert witness from giving an opinion in a civil commitment proceeding regarding the likelihood that a person will commit acts of serious bodily injury to or property damage against another.

• Decided that determining the need for a full-time magistrate should continue to be based on an individual review of various factors affecting court workload in each district, in preference to a proposal to authorize a full-time magistrate's position for each district.

• Endorsed the actions currently being taken or proposed by the Administrative Office to encourage the further use of magistrates and to inform the courts about the magistrates system in connection with such matters as the jurisdiction of magistrates, the processes used to approve requests for additional magistrate positions, and the availability of the AO's Division of Magistrates to study a court's utilization of magistrates as well as to provide information on other courts' use of magistrates. These actions are being undertaken in response to recommendations contained in a July 1983 GAO report (see *The Third Branch*, September 1983).

In addition, the Conference expressed its preference for language to amend 28 U.S.C. § 636(c)(2) to clarify the designation of a magistrate to exercise jurisdiction over a civil action when the parties consent. Rather than notifying parties of their "right to consent" to the use of a magistrate, the section should be amended to read, "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall notify the parties in a civil action of the availability of a magistrate to exercise such jurisdiction."

• Approved, in accordance with the recommendation of the Committee on the Administration of the Federal Magistrates System, a 3.5 percent cost-of-living increase in salary for all part-time magistrates. This raise, retroactive to the beginning of the first pay period commencing after January 1, 1984, will give part-time magistrates an adjustment equal to that received by other federal employees.

Authorized, in accordance with the recommendations of the Committee on the Administration of the Probation System, a joint sentencing insti-

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distinct types of assignment procedures: (1) random assignment through the clerk's office; (2) rotational assignment among magistrates, whereby an "on-duty" magistrate is assigned all appropriate matters; (3) assignment by a chief magistrate who oversees the random allocation of matters; (4) assignment through judge-magistrate pairs, whereby a magistrate is assigned to a group of judges and works for those judges on request; and (5) direct assignment by a judge at his or her discretion. Random assignment is the most common procedure for civil matters, rotational assignment the most common procedure for criminal matters.

The report raises several questions for further study: How do magistrates fit into the overall operation of the district court? How has the practicing bar responded to the presence of magistrates? And finally, what contribution have magistrates made to reductions in the courts' backlogs?

To receive a copy of this report, write to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked (but do not send an envelope). ■

Position Available

Federal Public Defender, Western, Northern, and Eastern Districts of Oklahoma. Salary up to $61,065. Provides federal criminal defense services in all three districts, appoints and supervises staff, manages offices in Oklahoma City and Tulsa, and manages courts' Criminal Justice Act panel. Requires law degree and membership in a state bar; a minimum of five years of criminal practice experience, preferably in federal courts, is desirable. To apply, obtain application form from Jack C. Silver, Clerk, United States District Court, Room 411, U.S. Courthouse, Tulsa, OK 74103. Completed applications must be received by May 1, 1984.

EQUAL OPPORTUNITY EMPLOYER

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thought until now. It seems to me that one is putting an additional burden on the court to decide what part of the opinion should be published. I think that if I had two issues in a given case, one of which was important and should be published and the other one not, I would handle that in the opinion and deal with the second issue in a very short paragraph.

What do you think are the greatest problems in the federal courts today?

I think the greatest problem the federal courts face is the volume of work. That volume has increased significantly in the fourteen years I've been on the federal bench—both for the trial courts and for the appellate courts. And I think the hardest problem we have is retaining the manner in which we have permitted cases to be presented, that is, with oral argument in the appellate courts and with careful reading of briefs by judges. How long can we maintain those practices with the volume of work we have? What has to give? There comes a point when there are no more hours in the week, and I think the appellate judges have reached that point. I think many trial judges reached that point a long time ago. The only immediate help available is from lawyers, which means lawyers have to prepare material more concisely so that judges have less to read. Lawyers are also going to have to learn to try cases more quickly. The judges will have to contribute to that by insisting that lawyers try cases more quickly. And we have to insist that lawyers argue cases more succinctly and write shorter, more-to-the-point briefs. There is still some slack in that area that can be tightened up. I don't see any other immediate hope. I haven't figured out a way yet to get any more hours in a day.

What about calendar control?

I think calendar control for many judges has reached its maximum right now, although there is room for improvement in the system as a whole. Another area where lawyers can help is in settling more cases. Lawyers are becoming more conscious of settlement as a manner of dispute resolution. Law schools are teaching settlement techniques now, which they didn't even ten years ago. I've always thought that if each lawyer would settle one more case it would result in a very significant reduction in our caseload.

Do you think the court should participate more in the settlement process or at least encourage it?

As some of the other circuits have done, our court has adopted a settlement program. Now the Second Circuit, the Seventh, the Sixth, and perhaps others have this program. It is the job of the settlement attorney to find cases that can be settled and settle them. The program has resulted in some additional cases being settled. The Center's study of the settlement program in the Second Circuit has shown that there is a statistically significant difference between the cases that went into the settlement program and the control cases that didn't. I think that's a good program.

As for whether district judges should participate in settlements more than they do, some judges participate a great deal, of course, and others don't participate at all. In the nonjury case it's very difficult for a judge to participate in settlements unless the parties are really pretty close and both want you to bridge the gap.

Should the "settlement judge" be one who will not be trying the case?

Yes. And indeed, in the Eastern District of Michigan, we would occasionally get together with another judge. We never had a formal program, but judges occasionally sent nonjury cases to another judge for settlement. The problem with that program is it takes up a lot of judicial time. You can't settle a case unless you know a little something about it. I think it might be possible to adopt a program like our settlement attorney program in the district court. Perhaps one of the settlement attorneys from a court of appeals could go to a district court and stay for a period of time and with a controlled program see what results could be had.

Has your settlement program caused any problems?

Our settlement project in the court of appeals has caused one problem for our circuit. Judges participating in the settlement conference cannot sit on the panel that heard the case. But we are changing our rule so that a judge who participated in the settlement conference can sit on an *en banc* panel. We don't feel we need to remove a judge from the *en banc* court in order to effectuate this program.

Does your court use some of the practices used in the Second Circuit's CAMP program?

Yes, our settlement attorneys studied that program, and they are working very hard, including reading casebooks on negotiation. Plus, they have worked with some of the experienced trial judges—those on the court of appeals now who were trial judges, such as Judge Keith and myself. For the first settlement conference these judges participated, but as we've gone along in the program, the settlement attorneys are doing more and more cases.

What could you suggest for dispute resolution, especially at the district level?

Our own judicial experiences shape our thinking. State courts in Michigan have compulsory mediation, and the Eastern District of Michigan has adopted compulsory mediation in diversity cases, with some sanctions. The sanctions in the Michigan courts are that you have to pay actual attorney fees for the trial if you reject settlement. Now, that may be a little severe, but compulsory mediation, even without sanctions, has some value because the mediation panel is looking at a case objectively. And their recommendations, if they are experienced trial lawyers, have got to be of value in determining what a case is worth in terms of settlement. That's something that can be done,

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and justice-system professionals informed about the growing body of knowledge dealing with management concepts and technology and their application to court operations."

The overall aim of the National Center has been "to help state courts better serve both litigants and the general public." Projects to this end have involved court statistics, judicial information systems, case-flow management, personnel administration, and court facilities studies. ■

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and it can be done without great expense. You may have to pay the mediator some small fee, but some mediators may be willing to do it without fees. In Michigan they are paid a small fee.

Could you use special masters?

The ideal would probably be to use magistrates; they are working full time at deciding cases. What you want is somebody who is on the side and available—somebody who is not being used now. A master is a possibility, but then, again, that is going to be an additional expense. I'm looking for an inexpensive resolution of these problems.

There is something to be said for mediation by lawyer panels. In Michigan they use one lawyer who is thought to be defense-oriented, one plaintiff-oriented, and one neutral. The neutral lawyer is one who doesn't practice in that field. The three are representative and it gives a certain amount of balance.

Do you have anything else you would like to add?

Well, there is one other thing, although this is just a judge problem. Judges become very isolated, and I think we have to make a real effort to maintain contact with the bar. You almost have to do that through formal bar association activities. A certain amount of isolation is unavoidable, but I do think you have to consciously try to not become too isolated.

Years ago judges used to have a little bit of time to do something besides judging. We don't have that time anymore. Yet we really need an opportunity for renewal—I mean intellectual renewal. We really need an opportunity to read and to think about something that isn't a case. The opportunity for this seems to be almost gone. We're just deciding cases, deciding cases, deciding cases. That's one reason that I think the Federal Judicial Center seminars are so valuable. They at least give judges an opportunity to expand their thinking outside the area of a particular case. ■

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tute for the Fifth and Seventh Circuits, to be held sometime in July 1985, and gave tentative approval to a sentencing institute for the Ninth Circuit in fiscal year 1985. (An institute for the First, Third, and D.C. Circuits is scheduled for April 30–May 2, 1984.)

- Noting that H.R. 3128 (the Sentencing Reform Act of 1983) contains a provision authorizing appellate review of sentences and that filings in the courts of appeals continue to increase dramatically, the Conference adopted a resolution recommitting all sentencing problems to the Committee on the Administration of the Probation System for further study and report.
- Pursuant to a September 1982 resolution regarding the need for expeditiously filling judgeship vacancies, the Conference released a list of current vacancies showing three circuit, twenty-one district, and two Court of International Trade judgeships to be filled. ■

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Assistant Attorney General J. Paul McGrath on Antitrust Cases, Economics, and the Courts

J. Paul McGrath became the assistant attorney general in charge of the Justice Department's Antitrust Division on December 16, 1983; previously, beginning in September 1981, he served as head of the department's Civil Division. A graduate of Holy Cross College and the Harvard Law School, where he was an editor of the law review, Mr. McGrath was a partner in the New York City firm of Dewey, Ballantine, Bushby, Palmer and Wood before joining the Reagan administration.

In the following interview, Assistant Attorney General McGrath describes the educational role that the Antitrust Division intends to play for the bench and bar and discusses other plans and priorities for the division. He also comments on certain techniques necessary for the appropriate preparation, management, and litigation of large, complex antitrust cases.

J. Paul McGrath

Please describe generally the function or mission of the Antitrust Division and how your activities relate to and are coordinated with other divisions in the Justice Department.

The Antitrust Division has several principal functions. Obviously, we enforce the antitrust laws in court. And since some of our cases are criminal cases, we do coordinate with the Criminal Division and with various U.S. attorney's offices. Further, we are engaged in many regulatory and legislative endeavors throughout government—principally preaching the gospel of competition. In recent years, that has meant that we have been on

See McGRATH, page 2

House Hearings Held on Federal Courts' Fiscal Year 1985 Budget Request

The House Appropriations Subcommittee on the Departments of State, Justice, Commerce, the Judiciary and Related Agencies held hearings March 13 and 14 on the federal judiciary's budget for fiscal year 1985. The amended request for all federal judicial agencies for 1985 totals $1,021,221,000, an increase of $108,060,000 over the amount appropriated by the Congress for fiscal year 1984. The judiciary accounts for about one-tenth of 1 percent of the total federal budget requested from Congress.

Testifying on behalf of the circuit, district, and bankruptcy courts' requests were the Judicial Conference's Budget Committee chairman, Chief Judge Charles Clark of the Fifth Circuit Court of Appeals, Judge James Harvey of the Eastern District of Michigan, and Administrative Office Director William E. Foley. The amount requested for the operation of these courts in fiscal 1985 totals $954,041,000, an increase of $103,992,000 over the approved spending level for fiscal year 1984.

Chief Judge Clark noted that the 1985 budget requests represent "the smallest increases possible consistent with the ever growing workload of the courts."

See BUDGET, page 5

Bankruptcy Transition Period Extended

On March 31, President Reagan signed Public Law 98–249 (98 Stat. 116), which extends the transition period for bankruptcy proceedings, enacted in 1978 as title IV of Public Law 95–598, through April 30, 1984. The extension provides Congress additional time to complete action on remedial bankruptcy legislation.

The new law delays for another thirty days the scheduled changes in title 28 of the U.S. Code that were enacted in 1978 but have not yet taken effect, including those provisions relating to the salaries of bankruptcy judges and magistrates. In addition, the terms of incumbent bankruptcy judges have been expressly continued until May 1, 1984, when they will expire. Finally, the service requirement to qualify for the special retirement provisions made available to bankruptcy judges by the 1978 act has been extended, and bankruptcy judges now serving must continue to serve until April 30 to qualify for the enhanced credit.

Questions concerning the new law should be addressed to the Office of the General Counsel of the AO (FTS 633-6127).

Inside...

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the side of deregulation in many, many agencies and in many legislative discussions within the executive branch. In addition, we get involved in other interagency matters. For example, international trade issues have competitive components and we therefore are involved in Cabinet council groups or sub-Cabinet council groups dealing with international trade or other economic issues where antitrust or competitive factors are significant.

You just mentioned "preaching the gospel of competition," and in a recent speech, you noted that the division had an *educational* role to play to bring to the forefront "the fruits of the best legal and economic analysis we can muster on questions of antitrust policy." How will you play that role in regard to the courts?

We play that role for the most part with amicus filings or with the publication of guidelines of one sort or another. Let me give you an example. An area of antitrust law that today is in a state of flux is the question of vertical restraints—restraints such as exclusive-dealing contracts or contracts that restrict a distributor to one territory. The law is in a state of flux because it was only seven years ago that the Supreme Court decided that "the rule of reason" should apply. In this area, we can be of assistance to the courts by doing two things: by filing amicus briefs in appropriate cases and also by promulgating vertical practice guidelines which would also be available to the courts. The reason we can be helpful is that we do have a great deal of antitrust expertise, and we can be seen as an objective voice because, unlike virtually every other litigant in such cases, we have no bias. We are not pro-manufacturer or pro-distributor or pro-big company or pro-small company. My hope would be, therefore, that if we can present sensible, well-reasoned analyses of these problems, the courts might well benefit from our thinking and be helped in their own analyses.

Is there anything that the courts or judges can do for themselves to help with their own educational process?

Very definitely. The study programs in the economic area that have developed over the last few years for judges are very helpful. Seminars and other training sessions in economics are critical as we come to recognize that sensible antitrust policy has to be based on sensible economics. By "sensible" economics I mean the best economic thinking of the time—thinking that is as advanced as possible. The programs that have been available to the federal judiciary in these areas have been excellent. The caliber of economists who have been participating in them has been top-rate. I know from talking to judges that their attendance at these sessions has been increasing and they have recognized more and more the importance of this kind of training. Most of us—judges and lawyers—do not have a strong economic background, or perhaps we have an economic background which was acquired before the teachings and advances of very recent years. Therefore, I think programs such as these are critical for effective handling of economic issues.

Judges, in reaching decisions in antitrust cases, do not use different skills to apply economics to the facts. The thing that differentiates complex economic cases from other cases is simply that if you have an understanding of economics you are in a much better position to then apply economics to the facts of the case. Frequently the facts and the economics are interrelated. It probably is little different, perhaps no different, from a situation in which a court has a very difficult case involving biological science. Obviously, a judge who understood biology would have a strong head start. I suppose you don't have training programs for all judges in biology because you don't have enough cases that re-

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CALENDAR

May 6–9 Eleventh Circuit Judicial Conference
May 13–15 Seventh Circuit Judicial Conference
May 13–18 Seminar for Newly Appointed Bankruptcy Judges
May 15–18 Sixth Circuit Judicial Conference
May 20–22 D.C. Circuit Judicial Conference
May 21–22 Judicial Conference Advisory Committee on Civil Rules
May 24–25 Judicial Conference Subcommittee on Judicial Statistics
May 29–June 1 Fifth Circuit Judicial Conference
May 30 Judicial Conference Ad Hoc Committee on the Media Petition (Cameras in the Courtroom)
May 31–June 1 Judicial Conference Subcommittee on Federal-State Relations
May 31–June 1 Judicial Conference Subcommittee on Federal Jurisdiction

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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 of the U.S. Courts.

A Reminder

The beginning date for receipt and consideration of applications for law clerkships will remain July 15 of the summer between an applicant's second and third years of law school.

The Judicial Conference agreed recently to retain that date and to ask the American Association of Law Schools to inform its members of the reaffirmed policy. The July 15 starting date will continue, on an experimental basis, until March 1985, at which time it will be "reexamined in light of the experience under it and with the benefit of the views of all federal judges formed by reference to that experience."

Second and Third Circuits Appoint New Clerk of Court and Circuit Executive

Elaine B. Goldsmith is the new clerk of court for the Second Circuit; William K. Slate II has been named circuit executive for the Third Circuit.

The Second and Third Circuit courts of appeals have announced the appointment of two senior staff officials. Elaine B. Goldsmith has been selected as clerk for the Second Circuit and William K. Slate II has been named circuit executive for the Third Circuit.

Mrs. Goldsmith, a graduate of the University of Michigan and Seton Hall Law School, brings to the Second Circuit an extensive background in judicial and public administration. From 1975 to 1980, she was executive director of the Executive Commission of Ethical Standards of the Department of Law and Public Safety for the state of New Jersey, and from 1980 until her appointment to the federal system, she was clerk of the Tax Court of New Jersey. Prior to her public service, Mrs. Goldsmith practiced law in New Jersey and was an adjunct professor at Seton Hall Law School. Mrs. Goldsmith was appointed clerk on March 12, 1984.

Mr. Slate, a graduate of Wake Forest University and the University of Richmond Law School, has served as clerk for the Fourth Circuit Court of Appeals for the past twelve years. During that period, among numerous other accomplishments, he was appointed by Chief Justice Burger as a member of the National Task Force to Review the Federal Rulemaking Process, served as a member of the Board of Directors of the American Judicature Society and as first chairman of the Circuit Clerks Liaison Committee with the Administrative Office and the Federal Judicial Center, and taught a variety of courses at the University of Richmond Law School, Virginia Union University, Virginia Commonwealth University, and the Institute for Court Management. Prior to serving with the federal judiciary, he was clerk of the Hustings Court (now the Circuit Court) of the City of Richmond and worked for the Federal Bureau of Investigation. Mr. Slate will assume his duties as circuit executive in June 1984. ■

Circuit and District Filings Continue to Rise Sharply

Docketing activity in the U.S. courts of appeals rose to unprecedented levels in calendar year 1983, according to a report presented by the director of the Administrative Office to the Chief Justice and the Judicial Conference on March 8. Appellate filings rose overall by 9.4 percent over the comparable period one year earlier, increasing in eight of the twelve regional circuits. Bankruptcy appeals represented the largest percentage increase; nonprisoner private civil appeals and state prisoner petitions represented the largest numerical increases.

Although terminations were 5.8 percent higher than in 1982, also reaching a record high, the pending caseload rose 4.5 percent because filings greatly outstripped terminations.

Both civil and criminal filings in the U.S. district courts continued to increase in 1983. Civil filings rose 14.3 percent over 1982 to 255,546. This number is 34.2 percent higher than the corresponding figure for 1981. Although civil dispositions rose 11.7 percent in 1983, the pending caseload increased by 13.4 percent. The number of pending civil cases at year's end 1983 represents 479 cases per judgeship. Criminal cases rose 11.6 percent in 1983, and although criminal dispositions also rose, they did not rise enough to offset filings; 20,276 criminal cases were pending on December 31, 1983, a 16 percent increase over the figure for 1982.

Social security disability insurance cases showed the largest increase, more than doubling from year's end 1982 to the corresponding date in 1983. Actions seeking recovery of overpayment of veterans' benefits also rose sharply in 1983.

Areas showing substantial increases in criminal filings were prosecutions under the Drug Abuse Prevention and Control Act, burglary prosecutions, and actions for immigration law violations. ■

McGRATH, from page 2

quire that expertise for it to be worthwhile. That isn't true with economics because not only antitrust cases but also many regulatory cases involve economics. Therefore, there are enough cases, I think, where economic background and economic training would be very helpful.

The 1979 National Commission for the Review of Antitrust Laws and Procedures concluded that district courts should consider the "possibility of assigning complex antitrust cases to judges whose background, temperament, and interests are conducive to the exercise of firm and efficient case management." Would you care to comment on that statement?

As a general matter, I am not in favor of specialized courts, nor am I in favor of assigning panels of appellate court judges to particular cases because of their expertise. I also generally am not in favor of assigning district court judges to cases because of particular expertise. There may be situations, however, where assigning very big cases to particular district court judges would be appropriate or where individual factors might have to be taken into account.

Would you please define both "very big" and "individual" factors?

Yes, let me give you an example. If a case the size of *United States v. AT&T* came in—a case that was clearly going to last for a number of years and was going to involve an enormous amount of effort by whichever judge was assigned—it might be appropriate for the judge assigned through the random process to excuse himself or herself from the case, if, for example, he or she was close to retirement or did not otherwise plan to be on the bench long enough to handle the case or to spend the enormous number of hours that might be needed.

I think it's clear that I would regard that as an unusual situation. By and large, except in that kind of unusual situation, I think it is better if cases are assigned on a random basis both in federal district courts and in the federal courts of appeals. It's nice in theory to have cases assigned to judges who are perfectly suited for them. But I have a concern that perhaps the system won't be viewed as being quite as objective, quite as impartial, and quite as fair if there is some selection of judges for particular cases. The overall perception of the system as being fair and impartial is so important that I think it's a little dangerous to start picking judges for cases because of their talents or perceived talents.

You mentioned *AT&T*. What did we learn from that case and from the *IBM* case?

One thing to learn from very large cases like those two is that they are manageable or not manageable depending on the management abilities and inclinations of the judge involved. I am not going to comment particularly about those two cases or the judges who handled them, but there are a

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Positions Available

Clerk of Court, U.S. Bankruptcy Court for the Eastern District of Louisiana (New Orleans). Salary from $42,722 to $55,538. Requires ten years of administrative experience in public service or business, three of which occurred in a position of substantial management responsibility; equivalencies of undergraduate, postgraduate, or law degrees, as well as years of active law practice, may be substituted. To apply, send resume, by May 18, to James M. Moore, Clerk of Court, U.S. Bankruptcy Court, 500 Camp St., New Orleans, LA 70130.

* * *

Clerk of Court, U.S. District Court for the Central District of Illinois (Springfield). Salary of $50,252. Requires ten years of administrative experience in public service or business, three of which occurred in a position of substantial management responsibility; equivalencies of undergraduate, postgraduate, or law degrees may be substituted. To apply, send resume, Standard Form 171, or local application form, by June 1, to Chief Judge J. Waldo Ackerman, Room 319, Federal Building, Springfield, IL 62701.

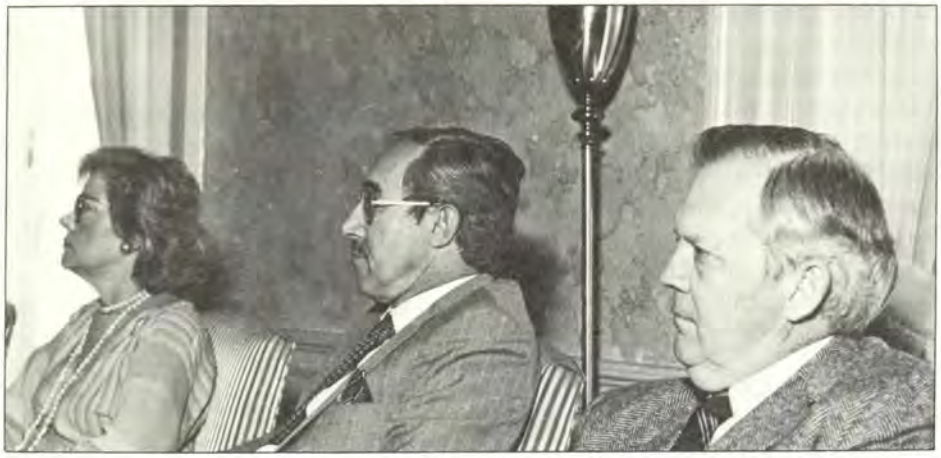
Clerk of Court, U.S. District Court for the District of Maryland (Baltimore). Salary to $66,000. Requires ten years of administrative experience in public service or business, three of which occurred in a position of substantial management responsibility; equivalencies of undergraduate and postgraduate degrees may be substituted. Undergraduate degree in government or public, business, or judicial administration required; graduate degree in law or business, public, or judicial administration preferred. To apply, send resume, by May 11, to Chief Judge Frank A. Kaufman, U.S. District Court, 101 W. Lombard St., Baltimore, MD 21201.

* * *

Senior Staff Attorney, U.S. Court of Appeals for the Eighth Circuit (St. Louis). Salary to $50,252. Requires three to five years' legal experience as practitioner or law professor; knowledge of federal appellate procedures and computer-assisted legal research desirable. Five-year commitment desired. To apply, send resume, salary history, and references, by June 4, to Lester C. Goodchild, Circuit Executive, 1114 Market St., Room 542, St. Louis, MO 63101.

EQUAL OPPORTUNITY EMPLOYERS

Seminar for Newly Appointed District Judges



Above right, AO Director William E. Foley speaks at the Seminar for Newly Appointed U.S. District Judges, held at the FJC in April. Right are Judges Maryanne T. Barry (D.N.J.) and Harry L. Hupp (C.D. Cal.). Above are Judges Lenore C. Nesbitt (S.D. Fla.), Hector M. Laffitte (D.P.R.), and James M. Kelly (E.D. Pa.).

BUDGET, from page 1

Approximately one-half of the increase in court appropriations is associated with the higher costs of maintaining the current level of services. Without these inflationary increases and other factors beyond the courts' control, the judiciary's budgetary requirements would be only $56,425,000 (6.6 percent) over the amount authorized for 1984.

The noninflationary increases sought for fiscal 1985 also are uncontrollable in that they relate to increases in case filings and new legislation, including the 1982 Pretrial Services Act. The impact of rising filings is seen most directly in the request for 31 additional deputy clerks in the circuit courts, 428 more deputy clerks in the district courts, 330 new positions for the probation service, and 147 additional positions for pretrial services. In all, 1,214 positions have been requested. Were Congress to approve the new positions requested by all third branch agencies in their appropriations estimates, staffing in the judiciary would total 17,658 positions.

Direct costs of establishing the new positions in the circuit, district, and bankruptcy courts will total more than $27,000,000. More than $3,000,000 will be needed for additional office space and furnishings and $6,000,000 for additional operational and maintenance costs such as travel, communications, and equipment.

"In order to handle the increased workload and continue to improve services to the bar and the litigants," Chief Judge Clark noted, "the Judiciary has been rapidly expanding its use of automation." He mentioned the five-year court automation plan and a number of the programs included in the plan. The budget contains an additional $1,015,000 in 1985 for these programs.

Members of the subcommittee were particularly interested in the ever-increasing workload of the courts and its impact on the court system. Interest was also expressed in the judicial process as it applies to the statutory right to appeal. Other issues discussed included the effect of the Speedy Trial Act on the district courts and the progress being made in implementing the Pretrial Services Act. The issue of the adequacy of judges' salaries and whether the current compensation of judges will at some time affect the caliber of those on the bench was also raised. ■

The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.

—Oliver Wendell Holmes, Jr.

McGRATH, from page 4
range of things that a court can either do or not do that will affect dramatically how a case is handled. For example, in a very large antitrust case I tried before I came here, the court, after extensive discussions with counsel, decided that each side would be allowed a certain number of trial days and, barring some unforeseen circumstances, that would be it. It was quite a large number of trial days, but it was quite a number fewer than the parties on their own would have used up. The parties knew in advance how many days they had; they constructed their whole presentation around that and, mechanically, it worked out fine. Now, obviously, it takes a judge who has gotten on top of the situation, has understood it, is realistic about how much time is going to be allowed, and then is firm in the end about how he or she is going to do it. This approach made for a vastly better trial than would have happened otherwise.

"The economic learning of the last ten years shows that most mergers are not troublesome economically and do not hinder competition or raise prices." —*J. Paul McGrath*

The same thing is true in discovery; there should be control over what discovery is going to be permitted, what areas of discovery are to be permitted, and the proper issues for discovery. There are many ways to do this, but to do it well takes time and effort, intelligence and perseverance, and flexibility. Flexibility is very important, because it's very easy to come up with some rule for a case, but you have to really think through where you are going and be ready to change if it doesn't work out.

Can you suggest any other management techniques to control these kinds of cases?

I don't have any magic formulae. It's been my experience that the judges and the magistrates who have done the most effective jobs have been the ones who have been willing to work pretty hard in the cases (and there is no substitute for hard work) and who have been good listeners and really have understood what the problems are that the plaintiff and the defendant each have in presenting the case—judges who are realistic and who are flexible but firm.

From the division's point of view, will there be any changes in tactics or any changes in approach that you will now take in cases like *IBM* or *AT&T*?

Since we do not now have a comparable case, there isn't any specific approach we have adopted. But there is one thing that is very important in a large case in which we are seeking injunctive relief of one sort or another—that is, to structure the case so that it can be moved to conclusion as rapidly as possible. That sometimes means you have to pare it down more than you might want to at an early date; it may mean that instead of litigating the fifty-two issues that you'd like to litigate, you have to lop off some early on. That takes some intelligence and some daring, but the problem is that if you don't do that kind of advance planning and surgery, you may end up putting on a trial years after it should have been put on, completing it even years later, and then ending up with a meaningless decree.

Would that structuring also involve more vigorous efforts at settlement rather than litigation?

I don't know. I have not really been involved in any settlement discussions in big monopoly cases here. From this side of the bar, I can't say. Obviously it's tremendously important to take a realistic approach toward settlement at every stage. You can't really separate litigation strategy from settlement strategy. But other than saying we should be realistic, I'm not sure I can really add much to that.

Several months ago, Deputy Attorney General Schmults, in an interview for *The Third Branch*, commended the Antitrust Division's work in "the program of eliminating or modifying old, outdated

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PERSONNEL

Nominations

Edward Leavy, U.S. District Judge, D. Or., Mar. 26

Terrence W. Boyle, U.S. District Judge, E.D.N.C., Apr. 4

William D. Browning, U.S. District Judge, D. Ariz., Apr. 4

Joseph J. Longobardi, U.S. District Judge, D. Del., Apr. 4

Alicemarie H. Stotler, U.S. District Judge, C.D. Cal., Apr. 4

Confirmations

Harry L. Hupp, U.S. District Judge, C.D. Cal., Mar. 20

H. Russel Holland, U.S. District Judge, D. Alaska, Mar. 26

Robert R. Beezer, U.S. Circuit Judge, 9th Cir., Mar. 27

Neal B. Biggers, U.S. District Judge, N.D. Miss., Mar. 27

Edward C. Prado, U.S. District Judge, W.D. Tex., Mar. 30

Senior Status

Lawrence T. Lydick, U.S. District Judge, C.D. Cal., Mar. 1

Fred J. Cassibry, U.S. District Judge, E.D. La., Mar. 15

Deaths

J. Sam Perry, U.S. District Judge, N.D. Ill., Feb. 18

John M. Davis, U.S. District Judge, E.D. Pa., Mar. 8

George Boldt, U.S. District Judge, W.D. Wash., Mar. 18

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Butler, M. Caldwell. *Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come?* National Legal Center for the Public Interest, 1983.

Clifford, Mary L. *Court Case Management Information Systems Manual: Guidelines for Implementing an Automated Information System in Courts.* National Center for State Courts, 1983.

Currie, David P. "The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864." 1983 *Duke Law Journal* 695.

Dellinger, Walter. "The Legitimacy of Constitutional Change: Rethinking the Amendment Process." 97 *Harvard Law Review* 386 (1983).

Flynn, John J. "'Reaganomics' and Antitrust Enforcement: A Jurisprudential Critique." 1983 *Utah Law Review* 269.

Green, Michael D. "From Here to Attorneys' Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts." 69 *Cornell Law Review* 207 (1984).

√Huyett, Daniel H. "Management of Federal Court Reporters." 99 *Federal Rules Decisions* 243 (1983).

Jorden, James F., and Michael T. Greif. "Federal Securities Fraud and State Law Fiduciary Duties—A Tour of the Circuits Reveals Continuing Confusion." 19 *Idaho Law Review* 211 (1983).

McGovern, Francis E. "Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management." 19 *The Forum* 1 (1983).

National Center for State Courts. *Women in the Judiciary: A Symposium for Women Judges Held April 15–17, 1982.* 1983.

Norton, William L., Jr., and Richard Lieb. "Ending the Bankruptcy Jurisdiction Dilemma—An Article III Bankruptcy Court Approach." 67 *Judicature* 346 (1984).

√Richey, Charles R. "A Modern Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial." 72 *Georgetown Law Journal* 73 (1983).

Schwarzer, William W. "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact." 99 *Federal Rules Decisions* 465 (1984).

Symposium: Sanctioning Attorneys for Discovery Abuse—The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar. Articles by Paul A. Batista, Abraham D. Sofaer, Nicholas deB. Katzenbach, and Peter M. Fishbein. 57 *St. John's Law Review* 671 (1983).

Tribe, Lawrence H. "A *Constitution* We Are Amending: In Defense of a Restrained Judicial Role." 97 *Harvard Law Review* 433 (1983).

Wallace, J. Clifford. "A Two-Hundred-Year-Old Constitution in Modern Society." 61 *Texas Law Review* 1575 (1983).

Videotapes on Working with Computers Available

The Federal Judicial Center has available for circulation a new three-tape series entitled "Working with the Computer." The tapes provide an introduction to computer systems and their use. Relying on analogies and using nontechnical language, the tapes explain electronic data processing and how computer systems can improve the flow of information by increasing the speed and efficiency with which data are collected, processed, and analyzed. The series also describes typical input, output, and secondary storage devices.

The videocassette series is designed primarily for nontechnical clerical workers, supervisors, and first-line managers. It is geared toward those who are not computer specialists but who need to understand what computers are and how they can be used to improve the information gathering, processing, and storage tasks that organizations typically face.

Each tape is approximately thirty minutes in length. The series is available in both ½-inch (VHS) and ¾-inch (U-matic) formats. The tapes can be ordered from the Center's Media Services Unit, Attn: Barbara Cicala, 1520 H Street, N.W., Washington, DC 20005 (FTS 633-6415). Priority in borrowing the tapes will be given to the pilot trial and appellate courts working with prototype computer systems. Please ask for "Working with the Computer" and specify Media ID VG–033.

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consent decrees." Is that program still ongoing?

It is. A number of the decrees have been modified and a number of them have been eliminated. I think we have eliminated some of the more troublesome ones. They are troublesome in this sense: A decree may have made perfect sense in 1925, but by 1985, it may artificially inhibit one or more companies in the industry and thus actually have anticompetitive consequences. We have other consent decrees under study, but what we are doing now is making a review of the program to see just how much more effort we should put into it. There are some very old decrees that don't really make any sense any more, but nobody very much cares about them. Perhaps

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we will just ignore a number of ones like that and then move along to other things.

In terms of moving along to other things, would you please outline your plans and priorities for the division.

The major things I am concerned about are these: First, in the area of merger policy, we have moved in the last few years from a policy that was hostile toward mergers and acquisitions generally to a policy that is based on sensible economics. The economic learning of the last ten years shows that most mergers are not troublesome economically and do not hinder competition or raise prices. Those mergers ought to be allowed and encouraged because there ought to be a free market of corporate assets in this country. We have, however, defined pretty well those mergers which create problems, which create the risk of undue concentration and thus collusion. The critical thing is to keep analyzing the guidelines to see whether we are doing it the right way. Right now we are studying the guidelines to see whether they should be updated or revised in any way to reflect two more years of experience, two more years of economic learning and comment. The reason for doing that is to keep merger policy in touch with reality.

Second, we can do a better job of advancing sensible antitrust enforcement through educational efforts, through the issuance, for instance, of the vertical guidelines, through speeches explaining what we are up to, and through amicus filings in the right kinds of cases. I think the Antitrust Division has a very strong role to play in these areas because, among other things, it is critical that business managers know what things they are permitted to do so that they have the maximum flexibility under the law in this era of tremendously difficult competition. And it is also important that we do the best job we can in assisting the courts to come to good sound conclusions in antitrust cases.

A third area of great importance to me is criminal enforcement—price-fixing and other cases attacking conspiracies among competitors. We have an intense study underway here of the manner in which we are using our criminal enforcement techniques and also of the economic approach to price-fixing cases. We want to see whether we can improve those techniques as well as our economic approach to price-fixing investigations and cases. I include that as a top priority because I believe a good deal of price fixing goes on, which is economically very costly, both in dollar terms and in competitive terms. I believe we have to do the best possible job we can of deterring price fixing.

You mentioned deterrence. What kinds of sentences do you feel will have the strongest deterrent effect—large fines, incarceration?

I believe both—large fines and incarceration. The jail sentences that have been meted out are often only a few months long. But, as a practical matter, I think a relatively short sentence in this area can have an enormous deterrent effect. Businesspeople generally are honest people and would be horrified at the prospect of even a day in jail. Therefore, I don't think this is an area where you need ten-year jail sentences. A much more moderate jail sentence can serve a very adequate deterrent role. Further, publicizing the sentence is tremendously important. The only way a jail sentence can have a deterrent effect on others is if others know about it. ■

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THE THIRD BRANCH

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VOLUME 16
NUMBER 6
JUNE 1984

Chief Judge Feinberg Explains Second Circuit's Success in Managing Heavy Caseload

Judge Wilfred Feinberg was appointed to the United States Court of Appeals for the Second Circuit in March 1966 and became chief judge of that court in June 1980. Prior to his appointment to the appellate court—from 1961–1966—he served on the United States District Court for the Southern District of New York.

Chief Judge Feinberg is a member of the Judicial Conference of the United States and has served on its Advisory Committee on Civil Rules, Subcommittee on Supporting Personnel, and Subcommittee on Judicial Statistics. He was also a member of the Federal Judicial Center's Advisory Committee on Experimentation in the Law.

A graduate of Columbia College with a law degree from Columbia Law School, where he was editor-in-chief of the law review, Chief Judge Feinberg was deputy superintendent of the New York State Banking Department before his appointment to the federal judiciary.

Arnold Newman

Chief Judge Wilfred Feinberg

Even though the Second Circuit has one of the larger caseloads among the circuits, the number of cases in your circuit under submission for longer than ninety days is relatively small. In fact, according to the AO's recently released statistics on the twelve months ending September 30, 1983, the Second was one of the few circuits without a case pending longer than a year. How do you explain this success?

The most important thing is that we've been fortunate in the circuit to have had a series of truly great administrators in the past as chief judge. I refer to Judge Lumbard and then Judge Friendly and then Judge Kaufman, all of whom were very good administrators over a span of twenty years. And so when I became chief judge in June 1980, the court was really up-to-date and was used to being up-to-date. The tradition, the habit of being on time, being prompt, getting out opinions quickly, is like any other habit—it's something you get accustomed to. It's just as easy to learn a habit of promptness as it is to learn a habit of delay. It's like cigarette smoking. Once you have the habit, it's very hard to break it. We use a lot of informal devices to try to keep our cases moving quickly. But I would say the most important thing we have is the shared concept that we should get our business done promptly.

Is that because New York is such a very big, busy metropolitan jurisdiction with a litigious population? Is it that you feel the pressure?

That may be part of it. I think the

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Bankruptcy Transition Period Extended Again

On April 30, during his visit to the People's Republic of China, President Reagan signed Public Law 98-271 (98 Stat. 163), which again extends the transition period for bankruptcy proceedings, enacted in 1978 as title IV of Public Law 95-598, through May 25, 1984. The transition period, which was to expire at the end of March of this year, had previously been extended through April 30 to provide Congress additional time to complete action on remedial bankruptcy legislation.

The new extension delays for another twenty-five days the scheduled changes in title 28 of the U.S. Code that were enacted in 1978, but have not yet taken effect, including provisions relating to the salaries of bankruptcy judges and magistrates. In addition, the terms of incumbent bankruptcy judges have been expressly continued until May 25, 1984, when they will expire. Finally, the service requirement to qualify for the special retirement provisions made available to bankruptcy judges by the 1978 act has also been extended, and bankruptcy judges now serving must continue to serve until May 25 to qualify for the enhanced credit.

As *The Third Branch* went to press, on May 25, the President signed H.R. 2174, granting a third extension of the transition period through June 20, 1984. ■

Inside . . .

FEINBERG, from page 1

people around New York—the lawyers, the judges, as well as all the others—tend to be a little bit more compulsive about these things, but that's only a small part of it. The volume in the last four or five years has been staggering. Just since I've been chief judge, the volume of filed cases has gone up over 25 percent, although last year it went down a little. This year it seems to be going up again, and it may be our highest year of filings, or close to it. That means we have to do something to deal with the flood of cases coming in.

We do have a number of habits, devices, and procedures that we use to try to keep cases moving. One of them is what we call the sixty-day list. That's an internal list of cases in which the opinion has not been filed sixty days after argument. We have a court meeting on the average of once every two months. At that meeting, one of the items on the agenda always is the sixty-day list. Each judge is responsible for reporting when a case on the sixty-day list is expected to be terminated by the filing of an opinion. Nobody criticizes anybody, and there's no reason for anyone to explain, just to forecast when he or she expects the case to be terminated. It's very effective because none of us likes to be on the list. Almost everyone is on it sooner or later, though, because everyone is busy and the cases do tend to back up; it does serve the purpose of focusing on the need to dispose of the cases.

New judges seem to come to your court with a certain esprit de corps—a feeling of the need to keep abreast of their work, the need to keep up with their colleagues and the traditions of the "Mother Court." What inspires them once they walk into Foley Square?

The federal courts are a good example of the old guild training where people learn from the more experienced by watching them do it and then by doing it themselves. When we have an influx of new judges—and we have had six on our court of eleven in the last four or five years—every new judge has a chance to see exactly how more experienced judges handle cases, extensions of time, disposition of relatively simple cases and filing of opinions without too much time going by. We set up our panels in such a way as to have the judges sit with as many other of their colleagues as possible.

And watching the presiding judges—who by definition are the senior active judges on the panel—is a way of absorbing the court's tradition of speedy dispositions while at the same time trying to give full consideration to every case. We try also to see to it that every judge, even the junior judges, presides over some of the panels. If a junior judge sits with a senior judge and a visiting judge, he or she would be the presiding judge.

We have other little customs and devices. For example, you are not supposed to delay when a draft opinion is received from a colleague. You're not expected to drop everything that minute, but

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FJC Videotape Describes Uses of Personal Computers

A videotape designed to introduce viewers to personal computers is available through the FJC's Media Services Unit.

The tape, "Introduction to Personal Computers," explains the hardware and software of microcomputers—the machines themselves and the programs that make them do specific tasks. The 53-minute tape also explores the special terms used in conjunction with microcomputers.

The tape reviews some common uses viewers might have for these machines, such as financial and statistical analysis using electronic spreadsheets, word processing, electronic communication, access to data bases, and creation of graphics. The tape complements "Microcomputers: An Introduction," a videotape that has been available through the Center for several months (see *The Third Branch*, November 1983).

The new tape emphasizes a how-to approach more than the earlier one does, which focuses on easing the fears of potential users with no computer training. Neither an understanding of how computers work nor a knowledge of how to program them is vital to performing the tasks explained in the new tape.

"Introduction to Personal Computers" is available for loan by writing to Barbara Cicala, Continuing Education and Training, 1520 H Street, N.W., Washington, DC 20005, or by calling FTS 633-6216. "Microcomputers: An Introduction" can also be borrowed through Ms. Cicala. The identification number for "Introduction to Personal Computers" is VG-034; for "Microcomputers: An Introduction," VG-026. Requests should indicate whether the ½-inch VHS format or the ¾-inch U-matic format is required. ■

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 of the U.S. Courts.

CALENDAR

May 29–June 1 Fifth Circuit Judicial Conference
May 30 Judicial Conference Ad Hoc Committee on the Media Petition (Cameras in the Courtroom)
May 31–June 1 Judicial Conference Subcommittee on Federal-State Relations
May 31–June 1 Judicial Conference Subcommittee on Federal Jurisdiction
June 4–5 Judicial Conference Subcommittee on Supporting Personnel
June 11–12 Pilot Court Automation Seminar
June 14–15 Judicial Conference Subcommittee on Judicial Improvements
June 18–19 Judicial Conference Advisory Committee on Criminal Rules
June 18–19 Seminar for Circuit Executives
June 18–20 Asbestos Case Management Workshop
June 25–27 Judicial Conference Committee to Implement the Criminal Justice Act
June 28–29 Judicial Conference Committee on Administration of the Bankruptcy System
June 28–30 Fourth Circuit Judicial Conference

Center to Maintain Collection of Local Rules

The FJC's Information Services Office is now maintaining a collection of and an index to the local rules of all federal trial and appellate courts.

To ensure that this collection is as complete and up-to-date as possible, courts are requested to forward all changes and additions to their local rules to the Information Services Office, 1520 H Street, N.W., Washington, DC 20005.

E.D. Pa. Establishes Historical Society

On the occasion of the creation of the historical society, Judge J. William Ditter holds a 1790 court document. With him are (l. to r.) Michael E. Kunz, clerk of court; Chief Judge Alfred L. Luongo; and Patrick T. Ryan, a Philadelphia lawyer.

The Eastern District of Pennsylvania recently formed a historical society to help preserve records of the court's contribution to American history.

As announced by Chief Judge Alfred L. Luongo, the Historical Society of the United States District Court for the Eastern District of Pennsylvania will assist scholars and researchers who want to use the court's significant collection of historical documents and judicial artifacts, including photographs, portraits, and memorabilia.

The court, one of the original thirteen districts, traces its roots to 1789, when it was founded as the federal court for the state of Pennsylvania, authorized to sit in Philadelphia and New York. Subsequent divisions gave the Eastern District responsibility for Philadelphia and its environs, while creating two other districts in the state.

In addition to maintaining the court's historical materials, the society will endeavor to publish articles and books on the court's function and role and to hold exhibits on court history. ■

FBI Statistics for 1983 Show Large Decrease in Serious Crime

Serious crime declined by 7 percent nationwide last year, FBI statistics compiled from records of reported crimes show. FBI Director William H. Webster, who announced the 1983 figures recently, said the decrease was the largest since the FBI began keeping records a quarter-century ago.

Attorney General William French Smith said that a 50 percent increase in federal law-enforcement budgets over the past three years helped bring the crime totals down. Last year, the FBI's figures showed a 3 percent decline in serious crime—the first major decrease since 1977.

A breakdown of the preliminary statistics, based on reports given to the FBI by state and local law-enforcement agencies, showed murder and robbery each down 9 percent, rape reduced 1 percent, assault down 3 percent, and property crimes, such as burglary and auto theft, lowered 7 percent.

The FBI's statistics showed that crimes were down in every region, and in communities of all sizes.

The decline "proves we are beginning to win the battle against crime,' Attorney General Smith said. He attributed part of that decline to increased deterrence of criminals. "It is no coincidence that the decreases in our crime rate come at a time when more criminals are behind bars than ever before. Indeed, beginning in 1980, a long-term decline in the probability that a person committing a serious crime would be arrested was reversed; today, criminals are more likely to be arrested and more

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within the next few days attention should be given to that opinion and either a concurrence sent, a memorandum prepared as to problems, or a draft of a dissent started.

We also rely heavily on summary dispositions. About 60 to 65 percent of the cases that go to a panel after briefing and argument are disposed of by what we call summary dispositions, and not by full opinion. Those are not ordinarily one-line orders; frequently, they run two or three pages. They are always reasoned dispositions, but they get out quickly. Frequently, they get out in the same week as the argument or the following week.

Are they calendared separately?

No, they are not. We calendar a case soon after the appellant's brief comes in. That's when it gets calendared for argument. We don't do any screening of cases for the purpose of deciding whether to have oral argument. That means the case is not delayed at all.

When is the decision made to handle a case by summary disposition?

After the argument. Sometimes even during the argument we will pass notes to each other. A tentative decision will be made as to whether the case can be disposed of by a summary order. The summary orders are usually prepared by the presiding judge. That's another example of how the guild system works. The preparation of summary orders is quite difficult. It takes a lot of care, but it's compressed into a fairly short period of time. And on those occasions when one of the junior judges presides, he or she has to do it, and then they get the experience.

What criteria are used in deciding which cases qualify for summary orders—simple issues with no precedential value?

That's exactly what the criteria are. Our local rule 0.23 states that the demands of an expanding caseload require the court to be conscious of the need to utilize judicial time efficiently. It continues, "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order." That doesn't mean that the disposition is not a reasoned disposition. We believe the litigants are entitled to know the reasons why their appeal failed.

I would like to add one thing about the disposition rate in the Second Circuit. We've been talking up to now about cases that go to panels and go to judges. One of the reasons why our median time has been, for some time, the lowest in the nation is that there are a lot of cases that never go to judges, that get disposed of rather quickly in our circuit. I'm talking now about the cases that get dismissed because timetables haven't been met, that get settled through our civil appeals management program (CAMP), or get withdrawn for one reason or another once the parties know that they are on a fast track and they have to file their briefs. About 50 percent of our cases are now disposed of without judge time being spent on them at all. Also, we have the advantage of being a relatively concentrated circuit geographically.

"The federal courts are a good example of the old guild training where people learn from the more experienced by watching them do it and then by doing it themselves."

—Chief Judge Wilfred Feinberg

Further, the judges see each other a lot, and we have a lot of panels sitting, fifty-one or fifty-two this year. We have a panel sitting almost every week of the year, and some weeks we have two panels sitting. And we also have a panel sitting in July and a panel sitting in August. This means that we don't have too many weeks going by where there is no panel already there to hear an emergency case. There is no two- or three-week delay waiting for the next group of judges to come in. That also saves disposition time because, when we see each other, we frequently can dispose of a case in a conversation. A matter that has bothered one judge or another can sometimes be dealt with quickly either in a response to a memorandum or in a face-to-face meeting.

Are these summer sessions a recent innovation?

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Rule 16(b) Scheduling Orders Discussed in FJC Paper

The Center has published *District Court Implementation of Amended Federal Civil Rule 16: A Report on New Local Rules*, by Nancy Weeks. This paper examines how federal district courts have responded to the amendment of Federal Rule of Civil Procedure 16, effective August 1, 1983.

To date, thirty-three districts have local rules implementing rule 16(b), which requires scheduling orders in all cases except those exempted by local rule. The author describes these new local rules to help to inform the decisions of courts that are examining their scheduling-order rules.

One aspect of the local rules discussed is the choice between a requirement that certain pretrial and discovery phases be completed by a certain date (fixed-time scheduling) and a requirement that separate deadlines be set for pretrial phases in each case (case-specific scheduling). Other issues examined include exemption of certain cases from the local scheduling rules, division of labor between judges and magistrates, and provisions for extensions of scheduling-order deadlines. An appendix includes local rules from fifteen districts.

Copies of the paper have been distributed to circuit and district executives and chief judges. Copies can be requested from the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked (but do not send an envelope).

Pictured are members of the Advisory Committee on Bankruptcy Rules, which met recently in Washington. Seated (l. to r.) are Bankruptcy Judge Asa S. Herzog (retired), District Judge Morey L. Sear, Circuit Judge Ruggero J. Aldisert (chairman), and District Judge John T. Copenhaver, Jr. Standing (l. to r.) are Herbert Katz, Esq.; Richard L. Levine, Esq.; AO Deputy Director Joseph F. Spaniol, Jr. (secretary); Prof. Lawrence P. King; Prof. Walter J. Taggart (reporter); Bankruptcy Judge Alexander L. Paskay; Bankruptcy Judge Clive W. Bare; Charles A. Horsky, Esq.; Bankruptcy Judge Beryl E. McGuire; Norman H. Nachman, Esq.; Prof. Robert W. Foster; and Joseph Patchan, Esq.

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likely to be incarcerated than they were in 1980."

The attorney general maintained, however, that to decrease crime further, "we need to reform our criminal statutes so they protect society more and free criminals less." ■

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No. We've had them for some time. I don't recall the exact statistics offhand, but when I first came on the court in 1966 I recall sitting nine weeks a year and we would hear about fourteen or fifteen cases each week. Now each active judge is expected to sit ten weeks a year, with a week's calendar of twenty-three to twenty-four cases. The volume has gone up so much that we have to have more panels sitting. We always had the system of having panels sitting consecutively without much time gap between them. But we did not have regularly scheduled panels sitting, let's say, from the end of June to perhaps the beginning of September. That doesn't happen anymore. For some time now, we have had regularly scheduled panels sit for a week in July and a week in August to hear a full complement of appeals.

Do you have enough judge power? Do you need extra help?

We do need extra help. We have eleven active judges and five senior judges. The Judicial Conference has approved a bill, now pending in Congress, for two additional active judges, which we badly need. Without those two judges, we have to rely heavily on the use of seniors and visiting judges—more heavily than we like. And the use of seniors, of course, is use of a diminishing resource. They work very hard in our court—much harder than anyone should expect of people in their seventies and eighties.

You mentioned earlier inheriting a rich tradition. What innovations have you added to that tradition?

I don't think there have been too many innovations. I was lucky enough to inherit, as I said before, a ship that was sailing pretty well. We've just done more of the same, I think. For example, we still expect to hear oral argument in every case. One thing that I did do—before Congress made it a statutory requirement—is to have two judges (senior or active) of the circuit on every panel. Also, I have tried to broaden and diversify the group attending the Second Circuit Judicial Conference to get a greater percentage of younger lawyers and minority groups. And I have tried

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Positions Available

Federal Public Defender, Central District of California (Los Angeles). Salary of $66,100. Requires law degree and membership in a state bar, with a minimum of five years of criminal practice experience, preferably in federal courts. Successful applicant must become member of California state bar at earliest possible date. To apply, send resume by June 15 to L. M. Jacobs, District Executive, U.S. District Court, Room G-11, 312 N. Spring St., Los Angeles, CA 90012, ATTN: Frances Granflor.

* * *

Staff Counsel, Supreme Court of the United States. Salary from $36,152, depending upon prior experience and salary history. Requires law degree, with a minimum of three years of practice and excellent analytical, research, and writing skills; also requires demonstrated ability to perform high-quality legal work with minimal supervision and within specified time limits. A commitment of two or three years is expected. To apply, send resume, SF-171, references, and brief writing sample by June 15 to James A. Robbins, Personnel and Organizational Development Officer, Room 3, Supreme Court of the United States, Washington, DC 20543.

* * *

Clerk of Court, U.S. District Court for the District of Connecticut (New Haven). Salary from $50,252 to $58,938. Requires ten years of administrative experience in public service or business, three of which occurred in a position of substantial management responsibility; college degree and other educational attainments may be substituted. To apply, send resume by June 29 to Chief Judge T. F. Gilroy Daly, U.S. Courthouse, 915 Lafayette Blvd., Bridgeport, CT 06460.

EQUAL OPPORTUNITY EMPLOYERS

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to reactivate the state–federal judicial councils.

Recently the Center published a reevaluation of CAMP—a reassessment of your circuit's preargument procedures. What do you see as the principal benefits of this program?

The principal benefit is the one that the reappraisal noted: The program seems to eliminate the work of about one and one-half circuit judges. That's been brought about by settling cases with greater frequency. The program also results in the saving of judicial time on motions, extensions of time, and other quarrels between the litigants, for example, as to what should be and what should not be in the record. Now, all of that is, to a great extent, handled by the staff attorneys in CAMP. We also get more focused briefs.

You testified in Congress recently in opposition to the proposed legislation to create an intercircuit tribunal. Would you give your views on this subject?

I testified noting that I represented the views of all of the active judges in the Second Circuit and also that Senior Judge Henry Friendly concurred. I said that we didn't think that the intercircuit tribunal was a good idea now, at least not until other things are tried first. We all realize that there's a workload problem in the Supreme Court, as there is in all courts. It's a real problem and something has to be done about it. But, the change that's being suggested by the creation of an intercircuit tribunal is a radical change in structure, one that shouldn't be undertaken until we are sure that it's necessary.

There are other things that can be tried first. The most obvious change is to get rid of the obligatory jurisdiction cases. Chief Justice Burger said recently that they amounted to 25 percent of the argued cases in the Supeme Court. I realize that many of those cases would come back anyway because the issues are important. But they would come back filtered through a circuit court and with the benefit of a circuit court opinion, which, I think, makes things a little easier at the Supreme Court level. And, in some cases, they might not come back at all.

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PERSONNEL

Nomination

Lloyd D. George, U.S. District Judge, D. Nev., Apr. 18

Confirmations

Terrence W. Boyle, U.S. District Judge, E.D.N.C., Apr. 23

William D. Browning, U.S. District Judge, D. Ariz., Apr. 23

Edward Leavy, U.S. District Judge, D. Or., Apr. 23

Joseph J. Longobardi, U.S. District Judge, D. Del., Apr. 23

Lloyd D. George, U.S. District Judge, D. Nev., Apr. 30

Alicemarie H. Stotler, U.S. District Judge, C.D. Cal., May 1

Appointments

Edward J. Garcia, U.S. District Judge, E.D. Cal., Mar. 23

Harry L. Hupp, U.S. District Judge, C.D. Cal., Mar. 23

Sarah Evans Barker, U.S. District Judge, S.D. Ind., Mar. 30

Neal B. Biggers, U.S. District Judge, N.D. Miss., Apr. 2

Edward C. Prado, U.S. District Judge, W.D. Tex., Apr. 9

Pauline Newman, U.S. Circuit Judge, Fed. Cir., May 7

Resignation

Malcolm M. Lucas, U.S. District Judge, C.D. Cal., Apr. 6

Senior Status

Robert C. Belloni, U.S. District Judge, D. Or., Apr. 4

Nils A. Boe, U.S. Court of International Trade Judge, Apr. 30

NOTEWORTHY

Women judges. The number of women judges more than quadrupled between 1970 and 1980, the Census Bureau estimates.

In 1970, the figures show, there were 945 female judges. In 1980, 4,762 women were serving as judges. In 1970, women made up 6.1 percent of the state and federal judiciary; in 1980, they constituted 17.1 percent.

These estimates, contained in a March 1984 Census Bureau report cataloguing occupations by sex, were derived from a sampling of responses to the 1980 census.

* * *

Attorney admissions rules. Senior Judge Myron L. Gordon (E.D. Wis.), sitting by designation in the Northern District of Illinois, recently granted defendants' motion for summary judgment, dismissing plaintiff's challenge in *Brown v. McGarr* (Civil No. 83–C–1267, March 20, 1984) to the constitutionality of that court's trial experience requirement. Judge Gordon held that the Northern District of Illinois's local rules on attorney admissions are in accord with both procedural and substantive due process. This district is one of thirteen trial courts participating in a pilot project aimed at improving the quality of advocacy pursuant to the recommendations of the Devitt Committee.

* * *

Good Samaritan judge. Officials in St. Louis, Missouri, had high praise for U.S. District Judge Edward L. Filippine (E.D. Mo.) after the judge, and others, tried to coax a suspected murderer from a ledge outside the third floor of the federal courthouse there and back into the building. According to U.S. Marshal William S. Vaughn, the judge "risked his life" in the ultimately successful attempt to talk the defendant, Steven T. Wougamon, out of the twenty-degree cold and back into the courthouse.

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Other suggestions have been made that I referred to in my testimony. They aren't my ideas; they are the ideas of outstanding scholars and judges. For example, having the certiorari petitions handled by panels of three, with the right of any one justice to bring the cert petition to the full court. It seems to me that, if you can't get one vote out of three, the chances of getting four votes out of the remaining six are pretty slim. This procedure would help to cut down the load, if only of the certiorari petitions. In addition, Justice Stevens, in his Madison Lecture in 1982, suggested a "Rule of 5" for the "Rule of 4." Generally, more restraint in granting certiorari petitions would, of course, cut down the Supreme Court's workload. These are things that can be done without any statute and without any congressional action. I might say that the circuit courts should also exercise restraint in granting stays of mandate because such stays, if granted, then give the party an incentive to go to the Supreme Court.

Further, it seems to me that the question of intercircuit conflicts, which is the other justification for the proposed tribunal, is simply not as much of a problem as scholars and others say it is. What is wrong with having a conflict for a while between the circuits? If a question is a significant one, different courts—different judges with different perspectives—can add to the sum total of our knowledge on how to deal with the problem, so that, by the time the case gets to the Supreme Court, the justices will have the benefit of all that's gone on before.

The emphasis on intercircuit conflicts has primarily centered on two fields—patents and taxes—where special considerations are involved. And patents are now handled by the Court of Appeals for the Federal Circuit. I would favor the creation of a court to handle tax appeals so that they wouldn't go to the circuits at all.

Finally, on the question of intercircuit conflict, the idea of a national law revision commission—similar to commissions that states have had—to deal with conflicts that do not involve big policy matters but, rather, relate to statutory interpretation or rules interpretation is a very useful concept. Such a commission could even be a committee of the Judicial Conference, perhaps staffed by professors or others who are experts in a field. They could, by examining what went on in the circuits each year, indicate what conflicts there were that could easily be resolved by Congress. A committee of Congress, perhaps working in connection with the Judiciary Committee of each house, could then bring about a resolution quite quickly. I'm talking now about the sort of rule as to whether you drive on the left-hand side of the street or the right-hand side. It doesn't matter really as long as there is a determination as to which is the correct rule.

I might add that one of the real problems relating to the question of intercircuit conflicts is the government's litigation policy. Is there any reason why the Internal Revenue Service or the National Labor Relations Board shouldn't be required to accept the unanimous view of, let's say, two or three circuits, if they don't go for certiorari or if certiorari is turned down? Why should the government insist on relitigating the same issue in all the circuits? That causes a lot of the so-called conflict.

What do you think are the

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greatest problems facing the federal judiciary?

I think the major problems facing the judiciary are quite obvious. The first is the increasing caseload and how we are going to cope with it. There are only three ways of coping. One is to have more judges; another is to have the judges do more work; and the third is to have fewer cases, in Judge Friendly's phrase, "averting the flood by lessening the flow." I think we are approaching the limit as to more judges. I'm not talking now about incremental changes, such as a court going from nine to eleven or from eleven to thirteen judges. But, clearly, if the Second Circuit went to fifty judges, the whole nature of the tribunal would be changed; we wouldn't have a court, we'd have a convention. I don't think that more work is sensible because I think federal judges, by and large, work very hard—some of them work too hard. The answer, therefore, is to get rid of some of the cases. And to me the obvious candidate is diversity jurisdiction. I've spoken about it many times. There is no justification for those cases to be in the federal courts anymore.

Why hasn't that change been made? Almost everyone seems to favor it.

Every lawyer has the natural desire to have the option of choosing a forum. I can't criticize lawyers for wanting to have that option, but it's a luxury we can't afford. The time has come for large chunks of cases to be thrown out of the federal courts, and diversity cases are the most obvious candidates. I think the statistics show that in the most recent fiscal year, 24 percent of the civil cases in the district courts and 18 percent of the civil appeals in the circuit courts were diversity matters.

Another real problem the federal judiciary faces is the erosion of the judiciary because of the economic squeeze that the judges are in. I'm talking now about judicial salaries. I don't want to get into any great detail, but the net take-home pay—after taxes and deductions for various federal programs—of federal judges now, in a metropolitan area, is shockingly low.

There are two other problems that I would like to mention just briefly. One is that the courts just aren't understood. Society as a whole doesn't really comprehend how the courts operate and particularly how the federal courts operate. I don't quite know how to solve that. I'm not suggesting that any one of us could solve it alone. But it's clear to me that the average person simply doesn't have enough of an understanding about how the federal courts work or what they do and how they do it.

And the last problem is that in the last ten or fifteen years, all institutions, including the federal courts, have suffered from an erosion of respect and trust. I'm talking now about schools, churches, synagogues, the family—all the large institutions of society, one of which is the judicial system. The courts used to be respected for what they did and for how they did it. All through society, there has been a distrust of authority, a distrust of institutions, a crankiness, a contentiousness, a kind of nastiness. The courts, as well as all the other institutions, suffer from that. How to solve that one is a large order indeed, and I wouldn't even begin to offer any prescription. ■

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Chief Justice Urges Curbing Discovery Abuse In ALI Speech

Following long-standing custom, established by Chief Justice Taft, Chief Justice Burger addressed the opening session of the American Law Institute last month when it met for its sixty-first annual meeting.

The Chief Justice commended the American Law Institute for "enormous contributions to improving the system of justice in this country through joint efforts of lawyers, judges and law professors." Much of this he credited to the willingness of Americans to engage in self-criticism, and he cited the ALI as a "glowing example of a constructive critic." But he went on to say that all those in the legal profession have a continuing obligation to see that "a small handful" of lawyers are not permitted to abuse the system and to preempt the time and machinery of the courts for purposes not intended.

Though the Chief Justice made peripheral references to contingent fees and cost shifting, he elected to direct his remarks mainly at the subject of discovery abuse. He singled out discovery abuse, he said, because no other abuse of the judicial process—other than high costs and undue delay—has caused more charges to be leveled against the profession. He called upon the members of the legal profession, as "ministers of justice," to produce justice and to take steps to eliminate "trial by annihilation before the litigants reach the courthouse."

The Chief Justice reported that he had written to all the chief judges of the federal district and circuit courts to ask what progress was being made with the 1983 amendments to the Federal Rules of Civil Procedure, with special questions directed to their experiences with misuse and abuse of the discovery process. Specifically, the questions were related to amended rules 11, 16, and 26. Rule 11, as modified, and as used in conjunction with rule 37, allows sanctions for abuses during discovery to be imposed upon the party to the litigation, the attorney, or both.

In many of the districts, the judges reported that the rule changes merely called for an updating and that the bar had been very cooperative; in other districts,

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Judge Edward A. Tamm: The Role of The Committee on Judicial Ethics

Judge Edward A. Tamm has been on the federal bench for thirty-five years. He was appointed to the District Court for the District of Columbia in 1948 and to the Court of Appeals for the District of Columbia Circuit in 1965. Judge Tamm graduated from Georgetown Law School in 1930 and joined the FBI the same year, where he served until his appointment to the bench.

In 1978, Judge Tamm was named the first chairman of the Judicial Conference's Committee on Judicial Ethics, which was formed pursuant to the Ethics in Government Act of 1978, 28 U.S.C. app. § 301 et seq. (1982). In this interview Judge Tamm explains how and why the ethics committee collects financial information from members of the judiciary, who receives that information, who reviews it, who may see it, and what happens if the information provided is incomplete or raises questions.

Judge Edward A. Tamm

What is the scope of the work encompassed by the Judicial Conference Committee on Judicial Ethics?

The scope of the work of the committee on ethics is prescribed by the statute. We are required by the statute to develop the necessary forms and promulgate such rules and regulations as may be necessary; and the most important thing, I think, is set out in the statute—to "monitor and investigate compliance with the requirements of the judicial ethics statute."

What responsibilities were assigned to the Judicial Review Committee?

The review committee was a committee established by Chief Justice Burger when he became the Chief Justice. That committee was required to review financial disclosure statements. The review com-

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mittee was originally composed of three federal judges, including myself, and we moved forward when the present legal ethics statute was adopted to become members of the Judicial Ethics Committee. The review committee no longer exists. But we do have under Chief Judge Markey an Advisory Committee on Codes of Conduct, and when judges are confronted with problems about whether they are in conformance with the Code of Judicial Ethics, they are authorized to write Judge Markey, who will tell them whether the conduct they outline is authorized or is prohibited by the Code of Judicial Ethics.

Does Chief Judge Markey do that as chairman of the committee or does he confer with his whole committee?

He confers with his whole committee. Because of the title we have, the Judicial Ethics Committee, it is not uncommon for me to receive a letter from a judge inquiring whether he or she is permitted by the Code of Judicial Ethics—which is quite different from the statute—to perform, or to participate, or to act in particular circumstances. I generally refer the letter of inquiry to Judge Markey and advise the inquiring judge of the reference and why it's being done.

Are there some areas, though, where your jurisdiction or the scope of your work overlaps?

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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 of the U.S. Courts.

No. There are none because the scope of our work is described by the statute itself; so we have no overlapping. We have recommended, through the Judicial Conference of the United States, a few suggested changes in the statute, but so far no changes have been enacted.

What recommendations did you make for statutory changes?

Well, I think the principal factor is that the District of Columbia judges, as distinct from federal judges, are included in the statute. Those judges are required to furnish, in addition to the financial disclosure form they have to file, a similar report with the District of Columbia's Judicial Tenure Commission. We have recommended to the Judicial Conference, and the Judicial Conference has recommended, that they be exempt or that they be eliminated from the judicial ethics statute.

Does that include the judges of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals?

Yes. We have recommended that they and their employees be excluded from the statute. Because the statute provides for both judicial officers and judicial employees, we have recommended that all District of Columbia people be excluded from the statute. But so far the Congress has not acted on that recommendation.

You are recommending that it be eliminated completely?

No, they would still continue to have to file with the Judicial Tenure Commission, but they would not have to file with us, which they are required to do at the present time.

Because they are really not within the jurisdiction of your committee?

They are not within our jurisdiction.

If the individual filing the financial disclosure report has a question, or has doubts about what and how to report, what procedures should be followed?

The reporting judge or judicial employee should address a letter to me, outlining the problem that confronts him. I have two possible dispositions to make if the inquiry relates to the applicability of the judicial ethics statute to a particular situation. I refer the matter to the members of the committee by sending them a copy of the inquiring letter and ask them to vote on the situation. They vote on it and I advise the judge in due course of

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CALENDAR

July 9–10 Judicial Conference Committee on Administration of the Probation System
July 9–10 Judicial Conference Committee on Admission of Attorneys to Federal Practice
July 9–13 Seminar on "Problems Judges Confront in the Litigation of Economic Issues"
July 11–12 Judicial Conference Advisory Committee on Codes of Conduct
July 16–17 Judicial Conference Committee on Administration of the Magistrates System
July 16–17 Judicial Conference Committee on Court Administration
July 16–17 Judicial Conference Committee on Rules of Practice and Procedure
July 16–17 Judicial Conference Committee on Operation of the Jury System
July 18–21 Judicial Conference Committee on Judicial Ethics
July 19–21 Judicial Conference Ad Hoc Committee on Inns of Court
July 22–25 Eighth Circuit Judicial Conference
July 30–31 Judicial Conference Committee on Administration of the Criminal Law

Supreme Court Adds Second Test for Ineffective-Assistance Cases

The Supreme Court has ruled that appellants seeking to overturn their convictions on the grounds of ineffective counsel must demonstrate that the attorney's shortcomings caused their convictions.

The Court's decision in *Strickland v. Washington*, 104 S. Ct. 2052 (1984), posed a two-pronged test for determining whether a defendant received adequate counsel. The first prong is competence. "As the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance." But the Court added another layer to the inquiry: A defendant challenging a conviction must show not only incompetent assistance but a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Such a test is not required, the Court ruled in another case decided at the same time, "only when surrounding circumstances justify a presumption of ineffectiveness ... without inquiry into counsel's actual performance at trial." *United States v. Cronic*, 104 S. Ct. 2039 (1984). One such example, the Court said, would be the case in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

The opinion in *Strickland* was written by Justice Sandra Day O'Connor. Justice Thurgood Marshall dissented, and Justice William J. Brennan, Jr., "join[ed] the Court's opinion but dissent[ed] from its judgment" because it upheld a death sentence—which he has consistently contended is unconstitutional. ■

John J. Galgay 1917–1984

The Third Branch notes with sadness the death of Bankruptcy Judge John J. Galgay of the Southern District of New York. Judge Galgay, who had been elected to the Board of the Federal Judicial Center in September 1983, died on May 27, 1984.

Bankruptcy Judge Galgay was appointed to the bankruptcy court July 1, 1973. Before serving on the bench, he was an attorney in the Office of Price Administration in Boston (1942 to 1947) and spent five years in the Antitrust Division of the Department of Justice in Boston (1948 to 1953). From 1960 to 1965, Judge Galgay was in charge of the Antitrust Division's regional office in New York City. He was also engaged in private law practice for several years.

In addition to his wife, Corinne, the Judge is survived by four sons, three daughters, and eleven grandchildren.

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the viewpoint of the majority of the committee. If the matter relates to the code of ethics, as distinct from the judicial ethics statute, I refer the matter to Judge Markey and advise the inquiring judge or judicial employee of the reference to Judge Markey.

Are the letters of inquiry to the Advisory Committee on Codes of Conduct, as well as the committee's replies, made public?

No, they are not.

But they are filed in the book on the Code of Judicial Conduct?

Yes, without reference to the identity of the inquiring judge. An advisory opinion is issued and it becomes part of the book; it relates to the views of the committee over the years on the applicability of the code of ethics to that particular situation.

What do you and members of the ethics committee look for mainly—conflicts of interest, large stock holdings, or what?

Basically we look for conflicts of interest. That is, as we understand it, the purpose of this statute. The conflict of interest situation arises very often in cases in which a judge or his spouse or dependent children are beneficiaries of a trust. The trust owns certain stock, and we are of the view that the judge should recuse himself if there is a stock in the trust estate which would debar him from acting in a particular case. Conflict of interest is basically the principal thing we look for.

If you see something that you think warrants the attention of the Advisory Committee on Codes of Conduct, do you refer that matter to this committee?

Ordinarily not, because we are required by the statute, if there is a brazen conflict of interest, to refer the matter to the attorney general of the United States for his consideration. Throughout the years of existence of the committee, we have yet to refer a case to the attorney general.

What are the most common mistakes made in completing the forms; and are there a lot of them?

Yes. The most common mistake is a failure to record a transaction, generally involving shares of stock. Our practice is to compare this year's reports with last year's reports. We may find in last year's report listings of various holdings for investment purposes that are not recorded in this year's report, yet no report of a transaction involving the sale of those items. So, I write in excess of 400 letters a

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year to individual judges pointing out that a stock or stocks that they held two years ago are not recorded in this year's return and the transaction involving the sale of those stocks is not set forth. Generally the judges have overlooked the fact that they sold certain securities in the past year. That is the basic problem. We have a variety of other problems on which we write. I think I wrote about 850 letters last year as a result of shortcomings, flaws, in the reports.

Every report is reviewed by a judge. A member of the committee brings to my attention any omission, and I write a letter to the judge pointing out what the reviewing member of the committee has noted as a shortcoming.

Do you divide up the work, with each member of your committee taking a specified number of reports?

Each member of the committee takes an assignment. I have a record here on my desk. Each judicial member of the committee is assigned either a circuit or a portion of a circuit. For example, the Ninth Circuit has so many judges that the resulting volume of work would be too heavy for one judge. So, in the Ninth Circuit, we assign all of the reports from the state of California to one judge. All of the additional reports from Washington, Oregon, Montana, Idaho, and Arizona are assigned to a second judge.

Geographically, how do you decide on the assignments?

The reviewing judge never reviews the forms of a judge of the circuit in which he sits. I try to allocate the work to a judge who is not a member of the circuit in which he is reviewing the reports.

Each year at our meeting of the Judicial Ethics Committee, I ask if any judge feels that he is overworked. Really, the amount of work that these judges do on these reports is incredible. We had 1,875 reports filed with us last year. And to take all 1,875 reports and fan them out to all these judges—they'd spend hours and hours and hours.

How many are on your committee to divide up this work?

Eleven.

Then reviewing these reports does present an enormous clerical task?

It's an enormous task and we have no staff.

None?

None at all. I am entitled as a circuit judge to have two secretaries. One of the secretaries is assigned to do the clerical work that's involved in the processing and the filing of the financial disclosure reports. She opens all the mail, records every financial disclosure report, and mails a copy of the report to the judge assigned to make the review. If the reviewing judge finds omissions or commissions in the report, he brings them to my attention. The secretary handles the mail, types the letter to the in-

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Plans for Bicentennial of Constitution Under Way

Plans for commemorating the 200th anniversary of the U.S. Constitution are burgeoning, even though the celebration itself is still more than three years away.

The National Endowment for the Humanities, which has established an Office of the Bicentennial of the United States Constitution, has begun accepting proposals for scholarly study of the Constitution and of the United States' early history.

Meanwhile, Project '87, a joint venture of the American Historical Association and the American Political Science Association, has published the second issue of *this Constitution*, a magazine devoted to the upcoming bicentennial. The Constitution's 200th birthday will be marked on September 17, 1987.

Chief Justice Warren E. Burger is the honorary chairman of Project '87's advisory board.

Information regarding the proposals being accepted by NEH is available from its Public Affairs Office, Washington, DC 20506.

PERSONNEL

Nominations

John M. Duhe, Jr., U.S. District Judge, W.D. La., May 15

Tom S. Lee, U.S. District Judge, S.D. Miss., May 15

Paul G. Rosenblatt, U.S. District Judge, D. Ariz., May 15

Jean G. Bissell, U.S. Circuit Judge, Fed. Cir., May 24

Rudi M. Brewster, U.S. District Judge, S.D. Cal., May 24

James M. Ideman, U.S. District Judge, C.D. Cal., May 24

William J. Rea, U.S. District Judge, C.D. Cal., May 24

Franklin S. Billings, Jr., U.S. District Judge, D. Vt., May 25

Dominick L. DiCarlo, U.S. Court of International Trade Judge, May 25

Peter K. Leisure, U.S. District Judge, S.D.N.Y., May 25

Robert M. Hill, U.S. Circuit Judge, 5th Cir., June 4

Confirmations

Joan G. Bissell, U.S. Circuit Judge, Fed. Cir., June 8

Dominick L. DiCarlo, U.S. Court of International Trade Judge, June 8

John M. Duhe, Jr., U.S. District Judge, W.D. La., June 8

Tom S. Lee, U.S. District Judge, S.D. Miss., June 8

Paul G. Rosenblatt, U.S. District Judge, D. Ariz., June 8

Deaths

Henry F. Werker, U.S. District Judge, S.D.N.Y., May 11

George L. Hart, U.S. District Judge, D.D.C., May 28

Liberato Vieira de Cunha of Brazil, Avraham Tirosch of Israel, and Luis Molina of the Dominican Republic (first row, l. to r.) were among the twelve journalists, government officials, and academics from abroad who recently visited the Federal Judicial Center as part of a thirty-three-day tour of the United States sponsored by the U.S. Information Agency. At the Center, the visitors heard a concise explanation of the United States' parallel federal and state court systems.

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dividual judge, and brings it in to me and I sign it. So we have no staff; we have no staff at all.

Do you think you should have?

I think that in the future, when I must step aside as chairman of the Judicial Ethics Committee, there will be a requirement that there be a staff. So far I've been able to take care of it. I'm not an empire builder. I don't want to bring a lot of people in and so on. I think there will have to be some staff in the future.

Just recording the reports in itself is quite a task.

Yes, just recording 1,875 reports. And if I inquire whether we received a report from Judge X, the secretary can look at her card index and say "yes" or "no" immediately. We have a good system.

Each May 15 all federal judges and certain officials in the Administrative Office and the Federal Judicial Center are required to file financial disclosure reports. When these reports were first mandated by an act of Congress, some judges did not submit reports; in fact, litigation was filed by some of the judges alleging, among other things, invasion of privacy. The result of this litigation left the filing requirements standing. Are all of the judges now in compliance?

Yes, all judges and all judicial employees are in compliance with the terms of the statute.

There are some who don't like to file the disclosure reports even though they do. Do you hear some of the objections?

The basic objection made by both judges and their spouses is that the reporting requirements violate their right of privacy. A second complaint is that if a judge or his or her spouse reports their assets accurately, they are subject to burglaries, to kidnapping of their children, to kidnapping of themselves, and so on. And we are sympathetic to those objections. But the statute requires that there be these filings, and there is nothing that we can do about it. I suppose that I receive thirty to fifty vitriolic letters a year criticizing me for making the requirements that we do, but the statute requires that all of these data be recorded. As a general rule I don't acknowledge vitriolic, critical letters, although I

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1983 Prison Population Increases 6 Percent Over 1982 Figure

The number of inmates in state and federal prisons in the United States has been growing at about 6 percent annually and will continue to grow, aggravating jail crowding, two government reports show.

The Department of Justice's Bureau of Justice Statistics found that the number of inmates rose to 439,000 last year—a 6 percent increase over 1982's prison population. A General Accounting Office study, meanwhile, estimated that the population of state prisons will increase by 35 percent by the end of the decade, while the number of federal prisoners will jump by 28 percent in the same time period.

The GAO found that the population of federal prisons was 28 percent over capacity. The BJS determined that state prisons were 2 to 17 percent over their population limits. The overcrowding statistics do not take into account the 8,100 prisoners being held in local jails in several states, nor do they inlcude the more than 21,000 inmates given early releases in fifteen states last year because of crowding.

Because of the effects of overcrowding on inmates, all the state prisons in seven states, and some prisons in twenty-one other states, were being operated under federal court order or court supervision, the Justice Department reported.

The GAO report, *Federal, District of Columbia, and States Future Prison and Correctional Institution Populations and Capacities*, GAO/GGD84–56, February 27, 1984, is available from the GAO, Document Handling and Information Services Facility, P.O. Box 6015, Gaithersburg, MD 20760. The Justice Department bulletin, *Prisoners in 1983*, NCJ–92949, April 1984, is available from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850. ■

TAMM, from page 5

do sometimes dictate an answer to them and then tear up the answer before I sign it.

Aren't there some days, particularly shortly after May 15, on which you think maybe you took on an impossible task?

Yes. I suppose that the spouses are the most critical, and they write letters, sometimes I think without the knowledge of the judge. I think the spouse writes in and raises the devil with me because I require all these things, but we have no voice in it. The statute requires us to do all these things, so we do it.

Is it true that one judge, in the space where inquiry was made as to his spouse's income, reported, "She won't tell me"? Is a situation like that possible?

The situation like that is possible, but if a judge filed a joint income tax return, we would write back to the judge and point out that since he or she had filed a joint income tax return, his or her claim of lack of knowledge of the spouse's holdings is obviously fictitious and that we require that he or she submit a supplemental report.

So there have been instances like that?

Oh, yes, there have been instances of that kind. It's invariably by letter, and if they call in by telephone and outline a problem, I suggest that they write a letter to me, so that there will be a record of what the inquiry was and what the answer was. I think so often judges overlook the public relations value of filing, and not uncommonly I point out to a judge, especially if the judge makes a telephone inquiry, "From the viewpoint of the statute you probably wouldn't be required to report this item, but as a matter of public relations could you stand the publicity that might occur if you didn't report this?" And almost invariably the judge says, "I haven't thought of it from that viewpoint, and I think from the viewpoint of public relations I better include it." Or I suggest it be included in a supplemental letter or something of that kind so that we have a record of it.

> **"Conflict of interest is basically the principal thing we look for."**
> *—Judge Tamm*

Do people other than the media request to see the reports?

Yes. Lawyers frequently request the copy of the report that's filed with the clerk of court. In other words, in a particular judicial district in the Middle West, the Far West, or the South, the attorneys go to the clerk's office and look at the report that the judge has filed there. That is the usual practice. Occasionally we get a request from some disappointed litigant who is going to prefer charges of malpractice against the judge or something of that kind. We get a request and if they send in the prescribed fee, which is 50 cents per page, we send them a copy of the report, on the theory that if they went to the clerk's office, they could see it anyway.

The committee recently responded to a request by CBS, which called for photocopies of the financial disclosure reports of every federal judge in the country.

And right here in Washington anyone can get copies of the reports for every judge?

For every judge, including the justices of the Supreme Court.

The district court judges file their financial disclosure report with the clerk of their court. The circuit judges in the First through the Eleventh and the District of Columbia Circuits file their financial

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to ensure compliance, the judges had worked with the bar to plan local workshops with judges and lawyers to assist with implementation.

The chief judges pointed out in their responses that good pretrial management brought advantages such as shorter discovery periods and reduction of frivolous filings. A number of the judges reported that just the potential for sanctions had already produced desired results; and replies noted that, when necessary, the new rules were being applied forcefully. Said one judge: "Sanctions have begun to be imposed upon attorneys and clients for abuse of discovery, frivolous motions, abuse of the court process, and this new trend is the subject of comment in the legal community . . . . [The] message has gone abroad." Recently applied sanctions ranging from $10,000 to $25,000 were also reported in the replies and were imposed for failure to produce documents upon a proper request, a meritless lawsuit, and frivolous motions.

The Chief Justice commented on discovery abuse and the 1983 amendments to the Federal Rules of Civil Procedure designed to curb such abuses in his 1983 year-end report on the judiciary last December. Reference to discovery abuses was also made in his State of the Judiciary address to the American Bar Association last February. The Chief Justice quoted with agreement a comment from Judge Elizabeth A. Kovachevich (of Florida): "Implementation of solutions must ultimately come from the individual trial captains of the courtrooms . . . . We cannot manufacture time; we can only manage the time that we have. A litigant is entitled to his day in court, but not to somebody else's day."

For a report on the Center's workshop on discovery abuse held last November, see *The Third Branch*, January 1984. ■

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Bell, Griffin B. "Assuring the Adversary System." 61 *Washington University Law Quarterly* 673 (1983).

Judicial Liability Insurance

Lawsuits alleging wrongful acts by judges, often stemming from performance of nonjudicial duties such as personnel actions, have been a matter of increasing concern. Members of the National Conference of Federal Trial Judges last year canvassed the insurance industry to see what liability insurance was available and found that premiums tend to be nominal. Judges Frank A. Kaufman and Frederick B. Lacey report that the coverage is available to both trial and appellate judges (see *The Third Branch*, August 1983).

Pulliam v. Allen, decided by the U.S. Supreme Court on May 15, 1984, held a state magistrate liable for attorneys' fees. This award was made under 42 U.S.C. § 1988, a civil rights case, which is not ordinarily applicable to federal judges. Nonetheless, there is some indication that the holding will affect the interest of federal judges in the available insurance program.

Judges interested in information concerning such insurance can contact Ernest Zavodnyik, staff director of the ABA's Judicial Administration Division in Chicago, 750 Lake Shore Drive, Chicago, IL 60611 (312/621-9564). ■

√Cummings, Walter J. "Report of the State of the Judiciary." Speech at the Seventh Circuit Conference, Indianapolis, May 1984.

DeMascio, Robert E. "Bankruptcy: A Solution in Search of a Problem." 67 *Judicature* 354 (1984).

Devine, James R. "Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come." 14 *University of Toledo Law Review* 1205 (1983).

Federal Judicial Clerkship Directory. National Association for Law Placement, 1984.

√ Feinberg, Wilfred. "The State of the Second Circuit." 39 *The Record of the Association of the Bar of the City of New York* 178 (1984).

Frank, John P. "Diversity: An Idea Whose Time Is Still Here." 70 *American Bar Association Journal* 16 (1984).

Greenstein, Richard K. "Bridging the Mootness Gap in Federal Court Class Actions." 1983 *Stanford Law Review* 897.

Higginbotham, A. Leon. "West Virginia's Racial Heritage: Not Always Free." 86 *West Virginia Law Review* 3 (1983).

Hillman, Douglas W. "Telephone Conferencing Togetherness in the U.P." 1984 *Michigan Bar Journal* 345.

Marcus, Richard L. "Conflicts Between Circuits and Transfers Within the Federal Judiciary System." 93 *Yale Law Journal* 677 (1984).

√Meierhoefer, Barbara S. *In-Court Orientation Programs in the Federal District Courts*. Federal Judicial Center, 1984.

Rubin, Alvin B. "Diversity: An Idea Whose Time Has Gone." 70 *American Bar Association Journal* 16 (1984).

Symposium: The Federal Courts Improvement Act. Articles by Joan E. Baker, Ernest C. Baynard III, Joseph V. Colaianni, Joseph R. Feidelman, George E. Hutchinson, Howard T. Markey, Philip R. Miller, and Josephine L. Ursini. 32 *Cleveland State Law Review* 1 (1983).

AO Updates Juror Utilization Statistics

More than one third of all jurors called for service in the federal trial courts are not selected, seated, or challenged on their first day of jury duty, the latest statistics from the Administrative Office show.

The AO began keeping juror records in July 1982. The most recent figures, for the twelve-month period ended March 31, 1984, show the national average of jurors not selected, seated, or challenged on their first day was 36.54 percent. That figure was virtually unchanged from the figure for the twelve-month period ended December 31, 1983.

The Judicial Conference approved a committee recommendation last March that all courts adopt procedures to keep the number of nonutilized jurors below 30 percent. The figures show that thirty-nine district courts met that goal in the latest twelve-month period. The lowest nonutilization rate was reported by the Eastern District of Oklahoma, which failed to use only 2.36 percent of its first-day jurors. The highest rate was in the District of Puerto Rico, where 61.95 percent of the jurors called were not selected, seated, or challenged on their first day.

The AO suggests several methods courts can use to increase their juror utilization rates. They include reducing the size of panels, the sharing of a panel by all judges conducting voir dire on a given day, starting all jury trials in a given court on specified days, having backup jury trials ready to proceed if the planned trial is settled or postponed, assessment of jury costs if settlement occurs after jurors are ordered to report, and calling only as many jurors as a judge can examine in one day when individual voir dire is being used. ■

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disclosure reports with the clerk of the circuit court. In addition, we receive two copies here, one of which is sent to the judge who is assigned to monitor that particular district or circuit, and the original we keep here. If there is any kind of inquiry, we are ready to furnish it if it's required to be furnished.

If some charge is made, for example, by a disgruntled litigant, and he or she wants to file a misconduct charge, that goes to the chief judge in the circuit?

The chief judge of the circuit, that's right.

And then you have no relationship to that?

No relationship and no responsibility at all.

The only reason a disgruntled litigant would really want to see a report would be to file a charge against a judge?

Presumably to look at the financial disclosure report for that reason. We've had less than half a dozen instances of that kind in the last year.

When you look at the overall picture, Judge, it really says a lot of good about federal court judges.

I not only admire the members of the committee for the tremendous amount of work they do, but I admire the judges and their conscientious efforts to comply with the statutory requirements. I really admire them for it—all the judges, all the judicial employees, and the court reporters. We recommended to the Judicial Conference of the United States a couple of years ago that any court reporter who received more than $50,000 a year in income should be required to file a financial disclosure report. They filed them. We've had to write some letters to them and point out an error of omission or commission, but they filed their reports.

We do another thing that may be of interest. Any procedures, any changes, we make in the instructions, and any changes we make in the requirements, are submitted first to the Judicial Conference. The statute probably gives us authority to make such changes as we think are necessary, but we always submit them to the Judicial Conference at their semiannual meeting so that if there is any inquiry about it, we can say that this has been approved by the Judicial Conference of the United States.

Is there anything else in the reports to the Conference that we are eliminating?

We try to avoid nit-picking. A judge occasionally will send a report back with a suggestion that it be pointed out that the method of evaluation was not set forth in a particular case. Well, if it's a U.S. government bond, for example, and the income is shown, we know what the face value of the bond is, so we try to avoid nit-picking. As for failure to check a particular box, if it doesn't have any significance, why bother to write a letter and send it to the judge, make the judge write back to us, and so on. We try conscientiously to avoid nit-picking; twice a year I point that out at our meetings of the Judicial Ethics Committee: "Don't harass a judge; don't harass a judicial employee; avoid, I repeat for the third time, nit-picking. ■

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Congress and the Judicial Budget

Congressman Smith Explains Legislative Process for Judicial Appropriations

Congressman Neal Smith (D-Iowa) has served in the House for twenty-six years and is chairman of the House Appropriations Committee's Subcommittee on Commerce, Justice, State and Judiciary, which has major responsibility for approving the federal judicial system's annual budget. Congressman Smith, who lives on a farm in Altoona, Iowa, attended Drake University Law School, served as an assistant county attorney in Polk County, Iowa, and then practiced law in Des Moines before being elected to Congress in 1958. In the following interview, Congressman Smith explains the legislative role in the judicial budget-making process.

Congressman Neal Smith

The judiciary budget represents one-tenth of 1 percent of the total federal budget and less than 9 percent of the funds allocated by your subcommittee. Historically, the House has reduced the budget for the judiciary. Is there a special reason for this?

Well, actually we work these things out so they are mutually agreeable. The judiciary starts to make their budget at least six to nine months before we even have hearings and usually eight or nine months before we decide on how much to recommend to the full House to be appropriated; and in that period of time, there are changes. We don't have any problems with the judiciary. Some agencies overestimate and we are skeptical of their estimates, but we don't have those kinds of problems with the judiciary. Usually the reductions that you will see in their requests are a result of having made some last-minute checks with their budget people and finding that certain things could be adjusted. In some instances, it is because they have not been able to hire the replacements they expected to have in certain offices.

Do you have any advice as to how the judicial branch might improve upon the justifications submitted?

No, I don't know that I do. They've done a lot in recent years to try to update their justifications and to make their projections of administrative workload more accurate, so I don't have any suggestions. If they're computerizing as much as they can, and getting as many improvements into their system as they can, I don't have any suggestions along that line.

See SMITH, page 5

Judges' Salaries to Rise

On July 18, 1984, President Reagan signed into law H.R. 4170, the Deficit Reduction and Tax Reform Act of 1984.

Section 2207 of that act contains the provision increasing the salaries of judges by 4 percent, effective January 1, 1984.

Chief Justice Extols 'Factories with Fences' in Conference, TV Interview

Chief Justice Burger delivered a strong plea recently for increased productive employment in prisons and removal of barriers to the sale of inmate-made products.

In a speech to a national conference of penal experts in Washington, followed by a national television interview a day later, the Chief Justice stressed the benefits of teaching inmates marketable skills and of letting them earn at least some part of their expensive "room and board."

"Something is drastically wrong with the way we are dealing with the problems of correctional and penal institutions," he told more than 700 people attending the National Conference on Factories With Fences. "What we are doing is not working and ought to be changed."

During an unprecedented television interview with Ted Koppel of ABC News, the Chief Justice termed prison conditions a "terribly important" issue and called for "dormitories, much like the military services have," rather than computer-controlled gated cells for all but maximum-security prisoners.

At the Factories With Fences conference, the Chief Justice drew

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Inside . . .

FJC Conference Focuses On Handling of Asbestos Cases

Judges, clerks, and magistrates from federal district courts with large numbers of asbestos-related cases met recently to share experiences about their attempts to meet the challenges presented by the recent wave of such cases.

The "Asbestos Case Management Conference," held in Baltimore in June, was an experimental effort to collect and disseminate information about application of case management principles to a particular type of case. It was sponsored by the FJC's Research Division, in consultation with the Clerks Division of the Administrative Office of the U.S. Courts.

Participants discussed such issues as use of standardized procedures, coordination of counsel for multiple parties, pretrial discovery, settlement, pretrial orders and rulings, and trial.

In preparation for the conference, the Research Division of the FJC and the Clerks Division of the AO collected information about standing orders used by courts to manage asbestos cases. An index and concise summary of these orders are available from the Research Division or the Information Services Office of the Center. ■

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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 of the U.S. Courts.

PERSONNEL

Nominations

Charles A. Legge, U.S. District Judge, N.D. Cal., June 19
Marcel Livaudis, Jr., U.S. District Judge, E.D. La., June 19
Illana D. Rovner, U.S. District Judge, N.D. Ill., June 19
Anthony J. Scirica, U.S. District Judge, E.D. Pa., June 19
Stanley Sporkin, U.S. District Judge, D.D.C., June 28

Confirmations

Robert M. Hill, U.S. Circuit Judge, 5th Cir., June 15
Franklin S. Billings, Jr., U.S. District Judge, D. Vt., June 15
Rudi M. Brewster, U.S. District Judge, S.D. Cal., June 15
James M. Ideman, U.S. District Judge, C.D. Cal., June 15
Peter K. Leisure, U.S. District Judge, S.D.N.Y., June 15
William J. Rea, U.S. District Judge, C.D. Cal., June 15

Appointments

Lloyd D. George, U.S. District Judge, D. Nev., May 3
Robert R. Beezer, U.S. Circuit Judge, 9th Cir., May 4
William D. Browning, U.S. District Judge, D. Ariz., May 11
Edward Leavy, U.S. District Judge, D. Or., May 18
Terrence W. Boyle, U.S. District Judge, E.D.N.C., May 29
Joseph J. Longobardi, U.S. District Judge, D. Del., June 14
Alicemarie H. Stotler, U.S. District Judge, C.D. Cal., June 15

Elevations

James E. Noland, U.S. District Chief Judge, S.D. Ind., June 10
Ruggero J. Aldisert, U.S. Circuit Chief Judge, 3d Cir., June 20
H. Theodore Milburn, U.S. District Chief Judge, E.D. Tenn., June 24

Senior Status

June L. Green, U.S. District Judge, D.D.C., Jan. 15
John B. Hannum, U.S. District Judge, E.D. Pa., May 29
James Harvey, U.S. District Judge, E.D. Mich., May 31

Fourth Circuit Names Clerk

The Fourth Circuit Court of Appeals has appointed John M. Greacen as its clerk, replacing William K. Slate II, who was named circuit executive for the Third Circuit.

Mr. Greacen, a graduate of Princeton University and the University of Arizona College of Law, where he served as editor-in-chief of the *Arizona Law Review*, comes to the federal system from the National Center for State Courts. Serving first as its associate director for project management in 1979, he had been deputy director for programs at the center since 1980.

In addition to his work in state court administration, Mr. Greacen brings to the appeals court a broad range of justice system experience. He was a visiting associate professor and acting director at the Institute for Advanced Studies in Justice of American University (1978) and was director of programs for the Police Foundation (1975–78). He served from 1973 to 1975 with the Office of Juvenile Justice and Delinquency Prevention, the National Institute for Juvenile Justice and Delinquency Prevention, and the National Institute of Law Enforcement and Criminal Justice, all of which were part of the Law Enforcement Assistance Administration. Prior to his work for the LEAA, he was assistant dean and assistant professor at the University of Arizona College of Law, where he also served as a research associate and reporter for the Revised Arizona Rules of Criminal Procedure. ■

Death

Ozell M. Trask, U.S. Circuit Judge, 9th Cir., May 5

Correction

In the July issue of *The Third Branch*, Judge Jean Bissell's first name was listed incorrectly.

Court-System Automation Explored at Seminar

Chief judges and clerks of pilot district courts for automation were briefed on the development of automated systems at a two-day FJC seminar held in Washington recently. The technological, organizational, and managerial implications of housing and operating one's own computer system were stressed, as was the emerging role of the system administrator in each court.

Eugene Lindstrom, senior systems consultant with IBM, described the changes he has seen during his career as a computer scientist, from his first assignment working with a program for predicting election results on a room-filling mainframe computer to the computer that he now carries between home and office, which has power equivalent to the old mainframe. Center and Administrative Office staff members involved in automated-systems development discussed the transition from centralized to decentralized computing and described the applications now under development for circuit and district courts.

The seminar, presented by the FJC's Innovations and Systems Development Division and the Administrative Office, also featured panel discussions by clerks experienced in automation, who spoke about the challenges of serving as pilot courts. Concurrent workshops for the judges and the clerks afforded an opportunity for each group to discuss their individual and joint roles in automating their courts. The speakers advised new initiates to courthouse computerization to be risk takers, motivators, organizers, and analysts, all the while maintaining a sense of humor.

Applications currently under development for decentralized operation include administrative subsystems, the New Appellate Information Management System (New AIMS), and the Probation Information Management System (PIMS). The administrative subsystems are attorney rolls, personnel, and property inventory. New AIMS, a full case management and docketing system for the circuit courts, is undergoing pilot testing in the Fourth, Ninth, and Tenth circuits and should be available for use in other circuits next April. PIMS is undergoing pilot testing on connected computers located in three probation offices in the Northern District of Ohio, with connected terminals in a fourth office. PIMS, which will provide integrated office automation and management support, is scheduled for a rigorous work-measurement evaluation starting next July.

Development of systems for civil case management and docketing has begun with the definition of functional requirements by a subcommittee of the Clerks Automation Committee. As the useful lives of systems now running on the centralized DEC 10 computers draw to a close, the Court Systems Branch of the Administrative Office has begun developing software for decentralized operations, including Jury and Financial Management systems. Conversion of STARS and INDEX, with enhancements to function as nondocketing case management systems, is also under way. This will be followed by the conversion of Courtran Criminal to decentralized operation on UNIX-based computers. All of this work must be completed and tested in pilot courts before the DEC 10 systems can be discontinued, probably in 1987.

The following courts participated in the seminar: District of Arizona, Eastern District of Arkansas, District of District of Columbia, Northern District of Georgia, Southern District of Illinois, Eastern District of Michigan, District of Nebraska, District of New Jersey, Eastern District of North Carolina, Eastern District of Pennsylvania, Southern District of Texas, Western District of Texas, Western District of Washington, and the Fourth Circuit. ■

Parole Commission to Allow Crime Victims To Attend Parole Hearings

Crime victims will be advised of upcoming parole hearings for prisoners who victimized them, the U.S. Parole Commission has decided. The notification plan will allow victims to comment on a proposed release and to attend the parole hearing.

The agency's action goes beyond the provisions of the Victim and Witness Protection Act of 1982, which requires only that a victim be notified of a prisoner's release. Under the new procedures announced by Commission Chairman Benjamin F. Baer, a victim not only will have the opportunity to comment on a proposed release but will also be notified of the outcome of the parole hearing and of the release date, if release was granted.

The commission also announced new procedures to make it easier for victims to obtain restitution from defendants with assets. If restitution was one of the conditions of an inmate's sentence or parole, the inmate will be required to show that he or she has no concealed assets before the parole becomes effective.

The 1982 legislation permitted, for the first time, such conditional sentences and parole terms. However, Baer noted, many inmates are indigent when they are released, and restitution is therefore impractical. He indicated that the Justice Department has submitted legislation known as the Victims of Crime Assistance Act, which would set up a fund to indemnify crime victims. The fund's assets would come from fines collected in federal criminal cases.

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a contrast between the majority of prisons in the United States and the penitentiaries of Scandinavia—which use the dormitory system. The Scandinavian institutions also keep inmates busy "learning new skills and producing goods at least 40 hours a week, with additional time spent on education, if that is necessary. They pay the inmate on some basis for what he produces, and this preserves and increases the self-esteem of that person."

In contrast, the Chief Justice said, "so many of our prisons in this country have been, and are today, an appalling failure for a civilized people. The number of inmates who enter and leave our prisons as functional illiterates, lacking any marketable skills, is staggering. We must change that."

During the televised interview, he noted that the vast majority of inmates are eventually released, and suggested that those who had no work skills were more likely to become recidivists. (A recent Justice Department study found that the average term served in twelve states' prison systems ranged from one and one-half to three years. See box at right).

The Chief Justice told the conference participants that "one of the largest barriers to improvements in correctional and penal systems is the wall of protectionism erected over the years limiting the sale of prison-made goods." Those "artificial barriers," he said, must be removed so that every inmate "has the same moral right to work, the same moral right to produce as you and I have." The federal prisons are subject to statutory barriers, but have one very large customer—the United States government.

During the interview by Mr. Koppel, an inmate who was also being interviewed raised the issue of whether inmates who performed valuable work would be forced into a form of "slavery" if the proposed work programs were implemented. Chief Justice Burger responded that he envisioned a work system that would be "monitored to see that there is no exploitation. . . . Prisoners must not be exploited." He suggested that a board of visitors made up of private citizens could perform the required monitoring.

Chief Justice Burger also said that prisons should have, in addition to full-time work programs for inmates, "whatever athletic facilities are necessary to drain off the excess energies that sometimes go to produce prison disturbances and riots. Tired inmates—tired because they are engaged in productive work and in training and in some athletic recreation—who are confined in humane conditions—are far less likely to engage in prison riots." He said prison officials should be ready to rebut "ill-informed critics who will talk in foolish terms of 'country clubs' because there are baseball and soccer fields."

He said that the next step in implementing inmate work programs would be to have a task force—perhaps appointed by the conference's sponsors—charged with developing a consensus on the issue and on what steps should be taken to implement their findings. The Factories With Fences conference was sponsored by George Washington University and the Brookings Institution. Participants included Sen. Mark Hatfield (D-Ore.), Rep. Robert W. Kastenmeier (D-Wis.), Associate Attorney General D. Lowell Jensen, and Federal Bureau of Prisons Director Norman A. Carlson. ■

Serious Offenders Serve Relatively Shorter Terms

Prisoners jailed for the most serious crimes tend to serve a smaller part of their sentences than those jailed for lesser offenses, a Justice Department study has found.

Although convicted murderers, for example, usually get the longest sentences, they serve only about half as much of those sentences as car thieves serve of their sentences.

The report, prepared by the department's Bureau of Justice Statistics, was based on analysis of data from twelve state prison systems. It found the average sentence for all inmates in those states ranged from one and one-half to three years.

The report also showed wide variations in average sentences for the same crimes in different states. In one state, for example, the average time served for criminal homicide was thirty-nine months, whereas in another state the average time behind bars for the same offense was nearly twice as long.

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Quite often there has been a delay in the approval of judicial appropriation bills because of some controversial issue relating to the State Department, Commerce, or Justice. Have you considered the possibility of your subcommittee's reporting out a separate appropriation bill for the judiciary?

Well, if we did that we'd probably end up with thirty or forty bills because the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Small Business Administration, the Commerce Department, the State Department, and all of the other departments and agencies would like to have a separate appropriation, especially if they think they are noncontroversial, relatively speaking. So we just can't have that many appropriations bills.

A recent floor amendment in the House resulted in a 4 percent across-the-board reduction in appropriations, with some exceptions. Would targeted reductions be more effective?

Yes. I opposed that amendment because we actually target in our bill. We target if we have to take out some appropriation authority. We try to target reductions toward the lowest-priority items, and so across-the-board amendments like that are not good. I don't approve of them and I opposed that one.

How does the Appropriations Committee allocate funds among the subcommittees, and how does your subcommittee in turn determine priorities and allocate funds among the agencies, that is, Commerce, Justice, State, and Judiciary?

We have a meeting of the thirteen subcommittee chairmen, and by that time we usually have an overall target under the first Concurrent Resolution on the Budget on overall appropriations for the year. We try to allocate that target among the subcommittees, subject to the approval of the full Appropriations Committee. We make the arguments for our case and try to do it as fairly as we possibly can. No one subcommittee gets as much money as it would like to have, but we try to do it that way, and I don't think there's a better way to do it, really.

Conference Committee on the Budget, prepared a list of 316 subjects covered by acts that vest jurisdiction—other than diversity—in the federal courts: the odometer law, the Egg Products Inspection Act, the Tuna Convention Act, and the Apple Barrel Act, for example. He feels jurisdiction in these areas should be removed from the federal courts. When you are looking for cost cutting, do you consider divesting some federal jurisdiction?

> **"We are at a point where the judicial system is becoming so expensive that some people cannot avail themselves of it.... We have got to find a faster way to get redress."**

The increase in caseloads often is due to new legislation, changes in prosecutorial and other policies of the administration, or the state of our economy. Which branch of government should initiate methods to deal with these increasing caseloads?

I think it's a combination. The legislative branch, of course, is the primary branch that is responsible one way or another. But to go back to the answer to the last question, to some extent the judiciary can alter that workload by their own actions.

Do you think we will ever see the elimination of diversity jurisdiction?

Well, it's in the Constitution, of course. We won't eliminate it completely. However, the courts do have some discretion to require that litigants proceed elsewhere before going into federal court, and I think they're moving in that direction. I think that the availability of more than one forum has been abused in some instances. Diversity jurisdiction exists for a purpose, but some people use it to shop for the right court, especially when nationwide jurisdiction is available because one of the parties is chartered in many states. Such a litigant can just pick out the state he or she wants a trial in.

The examples he gave are what I would call nonjudicial matters. In many instances we're asking a court to decide a question that could be decided by the executive branch, that's not really a judicial matter. But in those kinds of cases it's often easy to say, "Let the court decide that. Let the parties appeal to the court if they don't like the answer." But sometimes it's not a judicial decision.

But if it's covered by a statute, how can the courts refuse it?

Because the Constitution says judicial power under Article III resides in the courts. It doesn't say anything about legislative power. The courts could just say, "We

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Court Personnel Asked to Curb Travel Costs

Congressional leaders working on the budget for the federal courts for fiscal year 1985 have carefully scrutinized all amounts requested, with particular emphasis on travel costs.

Federal court personnel are requested to cut travel expenses wherever possible and to confine official travel only to that which is vital to carry on the business of the courts.

Congressman Neal Smith

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don't have the power. You can't force us to accept legislative power."

When new legislation requires additional resources, such as more personnel, does your subcommittee study all aspects of the legislation's impact before voting on an appropriation request?

Not always, no. The Congress has a two-tiered system. We enact authorizing legislation and then we appropriate to carry out the services and programs established under the authorizations. Sometimes the authorizing committees propose programs without regard to the amount of time that such programs are going to take or the cost. Just last week, for example, I pointed out that some of the members were proposing and supporting an amendment that would have added substantially to the cost of the U.S. Customs Service. Some of the same members who wanted to add to the authorization actually voted for a 4 percent decrease the week before. So they don't always consider the relative merits or priorities of these programs.

Approximately 15 percent of the total judiciary budget is for the payment of rent to GSA for courthouses and other space occupied in federal buildings or in leased facilities. Is this funding arrangement with GSA necessary?

The House Public Works Committee proposed amendments to the Public Buildings Act, which Congress approved several years ago, that provide that all agencies pay rent to GSA for the space such agencies occupy, whether in a federal building bought and paid for by the taxpayers or in a leased building. GSA then places those rental payments in a fund that they use to maintain buildings occupied by the federal government and to provide new space. I disagree with the idea that GSA can just send agencies a bill that they have to pay. For that reason—and it started in my subcommittee, although some other subcommittees have done the same thing—we said GSA can send agencies a bill, but if we don't appropriate the money GSA is not going to get paid. So we have been putting a cap on the amount of money agencies can pay to GSA for space rental. And in large measure the reductions you noted earlier in the amount we're appropriating are attributable to reductions in the amounts requested for payments to GSA. We just don't think they should pay GSA the large increases in rent that GSA wants.

"I disagree with the idea that GSA can just send agencies a [rent] bill that they have to pay."

"We try to target reductions toward the lowest-priority items."

Aside from the issue of rent, the courts are almost totally dependent upon GSA for building alterations and services—telecommunications services, rental of motor vehicles, and procurement of supplies. Should agencies be given more discretion and authority to contract separately?

I don't think there is any need to raise a problem that doesn't exist. It is possible for the legislative branch and the judicial branch to be at loggerheads in this area if, for example, Congress refused to give the judicial branch the necessary contracting authority to carry out their functions as outlined in the Constitution. This hasn't happened, but the courts could possibly enter an order requiring that certain supporting functions necessary for the operation of the courts be done, and we could get into a real constitutional hassle. But it's never occurred, so I don't think

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ABA Report Calls For New Legislation To Combat Computer-Related Crime

The American Bar Association has called for federal legislation to combat computer crime. Its Criminal Justice Section, in a report issued in June, called computer crime—which includes manipulation of computer data for financial gain and electronic trespassing—"a problem of substantial, and growing, significance." It noted that "comprehensive federal computer crime legislation" to deter or punish such activity is "long overdue."

One positive effect of such legislation, the ABA report indicated, would be clarification of what constitutes computer crime. That would make detection and prosecution of such conduct easier. "The existence of a federal criminal statute specifically directed at computer-related illegal activity and a few well-publicized prosecutions under such a statute should dispel any lingering perception that computer abuse is a 'game' that one may engage in freely without fear of prosecution or concern for the damage that may result," the report said.

Federal legislation, the ABA report noted, would also cure disparities in the criminal system, because "there are arguably no penalties that apply to certain types of computer abuse," while other activities are "subject to greatly varying penalties."

One particular concern voiced by the report involves deliberate tampering with government computers. "Existing federal criminal statutes are simply not adequate ... to deal with the government's increased exposure to computer crime," the ABA panel maintained.

The report noted that computer crime is also a problem in the private sector. In both government and industry, the ABA panel said, computer crime often goes undetected or unrecognized, and its scope is therefore underestimated. The ABA did not provide any dollar figures, but found that "the annual losses sustained by American business and government organizations as a result of computer crime are, by any measure, huge."

The ABA report was prepared by a task force headed by Joseph B. Tompkins, Jr. Copies are available for $5 each from the ABA Section on Criminal Justice, 1800 M St., N.W., Washington, DC 20036. ■

Position Available

Staff Counsel, U.S. Court of Appeals for the Second Circuit, New York, New York. Senior attorney with significant litigation experience, knowledge of federal law and practice, analytical mind, and excellent negotiation and mediation skills to conduct preargument conferences seeking mediated resolution of civil disputes. Compensation at high federal grade, depending on qualifications and salary history. To apply, send resume by September 1 to Steven Flanders, Circuit Executive, U.S. Courthouse, Foley Square, New York, NY 10007.

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there is any need to raise some kind of specter about it. What the judiciary has done is ask us for the funds and the contracting authority for necessary items such as the computer system and other things, and we have responded in a fashion that I think has been satisfactory. So I think we ought to leave it that way.

Do you have a good working relationship with the Senate and House judiciary committees?

Yes, I would say it's good. Once in a while we have a difference of opinion, but in general it is a very good relationship. I've tried very hard to work with the majority in both instances in coming up with appropriations bills that they can support. Now that's especially important because in recent years the authorizing legislation hasn't been passed by the time we must act on the appropriations bills. The authorizations should be passed before that, but quite often they aren't. So the authorizing committees often want some legislative provisions put into the appropriations bill, and we work with them to see what kind of legislative provisions are necessary. That's really their jurisdiction, but we cooperate with them and accommodate them when we can.

But do you go back to them—your staff or the other members of your committee—and advise them on costs?

We actually don't appropriate all they want for some of the programs they have authorized because there isn't enough money to do everything. Making these decisions is within our jurisdiction, in terms of what has the highest priority, and if the authorizing committees don't like our recommendations, they can oppose them when the appropriations bill comes to the House floor.

Do these conference committee meetings come about as a matter of course? Suppose, for example, Congress decided to divest the federal courts of diversity jurisdiction, which would save a considerable amount of money. Do you have stipulated meetings?

If Congress decided to divest diversity jurisdiction, the courts would take that into consideration before they submitted their next budget request, and presumably they would take into account the changes in the caseload that would result from the action of the Con-

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gress. So this change should be reflected when we considered the next regular appropriations bill.

But when the appropriations bill is being drafted, are regular meetings held before an agreement is reached as to an amount?

Oh, yes. We hear each of the agencies, including the courts and the various levels of courts. Each department and agency has an opportunity to justify their appropriations request. We have a subcommittee meeting in which we go over all of these matters and consider them, and our staff then checks with their staffs to see what last-minute changes there have been in their estimates. Then we get together as a subcommittee and make recommendations to the full committee as to the amount for each one of these items; and it's almost never—and I think I can safely say never—changed. There may have been an exception, but I don't remember any.

Do you have any special message to the federal judges?

Yes. I don't want to say that we are at a crossroad—everybody is always saying, "you are at a crossroad"—but we *are* at a point where the judicial system is becoming so expensive that some people cannot avail themselves of it, people who have a right to redress. We are now at the place where it takes so long to try such simple cases that justice is being denied to some people. We've got to find a way to permit everybody in this country to avail themselves of our judicial system—to be able to afford to do this, and in a rather speedy manner—because justice delayed is justice denied. The answer to this, I would have to say, is not merely hiring more judges. There is no way we can hire enough judges and build enough courthouses to take care of all these problems. There has got to be some more substantive answer than that. The judiciary has been—through the Federal Judicial Center and other means, through the judges' associations and bar associations—trying to come up with alternative ideas, and I think Congress needs to act on them as fast as we can to try to solve this problem in a way other than just adding judges.

Somebody told me last week about a case that, it seemed to me, ought to have been tried in half a day, and they said it took eleven days. It was a federal case. Such a case becomes so expensive that whoever the plaintiff was, it's surprising he or she didn't drop it. It was nice back in the days when there were very few cases; judges had plenty of time, and lawyers and access to the courts were inexpensive. It was nice to take your time; but somehow we have got to find a faster way to get redress.

Would you agree that some of the blame can be placed on the doorstep of the lawyers?

Some of it can and some of the blame can be placed on the so-called reforms that we have had, too. Discovery, for example, has been abused. It was created for a very good purpose, but in too many instances instead of shortening the process it has lengthened the process and made it more expensive. In some instances discovery has been used for purposes far in excess of what was anticipated. And, to some extent, discovery in many cases has made the process of arriving at a decision more expensive instead of less expensive; it has taken longer instead of being quicker. So we need to change either the rules themselves or the practices under the rules—probably a little of both. I don't have an exact answer, but I know that discovery is being abused. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Third Circuit's Collins J. Seitz:

From Chancery Court to Third Circuit Chief– Recollections of 38 Years on the Bench

Judge Collins J. Seitz has had a long and distinguished career as a jurist. At the age of 31, he began twenty years of service on the Court of Chancery of the state of Delaware, first as vice-chancellor (1946–1951) and then as chancellor (1951–1966). While on the Chancery Court, Judge Seitz wrote many landmark decisions, including the opinion desegregating the University of Delaware, later affirmed in a companion case to Brown v. Board of Education.

Judge Seitz was appointed to the U.S. Court of Appeals for the Third Circuit in 1966 and became chief judge in June 1971. A member of the Judicial Conference of the United States since 1971, Judge Seitz was appointed to its Executive Committee in 1981; he also served with the Committee on the Operation of the Jury System (1971–1978) and was appointed chairman of the Ad Hoc Committee to Monitor Regulations on Electronic Sound Recording in 1983. This past summer, Judge Seitz relinquished the position of chief judge, but not his active status.

A graduate of the University of Delaware with a law degree from the University of Virginia, Judge Seitz received an honorary LL.D. from his undergraduate alma mater.

Counting the twenty years you served as vice-chancellor and chancellor of the state of Delaware and the eighteen years you have been on the United States Court of Appeals for the Third Circuit, you have been a judge for thirty-eight years. Given other choices would you take the same route again?

Yes.

You always wanted to be a judge?

Not really. I went on the Delaware bench at a time when my term would have expired in four years. I was 31 and thought the experience would be valuable. The State General Assembly changed the law and gave me a full twelve-year term, and somehow it kept going on and on. I came to love the subject matter jurisdiction of the Court of Chancery. It has traditional equity jurisdiction as well as statutory jurisdiction over Delaware corporations. Many great controversies, including corporate disputes, are generated in chancery. I enjoyed the opportunity to mold the law through opinion writing.

Judge Collins J. Seitz

Were many of your cases appealed?

Relatively speaking, no. Of course, you can't be a trial judge for the number of years I was without being reversed sometime. Indeed, an unreversed trial judge is, to me, a questionable status.

In 1971, when you became the chief judge of the Third Circuit, many new judgeship appointments had recently been made. This must have brought added re-

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New Federal Judgeships

Title II of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98-353, 98 Stat. 333) created the following new federal judgeships:

Court of Appeals Judgeships		*District Court Judgeships*	
D.C. Circuit	1	S.D. Alabama	1
First Circuit	2	D. Alaska	1
Second Circuit	2	W.D. Arkansas	1*
Third Circuit	2	C.D. California	5
Fourth Circuit	1	D. Colorado	1
Fifth Circuit	2	D. Connecticut	1
Sixth Circuit	4	D. Delaware	1
Seventh Circuit	2	S.D. Florida	3
Eighth Circuit	1	M.D. Georgia	1
Ninth Circuit	5	D. Hawaii	1
Tenth Circuit	2	N.D. Illinois	5*

*Includes one temporary judgeship.

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Inside...

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sponsibilities to see that this new court functioned efficiently and smoothly. Were there any special problems?

Yes, there were. Some were caused by me because as chief judge I strongly believed that we had to make significant changes if we were to confront the growing volume of litigation. Of course it was nothing compared to what it is today. I immediately appointed ad hoc committees of the court to examine almost every phase of our operations to see how we could bring our court to a current status. It is a testament to the commitment of our judges that they contributed mightily to many improvements, including a willingness to undertake a substantial increase in their workload.

Were all of your judges then a lot younger than their predecessors in those judgeship positions?

Yes, they were. It was like a generation of judges moved out and were replaced by new judges. I might add that I have been constantly amazed that the political appointment process has produced judges in our court who are of such extraordinary capability and commitment.

So you had more progressive thinkers, younger and more willing to experiment?

Well, we had a mix, but they were willing to go along with change because they appreciated the importance of the prompt delivery of justice. Thus, among other things, we went to limited oral argument and streamlined dispositions in many cases. It has been a savior for us and has enabled us to continue to deliver prompt decisions without, I believe, compromising our oath of office.

Was there resistance to change?

There certainly was, mostly from the bar. However, we are convinced that the litigants want prompt decision making, because the uncertainty generated by prolonged delay seriously undermines our *raison d'etre*.

Let me ask you about the reduction in or elimination of oral argument.

We have eliminated oral argument in about 40 percent of the appeals. But that happens only when all the panel members so vote. In the argued cases we have reduced the oral argument time in the typical case to fifteen minutes a side. We believe the time limitation results in better arguments, perhaps because the lawyers spend more time in preparation.

Sometimes judges interrupt with questions, so the lawyers don't get their arguments in.

That certainly is true; it depends on the presiding judge. I have a relaxed attitude about that. I frequently will say to the lawyers, "Now we've used most of your time with questions, so we'll give you five minutes extra." Not all my colleagues are equally charitable. I come from a Delaware tradition where reciprocal sentiments of good will exist between lawyers and judges. I strongly believe that consideration is a two-way street.

It is reported from court proceedings that you believe a former judge practicing before you as counsel in a case should not be addressed as "Judge."

That is true. When I was a young

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

PERSONNEL

Nominations

Paul M. Bator, U.S. Circuit Judge, D.C. Cir., Aug. 1
Frank H. Easterbrook, U.S. Circuit Judge, 7th Cir., Aug. 1
Cynthia Holcomb Hall, U.S. Circuit Judge, 9th Cir., Aug. 1
Emory M. Sneeden, U.S. Circuit Judge, 4th Cir., Aug. 1
Juan R. Torruella del Valle, U.S. Circuit Judge, 1st Cir., Aug. 1
Charles E. Wiggins, U.S. Circuit Judge, 9th Cir., Aug. 1
Thomas J. Aquilino, Jr., U.S. Court of International Trade Judge, Aug. 1

Confirmation

J. Harvie Wilkinson III, U.S. Circuit Judge, 4th Cir., Aug. 9

Appointments

James M. Ideman, U.S. District Judge, C.D. Cal., June 25
Tom S. Lee, U.S. District Judge, S.D. Miss., June 25
Rudi M. Brewster, U.S. District Judge, S.D. Cal., June 29
John M. Duhe, Jr., U.S. District Judge, W.D. La., June 29
Paul G. Rosenblatt, U.S. District Judge, D. Ariz., July 5
Robert M. Hill, U.S. Circuit Judge, 5th Cir., July 20
Dominick L. DiCarlo, U.S. Court of International Trade Judge, July 23
William J. Rea, U.S. District Judge, C.D. Cal., Aug. 6

Elevation

Thomas A. Wiseman, Jr., Chief Judge, M.D. Tenn., Aug. 1

Senior Status

Wilbur F. Pell, Jr., U.S. Circuit Judge, 7th Cir., July 31

Death

H. Vearle Payne, U.S. District Judge, D.N.M., July 20

Law must be stable, and yet it cannot stand still.

—Roscoe Pound

Filings Continue to Rise in District And Appellate Courts

Criminal cases filed in the U.S. district courts increased for the third consecutive year, while cases filed in the courts of appeals—both criminal and civil—also increased, statistics compiled by the Administrative Office show.

Figures for the 12-month period ended June 30, 1983, show 35,872 criminal cases filed, up 9.8 percent from the 1981–82 period. Terminations also increased, but not as rapidly, so that the district courts' pending caseload went up 11.3 percent.

Examination of the cases disposed of shows that 68.8 percent were resolved with guilty pleas, 1.6 percent with pleas of nolo contendere, and 11.7 percent by conviction after trials. Dismissals were ordered in 15.2 percent of the cases, and 2.7 percent resulted in acquittals after trial.

The statistics are contained in a new publication, *Federal Offenders in the United States Courts 1983*, prepared by the AO. In addition to examining nationwide figures, the report provides year-by-year statistics for major offenses and gives sentencing information on a district-by-district basis.

The appellate statistics show that during the twelve-month period ended March 31, 1984, a total of 31,125 new appeals were filed in the twelve regional circuit courts, an increase of 7.3 percent over the comparable period one year earlier. However, more cases were terminated by the appellate courts than in any previous twelve-month reporting period; the 30,911 case dispositions represent an 8.1 percent increase. Even with this significant effort in case terminations, the overall pending caseload grew by 0.9 percent; as of March 31, 1984, 22,757 appeals were pending on

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1984–85 Judicial Fellows Announced

A law professor from Hamline University, a political science professor from Syracuse University, and a psychology professor at Williams College have been named the Judicial Fellows for 1984–85. The three, who were selected by the Judicial Fellows Commission, will work on projects designed to resolve problems confronting the federal judicial system.

Douglas D. McFarland, who will be assigned to the Supreme Court, teaches civil procedure, evidence, torts, and advocacy at the Hamline University School of Law in St. Paul, Minn., where he has been on the faculty for a decade. He graduated from Macalester College in St. Paul and New York University Law School and received a doctorate in speech/communication from the University of Minnesota. At NYU, Mr. McFarland, 38, was a law review editor.

D. McFarland

Doris M. Provine, 38, an associate professor of political science at Syracuse University, graduated from the University of Chicago, received a J.D. from Cornell Law School, and holds a doctorate in government from Cornell. She taught at Cornell Law as a visiting professor in 1982. Ms. Provine will work at the FJC.

D. Provine

Saul M. Kassin, 31, now an assistant professor of psychology at Williams College, previously taught psychology at Purdue. He graduated from Brooklyn College, and holds a master's and a doctoral degree from the University of Connecticut. His areas of interest include psychology and the law, especially juror decision making and eyewitness testimony. He has written extensively about mock trials and decision making among mock jurors. Mr. Kassin will be assigned to the Administrative Office. ■

S. Kassin

Analysis of Fee-Shifting Rules Published

The Center has published *The Influence of Rules Respecting Recovery of Attorneys' Fees on Settlement of Civil Cases*, a theoretical economic analysis comparing various fee-shifting rules, by John E. Shapard of the Center's Research Division.

The stimulus for this paper was the recent proposal of the Judicial Conference's Advisory Committee on Civil Rules to amend rule 68 of the Federal Rules of Civil Procedure to permit offers to be made by plaintiffs as well as by defendants, and to allow recovery of reasonable attorneys' fees (in addition to costs) when a party who rejects an offer fails to obtain a better result after trial. The paper compares the influence on litigants' financial incentives of five attorney fee "rules": the American rule, the English rule, statutory provisions allowing recovery by prevailing plaintiffs, contingent fee arrangements, and an offer-of-judgment rule analogous to the advisory committee proposal. The paper discusses possible modifications to the committee proposal in light of the theoretical analysis.

Copies of the paper can be obtained by writing to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked (but do not send an envelope).

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lawyer I had a personal experience that I never forgot. I was trying a very unimportant matter to the court. My opponent was a former judge and the judge kept addressing him as "Judge" and me as "Mr." I lost the case. The decision was announced from the bench. As I walked out of the courtroom my client said to me, "Well you did pretty well considering the fact you were against a judge." Appearance of equal justice as well as the reality has always been a fetish with me.

The Third was one of the first circuits to have a circuit executive. Did this make a marked difference in your administrative work, and, if so, in what way did that new court official give you the greatest assistance?

The chancellor was the administrative head of the Court of Chancery, so I had fifteen years' experience there before coming to the court of appeals. Court administration is unglamorous, but, in my view, it is at the heart of an effective justice system. The creation of the circuit executive position enabled our judges, district and circuit, to use the circuit executive to collect facts within and without the circuit that we needed to adopt procedures designed to improve our efficiency.

"Court administration is unglamorous, but, in my view, it is at the heart of an effective justice system."

It's not just court procedure; isn't it also a lot of personnel problems?

All kinds. When you get a group of strong-willed people together, such as we have in our circuit, it is a special challenge to operate so as to retain collegiality and respect for one another. I believe my greatest accomplishment in my thirteen years as chief judge was to generate a genuine spirit of mutual respect and friendship in the circuit. But it is something that requires constant work and, on occasion, requires the chief judge to turn the other cheek. I might add that these remarks apply to all personnel, not merely the judges.

Pat Doyle must have been of special help to you as your first circuit executive.

He was. When Pat started with us, the first order I gave him was to visit every district in the circuit and offer his assistance to the fullest extent possible. In time many of the judges and staff came to deal directly with Pat, particularly because he also developed a fine rapport with the Administrative Office.

Do you personally think a circuit executive should be a lawyer?

I do, although I recognize that there are contrary beliefs. I have found that many judges prefer to talk to lawyers about legal matters. I believe that there is better communication between judges and a circuit executive who can talk "their language."

You gave your circuit executive as much authority as you could?

That's correct. I have used them to their maximum potential, to the enormous benefit of the Third Circuit.

When you came to the Third Circuit in 1966 there were eight judgeship positions in the circuit, whereas now there are ten authorized judgeship positions. Do you feel your circuit has ample judge power today?

The answer is no. We need at least two more judgeship positions. Thankfully, they have recently been created. Even so, all our needs will not be covered. And, as you may know, we have a very heavy caseload. I believe we are up to around 300 cases a year per judgeship. In some sense, I say "thank goodness" for the many quasi-frivolous appeals. They do not make the demands on our time that would completely destroy our present reasonably current status.

Everyone agrees that just adding more judges isn't the total answer. Do you have any special suggestions?

Well, many suggest that we contract the jurisdiction of the district courts—eliminate diversity and so forth. I'm not sanguine because I believe the members of the bar desire to keep their federal court op-

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District Court Judgeships (Continued)

S.D. Illinois	1
N.D. Indiana	1*
W.D. Kentucky	1
W.D. Louisiana	1
D. Maryland	1
D. Massachusetts	2*
E.D. Michigan	2
D. Minnesota	2†
N.D. Mississippi	1
S.D. Mississippi	2
E.D. Missouri	1
D. Montana	1
D. Nevada	1
D. New Jersey	3
E.D. New York	2
N.D. New York	1
W.D. New York	1*
E.D. North Carolina	1*
N.D. Ohio	2*†
S.D. Ohio	1
W.D. Oklahoma	1
D. Rhode Island	1
E.D. Tennessee	1
W.D. Tennessee	1
E.D. Texas	2
N.D. Texas	1
W.D. Texas	1
D. Utah	1
E.D. Virginia	1
E.D. Washington	1
W.D. Washington	2*
D. Wyoming	1

*Includes one temporary judgeship.
†Includes one judgeship changed from temporary status.

CALENDAR

Sept. 13–14 Second Circuit Judicial Conference
Sept. 16–18 Third Circuit Judicial Conference
Sept. 19–20 Judicial Conference of the United States
Sept. 19–21 Workshop for Training Coordinators of the Tenth Circuit
Sept. 21–22 Judicial Conference Committee on the Judicial Branch
Oct. 14–17 Workshop for Judges of the Sixth and Seventh Circuits

E.D.N.Y. Civil Pro Bono Panel Called a Success

The civil pro bono panel of New York's Eastern District is serving indigent litigants "with striking success," a review of the panel's performance has concluded. The study found both "high levels of client satisfaction" and attorneys who represented those clients "diligently and effectively." It also found "no serious adverse consequences" resulted from the "inexperience" of many of the panel members. In fact, the study quotes "courthouse observers" as noting that "panel members' inexperience seemed to lead them to work harder—and on balance to provide more effective representation—than the courthouse norm in these cases."

The panel consists of more than 350 lawyers and students from several law school clinics. The bulk of its work has been in Social Security disability cases, prisoners' civil rights claims, and employment discrimination cases.

One aspect of the pro bono plan lauded by the study was its recognition that most of the "volunteer army was untrained in these types of cases," resulting in training seminars in those areas covering the bulk of pro bono litigation.

The pro bono panel was formed in mid-1981 at the behest of Chief Judge Jack B. Weinstein and began operation in October 1981. The report's authors, professors Milton Heumann and J.L. Pottenger, examined the 168 cases handled by panel members in 1981 and 1982 to arrive at their conclusions.

It is up to each judge to determine whether to appoint counsel from the civil pro bono panel in pro se cases. Approximately 750 pro se cases are filed in the court annually. Members of the pro bono panel, who are only assigned cases of litigants proceeding in forma pauperis, were appointed in less than 25 percent of the 750 cases, even though the bulk of them have in forma pauperis status.

The study found that some judges appointed panel members far more frequently than others did and recommended changes in the plan's discretionary rules to achieve more consistency in appointments from judge to judge.

The report said not enough cases had gone to trial to allow an evaluation of how much—if at all—representation helped in the cases assigned to pro bono attorneys. ■

16 Grants Will Promote Alternatives to Litigation

Sixteen grants totaling nearly $500,000 have been awarded to fund a variety of activities that will advance nonjudicial dispute resolution. The awards were made by the National Institute for Dispute Resolution, a Washington-based nonprofit group.

The largest grants—$50,000 each—went to Alaska, New Jersey, and Massachusetts to create statewide offices for mediation of various kinds of disputes that now often lead to litigation. Wisconsin received $10,000 for the same purpose.

Two special masters appointed by Judge Thomas D. Lambros (N.D. Ohio) to oversee more than 100 asbestos-related cases received a $44,190 grant to process those cases through a computer-assisted negotiation model they have developed. The institute considers that grant as aimed at resolution of a specific type of dispute. A second grant in that category, of $15,000, went to the Joint Management Project of the Northwest Renewable Resources Center, in Seattle, for mediation of conflicts involving salmon fishing.

The institute awarded five grants for projects to improve dispute resolution between relatively powerless individuals and large institutions or corporations. The Center for Community Justice, in Washington, D.C., received $39,352 to mediate disputes between caseworkers and social-service recipients; the Center for Dispute Resolution in Denver received $39,900 to resolve child neglect and child abuse cases; and the Massachusetts Attorney General's Office received $35,000 to fund two consumer groups that will engage in mediation of consumer disputes. Two other groups received seed-money grants.

Two grants were aimed at resolution of disputes between individuals: $15,000 was awarded to the Community Boards Center for Policy and Training in San Francisco to examine income-raising methods for community dispute resolution programs, and $19,985 was awarded to the Association of Family and Conciliation Courts, based in Denver, to evaluate the mandatory-child-support mediation program in the Delaware family court.

The University of Wisconsin Law School received a $19,334 grant to set up a clearinghouse for dispute resolution materials. ■

SEITZ, from page 4

tion open. It is a testimonial in a sense.

There's one possibility that many would consider radical: Make appeals to the court of appeals discretionary, at least in some areas. Reasonable people will disagree as to what those areas should be, but I think that there are such areas. Social Security cases come to mind. I concede that my view runs counter to a strongly held belief that a litigant should have one appeal as of right.

I must candidly say that I do not see how we are going to cut back on the federal court workload, because the function of Congress is to legislate and when it does the federal courts are the ready vehicle to implement its wishes.

What cases do you feel should have priority on the docket?

I think the direct criminal appeals should have number one priority unless there is some emergency situation. For years we have given direct criminal appeals top priority, particularly when the defendant is in jail.

"A lawyer has a vested right to be heard, but not a vested right to win."

What are some of the cases you handled that were "landmark" cases over the years?

Well, *Belton v. Gebhart,* is one. It involved desegregation of some Delaware public schools. I was chancellor when I decided that case in 1952. It was affirmed in 1954 as a companion case in *Brown v. Board of Education.*

Did you foresee thirty years ago some of the problems that would be coming to the courts as a result of the desegregation decision?

Not really. In those days we were dealing with so-called desegregation—striking down legally mandated segregation. As the years went by the shift was to problems of integration. As we all know, it continues to be one of the vital concerns in our society.

How about some of your opinions in the court of appeals?

I believe some of my opinions dealing with the relationship between the rights of the retarded and mentally ill and the state have been of great importance. The same is true of my decisions dealing with the First Amendment rights of the media and protection of the fair trial rights of defendants.

Do you think that different policies, different opinions, and generally different approaches to jurisprudence nationally are necessarily bad? Should acculturation be taken into consideration in jurisprudential matters?

You can't sit in conference for long with people from all parts of this country without an appreciation that room must be left in decision making for reasonable accommodation of cultural differences and attitudes in this great country. Certainly this is true, unless attitudes are inconsistent with higher values. Our jurisdiction over appeals from the Virgin Islands brings home my point with great intensity.

What about the relatively new statute dealing with judicial discipline?

I think I'm in the judicial minority that supported the statute. I

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FILINGS, from page 3

the dockets.

Nine of the twelve circuit courts reported increases in their docketing activity. The largest rise in new filings occurred in the Fifth and Ninth circuits, up 20.8 percent and 18.5 percent, respectively. Eight of the appellate courts increased their overall termination statistics, with the Eleventh Circuit raising its dispositions by 35.4 percent, the Fifth by 24.1 percent, and the Eighth by 20.5 percent. Over the past year, five of the twelve courts were able to reduce the number of pending appeals. The District of Columbia Circuit's decrease was 12.7 percent, the Fourth Circuit's 6.1 percent, and the Seventh Circuit's 4.4 percent.

The U.S. Court of Appeals for the Federal Circuit had 1,000 filings, 896 dispositions, and 519 cases pending for the year ending March 31, 1984.

During the same twelve-month reporting period, the volume of civil cases filed, terminated, and pending in the U.S. district courts also continued to rise. The number of civil cases filed reached 259,798, an increase of 11.5 percent. The number of terminations also rose—to 234,969—representing an increase of 12.4 percent over the number disposed of in the previous year. As the growth in filings outweighed the increase in terminations, the size of the pending civil caseload also rose. Pending as of March 31, 1984, were 248,775 cases, an 11.1 percent increase. ■

SEITZ, from page 6

think its mere existence is perhaps more important than its actual use. I say this because by being on the books, it says that judicial accountability is important. I might add that I believe the operation of the statute so far demonstrates that it is largely invoked by the disgruntled, and by pro se litigants. One of its weaknesses is that those most knowledgeable about judicial actions, the lawyers, are generally unlikely to invoke the statute.

The last report from the Administrative Office shows the Third Circuit has an exceptionally good record of case processing. Are there some special procedures you use that keep your docket moving in spite of increased filings, or do you do something that other circuits don't do?

Well, I think the circuits have shared their ideas in this area with each other in recent years, and so the techniques are now largely common to most circuits. We are proud of what the Third Circuit has done by way of experimentation, with the support of the Administrative Office and the Federal Judicial Center. My policy as chief judge, which was supported by our judges, was to examine all of our practices so that we could identify the problem areas and, with the assent of our judges, adopt new solutions. We think it has paid off in many ways.

Were you a pretty tough chief?

No. I worked at diplomacy. We have a group of strong-minded, hardworking, imaginative judges who take pride in their productivity and in the image of the Third Circuit.

So the point is that there are no special procedures or gimmicks?

Well, not beyond those now in place in many circuits. There is one thing I have always considered administratively important. Every judge of a court should see the monthly statistics of every other judge. Human nature being what it is, I am convinced that such comparisons constitute a silent appeal to pride and provide an incentive to keep up. We all want to look good.

What do you see as the greatest problems in the circuit courts today, and what are some possible solutions?

Well, volume obviously is the big problem. All judges recognize this, but they differ as to solutions. The Third Circuit opted for techniques designed to stretch the productivity of our personnel.

You have gone to many summary dispositions?

Yes, but we have some guarantees. We use so-called summary dispositions where the panel is unanimously convinced that such a disposition is in order and where there is an affirmance. It must also be remembered that there are a very large number of insubstantial appeals, and we think most of our time should largely be reserved for cases of substance.

Do you hear any complaints from counsel?

Yes.

What's your answer?

The answer is we would love to hear extended oral argument and write opinions in every case, but there must be a trade-off if we are to stay reasonably current. My personal belief is that the litigants are interested in prompt judgments. While I do not believe in efficiency at the expense of thoughtful decision making, I do believe that we must have trust in the fairness of our judges in deciding how their time will be spent.

When you could take senior status or totally cut off court work, why are you electing to continue with a full court schedule?

Well, judging has been my life. I enjoy going to the office and crafting opinions. I also feel, perhaps immodestly, that I have a heightened sensitivity for the im-

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NOTEWORTHY

More prisons. The Bureau of Prisons will open two additional facilities this year.

The bureau has purchased a former seminary in Loretto, Pa., which it will transform into its forty-fifth prison. The institution will house approximately 500 inmates and is expected to be ready late this year.

The bureau has additionally acquired part of a former state hospital in Rochester, Minn., for use as a medical and mental health center. Also to open late this year, this institution will house another 500 or so inmates, who will be referred from federal prisons throughout the country.

* * *

More pay. Lawyers representing indigent defendants in the California Supreme Court and in the state's courts of appeals have won an increase in their compensation from $40 to $50 an hour. The $40 rate had been in effect for three years, except in capital cases, the rate for which had been raised to $60 an hour earlier this year.

* * *

More clarity. Jurors in Wisconsin's state courts may soon get simpler, crisper instructions from the judge.

The *ABA Journal* reports that a state judicial council is revising pattern jury instructions. One now reading "You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way simply because a majority of the jurors, or any of them, favor such a decision" will become "Don't be afraid to change your opinion if you think you are wrong. However, you should not come to a particular decision simply because other jurors think it is the right decision."

SEITZ, from page 7

portance of evenhanded justice, and I take great satisfaction in trying to see that it is delivered.

Would you like to write a book?

Wouldn't almost everyone? I would have to find a challenging theme.

But will you miss being the chief and the administrative work—running a really busy court, one of the biggest in the country?

It is busy, and yes, I'll miss it, but life goes on and my successor is equally dedicated to the importance of court administration.

As you see new judges coming into the system, what advice do you have, especially for a new circuit judge, based on your experience?

Well, let me make a few points. First and foremost, decide the case before you. Not only will that approach save time, but it also recognizes that few judges have prophetic vision.

A second point: Take wisdom where you find it. Do not be swept away by counsel's reputation, or be a prisoner to the brief, just because some prominent lawyer wrote it.

Finally, a lawyer has a vested right to be heard, but not a vested right to win. We are deciding the rights of litigants.

The judges of the Third Circuit are geographically separated. When a new judge comes to the court, does each judge individually go to that new judge and say, "I'm Judge Smith or Judge Jones. I welcome you to the court"?

No. They would say, "I'm Bill Smith or Bill Jones." We have a tradition of warm collegiality that I think exists nearly everywhere. I must say, however, that I came out of a Delaware tradition that made it hard for me, a much younger man, to call Judge Maris, "Albert."

Did you involve the other judges in administrative matters?

Oh, yes, just ask them. If you were to see an agenda of one of our administrative or council meetings, you would find that nearly every judge is reporting on something that has been studied or investigated. We have standing committees for the clerk's office, the library system, etc. But there have been many committees tailored to consideration of a special concern.

Which judge do you admire the most as an intellectual?

There are many but I would not want to name names, with one exception. I refer to our own Albert Maris, who, at 90, is still a no-frills intellectual giant.

Will you be doing some teaching, as you have done in the past?

I'd like to do some seminar-type teaching. I would not want large classes like I had in the past. I couldn't stand grading all those examination papers.

What are some of the accomplishments in your thirteen years as chief judge of which you are most proud?

Above all, I am proud of the almost family atmosphere I have helped to inspire in the Third Circuit. Additionally, I take great satisfaction in the adoption of numerous procedures that have permitted us to deliver prompt justice without sacrificing quality. We adopted internal operating procedures and published them. We created a satellite library system that became a model for the country. We pioneered in word processing and electronic mail. There are others. In short, we have played the part of a role model for many improvements in the federal system.

What do you see in the future of the federal judiciary?

If life tenure remains unchanged, I believe the federal judiciary, despite its ever-increasing caseload, will continue to give substance to the great promises in our Constitution. ■

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THE THIRD BRANCH

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EPA's William D. Ruckelshaus:

Litigating Environmental Issues Brings Acid Rain, Toxic Waste Problems to Courts

William D. Ruckelshaus, administrator of the Environmental Protection Agency, was named to that post by President Reagan in May 1983. Mr. Ruckelshaus was the first administrator of the agency, in the Nixon administration, from 1970 to 1973. He later served as acting FBI director and as deputy attorney general under President Nixon.

Mr. Ruckelshaus went into private law practice in Washington in 1974, then became an executive of Weyerhaeuser, a wood-products company.

Mr. Ruckelshaus, who graduated from Princeton University and Harvard Law School, is a native of Indiana, where he returned after law school to serve as a deputy attorney general and later in the state's legislature. He came to Washington in 1969 as an assistant attorney general, a year before beginning his first EPA service.

William D. Ruckelshaus

You have been in office for well over a year now and you took on an agency being attacked by citizens, business, and Congress for ineffective management and lack of direction. Why did you agree to take on such a task?

Well, as you know, I was here when this agency was first created and it was clearly troubled in May of 1983 when the president asked me to return. I feel very strong about this place; I think it's an important institution in this society. And while I certainly wasn't eager to leave the West Coast—where we were happily ensconced—and come back into this turmoil, nevertheless, when the president asked me to do it, I didn't really think I had much choice but to accede to his request.

Do you now feel that you've

See EPA, page 4

Change Court Methods, Eliminate Some Cases, Two Studies Urge

Courts should not, ideally, be handling many of the cases now before them, and the way the remaining cases are handled should be altered, two separate studies concluded recently.

The call for reducing the kinds of cases that get to court comes from the Council on the Role of the Courts, a twenty-six-member panel of judges, practicing attorneys, and legal educators. Its findings were released recently in "The Role of Courts in American Society," a 171-page report published by the West Publishing Company and based on more than a dozen studies commissioned by the council. The studies focused largely on civil litigation.

The call for simplification of litigation comes from the American Bar Association's Action Commission to Reduce Court Costs and Delay, which conducted a five-year study of how to reduce costs and delay in "ordinary people's cases." On the basis of the study's findings, the commission recommends simplification of pretrial procedures, reduction of the time allowed for appeals, and use of tele-

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Restitution Under Victim–Witness Act Upheld

The constitutionality of the restitution mechanism of the Victim and Witness Protection Act of 1982 was upheld last month by the Second Circuit.

The appellate court faced a challenge to the restitution provision's constitutionality from a defendant convicted of fraud who was sentenced to a prison term and ordered to make restitution to the victims in *United States v. Brown*, No. 83-1454 (Sept. 7, 1984). Brown argued that the restitution order imposed by the trial court was akin to a civil judgment and could be imposed only after a jury trial. Rejecting that reasoning, the Second Circuit said that the restitution provision "serves traditional purposes of punishment." As part of a

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Inside...

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phone conferences instead of in-court appearances whenever possible.

Although the two panels' studies were completely separate, their findings can be read in tandem as a blueprint for reducing the crunch of cases overwhelming many courts and then moving the remaining cases through the system more rapidly.

The Council on the Role of the Courts identified five broad types of cases—those that undisputably belong in the courts, those that are suitable for court adjudication but do not belong in the courts for other reasons, those in which courts should play a backup role to other processes, those that do or do not belong in the judicial system according to the respective, opposing views of so-called adaptationists and traditionalists, and those that are unsuitable under any criteria.

In the first category are all cases with "constitutional claims involving life and death or serious property interests" and deadlocked "disputes between two sharply contending private parties," such as contract and tort claims that cannot be insured against.

Cases in the second category are those that would fit in the first category but would cost more to resolve than the sum at stake, involve more factual than legal questions, or involve risks that can be insured against. Thus, the council called for removing from the judicial system economically infeasible claims, administrative appeals, estate administrations, initial determinations of public benefits, auto accidents, workers' compensation claims, and minor traffic cases. It also called for judges to "actively manage the discovery process" to cope with discovery abuse.

Courts should play a backup role in the third category of cases, including such matters as child-custody disputes, warranty claims in which arbitration or mediation must be attempted first, and decisions as to what constitutes due process by state agencies. What the report recommends is that courts set ground rules—for the termination of welfare assistance, for example—without getting involved in every aspect of the case themselves.

The fourth category involves "public law"—largely "litigation that has been brought to restructure the practices of vast state bureaucracies such as schools, prisons, police departments, and hospitals in order to correct conditions claimed to be unconstitutional and often to be brutal." The council noted the disagreement between traditionalists and adaptationists on how, or even whether, courts should handle such cases, without suggesting how the conflict should be resolved.

The last category—cases the council deems unsuitable for the judicial system—are those that are already for the most part excluded from the system. These include cases that are not based on a legal entitlement and matters legislatively exempted from litigation, such as no-fault divorce and suits for alienation of affection.

The ABA commission's report, "Attacking Litigation Costs and Delay," is aimed at curbing the "excessive delay" that "prolongs the anxiety of litigants and undermines the value of judgments ... [and] results in the loss or deterioration of evidence."

The commission looked at various types of reforms instituted in different courts, largely in civil cases, and came up with four key findings:

- When both judicial controls on discovery and simplification of procedures are put into effect, time will be saved. The commission studied Kentucky's courts, where both kinds of reforms recently went into effect, and found that the time from filing to disposition had been cut by two thirds. Studies of Vermont, Colorado, and California courts showed that when procedural simplification or judicial controls—but not both—were put into effect, neither was an effective time saver.
- Limiting briefs in selected

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Judge Kern Named Dean Of Judicial College

The National Judicial College has announced that Judge John W. Kern III, a senior judge of the District of Columbia Court of Appeals, has been named dean of the college, a judicial education and training institution.

Judge Kern, a graduate of Princeton University and the Harvard Law School, has been on the District of Columbia bench since 1968; he took senior status in May of this year. Prior to his judicial service, he worked for the Central Intelligence Agency, was engaged in private practice, served as an assistant U.S. attorney for the District of Columbia, and held positions in the Department of Justice.

Dean Kern will assume his new responsibilities on October 3, 1984. ■

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

AO Annual Report Published

The 1984 edition of the *Annual Report of the Director* of the Administrative Office of the United States Courts was published recently. It details the business of the courts and the activities of the AO for the twelve-month period ended June 30, 1984.

VICTIM, from page 1

sentence, the court held, restitution "differs in significant respects from a civil adjudication," and is exempt from the jury-trial requirement. "The Seventh Amendment," the court concluded, "is no barrier to this addition to the arsenal of federal criminal sanctions."

The opinion—one of first impression on the issue on the circuit level—reaches the same conclusion as a lower court opinion handed down in July, also captioned *United States v. Brown*, 587 F. Supp. 1005 (E.D. Pa. 1984). The only other court that has considered the question has held the restitution provision unconstitutional (*United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983)). (See *The Third Branch*, October 1983.)

Judge Donald W. VanArtsdalen ruled, in the Eastern District of Pennsylvania case, that a man who pled guilty to bank robbery must repay the bank the amount he confessed he stole. The defendant—who was also sentenced to a twenty-year prison term—relied on the ruling in *Welden*, which held that the restitution procedure, in which a judge sets the amount of victim compensation on the basis of hearsay evidence, violated the defendant's right to a jury trial in a civil action and to due process and equal protection.

Judge VanArtsdalen disagreed. He ruled that the restitution legislation does not create a civil action, and that a jury trial on the amount of damages is thus not required. ■

Experimental Jury Procedures Tried, Evaluated by Second Circuit's Courts

Seven experiments with jury procedures are described and evaluated in a report issued recently by a committee appointed by the Second Circuit. The Committee on Juries of the Judicial Council of the Second Circuit last year invited trial judges in the circuit to adopt one or more of the experimental procedures and use them for at least six trials, in both civil and criminal cases.

The first experiment permitted attorneys, in addition to the judge, to question members of the venire during voir dire. Most judges reported that the procedure was not very time-consuming, because the attorneys were limited to specified amounts of time for questioning. Judges felt, however, that the attorneys doing the questioning improperly sought to influence prospective jurors during the selection process. Most attorneys seemed to like the procedure.

A related experiment involved detailed questioning of each potential juror *in camera* by a judge after some questions were asked in a mass voir dire. Some of the private questions were suggested by counsel. The majority of participating attorneys favored this kind of voir dire, as did about half the judges. The others said the procedure was not worth the added time it took.

Another experiment allowed jurors to submit questions—screened by the judge for evidentiary problems—to witnesses; and a separate experiment, used in different trials, allowed jurors to take notes. Many judges, and most prosecutors and plaintiffs' attorneys, liked both procedures, whereas most defense attorneys did not like either.

Other experiments included preinstruction of the jury, which produced a mixed reaction, and providing the jury with either written or taped copies of the charge, which most participants favored.

The committee noted that the sample was too small to be conclusive and did not recommend that any of the experimental procedures be made mandatory. But the committee indicated that many participating judges had said they would use the procedures again, and it encouraged discretionary use of them. ■

Revised Guidelines on Presentence Reports Issued

Modifications to the contents of presentence reports are spelled out in a revised monograph recently sent to all probation officers. The 1984 revision of *The Presentence Investigative Report* reflects recent changes in corrections law and new standards designed to promote uniformity in the reports.

One new section explains the need for a victim-impact statement, showing restitution needs, in cases in which there are identifiable victims. In such cases, presentence reports must also contain a section detailing the financial status of the defendant and his or her dependents.

A change in the section on information potentially exempt from disclosure makes clear that the presence of a defendant in a federal witness-protection program is not disclosable.

The revised monograph also specifies that the investigator's recommendation is not to include acts that are not in the part of the report disclosed to the defendant. Another new section describes how to make court-ordered corrections to a presentence report.

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turned around the feeling of frustration and discontent of some of your personnel?

Yes, I do. I think morale is very high. People are back focused on their jobs, working very hard. The people in here are highly motivated. The problem is making sure they've got the right assignments, that their talents are being fully utilized; and if that's true then they're happy. I think they are now in good shape.

The EPA has listed in the *Congressional Directory* fifty-five top officials and ten regional offices. What is your total complement?

We now have close to thirteen thousand. They are spread throughout ten regions in the country, where we average about four hundred people and where most of these laws are implemented; and we have another couple of thousand in research and development and several thousand here in Washington.

As EPA administrator you are responsible for enforcing nine statutes. Do you have enough enforcement personnel to police business, industry, and government installations all over the United States and, when you find violations, to bring actions?

Well, we are like any other government law enforcement agency; that's part of our responsibility. We have a problem of ensuring voluntary compliance. There are never enough enforcers if everybody starts violating the law. What we need are enough people to ensure that when somebody does violate the law, there's a high likelihood he is going to get caught. And we have now some 2,400 people in enforcement, which is more than we've ever had in the history of the agency. What I'm hopeful of is that the message throughout the country is very clear—that when we set these standards we mean it. We mean it when we put them on a permit that requires them to meet a certain schedule to reduce pollution and specifies that if they don't meet those standards on time, they'll find themselves in court or with an administrative order against them.

How do you decide whether to file a criminal as opposed to a civil action?

We have internal guidelines that help us make those determinations. A lot of that is based on experience, on precedent, and we work with the U.S. attorneys and with the Justice Department in determining whether certain actions warrant criminal prosecution versus civil action. Usually the criminal activities come about when somebody engages in life-threatening or really serious violations of environmental laws, and those are fairly clear. And what we are after in the other cases is compliance with the law; sometimes you can use criminal law for that, but other times civil law is just as effective.

Most states have their own regulations, which are bound to overlap federal regulations. How do you handle this dual jurisdiction responsibility?

Of the laws that we administer, almost all explicitly state that while it is up to the federal government to set air-quality standards, for example, if the states want to set stricter standards, they can. They can't be more lenient than the federal standards, but they can go beyond those. The laws also provide for a lot of delegation of program operation or implementation to the states. In more mature programs like air pollution and water pollution, that delegation has already been made, but when we delegate implementation of the program, we must have continued oversight responsibility. The states cannot enforce these laws on their own; they have to have a federal presence simply because the states compete so strongly for the location of industry within their borders. Therefore, they need the federal government behind them—what we call the gorilla in the closet—to come out in the event the states run into problems of the industry moving out of the state or whatever.

"States cannot enforce these laws on their own .... They need the federal government behind them—what we call the gorilla in the closet."

We view our role with the state as a partnership. It's a tough relationship because it's naturally abrasive in this enforcement area, but we have worked very hard at it. We have a new set of guidelines on state delegation and state oversight, which we published the first of this year. Those were jointly developed by a state–federal task force that I created when I came back here. And I think our relationship with the states today is about as good as it has ever been.

Does your previous Department of Justice background help?

Well, I think it does because much of what we do ends up in litigation. And we rely very heavily on the Justice Department for help: They're our lawyers; in fact, we're their client for almost everything we do—when either we are sued or we sue somebody else. I think we overdo it; nevertheless, my experience in the Justice Department is very helpful here.

How many lawyers do you have who actually litigate and handle the cases in court?

Well, we have more than four hundred lawyers both here and in the regions. And the way in which we handle these cases with the Justice Department, when we actually

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go to court, is on a partnership basis. The Justice Department people are really the lawyers and we're the client.

Including the solicitor general?

No. It's the Lands and Natural Resources Division primarily, and in the regions it is the U.S. attorney. And our people occasionally get into court. There are a couple of statutes involving mobile sources in the air pollution area and the issuance of water permits, for which our people will actually argue the cases in court. And they often sit in the court with the Justice Department lawyers or U.S. attorneys, but they're usually the courtroom lawyers and we're the client.

Sometimes that gets a little competitive, doesn't it?

Well, it can if you're not careful—most lawyers like to be in court and like to argue the cases. But I am a very firm believer—and I was when I was in the Justice Department before and in the attorney general's office in my home state of Indiana—that you've got to assign the litigating responsibility and control somewhere in the government or chaos results. If you don't do that in the state and federal government then it just won't work, regardless of the natural tendency of lawyers to want to go to court. As an administrative matter, as a management matter, you have to give that responsibility to the Department of Justice, and you just have to work through those potentially abrasive situations when you find them.

If your cases go to the Supreme Court, the solicitor general represents EPA?

Yes. He handles all the matters at the Supreme Court.

Let's turn to hazardous-waste sites. An EPA "Superfund" was set up to finance the cleanup operations. Can this cleanup program be accelerated? Reports are there are almost five hundred on the national priority list, yet EPA has concluded total cleanup in only six.

We have accelerated the cleanup process enormously since I came back here. We've done it in a number of ways. We have separated the question of who pays for it from the question of cleanup and have used the Superfund money to start

William D. Ruckelshaus

cleaning up these sites.

What efforts have been made to get industries that have caused the waste to pay for it?

The law provides that the parties whose waste is in these hazardous-waste sites are ultimately responsible for paying for the cleanup. What they were trying to do before I returned was to get these responsible parties to move forward and actually finance the cleanup themselves. The problem with that was two or three hundred of these parties were often involved, and we didn't know what the cost of the cleanup was going to be. We didn't have what we call a remedial investigation/feasibility study available to determine exactly what was involved; and they all have lawyers and the lawyers would sit around forever and negotiate and debate over what the settlement ought to be. What we did is separate the settlement process out from the cleanup process, decide to move the federal monies out and get the remedial investigation/feasibility studies going, and finally reach this construction stage, which is the cleanup stage.

This program has really only been going on now for about three years. The first sites weren't put on the list until 1982. We've now updated that during 1984 and it will be updated again this fall. There are presently 552 sites that have been put on the national priority list, which means they're eligible for federal funds—they're serious enough problems to be eligible for federal funds. As for the number that have been taken off, it takes a long time to get on the list, and it takes a longer time to get off the list. Now the figure that you cite, of 6 sites cleaned up, is technically true. We have actually completed more than 300 emergency cleanups around the country to eliminate immediate threats to public health. One hundred twenty of those cleanups were national priority list sites. What we have left are massive engineering undertakings that involve a lengthy study to understand what the nature of the problem is and what we need to do to alleviate it. And then we have to let out contracts and go on into the construction, the actual cleanup, stage. We have something going on in every one of these sites all over the country.

"What we did is separate the settlement process out from the cleanup."

Activity is accelerating, and I'll give you one illustration of how that's true. When I returned to EPA, we were spending $210 million of Superfund money in fiscal year 1983. This year we'll spend $460 million. We asked the Congress for $640 million for next year; they only gave us $620 million. But

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we are building this program up about as fast as it is possible to build it up and we're making real progress. The figure six is always thrown at us, but those are the sites that have been put on the list and then taken off. To get off the list you have to have a public hearing; you have to go through a lengthy rulemaking proceeding. And some of these sites may never come off the list because we have ground-water problems that entail pumping out, cleansing, and reinjecting the water into the aquifer. So in the sense that sites come off the list, some will never finally be cleaned up, but in the sense that the health problem is alleviated, it's been done.

Is it really possible to meet a social problem that's going to be with us for years? Do you feel the total amount now in the Superfund, and for the upcoming fiscal year, is enough to be effective?

Well, as I said, we asked the Congress for $640 million and they gave us $620 million. In fact, the House gave us $600 million. They're the ones who said we're not aggressive enough with the Superfund and cut us $40 million. We need more money. There is no question we need more money in the Superfund, and we are in favor of reauthorizing it. It doesn't run out until the end of fiscal year 1985. We have a whole series of studies—required by Congress, incidentally—going on to determine exactly how much money we need and how it ought to be raised. The Congress seems to be determined to reauthorize the Superfund before the election. If they want to do so, that's fine with me; but I hope they keep their eyes on what it is we're trying to do, which is to clean these dumps up. We're not adding a whole lot of other things to the program, which is what they are now attempting to do (at least in the House). And if we do that, we might have more money in the bill, but we'll have less to spend on cleaning the dumps up because there will be a lot of other claims on the fund.

Many of the EPA cases are in the Sixth Circuit, especially the acid rain cases, which started in 1976. Why is it taking so long to conclude these cases?

Well, we have concluded a number of them. I think it may be helpful to put these acid rain cases in some kind of perspective. The northeastern states, which are very concerned with acid rain, have decided that in order to try to move the sulfur oxide levels down in the Middle West, they will challenge state implementation plans—the state plans aimed at reducing pollutants of all kinds, including sulfur oxide—in court by saying the plan is not adequate to protect their areas. They've done that in Illinois and Ohio and several other states. Our approach to this has from the beginning been to follow what we believe is the intent of the Clean Air Act, namely, that we set ambient air-quality standards for the air around you to protect public health and the environment. We then translate those requirements into specific emissions standards that are imposed on power plants and industries of all kinds. Those are aimed at protecting the ambient air in the immediate area. The acid rain problem is a long-range transport problem, in which it is claimed that emissions in Ohio, for instance, are transported across very long distances, sometimes a thousand miles, and come down in the form of acid rain in New England—in Maine, New Hampshire, and Vermont. The problem we have in trying to get midwestern states to adopt emission standards that affect the states of Maine, New Hampshire, and Vermont is that we don't know how to do it. When we see the acid rain coming down in those states, we don't know where it's come from. So we don't know what to tell the states to do.

"They have all these amendments to the Clean Air Act in the Congress aimed at acid rain, because trying to deal with it under existing law is just impossible."

The Clean Air Act just isn't created, wasn't structured, to do that. The courts have agreed with us in every one of these cases so far. They've said, "You're right and you don't have a mechanism in this act that you can use to achieve the purpose that the plaintiffs are trying to get by suing you." The same thing is true in the suit being filed now by New England under section 126 of the Clean Air Act to stop the long-range transport of these pollutants. I understand and sympathize with the frustration of the New England states about the problem of acid rain. And I think we do need eventually to address this problem, but we can't really address it under the current Clean Air Act. They have all these amendments to the Clean Air Act in the Congress aimed at acid rain, because trying to deal with it under existing law is just impossible.

In some of the cases EPA at one point in the litigation said, "Well, maybe in view of what we've heard here we better take a look at the regulations, and perhaps we will relax some of them and perhaps we won't, but we should take another look at them." Is that what is holding up cases in the Sixth Circuit, where most of the acid rain cases are concentrated?

Yes. A number of suits have been filed in the Seventh and Sixth Circuits because that's where the affected states are. That's where

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THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Bedlin, Howard, and Paul Nejelski. "Unsettling Issues About Settling Civil Litigation: Examining 'Doomsday Machines,' 'Quick Looks,' and Other Modest Proposals." 68 *Judicature* 9 (1984).

Breyer, Stephen. "The Legislative Veto After *Chadha*." 72 *Georgetown Law Journal* 785 (1984).

Bright, Myron H. "Appellate Briefwriting: Some 'Golden' Rules." 17 *Creighton Law Review* 1069 (1984).

"Demystifying the Judicial Process: How Can Judges and Journalists Really Help?" Panel discussion at the meeting of the American Judicature Society, Las Vegas, Feb. 11, 1984. 67 *Judicature* 448 (1984).

Edwards, Harry T. "The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication." 32 *Cleveland State Law Review* 385 (1984).

Flanders, Steven. "Blind Umpires—A Response to Professor Resnik." 35 *Hastings Law Journal* 505 (1984).

Fletcher, William A. "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction." 35 *Stanford Law Review* 1033 (1983).

Ginsburg, Ruth Bader. "Reflections on the Independence, Good Behavior and Workload of Federal Judges." 55 *Colorado Law Review* 1 (1983).

Third Branch Survey: How Many Judges Are Members of Each Circuit Council?

Most of the circuits have added far more district judges to their circuit councils than the statutory minimum, a *Third Branch* survey has found. The results show that, three years after new legislation guaranteeing district judges minimum levels of representation on the judicial councils, all but one circuit—the Eleventh—has exceeded the minimum.

The legislation, 28 U.S.C. § 332(a)(1)(C), effective October 1, 1981, requires that every judicial council have at least two district judges as members and that councils with more than six circuit judges as members have at least three district judges. Prior to the 1981 legislation, all circuit judges were members of a circuit's judicial council, but no provision was made for district judge membership. The 1981 amendment provided that the chief judge of the circuit be a member of the council and stipulated that all the other circuit judges could vote on how many of them would serve on the council. All but three circuits opted to keep all their circuit judges as members of the councils.

The following list shows the current membership of each circuit's judicial council:

Circuit	Circuit Judges	District Judges
D.C.	11	6
First	4	3
Second	11	6
Third	10	5
Fourth*	5	4
Fifth	14	9
Sixth	11	5
Seventh	8	4
Eighth	9	5
Ninth*	5	4
Tenth*	6	4
Eleventh	12	3

Note: The Federal Circuit has no circuit council.

*The councils of these circuits do not have all appellate judges in the circuit as members.

✓Godbold, John C. Remarks at the Eleventh Circuit Judicial Conference, May 7, 1984.

Kaufman, Irving R. "Press, Privacy and Malice." 56 *New York State Bar Journal* 11 (1984).

Lay, Donald P. "A Blueprint for Judicial Management." 17 *Creighton Law Review* 1047 (1984).

✓Lively, Pierce. Brief History of the Sixth Circuit Judicial Conference (remarks to the conference), May 15, 1984.

Marcus, Richard L. "Conflicts Among Circuits and Transfers Within the Federal Judicial System." 93 *Yale Law Journal* 677 (1984).

✓Meador, Dan. "Law and the Courts in 2000." Address to the Fifth Circuit Judicial Conference, May 31, 1984.

Merritt, Frank S. "Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982." 20 *Criminal Law Bulletin* 44 (1984).

Note. "Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982." 52 *Fordham Law Review* 507 (1984).

✓O'Connor, Sandra D. Speech to Institute of Judicial Administration, Chicago, Aug. 4, 1984.

Stern, Herbert J. *Judgment in Berlin*. Universe Press, 1984.

✓Stevens, John P. Remarks at Northwestern University School of Law, Chicago, Aug. 4, 1984.

Turk, James C. "The Nation's First Application of the Exhaustion Requirements of 42 U.S.C. § 1997(e): 'The Virginia Experience.'" 7 *American Journal of Trial Advocacy* 1 (1983).

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the middle western states of the Ohio Valley have burned high-sulfur coal—the states whose emissions, at least allegedly, are being transported over long distances and affecting the New England states. And they have challenged in courts, in a number of instances, our approval of state plans to control health and the environment in their states. What we are saying is that we have to approve those plans under the existing Clean Air Act and cannot refuse to approve them on the grounds relating to acid rain that are offered by the New England states. We don't have that authority in the act. The courts have agreed with us every time they have ruled on these cases, and then new ones are filed. They are part of New England's effort to bring pressure against the administration, against those states, and eventually against the Congress to do something about acid rain.

Can't the coal be washed or processed in some way to avoid a serious problem?

The health problem in the immediate area is being handled. We do have ambient air-quality standards for the protection of public health as related to sulfur oxides. And the state plan that is submitted is aimed at protecting public health. Those standards are being issued and are being met. The acid rain problem is not a public health problem; it's an environmental problem associated with the impact on lakes and alleged impact on forests. And the utilities—these industries—are meeting our local ambient air-quality standards. What the states are saying is that we don't have anything to deal with the long-range problem. And they are right, because we don't have the authority under the law, we believe, to handle their problem. That's why the Congress has to deal with it. And as I said, so far every court that has ruled on it has agreed with us.

The clerk's office in the Sixth Circuit says they are ready, that they are just waiting for EPA. Is there an answer as to why EPA is delaying?

I don't know that we are delaying. In fact, we had a meeting here recently indicating we are going to reply, and very rapidly. We had a hearing on August 8 on the whole rash of suits that have been filed by New York, Maine, and Pennsylvania against the downwind states on a section 126 petition, and we told the court that we will be ruling very shortly. The ruling will be the same as it has always been. They know what the ruling is going to be. The ruling is going to be that we don't have any authority to do what they want to do. They keep filing the same case all the time. And it usually has a little bit different twist to it, but it's the same thing: "We want you to stop them from polluting because of this long-range transport." What we are saying is we don't know how to do it, we don't have the authority to do it under the law. Each time the court is presented with that conclusion of ours, they rule we are right.

Do you spend much time lobbying in Congress on proposed legislation affecting EPA?

I'm up there probably once a week lobbying on one feature or another of a law that is pending. What the administration is currently doing is spending, this next year, $55 million researching the issue of acid rain and trying to reduce the scientific uncertainties involved with it; it is trying to come up with a control program that would then be submitted in the form of legislation and to deal with the problem as we've identified it. There's enormous scientific controversy over the nature of this problem and what ought to be done about it. Now the people in New England don't believe that; they think the controversy is over. You ask the people in the Middle West what they think, and they say, "Well, New England thinks it's such a tough problem, why don't they pay for it?"

The difference between acid rain and any other pollution issue we have is that the source of the pollution is remote from its impact; so the people who produce it don't see any benefits for them in reducing it, and the people who are receiving it don't have control over the pollution. They want it to be reduced by having the people who cause it pay for it. And that's primarily the consumers, the rate payers, of those utilities.

Do you have anything to do with the president's Cabinet Council?

Yes. I'm a member of the Cabinet Council on the Environment.

All kinds of matters that come up affect EPA. They tend to be the things that cut across other departments of government, other governmental agencies, and not the ones that we simply deal with internally. There are issues like ground water, for which we have responsibility, the Interior Department has responsibility, and the National Oceanic and Atmospheric Administration of the Commerce Department has responsibility; these are the issues that come before the Cabinet Council. Major legislative issues, Superfund issues, which affect a whole lot of other departments, come before the Cabinet Council. In the Cabinet Council on Legal Affairs, issues like victims' compensation are discussed: Should these people living around the hazardous-waste sites be compensated? Those sorts of issues come forth.

Has the United States signed any international agreements in this area?

Yes, we've signed several of them. We've signed one with Canada involving the Great Lakes, and we have an agreement with several European countries to share infor-

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PERSONNEL

Nominations

H. Ted Milburn, U.S. Circuit Judge, 6th Cir., Sept. 6

Thomas A. Higgins, U.S. District Judge, M.D. Tenn., Sept. 6

James F. Holderman, Jr., U.S. District Judge, N.D. Ill., Sept. 6

James H. Jarvis II, U.S. District Judge, E.D. Tenn., Sept. 6

Richard F. Suhrheinrich, U.S. District Judge, E.D. Mich., Sept. 6

Howell Cobb, U.S. District Judge, E.D. Tex., Sept. 10

Charles R. Norgle, Sr., U.S. District Judge, N.D. Ill., Sept. 10

R. Allan Edgar, U.S. District Judge, E.D. Tenn., Sept. 11

William D. Keller, U.S. District Judge, C.D. Cal., Sept. 11

F.A. Little, U.S. District Judge, W.D. La., Sept. 11

Ronald E. Meredith, U.S. District Judge, W.D. Ky., Sept. 11

George La Plata, U.S. District Judge, E.D. Mich., Sept. 11

Walter S. Smith, Jr., U.S. District Judge, W.D. Tex., Sept. 11

William G. Young, U.S. District Judge, D. Mass., Sept. 11

Nomination Withdrawn

Paul M. Bator, U.S. Circuit Judge, D.C. Cir., Sept. 6

Confirmation

Ilana D. Rovner, U.S. District Judge, N.D. Ill., Sept. 12

Appointments

Franklin S. Billings, Jr., U.S. District Judge, D. Vt., Sept. 6

Peter K. Leisure, U.S. District Judge, S.D.N.Y., Sept. 6

Elevations

James M. Fitzgerald, Chief Judge, D. Alaska, July 15

James Lawrence King, Chief Judge, S.D. Fla., Sept. 1

Ninth Circuit Rules That Federal Courts Have Exclusive Jurisdiction Over Title VII Suits

Federal courts have exclusive jurisdiction over Title VII actions, the Ninth Circuit has ruled. The ruling, one of first impression among the federal courts of appeals, came in a suit originally filed in a California state court under Title VII of the Civil Rights Act of 1964. The district court dismissed the action—after it was removed from state court—because it found the state court had no jurisdiction. Thus, the district court could not have removal jurisdiction.

The Ninth Circuit upheld the district court's interpretation in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984). Noting that the jurisdictional clause of the legislation at issue gives federal courts jurisdiction, but not exclusive jurisdiction, over such claims, the court pointed, however, to three indicators it said "unmistakably" implied a congressional intent that the federal courts have exclusive jurisdiction of Title VII actions. The first was language in parts of Title VII, other than the jurisdictional clause, implying that the federal jurisdiction was exclusive. The second was the legislative history, and the third was Supreme Court precedent in analogous cases. ■

NOTEWORTHY

Prison population. The nation's prison population has nearly doubled in ten years and is now at an all-time high, a Justice Department survey shows.

The report, prepared by the department's Bureau of Justice Statistics, indicates 454,136 inmates were in federal and state prisons as of June 30, 1984. California had the most prisoners, 41,866, and North Dakota the fewest, 402. There were 34,168 prisoners in federal institutions.

* * *

Bankruptcy rules. Public hearings will be held early next year on two proposed amendments to the bankruptcy rules. The hearings have been set for January 17, 1985, at the National Courts Building, 717 Madison Place, N.W., Washington, D.C. Those wishing to testify should contact Joseph F. Spaniol, Jr., secretary of the Judicial Conference's Committee on Rules of Practice and Procedure, by the end of this year. Written comments can also be submitted to the committee, c/o the Administrative Office of the U.S. Courts, Washington, D.C. 20544; they must be received by January 1.

The proposed changes are to rule 5002, which deals with appointments of relatives and others connected with bankruptcy judges by those judges, and rule 5004, which covers compensation of persons related to or connected with a bankruptcy judge.

* * *

Interpreter use. Court interpreters were used more than 40,000 times in the district courts in the year ended June 30, 1984, statistics compiled by the Administrative Office show.

The interpreters were used to translate into 51 foreign languages or dialects, as well as sign language. More than 95 percent of the 40,118 interpretations were to and from Spanish. The second-ranking language translated was Thai, for which there were 205 requests for interpreters. The least frequently translated languages were Albanian, Samoan, Swedish, and Tongan, which each generated 1 request in the 12-month period.

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mation. I was in Japan recently—where we also have an environmental agreement—at a meeting pursuant to that agreement. We have an environmental agreement with the Soviet Union that we just reactivated.

Do you feel these are really helpful?

Yes, they are. To the extent those agreements are pursued aggressively and we pursue projects in which they may have some expertise and we have knowledge in another area, we can gain a lot of mutual benefit.

Your background tells you that there are many cases you simply can't prosecute for lack of time and personnel. Have you established any major policies; do you have certain cases on a high-priority list?

Sure. We issue policies all the time where we administer major statutes. We provide guidance to the regional offices, to the states, as to how we interpret those statutes, what we think they ought to do. Those policies pour out of here daily.

Do the courts cooperate with you on that?

Sometimes they do and sometimes they don't. It's up to them.

Do you have any message to the federal judiciary?

Well, I think the judges understand that the government, in being aggressive in a particular area, is trying to get a judicial interpretation for clarification of a statute. Sometimes we have a point of view as to how we think they ought to interpret it. The defendant will have another point of view. And it's up to the judge to decide. ■

STUDIES, from page 2

cases to ten pages, requiring briefs to be submitted within twenty days, eliminating reply briefs, and then allowing expanded oral argument can halve appeal time. These findings were based on a program in the California Court of Appeals in Sacramento.

• Telephone conferences between judges and counsel on such matters as nonevidentiary motions, pretrial and settlement conferences, arraignments, and bail settings cut in half the time needed to accomplish those proceedings in person, with no loss of effectiveness.

• In addition to saving time, these simplified procedures resulted in substantial cost savings to clients. But clients who agreed to contingent fees did not share in the dollar savings.

The report also contains specific suggestions for implementing some of its recommendations. It suggests that judges take an active role in determining which cases are candidates for "simpler procedures and a faster track," keeping in mind that "procedures drafted with the complex case in mind are overdesigned for simpler cases." To speed and simplify pretrial proceedings, the report recommends that judges eliminate time between pretrial steps to "sustain a sense of urgency in the participants," and that they ensure that "scheduled court events will actually happen on time." The report's authors concede that attacking delay poses special problems in urban areas with large backlogs, because expedited newer cases might conflict with older cases nearing trial. One suggestion, based on procedures implemented in Detroit, is to subject cases to mandatory nonbinding mediation before they go to trial.

Copies of the report are available free from ABA Action Commission, 1800 M St., N.W., Washington, D.C. 20036. ■

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Bankruptcy Judge Bostetter Elected to FJC Board

The Judicial Conference of the United States has elected Bankruptcy Judge Martin V. B. Bostetter, Jr., of the Eastern District of Virginia, to the Board of the Federal Judicial Center. Judge Bostetter fills the unexpired term of the late Bankruptcy Judge John J. Galgay, who had been elected to a four-year term in September 1983.

Bankruptcy Judge Bostetter was appointed to the bankruptcy court in Alexandria, Virginia, on July 1, 1959. Prior to his service on the federal bench, he was special assistant city attorney and associate judge in the Municipal Court in Alexandria.

Bankruptcy Judge Martin Bostetter, Jr.

Judge Bostetter received his undergraduate and law degrees from the University of Virginia.

DEA Administrator Outlines Federal Efforts To Curb Drug Trafficking and Drug Abuse

Francis M. Mullen, Jr., was appointed administrator of the Drug Enforcement Administration in July 1981, following a nearly twenty-year career with the Federal Bureau of Investigation. Serving in a wide variety of assignments with the FBI, including special-agent-in-charge in Tampa and New Orleans, Mr. Mullen was executive assistant director of investigations—one of the three top management officials at the bureau—when President Reagan named him to head the DEA.

In this interview, Administrator Mullen details the DEA's enforcement responsibilities and discusses the agency's education, prevention, and regulation roles.

Please describe the scope of the Drug Enforcement Administration's responsibilities.

DEA is an agency of about 4,400 people. In addition to having enforcement jurisdiction under title 21, the federal narcotic laws, we have responsibility in the areas of education, prevention, and regulation. In the education and prevention areas, for example, we undertake programs to educate the public about drug abuse and attempt to prevent people from becoming involved in drug abuse. One example of that is our recent national effort with the 48,000 high school coaches, the International Association of Chiefs of Police, and the National Football League and its Players' Association to reach 5.6 million high school athletes and, through them, to contact their peers to discuss the problems of drug abuse and to reduce the level of drug use.

In the regulatory area, we regulate the activities of 700,000 individuals who are authorized to dispense drugs legally—doctors, pharmacists, pharmaceutical companies, and so forth. In this connection, we can set quotas on the amount of controlled substances that can be produced by the pharmaceutical industry. We follow this

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Conference Sees Need For Increased Funds to Speed Court Automation

Recognizing the significance of the ongoing efforts of the Federal Judicial Center and the Administrative Office to automate the operations of the federal courts through the adaptation and introduction of modern technology, the Judicial Conference has supported a resolution calling on the directors of the AO and the FJC to seek and to devote additional resources for such efforts, in order to provide automation to the courts more rapidly.

See other stories on Judicial Conference session, pp. 2 and 3

Continuing its review of the *Five-Year Plan for Automation in the United States Courts*, which was jointly prepared by the Center and the AO, the Conference concluded that the need for speedier implementation can best be met by more money and more personnel for both development and implementation.

In its report to the Conference, the Committee on Court Administration had noted that several aspects of the five-year automation plan merited special comment—for instance, that development of certain software programs should be

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Inside ...

Changes to Federal Rules of Procedure Approved at Judicial Conference Session

State officials would have broader access to federal grand jury materials, appellate courts would be barred from their own review of documentary evidence, and filing periods would be liberalized under amendments to the federal rules of civil and criminal procedure recently approved by the Judicial Conference.

The rule changes now go to the Supreme Court for approval or rejection. Those that are approved will go into effect unless vetoed by Congress within ninety days after submission.

Changes in the Federal Rules of Criminal Procedure adopted at the September meeting of the Conference would authorize access to grand jury materials by state employees who are cooperating in the enforcement of federal laws (rule 6(e)(3)(A)(ii)), and would also authorize courts to permit disclosure of information indicating a violation of state law to state officials (rule 6(3)(3)(C)). Criminal defendants who plead guilty or nolo contendere would be notified of a potential obligation to make restitution to victims (rule 11(c)(1)). Amendments to rules 12.1(f) and 12.2 clarify the admissibility of a defendant's intent to present certain defenses. Amended rule 49 would ensure that a judge would not see a notice of dangerous-special-offender or dangerous-special-drug-offender status until after a verdict or plea.

Rule 35 would specify clearly that the 120-day period for motions to reduce sentence is a filing deadline rather than a jurisdictional limit. The amendment requires the court to "determine the motion within a reasonable time," but not necessarily within 120 days of sentencing.

Common to amendments to both the civil and the criminal rules are provisions requiring the district courts to provide an opportunity to comment on proposed changes in local rules (Fed R. Crim. P. 57; Fed. R. Civ. P. 83) and those changing computations of time. Saturdays, Sundays, and holidays would be excluded from time periods of less than eleven days, rather than seven days as under the present rule. Martin Luther King, Jr.'s birthday, which becomes a legal holiday in 1986, has been added to the list of holidays in both sets of rules (Fed. R. Crim. P. 45; Fed. R. Civ. P. 6). The amended civil rule would also extend filing deadlines when the last day to file a document is a day "on which weather or other conditions have made the office of the clerk inaccessible." The corresponding criminal rule currently has a similar provision.

The amendment to rule 52 of the civil rules would establish a "clearly erroneous" standard of review for findings of fact based on documentary as well as oral evidence. Another change in the civil rules would require persons subpoenaed for depositions to travel up to one hundred miles to attend the deposition (rule 45). Finally, rule 71A would provide for alternate commissioners in condemnation cases in which a three-member

See RULES, page 8

Hearings Scheduled on Federal Rules Changes

Public hearings will be held early next year on proposed changes in the federal rules of procedure. The hearings, scheduled for February 1 at the National Courts Building in Washington and February 21 at the Federal Court Building in San Francisco, will focus on proposed changes to the rules of appellate procedure, criminal procedure, and civil procedure, as well as to the rules for section 2254 and section 2255 cases.

Written comments on the proposed amendments can also be made, by April 1, and should be addressed to the Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Washington, DC 20544.

The proposed amendments have not yet been considered by the Judicial Conference. Among the recommended changes is one to Fed. R. Civ. P. 68 that would encourage offers of settlement before trial. A change in Fed. R. Crim. P. 31 would allow defendants to waive the requirement that a verdict be unanimous.

AUTOMATION, from page 1

accelerated, particularly those for full electronic civil and bankruptcy docketing.

The Conference emphasized preparation and training for judicial personnel to allow them to successfully meet the increased demands of the automation process. Systems administrators will be provided to each automated court, and selected personnel in the pilot project courts will be used as training cadres for other courts just receiving automation.

Finally, the Conference concluded that bankruptcy clerks' offices appear to be the court components most likely to benefit from automation, because of the high volume and repetitive nature of their work. ■

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

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

Judicial Conference Moves on Wide-Ranging Agenda at Fall Meeting

In addition to approving amendments to the federal rules of civil and criminal procedure and calling for more rapid development of automation for the courts, the Judicial Conference took a number of other initiatives at its September meeting. The Conference—

- Adopted a resolution endorsing the experimental use of summary jury trials, as a potentially effective means of promoting the fair and equitable settlement of lengthy civil jury cases.
- Recommended that Congress defer action on S. 2259, a bill that would require each district to establish an arbitration program, by local rule, until current experimental efforts with court-annexed arbitration are expanded, reviewed, and analyzed.
- Denied a request by the news media to lift the ban on television, still camera, and radio broadcasting from federal courtrooms. This action was based on a study by a special Conference committee. After surveying federal judges and experienced practitioners and reviewing state court experience with such broadcasting, the committee concluded that the alleged public benefits of permitting coverage were outweighed by the risks to the administration of justice.
- Opposed the enactment of H.R. 3919, a bill that would eliminate the $10,000 jurisdictional amount in certain interstate commerce cases.
- Recommended the creation of five additional court of appeals judgeships, twenty-six additional district court judgeships, and sixteen additional temporary district court judgeships. The Conference further recommended that four existing temporary judgeships be made permanent and that three roving positions be made judgeships for a single district only.
- Rescinded a 1973 Conference recommendation that 28 U.S.C. § 46(c) be amended to allow a majority of judges qualified to sit to order the hearing or rehearing of a case *en banc*. The Conference suggested that each court of appeals consider adopting a local rule, under 28 U.S.C. §§ 2071 and 2077 and rule 47 of the Federal Rules of Appellate Procedure, establishing a procedure for the determination of when a case is to be heard or reheard *en banc*, including whether a majority of active judges or a majority of those qualified to act is required to make the order.
- Ratified the action of its Executive Committee approving regulations for the selection and appointment of bankruptcy judges. The approved regulations, which are similar to the Conference's regulations governing the selection and appointment of United States magistrates, implement the requirements of the Bankruptcy Amendments and Federal Judgeship Act of 1984.
- Approved a budget request for fiscal year 1986, which, for the first time, exceeds $1 billion. This amount, approximately $1.098 billion, is still less than one-tenth of 1 percent of the total federal budget.
- Expressed its preference for H.R. 4307, the House-passed legislation to revise the Criminal Justice Act and change the compensation rates paid per hour and per case, as a more flexible and durable remedy than H.R. 5757, a bill that addresses CJA compensation rates as part of legislation to establish more uniform rates among federal "fee shifting" statutes.
- Approved a tentative agenda for a sentencing institute for the judges of the Fifth and Seventh Circuits, to be held in Butner, North Carolina, April 1–3, 1985. Also approved an institute for the judges of the Eighth and Tenth Circuits, to be held in 1985, and one for the Second and Sixth Circuits, to be convened in 1986.
- Amended the commentary following canon 3c(1)(d)(ii) of the Code of Judicial Conduct to require the exclusion of a law clerk who has been offered employment with

See JCUS, page 8

Justice Rehnquist: Reexamine Appeals as of Right

Supreme Court Justice William H. Rehnquist suggested recently, in a speech at the University of Florida Law School, that appeals as of right and wide-ranging discovery be reexamined in an effort to reduce the cost and duration of litigation.

"I think it is time," Justice Rehnquist said, that lawyers "begin talking seriously about how delay may be drastically reduced in ordinary civil litigation, and expense curtailed. Perhaps we should entirely abolish discovery in cases where the demand is for a money judgment below a certain dollar amount, or at least sharply limit it."

"Perhaps," he continued, "the time has come to abolish appeal as a matter of right from the district courts to the courts of appeal, and allow such review only where it is granted in the discretion of a panel of the appellate court."

The problem, Justice Rehnquist said, is that "for many litigants today, both our federal and state court systems offer no promise at all of a result, either just or unjust, because delay and expense simply make resort to those systems prohibitive."

The solution, he suggested, "is to either reduce the amount of time that lawyers must put in the resolution of a particular dispute so that a client can afford to retain a lawyer, or else let the disputants settle their disputes without lawyers ... [by] radically raising the jurisdictional limits on small claims courts."

Drug Enforcement Administration's Chief Explains Agency's Roles in Preven

MULLEN, from page 1

very closely. If we see a certain drug being abused on the street, we can reduce the quota that the industry may produce of the drug and encourage the company to take steps to secure distribution.

We also set quotas on controlled substances that can be imported into the United States. For example, the United States, by international agreement, does not grow the coca leaf or the opium poppy—we buy all of that from foreign countries. It's our contribution to keep down the level of drugs available to be abused. Several countries—India, Turkey, and Australia, for instance—want to furnish the opium poppy to this nation. We determine how much supply the United States needs. From the opium poppy you get morphine, an extensively used painkiller. You also get heroin, so it has to be controlled. Those are some of the functions we have in addition to law enforcement.

Do the pharmaceutical companies import these items under licenses issued by DEA?

Yes, they do. Often you have one or two companies bringing a controlled substance into the country. Then a third company wants to import also. It would have to apply to DEA for import authority. We'll have hearings—we have an administrative law judge who will hold hearings—as to whether the contracts are valid, whether there's a need, and so forth. Then a recommendation is made to me.

You mentioned that there were approximately 4,400 people in the administration. How many people are involved in enforcement?

About 2,200. Almost half of our agency personnel are classified as weapon-carrying agents, who are authorized to perform a full range of investigative duties. The other 2,200 are support personnel—stenographers, typists, chemists, radio technicians, etc. Another large contingent are analysts—individuals who review the reports that come in, review the cables from overseas, and put together the trends of drug abuse, where drugs come from, how drugs come in, and so forth, to assist the enforcement efforts.

What's the typical background and training of your agents?

Every DEA agent accepted for training today is a college graduate. That is one requirement we have. We take them from many backgrounds. We have accountants, attorneys, some with degrees in the scientific and technical areas, and some with degrees in social science, history, and political science. We send them for twelve weeks of training to Glynco, Georgia, where the DEA Academy and the Federal Training Center are located. In the past two and a half years, we've trained about 425 agents there.

"I personally consider any drug trafficker a danger to the community."

What is the function of the National Narcotics Border Interdiction System (NNBIS), and what role does DEA play as part of that system?

DEA is the lead drug enforcement agency in NNBIS. Other agencies have responsibilities in this area, too. When you consider that only 2,200 of our people are agents assigned to the drug enforcement effort, you know we need help. Every state has some capability in its law enforcement area to investigate drug problems, drug trafficking, drug abuse. The FBI has been given concurrent jurisdiction. The U.S. Customs Service has a lead role in interdiction—in the smuggling area. The U.S. Coast Guard has a role. The National Narcotics Border Interdiction System was set up under the vice president to coordinate the efforts of the various agencies in the area of interdiction and to ensure the support of the military under the amended Posse Comitatus Act. Posse comitatus previously prohibited military involvement in civilian law enforcement. That has been amended to enable the military to assist us in the drug enforcement effort. However, military personnel are still prohibited from making arrests, conducting searches, and so forth. They furnish resources, they can furnish intelligence, facilities, and equipment, but that is about the extent of their support. NNBIS is an attempt to coordinate all of these efforts.

The NNBIS is restricted to the interdiction of drugs coming into the country as opposed to distributed within the country?

That's correct. DEA is just one part of it. We do assign analysts to the six NNBIS centers to ensure there's an exchange of information and intelligence. And NNBIS does have a direct link with the El Paso Intelligence Center, called EPIC. At EPIC, we now have forty-nine states and about eleven federal agencies linked on-line by computer. We track all of the known traffickers, their planes, their cars, their boats, their weapons, those who are fugitives .... This computerized intelligence system is available to all the states, except Pennsylvania.

Who runs the El Paso Intelligence Center?

EPIC is headed by a DEA official and he has two deputies, one of whom is a Coast Guard official, the other a U.S. Customs Service offi-

...Education, Comments on Traffickers' Impact on the Courts

cial. Many other agencies are involved—the Federal Bureau of Investigation, U.S. Marshals Service, Immigration and Naturalization, FAA, Internal Revenue Service. It's really a remarkable thing to walk down the hall and see the agent-identifying signs on the doors—to see the agencies working together under one roof.

Is NNBIS an outgrowth of the task force that was established in Miami or is it separate and distinct?

It's an outgrowth. It's not exactly similar to the South Florida Task Force, because that entity actually investigated cases. NNBIS does not investigate cases; it does not initiate cases. It is a correlating mechanism, a coordinating mechanism. But the idea for coordination and cooperation did come out of the South Florida Task Force effort.

Do you have any idea of the numbers of cases that were generated by the South Florida Task Force?

I am not sure as to the precise number, but, to get the impact from the South Florida Task Force, you have to go beyond the statistics—beyond the arrests, the seizures—and see what happened to the murder rate in Dade County. It did decline substantially. The South Florida Task Force did have a positive effect on South Florida. Now, it did cause traffickers to go elsewhere, it did spread the problem around, so to speak. But it can be called a success, in my opinion, because it gave the people at least a sense of comfort and a realization something could be and was being done.

In many of the metropolitan areas where drug crimes are most prevalent, drug traffickers fear federal charges because the federal courts are less clogged than some state courts and there is less of an opportunity to plea-bargain. With DEA arrests climbing, is there a danger that the federal courts will get inundated by these kinds of cases? Are you concerned about that?

It's a concern and there is a danger. I'm not certain of the impact on the courts from the standpoint of numbers of cases. I do know, however, that the federal prison population in the past two years has increased by 32 percent, due mainly to convictions of drug traffickers. That had to have had an impact on the court system, because the individuals processed in the prison system had to go through the courts. It would have been a similar increase.

DEA's Francis M. Mullen

You may be aware that it was necessary to send additional judges into South Florida to handle the heavy caseload. So, yes, I am concerned—not only about the effect on the court system but about the impact on the Marshals Service, because they have to transport the prisoners; the impact on the prison system; and the impact on our capacity for handling the increase in arrests and in prosecutions.

Do you know what percentage of your cases go to trial and what percentage are handled with guilty pleas?

A majority of the defendants plead. Usually, when we decide to indict and go forward with a case, we have a pretty good case.

You've mentioned that some of your agents have legal training. Does your agency play any role in prosecutorial decisions, have any involvement in trial tactics?

It's my view that, in the investigation stage, the agent makes the decisions with input from the prosecutor, who in our cases is normally the U.S. attorney. If we are going to conduct certain interviews or make certain seizures, we want to know if we are going to run into some legal problems down the road during the prosecution stage. The determination to prosecute is made solely by the U.S. attorney. I know from my past experience and from what occurs today that there is input from the investigator at that time. If the prosecutor wants to know what type of evidence exists, if any pitfalls may be down the road, there is some discussion. But the decision to prosecute and on how to conduct the trial is solely the determination of the prosecutor.

You've talked about the growth in population in the federal penitentiaries as a result of narcotics cases. Are you satisfied with the sentences that are being handed down in these cases?

I believe the federal courts are handling the problem as well as they can under the circumstances. They have to consider many things: the nature of the charges, the individual involved, the capacity of our prisons. I am concerned, at times, with our bail procedures, where the consideration is whether or not the individual is going to appear at trial and how we ensure that he or she appears. It's normally a monetary bail. I'm sure it's clear to judges, prosecutors, and

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MULLEN, from page 5

investigators alike that a $1 million bail—even more in some cases—is just a cost of doing business. A drug trafficker will jump bail. Indeed, we have about 2,950 fugitives right now—more people in fugitive status than we have investigators. Bail, therefore, is a problem. I am happy to see bail reform, with danger to the community as a consideration. I personally consider any drug trafficker a danger to the community. And I think a judge should be able to consider that facet now. With regard to sentencing, the length of sentences in just the past year has gone up 11 percent, so individuals are being sentenced to longer terms in prison for drug trafficking. Generally, I am satisfied with the sentencing procedures.

You mentioned earlier your educational role. Is there anything you can do as administrator to help judges understand the breadth of the drug problem?

Yes, there is. I have lectured about the seriousness of the drug problem before groups of judges and before groups of attorneys. We have prepared a number of monographs that we make available to the courts, to attorneys, and to other groups and organizations. We have a chief counsel's office here consisting of about twenty attorneys. In addition to educating judges, attorneys, and others involved in the legal system, we appear before the United States Attorneys Advisory Committee when they come into Washington. It's an ongoing educational process. Beyond that, we go to the meetings of the state attorneys general and the National Association of District Attorneys and lecture. And our chief counsel's office has prepared model legislation in a number of areas—look-alike drugs, asset seizure and forfeiture, paraphernalia. Many states have adopted the legislation exactly as prepared by DEA. So I think we can play a critical role in education and in the legal area.

Are any new programs or specific efforts on your agenda for the next couple of years?

Yes. We are changing direction, to a degree, in the drug enforcement area. We have to be innovative. As we are attacking the problem with regard to the finished product and as we go after the drugs that are being imported into the United States, now the drugs are being produced here. As we change our tactics or methods to those that are more successful, the traffickers change theirs. For example, the Colombians are now becoming very effective in eliminating the laboratories in Colombia. Now we see the labs moving to Central America, and we are seeing them in the United States. We have already seized more cocaine laboratories in this country during the first six months of this year than we did all of last year.

We are taking a new approach in looking at the precursors—those chemicals necessary to produce drugs. For example, ether is a necessary precursor to produce cocaine. We have taken some substantial steps to control the export of ether, especially to Colombia and Jamaica.

We're going to move more into the education and prevention areas—the coaches' program, for example, and work with the National Association of Pharmacists and with the National Federation of Parents for Drug-Free Youth. We have our own program of producing comic books and coloring books for our very young people. I believe we have to eliminate the supply and eliminate the demand. Eliminating the supply is very difficult. You're going against centuries of tradition in some countries; you have to depend on foreign governments. Eliminating demand is within our grasp, I feel, and so you will see the Drug Enforcement Administration, as an agency, doing more in education and prevention in the future as we continue the enforcement effort. I be-

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PERSONNEL

Nominations

Edith H. Jones, U.S. Circuit Judge, 5th Cir., Sept. 17
Joseph H. Rodriguez, U.S. District Judge, D.N.J., Sept. 17
Herman J. Weber, U.S. District Judge, S.D. Ohio, Sept. 17
Howard D. McKibben, U.S. District Judge, D. Nev., Sept. 28
Melvin T. Brunetti, U.S. Circuit Judge, 9th Cir., Oct. 5
Alice M. Batchedler, U.S. District Judge, N.D. Ohio, Oct. 5
Donald E. Walter, U.S. District Judge, W.D. La., Oct. 5
Ann C. Williams, U.S. District Judge, N.D. Ill., Oct. 5
Mark L. Wolf, U.S. District Judge, D. Mass., Oct. 5

Confirmations

Charles A. Legge, U.S. District Judge, N.D. Cal., Sept. 17
Marcel Livaudais, Jr., U.S. District Judge, E.D. La., Sept. 17
Anthony J. Scirica, U.S. District Judge, E.D. Pa., Sept. 17
Cynthia H. Hall, U.S. Circuit Judge, 9th Cir., Oct. 3
H. Ted Milburn, U.S. Circuit Judge, 6th Cir., Oct. 3
Emory M. Sneeden, U.S. Circuit Judge, 4th Cir., Oct. 3
Juan R. Torruella del Valle, U.S. Circuit Judge, 1st Cir., Oct. 3
Charles E. Wiggins, U.S. Circuit Judge, 9th Cir., Oct. 3
Thomas A. Higgins, U.S. District Judge, M.D. Tenn., Oct. 3
James F. Holderman, U.S. District Judge, N.D. Ill., Oct. 3
William D. Keller, U.S. District Judge, C.D. Cal., Oct. 3
Howard D. McKibben, U.S. District Judge, D. Nev., Oct. 3
Charles R. Norgle, Sr., U.S. District Judge, N.D. Ill., Oct. 3
Walter S. Smith, Jr., U.S. District Judge, W.D. Tex., Oct. 3
Richard F. Suhrheinrich, U.S. District Judge, E.D. Mich., Oct. 3
James H. Jarvis II, U.S. District Judge, E.D. Tenn., Oct. 11
F. A. Little, Jr., U.S. District Judge, W.D. La., Oct. 11

Appointments

James H. Wilkinson III, U.S. Circuit Judge, 4th Cir., Aug. 23
Jean G. Bissell, U.S. Circuit Judge, Fed. Cir., Sept. 14

Elevations

William J. Holloway, Jr., Chief Judge, 10th Cir., Sept. 15
Eugene E. Siler, Jr., Chief Judge, E.D. & W.D. Ky., Sept. 30

Senior Status

Raymond J. Broderick, U.S. District Judge, E.D. Pa., July 1
L. Clure Morton, U.S. District Judge, M.D. Tenn., July 31
Malcolm Muir, U.S. District Judge, M.D. Pa., Aug. 31
Bernard T. Moynahan, U.S. District Judge, E.D. Ky., Sept. 30

Death

Benjamin C. Dawkins, Jr., U.S. District Judge, W.D. La., Aug. 31

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

✔Aldisert, Ruggero J. State of the Circuit Address, Third Circuit Judicial Conference, Pittsburgh, Sept. 17, 1984.

Brennan, William J. "Jefferson B. Fordham: A Tribute." 10 *Journal of Contemporary Law* 1 (1984).

✔Browning, James R. Remarks to the Ninth Circuit Judicial Conference, Seattle, Aug. 13, 1984.

Burger, Warren E. "Tribute to Soia Mentschikoff." 37 *University of Miami Law Review* ix (1983).

✔Burnett, Arthur L. "Practical, Innovative and Progressive Utilization of United States Magistrates to Improve the Administration of Justice in the United States District Courts." Paper based on a speech to United States magistrates at the Eighth Circuit Judicial Conference, July 23, 1984.

Edwards, Harry T. "The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication." 32 *Cleveland State Law Review* 385 (1984).

✔Erickstad, Ralph J. Opening remarks to the Conference of Chief Justices, July 31, 1984.

✔Kaufman, Irving R. "The En Banc Proceeding." Remarks to the Second Circuit Judicial Conference, Hartford, Conn., Sept. 14, 1984.

✔Kerr, Ewing T. "Territorial Judges and What They Encountered." Speech to the Tenth Circuit Judicial Conference, Aug. 1984.

Lay, Donald P. "A Blueprint for Judicial Management." 17 *Creighton Law Review* 1047 (1984).

Lee, Rex E. "Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine." 25 *Arizona Law Review* 805 (1983).

Marshall, Thurgood, Remarks to the Second Circuit Judicial Conference, Hartford, Conn., Sept. 14, 1984.

✔McGarr, Frank J. "Identifying and Reducing the Burden of Frivolous Litigation." Remarks at the Workshop for Judges of the Eighth and Tenth Circuits, Phoenix, Ariz., Jan. 19, 1984.

Rehnquist, William H. Address at University of Florida Law School, Sept. 15, 1984.

✔Stevens, John P. Remarks at Northwestern University, Chicago, Aug. 4, 1984.

RULES, from page 2

commission has been appointed to determine compensation.

Admiralty rules B(1), C(3), and E(4) would also be changed to ensure compliance with the principles of due process for the attachment of property or seizure of vessels. The rules spell out procedures that comply with a line of Supreme Court cases beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). ■

MULLEN, from page 6

lieve enforcement can stabilize the problem and make it less of a problem to a degree, but we will never eliminate the problem or reduce it to an acceptable level unless we eliminate both supply and demand—and demand is within our grasp. We will be using more sophisticated techniques. We are, for example, making increasing use of court-authorized wiretaps. We have had almost a 700 percent increase in the use of the wiretap in just three years—35 in 1981 to about 234 in 1983.

We will be using more sophisticated investigative techniques to a greater degree. We will be going after the money flow, after the assets. We are going to have an enhanced effort in seizing the assets of the traffickers. If we can show a relationship between drug trafficking and the property acquired, we can seize that property on behalf of the federal government. We seized, in fiscal year 1983, more than 200 million dollars worth of property. We hope to improve on that.

Is there any message to the judiciary that you wish to give?

I would encourage judges to remain abreast of developments in the area of drug abuse, drug trafficking, and the like. For example, I've read that the American Bar Association recently approved a motion of support for using marijuana for medicinal purposes. I really don't believe they examined all the facts before they made that decision. Also, I often see calls for decriminalization and I can only say, not only to the judiciary but to all concerned about the problem, that you do not make a problem go away by decriminalizing it. This has been tried in a number of countries, England being one, and they now are aware that it has not worked. ■

JCUS, from page 3

a law firm from participation in any case, pending before the judge, in which the law firm may be involved. Canon 3 of the Code of Conduct for Law Clerks was also amended to require a law clerk to inform the judge of any circumstance or activity that might serve as a basis for disqualification, including prospective employment and the association of the law clerk's spouse with a law firm involved in a pending case.

- In accordance with the Joint Statement of the Chief Justice and the Attorney General, dated March 11, 1984, resolved that no United States marshal shall be required to be present in a courtroom during trial except for security purposes.
- Authorized free distribution of the local rules of the courts of appeals and amended the fee schedule promulgated pursuant to 28 U.S.C. § 1913 to reflect this authorization. ■

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THE THIRD BRANCH

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Former FJC Director:

Travel, Training, Tough Cases Mark Active Career of Senior Judge Walter E. Hoffman

Judge Walter E. Hoffman was appointed to the trial bench in the Eastern District of Virginia in 1954 and, during the past thirty years, has been serving vigorously on behalf of both the court and the cause of judicial administration.

A member of the Board of the Federal Judicial Center from 1972 to 1974, Judge Hoffman was director of the Center from October 1974 until July 1977. Among his other numerous accomplishments, he was a member and chairman of the Judicial Conference Committee on the Administration of the Probation System, was appointed to serve on the Temporary Emergency Court of Appeals, and has chaired the Advisory Committee on Criminal Rules since 1978. Earlier this year, he was a recipient of the prestigious Devitt Distinguished Service to Justice Award.

Judge Hoffman is most known, perhaps, for presiding over the tax evasion case of Vice President Spiro Agnew in 1973 and for handling the recent trials in Nevada involving U.S. District Judge Harry E. Claiborne.

As a former football player, you know that certain players are brought into the game for special plays or special circumstances. You seem to have taken on such a role for the federal judiciary. Why did you agree to take on these tasks?

I agreed to take these assignments for several reasons. First, it is my feeling that although, as a senior judge, I have a right to accept or reject any assignment, as long as I am mentally and physically capable of trying cases, I should accept such assignments unless there exists a valid reason for me to act otherwise. Second, I am still drawing my regular salary as a judge, and I want to render some service as long as I am able to do so. Last, I did not personally know any of the parties involved or their counsel, but, of course, had seen the vice president on television in 1973 and prior years. I had no prior knowledge of the Nevada judge who was involved in the most recent trial. I might add that it is difficult to reply in the negative to a legitimate request from a superior judicial officer who is charged with the responsibility of finding a district judge he or she believes capable of trying cases involving public officials and who must be brought in from another district.

Obviously, these were difficult assignments: What were some of your concerns?

My principal concern was the problem presented in securing a fair and impartial trial jury, especially where there had been extensive advance publicity in the media. The 1973 case involving the vice president did not reach that

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Seminar for New District Judges Announced

The next seminar for newly appointed U.S. district court judges will be held January 7–12, FJC Director A. Leo Levin and FJC Continuing Education and Training Division Director Kenneth C. Crawford announced. All seminar sessions will be held at the Center's Dolley Madison House in Washington.

The traditional reception for the new judges and their families will be held on the Sunday preceding the opening of the seminar (January 6). The program also calls for a black-tie dinner at the Supreme Court.

Crime Act Authorizes Preventive Detention, Revamps Sentencing

The Comprehensive Crime Control Act of 1984, enacted by Congress in the waning days of the 98th Congress and signed into law by President Reagan on October 12, makes sweeping changes in bail and sentencing. Among the new law's key features are—

- Establishment of preventive detention.
- Sentencing reform, overseen by a presidentially appointed Sentencing Commission.
- Virtual elimination of parole for sentenced convicts.
- Repeal of the statute providing special treatment for youthful offenders.
- Tightening of the insanity defense.

See other stories on congressional activity, pages 2, 7, and 11

The highly controversial preventive-detention provision that is part of the new legislation (Pub. L. No. 98-473) authorizes the holding of an allegedly dangerous defendant without bail if the judicial officer finds that no conditions of release would ensure the defendant's appearance at trial and the safety of the community. A rebuttable presumption in favor of detention arises if the defendant is charged with a violent crime or

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Inside . . .

CRIME, from page 1

some drug-related crime or is charged with a felony and has been convicted at least twice of violent or drug-related federal or state crimes. The previous standard for granting bail dealt only with the probability that a defendant would appear for trial.

Suspected felons who fit the new criteria for preventive detention are entitled to a hearing on efforts to confine them without bail, but the burden is on them to show that they are not dangerous. The new law also reverses the presumption favoring release after conviction or pending appeal.

The sentencing changes will reduce the discretion that judges now have to vary the length of a sentence for a given offense. The new Sentencing Commission will set a narrow range of time to be served for a particular crime. A judge will be allowed to depart from the guidelines, but only by citing, on the record, mitigating or aggravating circumstances. A defendant will be able to appeal an enhanced sentence, and a prosecutor will be allowed to appeal a sentence that is shorter than the guidelines provide for. Judges will also have to explain on the record a failure to require restitution when it would be appropriate.

The U.S. Sentencing Commission will have seven voting members, appointed by the president and confirmed by the Senate. At least three of these members must be active federal judges selected by the president from a list of six judges to be submitted by the Judicial Conference. The commission's guidelines are due within eigtheen months and will then become law unless altered by Congress after a six-month period of study.

As part of the move to make sentences uniform and determinate, parole of newly sentenced prisoners has been abolished, and the U.S. Parole Commission will be phased out over a seven-year period. Defendants sentenced under the new law will know when they enter prison how long they will serve, less a maximum 15 percent reduction in time for good behavior.

The elimination of special treatment under the Youth Corrections Act, 18 U.S.C. §§ 5005–5026, also furthers the push toward determinate sentencing. Under that act, which was repealed by the crime control act, judges could fashion open-ended sentences of supervised commitment, work release, and/or parole for defendants 21 or younger. The offenders could have their criminal records expunged if they satisfactorily completed their sentences.

The insanity defense has been curbed by elimination of one of the two tests used to establish it. A defendant pleading insanity must now show a mental disease making it impossible to appreciate the wrongfulness of an act. The previous irresistible-impulse insanity defense has been abolished. In addition, the burden of proof has been shifted. The prosecution no longer has to prove sanity beyond a reasonable doubt once the issue has been raised; rather, the defendant who claims insanity must prove it by clear and convincing evidence. And a defendant found insane and deemed dangerous will be held in federal custody either until he or she is deemed no longer dangerous or until a state mental institution will accept the defendant.

Other provisions of the omnibus bill—

- Create a National Drug Policy Enforcement Board, headed by the attorney general, to coordinate the efforts of the various federal agencies involved in drug control.
- Create new computer-related crimes. Spying by computer—obtaining classified information from a computer that could harm the

See CRIME, page 3

Criminal Justice Act Rates Increased

The hourly rates and case compensation maximums payable to defense attorneys under the Criminal Justice Act were doubled by legislation that went into effect recently.

Private attorneys appointed under the act may now be paid up to $60 per hour for in-court time and $40 per hour for other time expended on a case. The limits for any one case were raised to $2,000 for felonies, $800 for misdemeanors, $500 for other representations, and $2,000 for appeals. The legislation does not change the procedures for waiving the case compensation maximums.

According to Administrative Office Director William E. Foley, the new hourly rates apply to all work performed on or after October 12, the date President Reagan signed the Comprehensive Crime Control Act (Pub. L. No. 98-473), which includes the higher limits. The former hourly rates apply to all work done before that date, even though a case may not be completed, or a claim submitted, until after the legislation's effective date. Director Foley said, however, that the higher case maximums apply to any case in which some portion of the work was performed on or after October 12.

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

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

CALENDAR

Nov. 29–30 Judicial Conference Subcommittee on Federal-State Relations
Nov. 29–30 Judicial Conference Subcommittee on Federal Jurisdiction
Dec. 3–5 Workshop for Judges of the Eighth and Tenth Circuits
Dec. 10–11 Judicial Conference Subcommittee on Judicial Statistics
Dec. 10–11 Judicial Conference Committee on the Administration of the Magistrates System
Dec. 10–14 Seminar for New Assistant Federal Public and Community Defenders
Dec. 12–14 Judicial Conference Subcommittee on Judicial Improvements
Dec. 13–14 Judicial Conference Subcommittee on Supporting Personnel

CRIME, from page 2

United States or help another nation—is a newly created felony. Unauthorized use of computer data about credit or financial records, making unauthorized changes affecting a government computer's operation, and unauthorized destruction of information obtained from a government computer were made misdemeanors.

• Make it easier for federal prosecutors to seize profits from organized-crime rings and drug traffickers.

• Create a Crime Victims Fund, which will be financed through fines, forfeitures, forfeited collateral, and special assessments collected from persons convicted of crimes.

Most of the law's provisions go into effect immediately. An exception is its sentencing facets, which depend on the proposed guidelines. ■

Holiday Message from Chief Justice Warren E. Burger

Chief Justice Warren E. Burger

The Holiday Season traditionally affords the occasion to thank colleagues and staffs for their support and good works, provides the opportunity to reflect on past accomplishments and to look forward to the future.

When I first extended personal Holiday Greetings in 1969, there were 416 authorized federal judgeships; today there are 768. With senior judges, the total is now well over 1,000. For fiscal year 1969, there were 10,428 filings in the courts of appeals and 102,606 cases commenced in the trial courts. In fiscal year 1984, 31,490 appeals were commenced and 290,320 cases were docketed in the district courts. The growth in our "family" and the growth of our workload are both remarkable and alarming.

In 1969, state prison inmates filed 9,312 cases in the district courts. This year, the total is almost double. While the task of handling these cases has been aided greatly by the manual prepared in 1980 by a Federal Judicial Center committee and by other innovations, the burden remains high. Changes are needed from outside the judiciary. I have spoken often about converting our prisons into places of education, training, and production. The failures of existing institutions directly affect our caseloads.

To your great credit, you have responded with vitality and dedication as the increasing dockets and cases have grown in complexity. We are terminating record numbers of cases, due in no small part to our senior judges, whose contributions are legion. Productivity has been enhanced further through the development, introduction, and implementation of automation. While concentrated efforts are being made to implement the federal courts' five-year automation plan, the success of these computerized operations depends on the ability of our courts' staffs to adapt rapidly to the new procedures, to train their fellow workers, and to provide practical feedback to the computer designers.

We will face the same challenges in 1985 as we have in the past, and no doubt some new ones. The recently enacted Comprehensive Crime Control Act will bring additional matters to already crowded dockets, but I am confident you will meet this new task. For this and for your unswerving support and cooperation over the past year, I express my deep appreciation.

Mrs. Burger joins me, as do my colleagues on the Court, in wishing all of you and your families a happy Holiday Season.

Sincerely,

Warren E. Burger

New Telephone Number for U.S. Supreme Court

The Supreme Court has a new telephone number. The Court's switchboard now answers to (202) 479-3000 and FTS 989-3000. Individual extensions and the last four digits of direct-dial numbers remain the same.

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point, as the plea agreement and the plea of *nolo contendere* terminated the matter. The 1984 case, in which the active U.S. district judge was the defendant, was tried twice because the first jury failed to reach an agreement as to his guilt or innocence. In that case I prepared a questionnaire to be completed by each prospective juror when the juror reported for duty. The questionnaire did not mention the name of the defendant, but covered a wide variety of background information with respect to each juror and was signed by the juror under the penalties of perjury. Copies of the questionnaire were then made available to counsel, and after a brief opportunity for inspection, the prospective jurors' names were drawn by lot, with four jurors reporting to the courtroom for the voir dire examination by the court and counsel.

While ordinarily I am a firm believer that judges should conduct the voir dire, with the right reserved to counsel to have the court submit additional questions, in this case I permitted counsel to ask specific questions of the four prospective jurors; and if it appeared that one or more jurors by their prior answers might be biased, I then permitted, in the absence of the other three jurors, a further examination of the single juror. This procedure was repeated until we secured a sufficient number of prospective jurors and alternates, at which time the peremptory challenges were exercised.

The use of the questionnaire saved a great deal of time, as it provided all background information customarily requested by counsel. The jury in the second Nevada trial was selected after one full day and about two hours of the second day. Considering the publicity given to the matter, including the fact that the prior trial resulted in a hung jury, that is probably somewhat of a record in obtaining an acceptable jury in a case in which a public official is the defendant. I might add that much of the advance publicity was favorable to the defendant, and the interests of the United States in securing a fair and impartial jury were directly involved.

"Serving in another district, especially a district outside my own circuit, has broadened my judicial education."

You continue to carry your caseload at the U.S. District Court for the Eastern District of Virginia in addition to these special assignments. Isn't that too demanding a schedule?

Actually, I do not carry any regular caseload in the Eastern District of Virginia. I refer to myself as a "substitute" and am always available, unless on special assignment elsewhere, to take a particular case. This might arise when an active judge is ill or away on other matters—whether for pleasure or business, recusals, or, more frequently, when the trial of a case before an active judge requires more time than anticipated and the judge therefore cannot be available on the scheduled date for trial. We assign cases for a specific trial date, and counsel know that the case will be tried on that date, which is set about four months in advance. Under this arrangement, we hardly ever miss a trial date.

Specifically, in answer to your question, it is not too demanding a schedule for me. In fact, after I dispose of two remaining cases in which I am now serving as a special master for the Supreme Court, I will have ample time for my duties.

In general, are there special problems for a judge coming into another district outside his or her headquarters to try a case? Are there any special preparations a judge should make before going into another district?

Other than arranging to obtain any local rules in the district to be visited, and requesting that civil cases be thoroughly subjected to pretrial, I do not believe the judge need be concerned with special preparations in trying cases in another district. Of course, situations might arise in which decisions from other circuits would require a visiting judge to examine the authorities of the circuit in which the case is tried, but these questions are not generally capable of ascertainment before the actual trial. The uniformity of the federal rules has aided greatly in permitting judges from outside a district to try cases within that district.

Do you feel it is helpful for district judges to try cases outside their districts?

The trial of cases outside my district has been very helpful to me. The attorneys may act differently; the procedures may vary slightly, especially in the selection of juries; the circuit opinions may be in conflict with the decisions of one's own circuit; the order of the trial of cases may vary, particularly where a district uses a "trailing" docket or similar procedure. My only advice to a visiting judge is to adopt the old adage "When in Rome, do as the Romans do." Serving in another district, especially a district outside my own circuit, has broadened my judicial education.

You have also sat on circuit courts throughout the country. How often have you done this recently?

My most recent experience on the circuit level was in March 1984—just prior to the first trial in Nevada—when I served with the Third Circuit in Philadelphia. I have a two-week sitting scheduled with the Eleventh Circuit in At-

See HOFFMAN, page 5

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lanta in April 1985. I have served on all circuit courts throughout the country—some on a number of occasions—except the Eighth, the Tenth, and the new Federal Circuit.

Do you feel this is a helpful experience for a trial judge?

Yes, I feel that it is very helpful for a trial judge to sit with an appellate court. It gives you an insight on the manner in which appeals are presented and on what you should attempt to anticipate when trying cases on the district level. Frequently cases are not well presented at the trial stage, and when one is sitting as an appellate judge, counsel will attempt to persuade the court to overlook the trial deficiencies to seek the ends of justice in a given case. As we all know, when the appellate opinion is filed, it is sometimes difficult to recognize the case over which one presided at trial.

What are the benefits for circuit judges in having a trial judge sit with them?

When a district judge has been assigned one or more opinions to write, obviously that is of assistance to the circuit judges. Likewise, I would assume, but do not know, that a circuit judge without trial experience would be especially interested in the reaction of a district judge to procedural matters.

Over the past several years, the number of federal judges has increased dramatically. Although we need more personnel to keep pace with the increase in filings, is there a point at which further increases in the judiciary might present some problems? If so, what are some of those problems; and can you suggest any solutions?

When my name first appeared in volume 213 of F.2d as a district judge in 1954, the ten circuits had a total of 65 active circuit judges and 235 active district judges serving the country under lifetime appointments. My own circuit, the Fourth, had 3 active circuit judges and 16 active district judges. Now, by comparison, the Fourth Circuit has 11 active circuit judges, and 44 active district judges, although I must admit that the recent nominations and confirmations have been coming with such rapidity that I find it difficult to keep track of the numbers. Thus, the increase in the

Judge Walter E. Hoffman

Fourth Circuit alone has been nearly 400 percent on the circuit level and almost 300 percent on the district level. I presume that the other circuits have increased by approximately the same degree.

Of course, the filings have also increased to such an extent that the increase in the number of judges was absolutely necessary. The nature of federal cases has altered considerably since 1954. Even the many cases filed by prisoners under 42 U.S.C. § 1983 require the attention of district judges, as the appellate courts are well aware of some of the constitutional implications involved and do not hesitate to reverse a district judge who fails to recognize these points.

I do not necessarily feel that the creation of more circuits and more districts will solve the problems. Admittedly, the organizational and administrative responsibilities of a chief judge of a circuit or district will increase whenever judges are added. However, those problems are not insurmountable if the chief judge is willing to modify procedures to provide for a delegation of duties, a reduction in the number constituting an *en banc* court, and a willingness to accede to the majority views of the active judges even if the chief judge may be of a contrary opinion.

Judges are nominated with an eye to politics. It is unfortunate that, frequently, the better qualified, available prospect for a nomination is passed over solely because of political implications. Nevertheless, federal judges must be selected in some manner, and the election of judges assuredly has not resulted in the best qualified man or woman serving. The appointment of a commission, advanced during the Carter administration, was a step in the right direction, but that system had its deficiencies and political implications took over. It is my personal belief that the American Bar Association, which should work in conjunction with a state bar association when considering nominations for federal judgeships, should be given a greater weight than it is now accorded, and should be cut loose from political aspects. I realize that this may not be possible, and it is entirely possible that in 1954 I may have been classified as "not qualified" and still received the appointment. I do not know, as I have never seen the ABA report

"When the appellate opinion is filed, it is sometimes difficult to recognize the case over which one presided at trial."

See HOFFMAN, page 6

HOFFMAN, from page 5

and know nothing of its contents.

We all know that the tendency of the Congress to pass legislation giving more jurisdiction to the federal courts has, in large measure, been the cause of increased filings. It has been said that this country may be "overlegislated," rather than "overlitigated." But this is a matter for the Congress to determine, and the members of the House and Senate are cognizant of the fact that when jurisdiction is increased, the personnel to handle the increase must be adequate.

"It has become increasingly difficult to persuade qualified attorneys to accept nominations for federal judgeships."

The failure to make judicial nominations based on qualifications and experience may be occasioned by the vast increase in numbers of the federal judiciary. The importance of the position has diminished in the eyes of the public. I recall it was reported that President Truman once said to a prospective nominee for a judgeship, who was protesting that he was not qualified to serve, "You don't have to have any sense to be a federal judge." The nomination and confirmation followed and, as was predictable, the person involved never did meet the test of being a qualified federal judge.

As a judge with more than thirty years' experience, what do you consider to be the greatest problems of the federal judiciary today?

What I have just related is probably one of the greatest problems. Allied to this point is the fact that the salaries of federal judges have not kept abreast of the income of well-qualified attorneys. It has become increasingly difficult to persuade qualified attorneys to accept nominations for federal judgeships, principally because at the average age of appointment, the attorneys have children either in college or about to enter college, with education expenses from $4,000 to $12,000 per year.

Aside from the issue of judge selection and salary, district judges are confronted with the abolition of the U.S. Marshals Service in all civil cases other than those of a specially sensitive nature requiring protection. Thus, in all civil jury cases, we will be without the service of a deputy marshal. Answers to such questions as who will respond to a door knock from the jury room, and who will deliver a jury note to the judge, are not forthcoming. Will it be the judge's law clerk, thus bringing the judge into the picture, with a related claim of jury tampering? Will it be a deputy clerk, who may have charge of certain exhibits, such as narcotic drugs, that are not customarily sent to a jury room? Or will we create a new position, all of which is possible only at the expense of the taxpayers? Even now, some judges are in the process of releasing one of their law clerks—in anticipation that the marshal will be removed from courtroom duty in all except criminal cases—to permit a court crier to be hired to carry on the duties of the deputy marshal. But such a procedure does not divorce the judge from the jury as it should, certainly while a jury is deliberating. As we all know, the Marshals Service has already been relieved of the duty of serving processes and subpoenas in civil cases by the 1980 amendment to rule 4(c) of the Federal Rules of Civil Procedure. At the very least, a ten-year experience with the revised rule 4(c) should be studied before further reducing the service to the courts by the U.S. marshals. The history of the establishment of the office of U.S. marshal will reveal that one of its primary purposes was to serve as an "aid to the court."

You have been unusually generous with your time in contributing to the orientation of newly appointed federal district judges. What do you see as the major immediate educational needs of a new federal trial judge?

My experience with the three- to four-day orientation seminars for newly nominated or appointed federal judges has been most rewarding. In fact, I feel that it is my greatest contribution to the federal judiciary. These nominees for judgeships, together with those who may have been confirmed and even those who may have been in office for a short time, are invited by the Federal Judicial Center to attend an orientation seminar at the earliest possible moment after nomination. True, there may be a lapse of several months to wait for a sufficient number to justify a seminar, but when six or more are eligible, it is customary to make arrangements for the seminar. The response of those attending these seminars has been very gratifying. Even newly nominated circuit judges who have not had prior judicial experience are now invited to attend, as it is their duty, in about 90 percent of their cases, to review the action of the district judge. The seminar gives all a feeling of what it is like to be a district judge. As one recently appointed circuit judge said, "It was one of the

"I like to feel that judges have become better educated in the necessity of some organization or system in the disposition of cases."

See HOFFMAN, page 8

PERSONNEL

Appointments

H. Russel Holland, U.S. District Judge, D. Alaska, July 23

Marcel Livaudis, Jr., U.S. District Judge, E.D. La., Sept. 19

Cynthia H. Hall, U.S. Circuit Judge, 9th Cir., Oct. 4

Walter S. Smith, Jr., U.S. District Judge, W.D. Tex., Oct. 6

H. Ted Milburn, U.S. Circuit Judge, 6th Cir., Oct. 9

Elevations

Robert L. Taylor, Chief Judge, E.D. Tenn., Oct. 9

Truman M. Hobbs, Chief Judge, M.D. Ala., Oct. 15

Resignations

Fred M. Winner, U.S. District Judge, D. Colo., Aug. 1

Robert O'Conor, Jr., U.S. District Judge, S.D. Tex., Sept. 30

Senior Status

James A. von der Heydt, U.S. District Judge, D. Alaska, July 15

John R. Brown, U.S. Circuit Judge, 5th Cir., July 20

Charles W. Joiner, U.S. District Judge, E.D. Mich., Aug. 15

Robert H. McWilliams, U.S. Circuit Judge, 10th Cir., Aug. 31

Herbert Y. C. Choy, U.S. Circuit Judge, 9th Cir., Oct. 3

Death

Walter Ely, Jr., U.S. Circuit Judge, 9th Cir., Oct. 9

New Law Limits Priorities for Some Civil Cases, Expands Computer-Chip Copyright Protection

Legislation sharply reducing the categories of civil cases entitled to expedited consideration in the federal courts, creating a new body to assist state judicial systems, establishing new sites where federal courts may sit, and providing new legal protection to makers of computer chips was signed by President Reagan on November 8. The provisions are part of Pub L. No. 98-620, 98 Stat. 3335, which won final congressional approval on October 9.

Civil priorities. Under title IV of the new act, about eighty statutes granting priority handling to a wide variety of civil cases on the dockets of federal trial and appellate courts are repealed or deleted from the U.S. Code. The statutory expedition requirements had become so numerous that it was virtually impossible for the courts to reconcile and comply with competing priorities. See *Priorities for the Handling of Litigation in the United States District Courts* (Federal Judicial Center 1976); *Priorities for Handling Litigation in the United States Courts of Appeals* (Federal Judicial Center 1977).

The legislation does not affect the priority processing of criminal cases under the Speedy Trial Act; it also retains the existing requirement for the expedited treatment of habeas corpus petitions, cases seeking temporary restraining orders or preliminary injunctive relief, and appeals of civil contempt commitments. Further, it requires expedition of any other action if "good cause" for expedition is shown by a demonstration from the factual setting of the case that a right under the Constitution or a federal statute would be maintained by prompt judicial action.

Aside from its specific requirements, the act provides that each federal court shall determine the order in which civil actions are heard and determined. The Judicial Conference may modify the priority rules adopted by the courts to establish consistency among the circuits.

State Justice Institute. Title II of the act establishes a private, nonprofit corporation, the State Justice Institute, to help improve judicial administration in state court systems. The institute is authorized to award grants and to enter into contracts to conduct research and demonstrations, to provide technical assistance and training, and to serve as an information clearinghouse. It is further authorized to participate in joint projects with other agencies, specifically including the Federal Judicial Center.

Among the areas listed in the act for potential study are alternative means for using nonjudicial personnel in court decision-making activities, causes of trial and appellate delay in resolving cases, and methods for measuring the performance of judges and courts.

The institute will be governed by an eleven-member board of directors appointed by the president and confirmed by the Senate. Six of those directors are to be state

See ACT, page 12

Some Social Security Cases to Be Remanded to HHS for Review

The Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460) was signed by President Reagan on October 9. The new law changes, among other things, the standard of review to be used by the secretary of Health and Human Services when making determinations concerning the termination of social security disability benefits.

Of significant interest to the federal courts is section 2(d)(2)(C) and (D), which provides that requests for judicial review in actions relating to medical improvement that were pending in the federal courts on September 19, 1984, as well as cases in which a timely request for judicial review is or has been made within sixty days prior to the enactment date, are to be remanded to the secretary of HHS for review in accordance with the amended standards.

United States Court of Appeals for the Eleventh Circuit, Atlanta

Seated, l. to r., are Judge Gerald B. Tjoflat, Senior Judge David W. Dyer, Senior Judge Elbert P. Tuttle, Chief Judge John C. Godbold, Senior Judge Warren L. Jones, Judge Paul H. Roney, and Judge James C. Hill. Standing, l. to r., are Judge Thomas A. Clark, Judge Joseph W. Hatchett, Judge Frank M. Johnson, Jr., Judge Robert S. Vance, Judge Peter T. Fay, Judge Phyllis A. Kravitch, Judge Albert J. Henderson, and Judge R. Lanier Anderson III. At left is the U.S. Court of Appeals building in Atlanta.

HOFFMAN, from page 6

finest educational experiences in my lifetime, and I would make the attendance mandatory for those without prior judicial experience." Of course, there are nominees from the state court bench, and for them, it is mainly an educational advantage in federal judicial procedural matters.

"I feel that my experience with the three- to four-day orientation seminars for [new district] judges is my greatest contribution to the federal judiciary."

When I was serving as the director of the Federal Judicial Center from October 1974 until July 1977, I was concerned about the lag between the time a new judge took office and the date the one-week orientation seminar began. In some instances, eighteen months to two years had elapsed. Now, with the mini-orientation seminar occurring promptly, the Center has been able to broaden the scope of its annual seminars for newly appointed judges. I certainly hope that the Center will continue to provide this valuable assistance to the new judges.

As to the major immediate educational needs of a new federal trial judge, it can only be said that they vary considerably. An attorney with vast courtroom experience in the trial of a case, as is the situation when an experienced state court judge is nominated, will need less than others. However, some attorneys are nominated who have seldom, if ever, been in a courtroom. And many have never tried a criminal case. Law professors, although thoroughly educated in studying decisions of various courts, may have never practiced law, or if they have, their courtroom experience may be next to nothing. At the very least, these mini-orientation seminars give nominees a feeling of confidence with respect to their ability to assume the role of an active judge.

It has been more than seven years since you returned to the bench from the Center. Is there anything in particular about your work there that you miss, anything that you don't?

Although I miss the association of my many friends at the Federal Judicial Center, I have been able occasionally to renew these friendships, particularly through the Education and Training Division by way of the mini-orientation seminars and circuitwide workshops when they are held for the Fourth Circuit judges. Likewise, I have frequent contacts with Director Levin and Deputy Director Nihan through the Conference of Metropolitan District Chief Judges and by serving as its chairman, although I relinquished the position of chief judge of the Eastern District of Virginia on July 1, 1973. Additionally, of course, I have been called upon by the Division of Inter-Judicial Affairs and Information Services and the Research Division. The only division I have stayed away from is the Division of Innovations and Systems Develop-

See HOFFMAN, page 9

New Center Publications Examine Civil Rules, Drug Aftercare, and Prisoners' Filing Fees

The Center recently published *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility*, a short monograph by Professor Arthur Miller of Harvard Law School, who has served since 1978 as reporter to the Advisory Committee on Civil Rules.

The monograph, an adaptation of his lecture at a recent Center workshop for district and circuit judges, analyzes the committee's reasons for proposing the amendments to rules 7, 11, 16, and 26 that became law August 1, 1983, and explains the responsibilities they impose on, and opportunities they offer to, both judges and lawyers.

* * *

A Process-Descriptive Study of the Drug Aftercare Program for Drug-Dependent Federal Offenders by James B. Eaglin, another recent Center publication, presents the results of a preliminary study of the operation of the drug aftercare program administered by the Probation Division of the Administrative Office.

Based on a sample of 1,260 drug-dependent federal offenders in ten probation districts, the report provides detailed statistics on various characteristics of probationers and parolees participating in drug aftercare, including education, prior employment, nature of offense, sentence, and drugs used before enrollment in the program. The study also examines variations in services across districts during the six-month study period. Required services include urine testing and individual, group, or family counseling, which may be provided by the probation office, a community treatment center (at no cost to the government), or a private contractor. Finally, the report presents preliminary data on the adjustment experiences of the sample.

* * *

Also recently published is *Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases: A Preliminary Report*, a description of the procedures used in several district courts to adjust the filing fee to the amount of income available to a prisoner. The report, by Thomas E. Willging of the Center's Research Division, is the first in a series entitled *Innovations in the Courts: A Series on Court Administration*.

The report details the operation of the program in the Northern District of Ohio, Western Division, and assesses the impact of the procedure on court personnel, litigants, and the penal institution. References to procedures in other districts are included. A detailed description of the operation of the program in the Southern District of Texas, Houston and Galveston Divisions, is incorporated as an appendix.

The report sets forth criteria for evaluation of the success of such procedures and provides a preliminary evaluation of the program in the Northern District of Ohio, Western Division. It also suggests steps a court considering such a program might take. Forms in use in the Northern District of Ohio and the Southern District of Texas are described and will be available from the Center.

* * *

Copies of these reports can be obtained by writing to the Center's Information Services Office, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope). ■

HOFFMAN, from page 8

ment, as that involves computers, about which I know nothing.

As to what I do not miss, I can assure you that I am glad to be relieved of riding by airplane every Monday morning and returning to Norfolk late Thursday night, or perhaps on Friday, as well as eating dinner alone and staying in a hotel while in Washington. Commuting on that basis is rather disruptive of home life.

From today's vantage, is there anything you would have done differently as director of the Center? Would you have had any different priorities in research, training, or automation?

As I look back on the two years and eight months I served as the director of the Center, I realize that I probably made many mistakes. What disturbed me then was the backlog of pending cases in most districts and the apparent lack of organizational ability to overcome this backlog. While there remains a backlog in many districts, I do not feel that the per-judge delay in the disposition of pending cases is nearly as great as it was in the 1974–77 period. The median time between filing and disposition has been appreciably reduced. The addition of many judgeships is probably mainly responsible for this improvement, but I like to feel that judges have become better educated in the necessity for some organization or system in the disposition of cases. Assuredly, the training has greatly improved, not only for judges but for all court personnel. I have not kept abreast of the Research Division's activities, but I do read some of their reports that are sent to the judges. Finally, I hear that automation is slowly but gradually making its way to the point where the system—essentially started in late 1974 when a substantial appropriation was made by the Congress—will prove its merit as an aid to all the courts. ■

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Adams, Charles W. "The Court of Appeals for the Federal Circuit: More than a National Patent Court." 49 *Missouri Law Review* 43 (1984).

Betz, William F. "For the Retention of Diversity Jurisdiction." 56 *New York State Bar Journal* 35 (1984).

Brachtenbach, Robert F., and Carol S. King. "What an Automated Information System Can Do for You." 23 *The Judges' Journal* 40 (1984).

Brennan, William J., Warren Burger, and others. "In Honor of Collins J. Seitz." 132 *University of Pennsylvania Law Review* 1275 (1984).

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NOTEWORTHY

Judicial appointments. During his first term, President Reagan nominated 147 judges to the United States district courts and courts of appeals. More than 100 vacancies remain in the federal courts, and White House officials have been quoted as saying that they hope to have nominees for all the vacancies by the end of next month.

A study by the Center for Judicial Studies of several hundred decisions shows that most of the judges the president named during his first term have exercised judicial restraint.

* * *

Independent counsel. Two members of the special division of the Court of Appeals for the District of Columbia Circuit were reappointed by Chief Justice Burger recently, and a third judge was named to replace a jurist who declined reappointment.

The special division's sole function is to appoint independent counsel—formerly known as special prosecutors—under the provisions of 28 U.S.C. § 49.

In a recent letter to President Reagan, the Chief Justice said that he had reappointed Senior Judge Roger Robb of the District of Columbia Circuit and Senior Judge Lewis R. Morgan of the Eleventh Circuit to the special division. Senior Judge Ray McNichols of the District of Idaho was named to replace Senior Judge J. Edward Lumbard of the Second Circuit, who asked not to be renominated.

* * *

Courthouse dedication. A new courthouse to serve the Western District of Wisconsin at Madison was dedicated recently in a week-long series of programs designed to involve the public in the ceremonies. The week of activities began with a dedication ceremony on October 21. Among the speakers were the district's chief judge, Barbara B. Crabb; the other judges of the court; and Rep. Robert Kastenmeier (D–Wis.).

The events included a voter registration drive, a discussion on art in public buildings, a senior citizens' program, and free legal consultation sessions sponsored by a local bar association. In its inaugural week, the new building was the site of a law school class and a lawyers' seminar on federal practice. Each day, there was a speaker at a brown-bag luncheon. Tours of the building were also provided daily.

Justice Cardozo on Decision Making

As part of the Storr Lectures delivered at the Yale Law School in 1921, Justice Benjamin N. Cardozo, then a judge on the New York Court of Appeals, provided some insight on how he arrived at decisions in cases pending before him. He approached that process through the following series of questions:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? To what proportion do I permit them to contribute to the result? To what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

The four lectures in the series are reproduced in *The Nature of the Judicial Process* (Yale University Press, 1921).

Extension of Equal Access to Justice Act Vetoed

President Reagan vetoed last month legislation to make permanent the Equal Access to Justice Act, the 1980 law that allowed the award of attorneys' fees to individuals and small businesses that prevail in certain legal disputes with the federal government. The original act (Pub. L. No. 96-481) expired on October 1, 1984. Congress had passed legislation to extend the act permanently in October. ■

Positions Available

Federal Public Defender, Eastern District of North Carolina (Raleigh). Salary to $66,400. Provides federal criminal defense services; appoints and supervises staff. Requires law degree and membership in a state bar. Significant federal criminal trial experience, ability to administer an office effectively, reputation for integrity, and commitment to the representation of those unable to afford counsel are desirable. To apply, obtain application form from J. Rich Leonard, Clerk, U.S. District Court, P.O. Box 25670, Raleigh, NC 27611. Completed applications must be received by Dec. 15, 1984.

* * *

Clerk of Court, U.S. District Court for the Western District of Arkansas (Fort Smith). Salary from $31,000 to $50,495. Requires ten years of administrative experience in public service or business, at least three of them in a position of substantial management responsibility. College or law degree may be substituted for experience. To apply, send two copies of resume by Jan. 1, 1985, to Chief Judge H. Franklin Waters, P.O. Box 1606, Fort Smith, AR 72902.

EQUAL OPPORTUNITY EMPLOYERS

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judges, one is to be a state court administrator, and the remaining four are to come from the public sector. Funding for the institute will begin in fiscal year 1986.

Court sites. The legislation adds new places of holding court in the District of Colorado, the Central District of Illinois, the Eastern District of New York, and the District of Vermont. It creates a new division for the Southern District of Texas, realigns the divisions in the Northern District of Illinois and the Northern District of Georgia, and changes the place of holding court in one division of the Southern District of Georgia.

Computer chips. The act also adds a new chapter to title 17 of the U.S. Code (the copyright title) to protect semiconductor chips from unauthorized copying, by providing ten years of copyright style protection for "mask works fixed in a semiconductor chip." A mask work is defined as a series of related images fixed or encoded on a piece of semiconductor material, such as silicon, that are arranged in a pattern to perform a specific function.

Other provisions. The act contains some technical amendments to the Federal Courts Improvement Act of 1982, including changes and additions affecting the Court of Appeals for the Federal Circuit and the U.S. Claims Court. Further, it contains changes to title 15 of the U.S. Code that revise the definition of a trademark to make clear that a mark shall not be considered entitled to protection as the "common descriptive name" of goods solely because it is also used as the name of or to identify a unique product or service. The only test for determining whether a trademark has become generic, according to the new statute, is whether the "relevant public" recognizes it as a way of distinguishing one specific product or service from others, regardless of purchaser motivation. ■

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