## TABLE OF CONTENTS

TITLE III - MISCELLANEOUS PROVISIONS

## SECTION-BY-SECTION ANALYSIS

**Section 301.** Judicial retirement matters.

Section 301 makes three changes in the existing retirement provisions for officers of the Judiciary. First, section 301(a) enhances the "rule of 80" age and service requirements for retirement to senior status by justices and Article III judges under 28 U.S.C. § 371(b). Currently, the earliest time at which a justice or judge may take senior status is at age 65, with 15 or more years of judicial service. Subsection 301(a) amends 28 U.S.C. § 371 by authorizing justices and judges to retire to senior status at age 60 with at least 20 years of service. This enhanced age and service provision does not apply to retirement from the office under 28 U.S.C. § 371(a), for which the minimum age remains 65.

Subsection 301(b) provides a greater degree of equity and parity in crediting prior Federal service for purposes of retirement by the Directors of the Administrative Office of the United States Courts and the Federal Judicial Center under 28 U.S.C. §§ 611 and 627. These officials currently may receive retirement credit for prior service in any Presidential appointment in the Executive Branch, but they may receive credit for prior service in the Legislative Branch only as a Senator or Representative. Subsection 301(b) allows credit for prior Legislative Branch service of a comparable rank and responsibility to the Executive Branch service that is currently creditable. Credit is allowed for Legislative Branch service as primary administrative assistant

to a member of Congress or as staff director or chief counsel for a committee or subcommittee. Other changes to 28 U.S.C. §§ 611 and 627 are clarifying and conforming amendments.

This subsection would amend sections 611 and 627 of title 28 relating to the retirement of the directors of the Administrative Office of the United States Courts (AO) and the Federal Judicial Center (FJC)(and section 677 relating to the retirement of the Administrative Assistant to the Chief Justice by cross-reference) to permit retirement credit for up to five years of service in the Legislative Branch as primary administrative assistant to a member of Congress or as staff director or chief counsel for the majority or the minority of a committee or subcommittee of the Senate or House.

Under current law, the directors of the AO and FJC and the AA to the Chief Justice may receive retirement credit not to exceed five years for service "as a judge of the United States, a Senator or Representative of Congress, or a civilian official appointed by the President, by and with the advice and consent of the Senate." The effect of the underlined clause is to exclude service of the high ranking Legislative Branch officials specified in the amendment from consideration as creditable service for retirement purposes in the event such an official subsequently is appointed to one of these three high Judicial Branch positions. As a matter of parity and equity, the specified senior Legislative Branch officials should receive the same service credit opportunity as an assistant secretary of a

cabinet department, a United States Marshal, a United States Attorney, or the myriad other Senate-confirmed "civilian official(s)".

**SECTION BY SECTION ANALYSIS**

**Section 301(c).** Judicial Officers' Retirement Fund

This section corrects an omission from Public Law 100-659, the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988 (28 U.S.C. {377). Section 377(o) of that Act established in the Treasury the Judicial Officers' Retirement Fund (JORF) for the payment of annuities and refunds under the Act. Currently, payments from the JORF are susceptible to being suspended during periods of budgetary constraint. Section 905(g)(2)(B) of the Balanced Budget and Emergency Deficit Control Act includes all other federal retirement funds and excludes such funds from sequestration orders.

**SECTION-BY-SECTION ANALYSIS**

**Section 302.** Judicial survivor annuities.

Section 302 alters the computation of annuities and minimum service requirements for the Judicial Survivors' Annuity System (JSAS), 28 U.S.C. § 376. Presently, annuities for survivors are computed based on the average of the judicial officer's highest salary for three prior years of service. However, judicial officers with less than three years of service have annuities computed based on the average salary during the period they have served. As a result, when salary increases occur, annuities computed for recent judicial appointees can be significantly

higher than annuities computed for judicial officers with lengthy judicial service. Subsection 302(a) provides a uniform, equitable standard for computing annuities, which are to be based on the annual salary payable to the judicial officer at the time of death.

The JSAS program currently incorporates a minimum service requirement, under which judicial officers must complete at least 18 months of civilian service before their survivors are eligible to receive an annuity. If a judicial officer dies before completing this service, the survivors will not receive any annuity. Subsection 302(b) eliminates the minimum service requirement, thus authorizing payment of annuities in instances where a judicial officer dies before completing 18 months of service.

The foregoing revisions to the JSAS program may make it more attractive to judicial officers who previously declined coverage under the program. Accordingly, subsection 302(c) authorizes a six-month special election period, during which time eligible judicial officers may elect coverage by JSAS.

Subsection 302(d) provides that these amendments take effect on the date of enactment and apply with respect to deaths of judicial officers occurring on or after the date of enactment.

## SECTION-BY-SECTION ANALYSIS

**Section 303.** Senior judge certification.

Section 303 revises the senior judge work certification procedures set forth in 28 U.S.C. § 371(f). The law currently requires retired justices and senior judges to be certified every year in order to receive subsequent salary increases (other than cost-of-living increases). If a justice or judge is not certified in any year, 28 U.S.C. § 371(f)(3) provides that he or she is thereafter ineligible to be certified and to receive subsequent salary increases.

Subsection 303(a) alleviates this harsh result, and provides retired justices and judges with incentives to resume working after a lapse in service, by allowing retroactive certification if the justice or judge resumes a significant workload. Subsection 303(a) revises 28 U.S.C. § 371(f)(3) by providing that justices or judges who are not certified in one year may perform work in a subsequent year and then attribute the subsequent work to the earlier year, in order to satisfy the certification requirement for the earlier year. Subsection 303(a) further provides that senior judges may not receive credit for the same work for more than one year.

The work certification requirement in 28 U.S.C. § 371(f)(1) distinguishes between judicial duties, which must be performed in an amount equal to what an average active judge performs in three months, and administrative duties, which must equal full-time work. There is no provision for aggregating judicial and

administrative duties in proportional amounts, nor is there any provision for judges to receive credit for the work they do if they are unable to perform administrative duties for a full year. Subsection 303(b) revises 28 U.S.C. § 371(f)(1) by allowing retired justices and judges to aggregate administrative work described in paragraph 371(f)(1)(D) with judicial work described in paragraphs 371(f)(1)(A), (B), or (C). Under this revision, only one-half of the administrative work may be aggregated, reflecting the proportionally greater amount of administrative duties that must be performed for certification purposes under the existing requirement

**SECTION-BY-SECTION ANAYLISIS**

**Section 304.** Appointment of Director and Deputy Director of the Administrative Office.

This section modifies 28 U.S.C. 601 which states that the Supreme Court shall appoint the Director and Deputy Director of the Administrative Office to provide that the Chief Justice shall make the appointment but only after consulting with the Judicial Conference of the United States.

The Chief Justice is the only member of the Supreme Court with official administrative duties regarding the courts of appeals and district courts and, of course the Chief Justice is the titular head of the Judicial Branch and Chairman of the Judicial Conference of the United States. In these capacities, he works on a daily basis with the Director of the Administrative Office and has an obvious substantial interest in

naming a qualified person to fill this major judicial branch position.

The Administrative Office, on the other hand, serves the Courts of Appeals, district courts and all other facets of the Judicial branch, and does so based on the policy guidance of the Judicial Conference. The Conference ,therefore, also has a substantial interest in assuring that a qualified individual is named to head up the administrative apparatus that applies directly to them.

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

**SECTION-BY-SECTION ANALYSIS**

**Section 305. Effect of Appointment of an active Federal judge to the position of Director of the Federal Judicial Center, Director of the Administrative Office of the United States Courts, or Administrative Assistant to the Chief Justice.**

This section would amend title 28 to provide, in effect, that the appointment of an active Federal judge to the position of Director of the Federal Judicial Center, Director of the Administrative Office of the United States Courts, or

Administrative Assistant to the Chief Justice will create a vacancy in the court on which the judge was sitting and, if the judge subsequently returns to the court as an active judge, the next judicial vacancy on the court will not be filled. The purpose of this section is to encourage active judges to seek to serve in these important Judicial Branch administrative positions without penalizing the court from which they come or prejudicing their opportunity to return to active service as a judge.

This proposal was recommended by the Federal Courts Study Committee.

**SECTION-BY-SECTION ANALYSIS**

**Section 306.** Salaries of Administrative Office Personnel

This section amends existing statutes by increasing the number of positions the Director of Administrative Office may place in GS-16, 17, and 18 and by increasing the number of positions the salaries of which may be fixed by the Director.

These amendments are needed in part in light of the fact that members of the Senior Executive Service are expected to receive 18-25% increases in their salaries in January of 1991, as a result of enactment of the Ethics Reform Act of 1989. That Act does not allow for similar increases in salaries for senior Administrative Office staff in GS-16, 17, and 18. These amendments will enable the Director to increase salaries of his top level staff commensurate with increases that will go into effect for employees at the same levels of responsibility and authority in the executive branch of government.

Addition of these positions would bring the management/employee ratio of the Administrative Office more in line with current personnel ratios in executive branch agencies with similar organizational structure and areas of responsibilities.

It is necessary to increase by one position the Director's authority to fix salaries not to exceed level V of the Executive Schedule, in order to allow the Director to establish a position that would supervise a group of divisions within the Administrative Office and would encompass setting policy, giving direction, and providing leadership for those served in the Judicial Branch.

It is also necessary to increase by ten the number of positions the Director is authorized to place in GS-16, 17, and 18. One of these positions would direct a newly created Article III Judges Division, which is being established in response to evolving court needs, complex statutory requirements, and increasing numbers of Article III judgeships. At least four of the additional positions are needed to manage new divisions in the Office of Automation and Technology. These positions are needed in order to manage the expansion of court automation, the importance of which was recognized by Congress in FY90 when it established the Judiciary Automation Fund. The remaining additional positions are needed for those managers who are of division chief rank and for deputy division chiefs and their equivalents who have duties and responsibilities commensurate

with managers in agencies of the executive branch at comparable grade levels.

## SECTION-BY-SECTION ANALYSIS

### Section 307. Judicial Cost-of-Living Increases

This section repeals a provision enacted in an continuing appropriation resolution in 1981 that bars annual cost-of-living adjustments in pay for federal judges except as specifically authorized by Congress. While the sponsors of the provision thought it applied only to a single year, the Comptroller General ruled that it was permanent law. However, the Comptroller General recommended repeal of section 140 to the 99th Congress and S. 2671 was introduced to accomplish that result. Instead, Congress adopted the practice of suspending application of section 140 to discrete cost-of-living raises. Repeal of section 140 would restore the operation of 28 U.S.C. 461 as to Article III judges, as enacted by the Federal Salary Cost-of-Living Adjustment Act of 1975, and has at least been tacitly endorsed by the Judicial Conference (JCUS.SEP86, p. 53).

Repeal of section 140 passed the Senate as an amendment to H.R. 439 (Race to the courthouse bill) offered by Senator Dole on the floor of the Senate on November 10, 1986 (see Cong. Rec. p. S16044), but the House failed to act before the Congress adjourned. Repeal almost passed the Senate as a part of the Judicial Improvements and Access to Justice Act (Public Law No. 100-702) with the understanding that the House would accept it; Senator Rudman insisted it be deleted at the last minute.

Inquiries this Congress indicate that objections to repeal of section 140 no longer exist.

While suggestions have been made otherwise, it appears that section 702(c) of the Ethics Reform Act of 1989 complies with section 140 rather than repeals it.

## SECTION-BY-SECTION ANALYSIS

**Section 308** Full-Time Status of Court Reporters

This section corrects an inequity caused by the unique nature of court reporter work that unjustly penalizes court reporters at retirement. Sections 8339(o) and 8415(e) of title 5 were added in 1986 by the Omnibus Budget Reconciliation Act of 1985 to eliminate the availability of windfall retirement annuities for part-time employees. The Office of Personnel Management has issued a formal opinion which could deprive court reporters who are not on a regularly scheduled 40 hour weekly tour of duty, in the courthouse, of a full retirement annuity, irrespective of receipt of a full-time salary and concomitant full retirement contributions.

By virtue of these amendments to title 5, as interpreted by the Office of Personnel Management, court reporters who wish to receive a retirement annuity based upon "full-time" service (as opposed to part-time service and a resulting reduction in annuity) must either (a) work a scheduled tour of duty in the courthouse of 80 hours per pay period; or (b) maintain records of the actual hours worked on federal business and work a minimum of 2080 hours per year on that business.

In order that annuities not be reduced solely due to the lack of a regularly scheduled tour of duty if the reporter is paid a full salary as fixed by the Judicial Conference, the Conference, at its September 1988 session, recommended the proposed legislative change to define court reporters as "full-time" employees for annuity purposes if they are paid full-time salaries.

**SECTION-BY-SECTION ANALYSIS**

**Section 309.** Suspension of Repayment of Federally-Insured Education Loans During Service As A Law Clerk

Observing that initial salary offers for top law school graduates seem to be increasing yearly, the Judicial Conference, at its September 1988 session, endorsed a proposal to recommend that 20 U.S.C. 1077(a)(2)(C) be amended to include judicial law clerks as one of the occupations for which, during service, repayment of the principal on a federally-insured educational loan is waived and only the interest paid.

With the escalation of salaries at private law firms, the judiciary has been losing from the pool of applicants many bright students who opt to go directly into private practice. The financial incentive is even greater for the majority of law students who graduate owing substantial sums of money in student loans.

Current law grants deferments on student loans for a variety of relatively low-paying, yet highly valuable jobs. Deferments

are provided to, among others, officers in the Commissioned Corps of the Public Health Service, teachers in areas established to have teacher shortages, and doctors during their internships. Including law clerks in this list of occupations will involve only minimal expense on the part of the government, yet will encourage top law school students to compete for clerkship opportunities.

## SECTION-BY-SECTION ANALYSIS

**Section 310. Immunity of judicial officers acting in their official judicial capacity.**

This proposal was adopted by the Judicial Conference in March 1985 in response to a request from the Conference of Chief Justices to support its efforts to overrule Pulliam v. Allen, which permitted the assessment of attorney fees in section 1983 actions in the Federal courts to enjoin a state judge acting in his or her judicial capacity even though the judge was immune from damages. JCUS.MAR85, p. 10 A substantially modified bill was reported by the Senate Committee on the Judiciary in the 100th Congress, but did not pass the Senate. This section was included in the Judicial Conference "Judicial Branch Improvements Act of 1987" in the 100th Congress (see section 614 of S. 1482), but deleted in favor of separate legislation on the subject. Representatives of the Judicial Conference testified in favor of the provision in hearings on that legislation in both the Senate and House. In the hearings, Judicial Conference witnesses specified that the scope of the provisions approved by the

Judicial Conference were limited to overruling the attorney fees awards part of the Pulliam case, but made it clear that the Judicial Conference would not object to enactment of a broader immunity for State judges (such as the ABA position) and the provisions of the bill reported by the Senate Judiciary Committee in the 100th Congress. The latest bill is S. 590 (Heflin) in the 101st Congress. After a day of hearings, the Subcommittee on Courts and Administrative Practice marked up the bill on March 1, 1990 along the lines of the bill reported in the 100th Congress.

The Judicial Conference would not object to substituting Senator Heflin's bill as reported by the subcommittee on Courts and Administrative Practice.

**SECTION-BY-SECTION ANALYSIS**

**Section 311. AVAILABILITY OF APPROPRIATIONS**

Section 311 amends Chapter 41 of title 28, United States Code, adding section 613 - Availability of appropriations.

Section 613 (a) states that funds appropriated for the judicial branch for salaries and expenses for each fiscal year shall be available as follows:

(1) "Sums made available for space alteration projects shall remain available until expended."

Normally the Judiciary and the General Services Administration (GSA) share the cost of large projects. The GSA has authority for no-year funds vested in its revolving fund, the Federal Buildings Fund. When a contract schedule is delayed, GSA still has the ability

to obligate its share of the alteration costs. Contracts cannot be initiated unless both the Judiciary's share and GSA's "share" of the project have been committed.

The Judiciary's alteration funds are returned to the United States Treasury at the close of the fiscal year if a contract has not been awarded or the funds cannot be obligated for another project. The Judiciary's share of the costs that were budgeted and appropriated for a given project's contract cannot be made available, without deferring another planned project, if a contract slips to the next fiscal year.

In addition, GSA or the courts may cancel a project, or GSA may over-estimate the cost. The funds obligated are now returned to the Treasury. No-year authority provides the flexibility to use those funds to offset the cost of a future project. In the long term, therefore, the Judiciary's budget would be reduced.

(2) "Funds so appropriated may be expended for the purchase of firearms and ammunition."

The Judicial Conference of the United States has given the Chief Judges of each district court the authority for probation officers to carry firearms and to be trained in their use. This authority was given for the self-protection of probation officers when they have to enter areas which would put their lives in danger.

(3) " Of the funds so appropriated, $500,000 shall be available until expended for acquisition of books, periodicals, newspapers, and all other legal references materials, including transcripts."

Lawbooks and other legal materials are vital to the operation of the courts. The availability of funds on a no-year basis enables issuance of standing orders under which continuations for future years should be automatically furnished to the courts. Similar authority is granted the Library of Congress. The requested amount would provide for the continuance of obligational authority early in a new fiscal year in absence of appropriations, thus allowing the courts to receive subscriptions and other continuation materials until the appropriations are enacted.

Section 613 (b) states that funds appropriated for the judicial branch for each fiscal year for Defender Services shall be available as follows:

(1) "Such funds may be expended for compensation (in accordance with Criminal Justice Act maximums) and reimbursement of expenses of attorneys appointed to assist the court in criminal cases where the defendant has waived representation by counsel."

These so called "standby counsel" serve principally to protect and maintain the integrity of the judicial

process, do not "represent" the defendant (since they are generally appointed over the defendant's objection), and actually provide a service to the court rather than to the accused. Since the Criminal Justice Act does not authorize the appointment and compensation of counsel where the defendant has waived representation by counsel, these appointments are made pursuant to 5 U.S.C. 3109 which provides for the temporary or intermittent employment of experts and consultants. The language also specifically provides that the compensation payable to standby counsel under 5 U.S.C. 3109 shall be consistent with the Criminal Justice Act maximums.

(2) "Such funds may be expended for compensation and reimbursement of travel expenses of guardians ad litem acting on behalf of financially eligible minor or incompetent offenders in connection with transfer from the United States to foreign countries with which the United States has a treaty for the execution of penal sentences."

These guardians ad litem serve to protect the interests of those offenders requesting transfer from the United States who are deemed to be mentally incompetent or otherwise incapable of knowingly and voluntarily consenting to the transfer. While the appointment and compensation of guardians ad litem is not expressly

authorized under the CJA, amendments to 18 U.S.C. 4100 and 4109 set forth in the Anti-Drug Abuse Act of 1988 provide that such guardians ad litem shall be compensated and reimbursed in the same manner as counsel appointed under the CJA in connection with prisoner transfers from the United States.

Section 613 (c) states that funds appropriated for the judicial branch for each fiscal year for fees of jurors and commissioners shall be available as follows:

(1) " Such funds shall remain available until expended."

The main reason this is a no-year appropriation is that the cost of jury trials is uncontrollable in that budgetary requirements depend largely upon the volume and the length of jury trials demanded by parties to both civil and criminal actions and the number of grand juries being convened by the courts at the request of United States Attorneys. Consequently, the Judiciary does not obligate funds for jury trials, but rather pays bills as they are received. As a no-year account there is flexibility at the end of a fiscal year in that a bill received in one fiscal year can be paid in the next year.

(2) " Such funds may not be expended for payment of compensation of land commissioners in excess of the daily equivalent of the maximum rate payable under section 5332 of title 5."

The purpose of this section is to place a cap on payments to land commissioners. It would be unwise to have these payments open-ended in that there is a risk that we would lose control of the payments.

Section 613 (d) states that funds appropriated for the judicial branch for the Administrative Office of the United States Courts for each fiscal year shall be available as follows:

(1)" Such funds may be expended for necessary expenses for official receptions and representation."

This authority permits the Director of the Administrative Office to use appropriated funds for expenses of items in the official or quasi-official interests of the Judiciary. A reception for a foreign visitor studying the American court system would be an expense of this type.

(2)" Such funds may be expended for necessary expenses for advertising and rent in the District of Columbia and elsewhere."

This authorizes the Director of the Administrative Office to rent space as needed either in the District

of Columbia or in other areas. The Administrative office does rent office space in the District, and a printing facility in Forestville, Maryland. The language "advertising" allows the AO to recruit personnel through newspaper and other media.

Section 613 (e) states that funds appropriated for the judicial branch for the Supreme Court of the United States for care of buildings and grounds shall remain available until expended for necessary expenses for the structural and mechanical care of the United States Supreme Court building and grounds, including maintenance and operation of mechanical equipment.

These funds are appropriated for use by the Architect of the Capital in performing maintenance and repair of the Supreme Court Building. In order to facilitate the lengthy process of engineering, contract bidding, fabrication, delivery, and installation, these funds are requested on a no-year basis.

The Federal Judicial Center--(1) Chapter 42 of title 28, United States Code, is amended by adding at the end thereof the following new section:

**Section 629a. Availability of appropriations**

"Funds appropriated for the judicial branch for each fiscal year for the Federal Judicial Center may be expended for necessary expenses for official receptions

and representation." This language will provide the Director of the Federal Judicial Center with the authority, similar to that provided the Supreme Court and the Administrative Office, to pay expenses associated with official functions such as a "working meal" with visiting judges of other countries.

**SECTION-BY-SECTION ANAYLISIS**

**Section 312.** REIMBURSEMENT OF JUDICIARY FOR EXPENSES OF COLLECTING FINES.

This section amends section 1402(c)(1)(A) of the Victims of Crime Act of 1984 to provide that an amount equal to 5 percent of the statutory ceiling of the Crime Victims Fund be made available to the judiciary for the purpose of criminal fine collection.

The Criminal Fine Improvements Act of 1987 (P.L. 100-185) transferred responsibility for receiving criminal fine and assessment payments from the Department of Justice to the courts. As a result, clerks of the district courts are now responsible for receiving all criminal fine and assessment payments. The Act also added 28 U.S.C. § 604 (A)(18), which requires the Director of the Administrative Office to: establish procedures and mechanisms within the judicial branch for processing fines, restitution, forfeitures of bail bonds or collateral, and assessments.

Section 7121 of the Anti-Drug Abuse Act of 1988, Public Law 100-690, amended the Victims of Crime Act of 1984 (42 U.S.C. 10601(c)) to provide that the first $2,200,00 in excess of

$125,000,000 deposited in the Crime Victims Fund each fiscal year through FY 1991 will be available to the judicial branch for administrative costs of fine monitoring and collection. The cap on the fund will increase to $150,000,000 in fiscal year 1992. Therefore, funds will be received only if payments exceed the ceiling and, even then, the amount available is capped at $2,200,000 which is less than is needed by the judiciary establish a national fine center and carry out its administrative obligations with respect to fines collections.

For the current fiscal year, $2,200,000 has been made available to the judiciary for this purpose as a result of the Crime Victims Fund exceeding the $125,000,000 ceiling in FY 1990. In an effort to establish a more sufficient and dedicated source of funding, The Committee on Criminal Law and Probation Administration recommended, and the Conference has agreed, that in lieu of the existing statutory scheme, legislation should be sought to provide the judiciary with five percent of the statutory ceiling specified in the Crime Victims Fund, to be used to cover the costs of processing fines, assessments, restitution, interest and penalties.

**SECTION-BY-SECTION ANALYSIS**

**Section 313.** Amends section 524(c) of title 28, United States Code, to authorize reimbursement of the Judicial Branch, out of funds in the Department of Justice Asset Forfeiture Fund, for certain expenses incurred by the Judicial Branch in connection

with adjudications of asset forfeitures and the furnishing of home detention services and equipment. No reimbursement of judges' salaries is authorized under this amendment in order to avoid any appearance that a judge might benefit from the decision in any forfeiture proceeding.

The amendment limits the total amount available for reimbursement in any fiscal year to the lesser of 5 percent of the total revenues credited to the Asset Forfeiture Fund during any fiscal year or $10,000,000. However, the Attorney General has the discretion to reimburse the Judicial Branch more than that amount if the actual expenses of the Judicial Branch exceed the limit.

The amendment requires the Director of the Administrative Office of the United States Courts to transmit to the Attorney General an annual report on the reimbursable expenses of the Judicial Branch.

Amounts reimbursed to the Judicial Branch are to be transferred into the same fund that now receives the fees from civil filings, bankruptcy filings, and motions to lift the automatic stay in bankruptcy proceedings. Sums in that fund are available until expended, without appropriation, for Judicial Branch expenses.

The Judiciary would be reimbursed from the Asset Forfeiture Fund for costs associated with forfeitures, just as other agencies are reimbursed for their roles in seizures and forfeitures. The Judiciary would also be reimbursed for costs

associated with home detention. Prison construction is an authorized use of the Asset Forfeiture Fund. Home detention, as an alternative to incarceration, lowers the demand for prison space. The courts' home detention pilot project in 1990 includes 500 offenders. In 1991, the program will be expanded to 2,000 persons, dependent on the availability of funds. If sufficient funding is available, the program could grow to include at least 1,000 additional offenders per year nationwide for the next several years.

## SECTION-BY-SECTION ANALYSIS

**Section 314.** Award of filing fees in favor of the United States.

Subsection (a) of this section adds a new subsection (b) to 28 U.S.C. § 2412 that permits the filing fee prescribed under 28 U.S.C. § 1914(a) to be taxed as a cost in favor of the United States when the United States prevails as plaintiff. This practice is consistent with the policy reflected in the rest of 28 U.S.C. § 2412, which is to put the United States and private litigants on the same footing with respect to costs and attorney fees. Under current law and custom, the United States does not pay a civil filing fee and, therefore, cannot seek to recover it through an award of costs when it prevails in the action. The defendant in such a case thus escapes paying an element of costs that is paid by virtually every defendant who loses a case to a private plaintiff. This subsection also expressly provides that the litigating agency need not have paid the fee upon commencing the action to obtain this element of costs.

Subsection (b) amends 28 U.S.C. § 1931 to provide the same treatment for the filing fees taxed under section 2412(b) as for civil filing fees that are paid to the clerks of the court by plaintiffs other than the United States. Under the present section 1931, sixty dollars of each filing fee is deposited into a special fund of the Treasury to be available to offset funds appropriated for the operation and maintenance of the courts of the United States.

By way of background, reference may be made to United States v. Orenic, 110 F.R.D. 584 (W.D.Va. 1986), in which it was held that the plaintiff United States could not recover the filing fee as a taxable cost under 28 U.S.C. § 1920 when it had not actually paid the fee. In discussing why the United States had not paid the filing fee, the court noted that, before 1919, when the clerk of court relied on fees for his or her livelihood, the United States paid filing fees to the clerk of court only under certain conditions related to the clerk's income. In the 1919 Salary Act, however, the present system of compensating court clerks was established, and the United States was exempted from paying the clerk's fees. Act of February 26, 1919, 40 Stat. 1182, § 1 et seq., as amended, ch. 46, 41 Stat. 1099 (1921); Act of February 26, 1853, ch. 80, 10 Stat. 161. The 1919 Salary Act stated that the statute providing for the collection of the clerk's fees "shall not be construed to require or authorize fees to be charged or collected from the United States." 40 Stat. 1182, § 1. This exemption was then embodied in the 1949 codification of

28 U.S.C. § 2412(a), providing: "The United States shall be liable for fees and costs only when such liability is expressly provided for by act of Congress." The 1919 language unmistakably prohibited the collection of fees from the United States as a litigant, while the 1949 language seemed to encompass only the liability of the United States for fees and costs taxed in favor of a prevailing adversary. The court in Orenic nonetheless ruled that the 1949 language "effectively established a filing fee for the United States of $0.00," because there was no statute expressly requiring the United States to pay a filing fee. Id. at 586-7.

In 1966, 28 U.S.C. § 2412 was amended to exclude the language cited in the previous paragraph. The court stated in a footnote in the Orenic decision, though, that the omission of this language did not affect the Government's immunity from paying the filing fee, "since Congress has not stated its intent to the contrary." Id. at 587 n.2. The other case law dealing with 28 U.S.C. § 2412 and its predecessors deals only with the question whether the Government may recover the filing fee as a taxable cost when it has not in fact paid the fee. These cases hold, like Orenic, that the Government may not recover a fee that it has not actually paid, but they do not address the Government's responsibility to pay the fee in the first place, even after the 1966 amendment to section 2412. See United States v. Langlois, C.A. No. 73-CV-553 (N.D.N.Y. 1973) (unreported);

United States v. Mohr, 274 F.2d 803 (4th Cir. 1960); Asher v. United States, 28 F. Supp. 893 (S.D. Cal. 1939).

The current case law thus suggests that, if the United States paid the filing fee, it could seek to recover it from its adversary in each case where it prevails. The volume of the Government's filings, however, would add a very large number of receipt and payment transactions to the workload of the clerks of court, if the fee were paid when each complaint is filed, as with other litigants. Alternatively, the United States could make regular, aggregate payments representing its filing fees for a given period, based on estimated or actual figures. Either system, though, would require the Justice Department to pay out several million dollars a year, which would become unavailable for their general operations even after an award of costs. The mechanism proposed by section 314 would avoid this dilemma without imposing any greater burden on the losing party.

## SECTION-BY-SECTION ANALYSIS

### Section 315. FEES FOR ACCESS TO ELECTRONIC DATA MADE AVAILABLE BY THE JUDICIAL BRANCH

Automated public access to the vast amount of case information which is contained in the courts' automated systems is of great interest and value to the bar, enterprises, and the general public. The development and implementation of public access to this information will provide the courts with a powerful resource which will not only allow them to serve the public better, but also free staff resources from the responsibility of personally

responding to inquiries, thus allowing them to accomplish the court's mission more efficiently and effectively.

Fees for public access will defray the cost of providing this additional service to the public, as well as some portion of the operational cost for automated systems in the courts.

Sec. 315. Fees for access to electronic data made available by the Judicial Branch.

This section directs the Judicial Conference of the United States to prescribe reasonable fees for electronic access by members of the public to court docket information and other records, and authorizes the Director of the Administrative Office of the United States Courts to prescribe reasonable fees for electronic access to other publicly available information which the Director is required by law to maintain. This section authorizes the Judicial Branch to retain the fees as an offsetting collection to reimburse the costs of providing electronic-access services. To promote public access and to avoid undue burdens on some organizations and individuals, these fees may differ on the basis of classes of persons and shall include exemptions for appropriate persons or classes of persons.

**SECTION-BY-SECTION ANALYSIS**

**Seciton 316. WITNESS AND JUROR FEES**

The "Jury System Improvements Act of 1978," Public Law 95-572, among other things, increased the daily fee paid to grand and petit jurors from $20 per day to $30 per day. This change was approved to more adequately compensate jurors for their

services. Although the "cost of living" has continued to increase each year, this daily fee of $30 has not changed over the past eleven years. Therefore, the proposed daily fee of $40 will adjust the compensation paid to jurors and witnesses to account for cost of living increases since the passage of the Jury System Improvements Act of 1978.

**SECTION BY SECTION**

**Section 321. Diversity jurisdiction.**

Subsection (a) of this section would amend section 1332 of title 28 relating to diversity jurisdiction to raise the jurisdictional amount from $50,000 to $75,000 and to index such amount for inflation to be adjusted at the end of each year divisible by five. The purpose of this amendment is to supplement the increase of the jurisdictional amount from $10,000 to $50,000 in the 100th Congress by a modest upward adjustment to $75,000 and to maintain the workload reducing effects of these changes by indexing the diversity jurisdictional amount to inflation. This was an alternative recommendation of the Federal Courts Study Committee and fits within the rationale of the position of the Judicial Conference on diversity jurisdiction.

Subsection (b) of this section would amend section 1332 of title 28 to expand the category of items excluded in determining the jurisdictional amount to include "non-economic damages and attorneys' fees". The purpose of this amendment is to reduce the speculative nature of the amount in controversy so that a court can reasonably determine early in the case whether a complaint

meets the jurisdictional requirements of the law and to facilitate disposition of inappropriate claims on a motion for summary judgment.

**SECTION-BY-SECTION**

**Section 322.** Removal of separate and independent claims.

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

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

pendant jurisdiction over the state claim. Removal of such cases is possible under Sec 1441(a). The amended provision would establish a basis for removal that would avoid the need to decide whether there is pendant jurisdiction.

The further amendment to Sec. 1441(c) that would permit remand of all matters in which state law predominates also should simplify administration of the separate and independant claim removal.

The proposal is designed to enact in modified form the recommendation of the Federal Courts Study Committee to simply repeal section 1441(c)(Rept. p. 94).

**SECTION-BY-SECTION ANALYSIS**

**Section 323. Statute of Limitations.**

This section simply provides a fall-back statute of limitations for federal civil action by providing that, except as otherwise provided by law, a civil action arising under an Act of Congress may not be commenced later than 4 years after the cause of action accrues.

At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Congress should be the institution that determines federal statute of limitations policy. Moreover, reference to analogous state law creates a number of practical problems. As pointed out by the FCSC (Rept. p. 93):

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on

litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

This is a recommendation in concept of the Federal Courts Study Committee (Rept. p. 93). The FCSC also recommended a study of current federal statutes of limitations with the objective of enacting specific limitation periods for major congressionally created federal claims that currently lack such periods and perhaps rationalizing the existing limitations.

**SECTION-BY-SECTION ANALYSIS**

**Section 324. Prisoner Civil Rights Suits.**

This section amends 42 U.S.C. §1997e that authorizes district courts to require state prisoners filing section 1983 actions to exhaust the prison's administrative grievance procedures, if the United States Attorney General has certified, or the district court has determined, that the procedures are in "substantial compliance" with statutory "minimum requirements". This section amends section 1997e by increasing the time period for exhaustion of administrative remedies to 120 days and providing some flexibility with respect to the statutory minimum requirements by permitting the judge to require exhaustion if he or she finds that the procedures adopted by the prison "are otherwise fair and effective".

Section 1997e has failed to fulfill the promised benefits hoped for when it was enacted in 1980. This appears to be

partially the result of a slow process for states to obtain Department of Justice certification; but the main reason seems to be resistance by prison administrators to some of the statutory minimum standards, particular the requirement that inmates participate in the grievance system's design and administration. The Federal Courts Study Committee noted that the Federal prisons are not required to meet the standards that section 1997e imposes on the states and several states have adopted effective administrative remedies that do not conform to section 1997e (Rept. 49). Accordingly, that Committee recommended more flexibility and the implementation of a program to encourage state and local prison authorities to adopt fair and effective administrative procedures to deal with inmate grievances.

It might also be noted that penal custodial institutions in the United States vary tremendously. Procedures fair and effective in a small county jail might be totally unworkable in a large maximum security prison.

Recommendation of the Federal Courts Study Committee (Rept. p. 48) and the Committee on Federal-State Jurisdiction to the FCSC.

**SECTION-BY-SECTION**

**Section 325. Venue**

This amendment is intended to establish venue for both diversity and federal question cases in identical terms. Subsection (1) of the amendment to both 1391(a) and 1391(b) would allow venue in a district in which any defendant resides, if all

defendants reside in the same state. This language is from the ALI study and adheres to the traditional belief that it is fair and convenient to allow suit where the defendants reside .

The Subsection 2 amendment to both (a) and (b) is taken verbatim from the ALI study and has already been adopted in Section 1391(f), added by the Foreign Service Immunity Act of 1976. The great advantage of referring to the place where things happened or where property is located is that it avoids the "litigation breeding phrase" "in which the claim arose". It also avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts.

Subsection 3 is meant to cover the cases in which no substantial part of the events happened in the United States and in which all the defendants do not reside in the same state. This provision would act as a safety net by allowing venue in a "judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced". If personal jurisdiction cannot be brought in a single federal court, this proposal does not create any new basis for personal jurisdiction. Instead two actions must be brought in separate courts.

This language is intended to reflect the position of the Judicial Conference as passed by its Executive Committee on May, 18 1990.

## SECTION-BY-SECTION ANALYSIS

**Section 331.** District Court Executive

This section will provide statutory authority for permanent positions for this program and expand its applicability beyond the current six pilot district courts.

The judiciary's fiscal year 1981 budget request sought funding for 15 district court executive positions (which were then referred to as assistant circuit executives) and 15 secretaries for the executives. Congress indicated approval for only five such positions as part of a pilot program. See S.Rep. No. 96-949, 96th Cong., 2d Sess. at 58. Subsequently, the House Appropriations Committee's Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies agreed to the judiciary's request to reprogram funds in order to provide for a sixth district court executive and secretary.

In March 1985, the Committee on Court Administration reviewed a Federal Judicial Center report on the pilot project and agreed with the conclusion of the Center that statutory authority for permanent positions should be sought. The Judicial Conference subsequently approved draft legislation and authorized its submission to the Congress (JCUS.MAR85, p.15).

The district court executive program has been a pilot project for nine years. It has been the experience of the judiciary that this program has been of great benefit to judicial

officers in large courts and should be expanded to assist other districts.

## SECTION-BY-SECTION ANALYSIS

**Section 332.** Revision of Divisions of South Dakota Judicial District

This section amends Section 122 of title 28 to transfer Jackson County to the Western Division of the District and to eliminate the designation of Washabaugh and Washington Counties as part of the Western Division. This change is necessary to reflect the changes in the makeup of counties in South Dakota. Washabaugh and Washington counties were eliminated through merger and therefore should no longer be designated as part of the Western Division in the statute.

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

**SECTION-BY-SECTION ANALYSIS**

**Section 333.** Place of Holding Court

This section amends Section 112(a) of title 28, United States Code, to add Watertown, New York as a place of holding court within the Northern District of New York. The Northern District of New York is a large district consisting of approximately 28,000 square miles. Litigants in the Watertown area presently have to travel approximately 70 miles to Syracuse, the nearest place of holding court. There are federal facilities and Indian reservations in the Watertown area and litigation in the area has been increasing rapidly. The addition of Watertown as a place of holding court will reduce travel time and thus litigation expenses. The district court and the Judicial Council of the Second Circuit support the addition of Watertown and the Judicial Conference at its March 1988 session voted to support the designation of Watertown as a place of holding court.

**SECTION-BY-SECTION ANALYSIS**

**Section 341.** Consent to Trial in Civil Actions

Section 341 of the bill amends 28 U.S.C. section 636(c)(2) to permit judges and magistrates to advise civil litigants of the option to consent to trial by a magistrate.

Under present provisions, judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate. Many judges refrain entirely from even mentioning to parties the option to consent to civil trial

by a magistrate. Litigants in many jurisdictions often receive little more than a standardized written notification of this option with the pleadings in a civil case. As a result, most parties in civil cases do not consent to magistrate jurisdiction. The present procedures have effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases.

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

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

maximum utilization of judicial resources. Both the Judicial Conference and the Federal Courts Study Committee have endorsed this amendment.

**SECTION-BY-SECTION ANALYSIS**

**Section 342.** Consent to Trial in Certain Criminal Actions

Under 18 U.S.C. § 3401(b), United States magistrates may not try a petty offense case unless the defendant consents to be tried before a magistrate. Section 342(a)(1)(A) removes this restriction and authorizes magistrates to try petty offense cases without the consent of the defendants. Petty offenses historically were not considered "crimes" at common law and do not require trial in an Article III court. See Palmore v. United States, 411 U.S. 398, 407 (1973).

Some magistrates handle thousands of petty offense cases each year, and the burden of explaining the concepts underlying Article III of the Constitution to each defendant is especially great. Following the explanations, very few trial defendants charged with petty offenses request trial before a district judge. Not only are the explanations time-consuming but on occasion are exploited for wholly improper reasons. Some defendants purposely decline a trial before a magistrate with the foreknowledge that the charges will likely be dropped by the prosecution because of the severe time restraints imposed on Article III judges. The amendment enhances the efficiency of the courts and eliminates the abusive manipulation of the system by knowledgeable defendants.

Section 342(a)(1)(B) provides that the consent to be tried before a magistrate in misdemeanor cases, other than those cases included in section 342(a)(1)(A)- i.e. petty offense cases - may be made either orally on the record or in writing. The present provision requires that the consent be in writing.

Although there is no legal significance attached to a consent in writing as opposed to a consent made orally on the record, the execution of a written consent often unnecessarily prolongs the time needed to hear each case. The elimination of the written consent requirement saves time and eases burdensome paperwork for the magistrate.

The other changes made by Section 342 merely bring other statutes into conformity with the effects of Section 342(a) discussed above.

**SECTION-BY-SECTION ANALYSIS**

**Section 343.** Performance of Certain Criminal Trial Duties

Section 343 of the bill amends 28 U.S.C. section 636(b) and authorizes courts to delegate to magistrates the authority to conduct jury selection in criminal and civil cases upon the consent of the parties.

Until recently, most courts had permitted magistrates to preside at jury selection in felony and civil cases pursuant to 28 U.S.C. section 636(b)(3). Section 636(b)(3) allows judges to delegate various "additional duties" to magistrates. This section was intended to provide increased flexibility in the use

of magistrates by courts and to encourage judges to experiment in delegating novel duties to magistrates beyond those stated in sections 636(a) and 636(b)(1). Many courts had found delegation of voir dire duties to magistrates to be very useful, and in some cases indispensable, particularly when judges were temporarily unavailable or otherwise occupied in the trial of cases.

In Gomez v. United States, ___ U.S. ___, 109 S.Ct. 2237 (1989), the Supreme Court held that a magistrate could not preside over jury selection in a felony trial pursuant to 28 U.S.C. section 636(b)(3) where the defendant objected to the magistrate's involvement. The court found no relation between voir dire and the duties specifically mentioned in the Magistrates Act and therefore concluded that Congress did not intend jury selection in a felony case to be a duty delegable to a magistrate pursuant to section 636(b)(3) without the consent of the defendant.

As a result of Gomez, the problems courts have experienced in coping with their felony caseloads have worsened. In an effort to limit the effects of Gomez, courts have struggled to interpret its holding as narrowly as possible. See Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), cert. denied, 110 S.Ct. ___, 58 U.S.L.W. 3750 (U.S. May 21, 1990); United States v. Musacchia, 900 F.2d 493 (2d Cir. 1990).

The amendment addresses the Supreme Court's concerns in Gomez. The authority to preside at jury selection in both civil

and criminal cases is made a specific duty delegable to magistrates under section 636(b). The involvement of a magistrate in jury selection is conditioned upon the written or oral consent of the parties in a civil case and the defendant in a felony case. By placement in section 636(b)(1)(A), a magistrate's authority to conduct jury selection is subject to review by the district court pursuant to the "clearly erroneous or contrary to law" standard. The consent requirement eliminates the constitutional problem by retaining the opportunity to have an Article III judge preside over jury selection. This duty increases the flexibility of courts in utilizing their magistrate resources.

**SECTION BY SECTION ANALYSIS**

**Section 344.** Revocation of supervised release

Section 344 amends 28 U.S.C. §636(a) to authorize magistrates to conduct supervised release revocation proceedings under Section 3583(e) of title 18. In accordance with that provision, supervised release may be modified or revoked pursuant to the provisions of the Federal Rules of Criminal Procedure relating to probation revocation, which require two hearings--a preliminary "probable cause" hearing and a "final revocation" hearing.

Magistrates routinely conducted, and in some circuits still conduct, both preliminary and final probation revocation proceedings under authority of 28 U.S.C. § 636(b)(3). Two circuits, however, held that Congress did not intend to permit

the assignment of final probation revocation functions to magistrates. See United States v. Curry, 767 F.2d 328 (7th Cir. 1985), and Banks v. United States, 614 F.2d 95 (6th Cir. 1980).

Section 344 specifically authorizes a magistrate to conduct both the preliminary and final revocation of supervised release hearings. It contemplates that if a court delegates a final revocation of supervised release hearing to a magistrate, the magistrate will prepare proposed findings of fact and recommendations as provided in 28 U.S.C. § 636(b)(1)(B), thereby following procedures similar to those used in final probation revocation. The district judge may make a de novo determination and act on the proposed findings of fact and recommendations as provided in 28 U.S.C. § 636(b)(1).

The Judicial Conference approves express statutory authority for magistrates to conduct supervised release revocation proceedings.

**SECTION-BY-SECTION ANALYSIS**

**Section 351.** Exemption from jury service.

The Jury Selection and Service Act of 1968, as amended, declares as exempt from jury service three classes of persons: (1) members in active service in the Armed Forces of the United States; (2) members of state or local fire or police departments; and (3) "public officers" of Federal and state governments. 28 U.S.C. § 1863(b). This section eliminates the latter two categories of exemptions.

These exemptions were originally provided in 1948 legislation, on the assumption that it would be a waste of a court's time to attempt to include on juries persons who have critical jobs affecting the public health, safety, or welfare. See 28 U.S.C. § 1862 note (1952 ed.) These provisions were carried over in the current Jury Act apparently without consideration. Modern experience has shown, however, that many individuals who literally fall within the scope of the exemptions could easily serve, such as police officers or fire fighters who only work 20 hours a week. Difficulties are compounded by the expansive definition of "public officer" at 28 U.S.C. § 1869(i), which term includes any person elected to public office or one directly appointed by such an elected official. Under this provision, Federal courts have had to bar from service elected school board officials and state legislators who perform their public functions only sporadically, as well as secretaries and clerks appointed by locally elected magistrates and justices of the peace.

Note that persons covered by this section are "barred from jury service on the ground that they are exempt." Thus, they are forbidden to serve even if they wish to, which clearly can produce a conflict with the declared policies of the United States that all litigants shall have the right to juries selected at random from a fair cross section of the community and that all citizens shall have both the opportunity and obligation to serve as jurors when called to do so. 28 U.S.C. § 1861.

Accordingly, this section eliminates unnecessary and undesirable rigidity in the administration of the Jury Act and at the same time promotes the policy of universal service. Of course, notwithstanding this amendment, police and fire officers and public officials will be able to request excuses from service on an individual, case-by-case basis in the same manner as all other prospective jurors. See, e.g., 28 U.S.C. § 1866(c), authorizing excuses on the grounds of "undue hardship or extreme inconvenience."

**SECTION-BY-SECTION ANALYSIS**

**Section 352.** Jury selection list.

The Jury Act at 28 U.S.C. § 1863 requires that, with limited exceptions, prospective jurors must be selected from voter lists. In order to obtain better representation of minorities and otherwise advance the policy of universal service, district courts may supplement voting lists, but they are not authorized to supplant them. Uniquely in the state of Massachusetts, however, an alternative to voter lists exists that both improves the representativeness of juries and enhances administrative efficiency. This section allows the district of Massachusetts to rely on this alternative source exclusively.

The 1988 resident lists contained 4,497,421 names, while only 3,274,777 voters were registered throughout the state. Accordingly, use of these lists will include all registered voters in the district as well as all non-voters, thus complying fully with the objectives of the Jury Act that all citizens have the opportunity to be considered for service and that juries be selected from a fair cross-section of the community. Additionally, the resident lists are imprinted on electronic tape, and their use would substantially simplify the process and reduce the cost of filling the master wheel. The court calculated in 1989 that creating the master wheel through use of voter lists would cost nearly $30,000 for Boston alone, while use of the resident lists would cost only $13,400. Comparable savings were predicted for the jury wheels in Springfield and Worcester.

To efficiently fill its master wheel after the 1988 election, the district court amended its jury selection plan (with approval of a panel of the circuit council as required by section 1863(a)), to specifically authorize use of resident lists in lieu of voter lists, and the court has been selecting juries from this source. This amendment ensures that this practice complies not only with the spirit, but also the letter of the Jury Act.

**SECTION-BY-SECTION ANALYSIS**

**Section 353.** Expanded workers' compensation coverage for jurors.

The Jury Act currently extends Federal Employees' Compensation Act (workers' compensation) coverage o persons summoned for jury duty in the Federal courts when they are "(A) in attendance at court pursuant to a summons, (B) in deliberation, (C) sequestered by order of a judge, or (D) at a site, by order of the court, for the taking of a view." 28 U.S.C. § 1877(b)(2). This amendment also extends FECA protection to jurors while they are traveling to or from court.

The Judicial Conference of the United States first endorsed the extension of FECA coverage to Federal jurors in 1974, and the Conference's original proposal included "portal to portal" coverage. 1974 Report of the Proceedings of the Judicial Conference of the United States, at 20. Although an appropriate bill passed the Senate in 1978 (S. 2074, title III, 95th Cong., 2d Sess.), it was not until 1981-1982, in the 97th Congress, that the legislation finally advanced. In August 1982, the House Judiciary Committee approved H.R. 6872, which was based upon a draft submitted by the Judicial Conference and which included portal to portal coverage. H.R. Rep.
No. 97-824 (reporting H.R. 6872), 97th Cong., 2d Sess. 2-3 (1982). However, the bill which was finally enacted was the Senate version, S. 2863, from which the provision for portal to portal coverage was deleted. The Judicial Conference continues to support this extended coverage, as reaffirmed by the

Conference's Committee on Judicial Improvements at its meeting in June 1988.

Although claims by commuting jurors have not arisen frequently, the do in fact occur. The Department of Labor, which administers FECA, recently denied compensation to a special grand juror in the district of Maryland who was injured while enroute from her home to the courthouse. The basis for the holding was that, "A juror is not covered while traveling to and from home." Department of Labor File No. A25-316984, Re: Mary Shauck (April 28, 1988). The file does not reveal whether this individual had access to other protection, such as her automobile insurance, but the fact remains that without workers' compensation coverage jurors may well be unprotected while traveling to and from court.

When the Senate withdrew portal to portal coverage from the Jury Act amendments in 1982, it did so to conform to conventional workers' compensation principles, under which commuting "is not considered a duty related activity." S. Rep. No. 97-964, 97th Cong., 2d. Sess. 2 (1982). If fact, however, home-to-court travel by jurors is of a very different nature that conventional employee commuting.

For one thing, jurors appear in court under compulsion of law; they are not free to quit their "jobs" and decline to come to court at the time and place directed. The fact that they might have to travel a long distance--often across an entire judicial district--or suffer significant inconvenience is doing so does not in and of itself relieve them of this legal

obligation. Additionally, while regular employees must bear their own travel costs, the Jury Act at section 1871(c) provides that jurors shall receive mileage reimbursement for their expenses of commuting to and from the courthouse, as well as reimbursement of toll charges and (in the discretion of the court) parking expenses. Thus, as a matter of law the Jury Selection and Service Act can be viewed as providing that jury service "begins" when a juror steps out of his door. Statutory consistency suggests that FECA coverage be in accord.

Practical reasons support this legal analysis. Normally, employees exercise a great deal of choice in making commuting plans, being free to select the location of their residence, the location of their place of work, and the means by which they travel to and from work. It is not unfair to rely on employees also to make their own arrangements to insure against the risks associated with commuting. Jurors, by contrast, enjoy no such prerogatives. The time, date, and location of their service are imposed upon them, and there is nothing they can do to control the travel demands with which they are faced. Jurors often must travel to a city or location with which they are completely unfamiliar while under the stress and anxiety of being called upon to perform this most serious public service. Jurors also serve for only a limited period of time, so that they typically cannot ease travel burdens by organizing car pools or using public transportation. In all these ways, then, jurors are different from and at a much greater disadvantage than normal

employees. The courts in both a legal and practical sense take control of jurors' lives from the moment they depart their homes until the moment they return, making it fitting that FECA protection be extended appropriately.

The number of occasions on which FECA claims will be filed by commuting jurors cannot be estimated with any precision, but, on the basis of inquiries received in the Administrative Office of the United States Courts over the years, the number is likely to be exceedingly small. The dollar value of benefits provided by the Labor Department likewise will be insignificant, since the Jury Act at section 1877(b)(1) deems jurors to be paid at the minimum rate of GS-2 of the General Schedule, which in 1990 is $11,897 annually.

## SECTION-BY-SECTION ANALYSIS

**Section 354.** Compensation for loss or damage to personal property of jurors.

The Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721, permits the Director of the Administrative Office of the United States Courts to compensate judicial branch employees under some circumstances for the loss of, or damage to, personal property incident to their official service. No such authority exists, however, for jurors serving in Federal courts, for absent specific inclusion they do not fit within the general statutory definition of "employee." See, e.g., Sellers v. United States, 672 F.Supp. 446 (D.Idaho 1987), holding that jurors are not "employees" under the Federal Tort Claims Act. Courts have

often been embarrassed by the theft from the courthouse of jurors' personal effects, coats in particular, and this embarrassment is compounded by the absence of any authority to compensate the victims from Federal funds. This amendment permits the Director of the Administrative Office to adopt guidelines for paying such claims.

Under existing law, the only way in which the Government can provide restitution to a juror whose property is lost or damaged is through a Federal tort claim, which requires the Director to determine that a court employee negligently caused the loss. 28 U.S.C. §§ 2671-2680. If the problem is caused by an employee of another agency, such as the General Services Administration, the Administrative Office must forward the claim to them. There is usually scant evidence to support a real determination; thus the tort claim procedure is susceptible of being a pretext. By specifically authorizing the Director to compensate jurors for their personal property claims, these problems are avoided. Extension of this benefit also is consistent with other employee-like protections afforded jurors, such as payment of Government travel allowances and coverage under the Federal Employees' Compensation Act (28 U.S.C. §§ 1871(c) and 1877), and is not likely to result in anything more than negligible costs.

## SECTION-BY-SECTION ANALYSIS

**Section 361 - PARTIES' CONSENT TO DETERMINATION BY BANKRUPTCY COURT**

Background: This proposal originated from a recommendation of the Federal Courts Study Committee. That Committee recommended that "Congress should amend 28 U.S.C. § 157(c)(2) to provide that a bankruptcy judge's findings in 'non-core' proceedings become final unless a party objects within thirty days."

28 U.S.C. § 157 provides that in non-core proceedings, the bankruptcy judge conducts hearings but the judge's findings become final only if the parties consent. In the absence of such consent, the findings must be submitted to the district court and have no force unless the court adopts them after de novo review.

The Federal Courts Study Committee report noted that the statutory language does not specify whether the consent must be express or may be implied, although Bankruptcy Rules 7008 and 7012 appear to require express consent. The Committee recommended amending the statute to provide that a bankruptcy judge's findings become final unless a party objects within thirty days, thus eliminating the need for de novo district court review in non-core proceedings when no timely objections have been filed. Implied consent will eliminate problems in default cases where the plaintiff often finds it difficult to obtain express consent.

2. Effect of Section

28 U.S.C. § 157(c)(2) provides that the district court, with the consent of all the parties to the proceeding, "may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments." Thus, when the parties consent to the referral, the bankruptcy court may enter a final order or judgment with respect to the related proceeding.

The proposed language provides that "a party shall be deemed to so consent (to the reference of the case to the bankruptcy court and, presumably, to the entry of a final judgment) unless an objection to the referral is filed in the district court. The objection must be filed no later than the date such party files its first pleading in the proceeding or 30 days after service of the pleading that initiates such proceeding. Thus, the consent required under 28 U.S.C. § 157(c)(2) will be implied in the absence of an objection.

3. Justification

This section of the bill is designed to implement a specific recommendation of the Federal Courts Study Committee.

**SECTION-BY-SECTION ANALYSIS**

**Section 362 - APPEALS OF JUDGMENTS, ORDERS, AND DECREES OF BANKRUPTCY COURTS**

Background: This proposal originated with a specific recommendation of the Federal Courts Study Committee. The Committee recommended that "Congress should amend 28 U.S.C. § 158 to require each circuit to establish bankruptcy appellate panels,

with an opt-out provision, and Congress should authorize small circuits to create multi-circuit panels. Congress should also provide necessary funding to implement this requirement." The Committee's recommendation is to (1) require each circuit to establish bankruptcy appellate panels, and (2) authorize small circuits to create multi-circuit panels.

2. Effect of Section

The draft language of section 362 would not require each circuit to establish a bankruptcy appellate panel.

The proposed language would allow the judicial councils of 2 or more circuits to establish a joint bankruptcy panel "if authorized by the Judicial Conference of the United States." This would allow small circuits to form multi-circuit bankruptcy appellate panels.

3. Justification

The 9th Circuit BAP disposed of 902 appeals in 1987 and 664 in 1988, reducing the workload of both district and appellate courts, and have received favorable reviews from both bench and bar. They foster expertise and increase the morale of bankruptcy judges, in part by offering them an opportunity for appellate work. Appeals from BAPs to the courts of appeals would be limited to constitutional issues and questions of law.

The Judicial Conference recommended that power to create BAPs be left to the circuits.

**SECTION-BY-SECTION**

**Section 363 - APPEAL OF CERTAIN DETERMINATIONS RELATING TO BANKRUPTCY CASES**

Background: This proposal originated with a recommendation of the Federal Courts Study Committee. The Committee recommended that "Congress should amend 11 U.S.C. § 305(c) and 28 U.S.C. §§ 1334(c)(2) and 1452(b) to clarify that they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts."

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

2. Effect of Section

The proposed amendment would authorize bankruptcy judges to enter binding orders in connection with abstention determinations under title 11 or title 28 and remand determinations under title 28, subject to review in the district court. The statutory language under each of these sections now provides that the decision of the bankruptcy court (to abstain or remand) "is not reviewable by appeal or otherwise." The proposed amendment would modify these three sections to provide that the decision of the bankruptcy court is not reviewable "by the court of appeals ...

or by the Supreme Court of the United States ...." Such determinations would therefore be reviewable by the district court.

3. Justification

Section 363 implements one of the specific recommendations of the Federal Courts Study Committee. Speeding the disposition of these types of motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals.

**SECTION-BY-SECTION ANALYSIS**

**Section 364 - EXTENSION OF TERMS OF OFFICE OF BANKRUPTCY JUDGES**

Background: Bankruptcy judges are appointed for 14-year terms. The statute does not authorize them to continue serving until a successor is appointed.

2. Effect of Section

Sec. 364 amends 28 U.S.C. § 152(a) to permit a bankruptcy judge whose 14-year term of appointment has expired to continue to serve until a successor has been appointed. The provision includes a 180-day limitation on such extended service and is subject to the approval of the judicial council of the circuit.

3. Justification

Allowing a bankruptcy judge to serve up to 180 days after the judge's term of appointment has expired will provide invaluable assistance when the appointment of a successor is delayed. At present, the only assistance available during such a "gap" period is from visiting judges or retired bankruptcy judges

recalled to active service. Because bankruptcy filings have increased rapidly across most of the country in recent years, visiting judges and recall judges are not available for all of the districts which need assistance.

**SECTION-BY-SECTION ANALYSIS**

**Section 365.** Extension of Terms of Office of Magistrates

This provision lengthens the "holdover" period during which a court may retain a magistrate in office after the expiration of his term from 60 days to 180 days. The process of filling a vacant magistrate position normally takes about six months. Although the appointment process usually operates smoothly and there is sufficient time to complete the appointment by the end of an expiring term, or within 60 days thereafter, there are some occasions where further time is required. For example, an FBI report might be delayed or a court's nominee may withdraw, making it difficult to fill the position within the current holdover period. This amendment would insure a continuity of magistrate services in those cases where the appointment process might otherwise extend past the current holdover period.

**SECTION-BY-SECTION ANALYSIS**

**Section 366. BANKRUPTCY ADMINISTRATOR PROGRAM**

1. Background: The Bankruptcy Administrator Program was established by Congress in the "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986", P.L. 99-554, to administer estates in cases under the Bankruptcy Code in the judicial districts in the States of Alabama and North

Carolina. United States trustees appointed by the Attorney General pursuant to 28 U.S.C. § 581 supervise the administration of cases and trustees in the other districts. Section 302(d)(3)(A) of the 1986 Act provides for the bankruptcy administrators to be replaced by United States trustees on or before October 1, 1992.

Section 307 of the Bankruptcy Code gives the United States trustee standing to raise issues and appear and be heard on those issues. The statute does not provide standing for bankruptcy administrators.

As amended by the 1986 Act, section 105(a) of the Bankruptcy Code provides that a bankruptcy court may act sua sponte to take any action or make any determination "necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process." The 1986 Act, however, provides that the amendment to section 105(a) does not take effect in a district until the United States trustee program becomes effective in the district. Thus, the amendment does not yet apply in the judicial districts in Alabama and North Carolina.

2. Effect of Section

Sec. 366(a) amends the "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986", to extend the Bankruptcy Administrator Program through October 1, 2002. As is the case under the current law, the bankruptcy court (with the concurrence of the chief district judge) in any of the six bankruptcy administrator districts can elect to come into the

United States trustee program at an earlier date. Both current law and Sec. 366 provide for a one-year transition between the bankruptcy administrator program and the United States trustee program.

Sec. 366(b) amends the 1986 Act to give bankruptcy administrators the same standing as United States trustees.

Sec. 366(c) amends the 1986 Act to make the amendment to section 105(a) effective upon the enactment of this legislation.

3. Justification

The Bankruptcy Administrator Program has won widespread praise for its effective, efficient, and economical administration of bankruptcy estates and trustees. The six bankruptcy administrators have built smoothly functioning organizations. None of the six districts in the Bankruptcy Administrator Program has elected to join the United States Trustee Program. Extending the termination date and giving the bankruptcy administrators standing will permit the continued development of this worthwhile program. The amendment will clarify the status of the bankruptcy administrators.

Unlike the Bankruptcy Administrator Program, the United States Trustee Program has been the subject of extensive criticism. Oversight hearings before the House Judiciary Subcommittee on Economic and Commercial Laws in June 1989 revealed conflicts of interest, duplication of clerical and administrative efforts, excessive costs, interference with case management efforts, improper political influence in the selection

of United States trustees and in the administration of estates, and potential erosion of the separation of powers. Bankruptcy judges and clerks have reported continuing disputes with United States trustees and complain about their failure to supervise case trustees adequately and to perform several of the other statutory duties transferred to them in the 1986 Act.

Making the amended section 105(a) effective immediately in the judicial districts in Alabama and North Carolina will clarify the powers of the bankruptcy court and avoid any questions about the judges' authority to act sua sponte to manage their case load. Many bankruptcy judges rely on the section to dismiss inactive cases and as authority for other docket management procedures.

## SECTION-BY-SECTION ANALYSIS

### Section 367. ELECTION NOT TO BE COVERED BY UNITED STATES TRUSTEE PROGRAM

1. Background: The "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986", extended the United States Trustee Program to the entire country except the six judicial districts in Alabama and North Carolina. As noted in the discussion of Sec. 366, the United States Trustee Program has been the subject of extensive criticism. A number of bankruptcy courts have expressed interest in having the power to elect not to be covered by the program.

2. Effect of Section

The section is intended to allow districts which are currently part of the United States trustee program to elect not to be covered by the program.

3. Justification

The functions assigned to the United States Trustee Program can be performed by an independent office within the Judiciary with minimal disruption while maintaining the necessary separation of judicial and administrative functions in processing bankruptcy cases. The Bankruptcy Administrator Program has won widespread praise while performing many of those functions. Restructuring the United States Trustee Program as an independent office within the Judiciary would ensure more efficient administration of the bankruptcy system by correcting the problems cited above.

## SECTION-BY-SECTION ANALYSIS

**Section 368. BANKRUPTCY RULEMAKING**

1. Background: Section 401 of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 (November, 19, 1988), substantially amended the rules enabling act contained in chapter 131 of title 28, United States Code. Among the modifications made by the amendments was a change in the effective date of new procedural rules from August 1 to December 1 of the year in which the rules are transmitted to the Congress by the Supreme Court. Sec. 2075 of title 28, which governs bankruptcy procedural rules, was left intact by the 1988 amendments. One of the results of

the exclusion of bankruptcy rules from the 1988 amendments is that the bankruptcy rules retained their original effective date of August 1.

The Judicial Conference Committee on Rules of Practice and Procedure and its Advisory Committee on Bankruptcy Rules believe that all rules of procedure should have the same effective date. Accordingly, the committees requested that chapter 131 of title 28 be amended to conform the effective date and other procedures for bankruptcy rulemaking to those prescribed for other bodies of court rules.

2. Effect of Section

The effect of Sec. 368, (with one exception discussed below), is to conform the procedure for prescribing bankruptcy rules to that used for other types of procedural rules.

Subsection (a) would amend section 2073 of title 28 to: 1) authorize the Judicial Conference to appoint a committee to recommend bankruptcy rules, 2) require the committee to support any proposed rules with explanatory notes and appropriate reports, and 3) save (from invalidation) any bankruptcy rule prescribed under procedures not in compliance with section 2073.

Subsection (b) would make bankruptcy rules effective on December 1 of the year in which they are transmitted to the Congress by the Supreme Court.

Subsection (d) is an effective date provision. It would make the amendments described above effective on January 1, 1991.

3. Justification

The procedure for prescribing bankruptcy rules to resemble as closely as possible that for prescribing other bodies of federal court rules. The effective date for bankruptcy rules should be the same as that for other bodies of federal rules.

**SECTION-BY-SECTION ANALYSIS**

**Section 371. POWER OF SUPREME COURT TO DEFINE FINAL DECISION FOR PURPOSES OF SECTION 1291.**

This section requires that the Judicial Conference advise the Judiciary Committees of the House and Senate on whether the Supreme Court should be authorized to promulgate rules which define when a ruling by the district court is final for purposes of appeal. This implements a recommendation of the Federal Courts Study Committee (at p.95). Such a change would be a major extension of the Supreme Court's power to prescribe procedural rules. At present, 28 U.S.C. § 2072 provides that rules of procedure and evidence "shall not abridge, enlarge or modify any substantive right."

**Section 372. PRETERMISSION OF REGULAR SESSIONS OF COURTS OF APPEALS.**

Upon the recommendation of the Judicial Conference (JCUS.MAR 89, p. 21), this section would amend section 48(c) of title 28 to permit courts of appeals to pretermit any regular session of court at any place for insufficient business or other good cause without seeking the consent of the Judicial Conference. The purpose of the change is to eliminate unnecessary administrative actions imposed on the Judicial Conference that can better be

handled in changing circumstances at the local court. As might be expected, Judicial Conference action on pretermission recommendations has become ministerial and automatic. The procedure does not serve any useful purpose.

**SECTION-BY-SECTION**

**Section 373. AUTHORITY OF JUDICIAL CONFERENCE TO ISSUE ADMINISTRATIVE RULES**

This section grants the Judicial Conference explicit rule-making authority for court administration, implementing a recommendation of the Federal Courts Study Committee. The Conference frequently adopts directives regulating administrative matters within the federal court system. The function should be recognized by statute to avoid any confusion on the issue.

**SECTION-BY-SECTION ANALYSIS**

**Section 374. Biennial circuit judicial conference.**

This section derives from section 1003 of H.R. 4807 (100th Cong.) as reported by the House Committee on the Judiciary.

The Judicial Conference adopted this proposal to require circuit judicial conferences once every two years (instead of every year) and optional in the off year as one of a number of ways to reduce costs during the initial phases of the "Gramm-Rudman-Hollings" budget cuts in 1986 (JCUS.MAR86, pp. 15-17). It was included in the S. 1482 as introduced and H.R. 4807 as passed by the House in the 100th Congress. Senator Heflin personally objected to cutting down on required meetings and it was removed from the final version of the Judicial Improvements and Access to

Justice Act of 1988. The idea of interjecting this flexibility into expensive circuit judicial conference meetings is still considered sound.

## SECTION-BY-SECTION ANALYSIS

**Section 375. Abolish the Temporary Emergency Court of Appeals.**

This section would abolish the Temporary Emergency Court of Appeals and transfers its cases to the Court of Appeals for the Federal Circuit. Whatever may have been the value of this court when created in 1971 as part of the Economic Stabilization Act Amendments which established price controls long since abolished, its case load is so small and the process of running the court with temporarily assigned active and senior Article III judges burdensome enough to justify eliminating the court. The section as drafted derives from section 623 of S. 1482 as introduced and title V of H.R. 4807 as reported in the 100th Congress. This is a Judicial Conference proposal to save resources (JCUS.MAR87, p. 20; JCUS.SEP87, p. 72). Title V of H.R. 4807 was lost in the House for lack of time to wait out the referral to the Committee on Energy and Commerce until September 26, 1988. The provision was deleted from S. 1482 without explanation at the instance of Senator Metzenbaum. The Federal Courts Study Committee reviewed the issue and agreed that this court should be phased out as unnecessary and expensive (Rept. p. 73).

**SECTION-BY-SECTION ANALYSIS**

**Section 376. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES**

Subsection (a) of this section would amend 28 U.S.C. § 2071 to permit federal courts to adopt a rule(s) establishing alternative dispute resolution procedures. 28 U.S.C. § 2071(g)(2), as drafted, would allow the courts to adopt a rule setting forth "mandatory" procedures such as mediation, early neutral evaluation, and court-annexed arbitration.

Subsection (a) of Section 376 amends 28 U.S.C. § 2071 by adding at the end a new subsection (g) which broadens the statutory authority for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives.

For the past decade and more, federal and state courts have adopted and adapted supplemental and alternative techniques to standard procedures for processing civil litigation. The stated objectives of these techniques are to reduce cost, delay and antagonism, and at the same to time to preserve the time of judges for the disputes that most need their attention. These methods are those that courts might either require, or make available to litigants, during the pretrial stages of civil litigation or on appeal before full briefing and argument. The

**SECTION-BY-SECTION ANALYSIS**

**Section 377.** Extension of Parole Commission.

This section extends the existence of the Parole Commission for an unspecified period of time to consider cases where the

offense occurred prior to Nov. 1, 1987 (these cases are commonly referred to as "old law" cases). The Committee on Criminal Law and Probation Administration and the Federal Court Study Committee of the Judicial Conference of the United States have both endorsed the continuation of the Parole Commission to deal with "old law" cases. The Federal Court Study Committee also recommended that the Parole Commission be extended to consider supervised release revocation of "new law" cases. The Criminal Law and Probation Administration Committee endorsed an extension for the sole purpose of consideration of "old law" cases. The Committee, however, did not take a position on how long the Commission should be extended to deal with these cases. Judicial Conference has consistently supported various alternative dispute mechanisms including court-annexed arbitration and summary jury trials.

Examples of supplemental and alternative techniques include: "court-annexed arbitration," which usually requires a non-binding hearing and award some months after filing and before the parties may proceed to trial (if they do not accept the award or settle); the less formal "early neutral evaluation" procedures, in which an experienced attorney meets with the parties and counsel fairly soon after filing to discuss issues in a case and possible claim values; "mediation" procedures, in which a magistrate or judge, or an experienced attorney or professional, meets with the parties to facilitate the efficient settlement of the case or dispute; special masters for discovery and other matters in

complex cases; and "summary jury and bench trials," to provide the parties a nonbinding estimate of the case as a means of facilitating settlement.

Although alternative dispute resolution (ADR) may seem a relative newcomer to the judicial scene, the procedures are not new to judicial dispute processing, and they are not alternatives in any strict sense. A 1983 amendment to Federal Rule of Civil Procedure 16 specifically authorized judges and litigants, at the pretrial conference, to "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." In 1988, legislation was enacted authorizing the continuation of mandatory court-annexed arbitration programs that had begun in ten judicial districts between 1977 and 1986, and also authorizing consensual programs in ten additional districts.

Studies of different ADR systems report satisfaction by participants and, in some cases, favorable effects on litigation cost and delay. Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar, and interested publics.

New subsection (g)(1) authorizes all federal courts other than the Supreme Court to adopt local rules establishing dispute resolution mechanisms that complement or supplement traditional civil pretrial, trial, and appellate procedures.

New subsection (g)(2) permits (but not requires) district courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and court-annexed arbitration, with limitations on types of cases subject to mandatory reference, and authorization for motions to exempt cases from an otherwise mandatory procedure. Such rules are not to create financial incentives in mandatory ADR proceedings except as a sanction for misconduct, but allow for cost and fee incentives for parties who reject arbitration hearing awards and fail later to improve on them, or who reject and fail to improve on formal post-award settlement offers.

New subsection (g)(3) provides that the authority under any such rule shall be in addition to the authority provided in chapter 44 of title 28 which deals with the use of arbitration.

Subsection (b) of Section 376 requires the Director of the Federal Judicial Center to conduct, on a continuing basis, research on the ADR techniques adopted by the district courts, and to prepare and publish descriptions and analyses of the experience of district courts with the application of such techniques.

**SECTION-BY-SECTION**

**Section 378.** Would implement the recommendation of the Federal Court Studies Committee Report (p. 96), as endorsed by the Judicial Conference Executive Committee action of May 18, 1990, to provide that National Labor Relations Board orders be self-enforcing and to give jurisdiction over contempts and

executions to the district courts. Similar power has been granted to the Federal Trade Commission and should be extended to National Labor Relations Board orders.

**Section 379. SECTION-BY-SECTION ANALYSIS**

The Judicial Conference, at its March 1990 meeting adopted the recommendation of its Committee on Criminal Law and Probation Administration with regard to the subject. At its January 1990 meeting, that Committee recommended that an amendment be sought to Title 18 U.S.C. § 3154 authorizing the courts to remove the requirement for pretrial services reports in Class A Misdemeanor cases. The Committee concluded that allowing individual districts to set policy in this area would provide the necessary flexibility to address the concerns of different districts. As previously stated, that recommendation was adopted by the Judicial Conference.

**SECTION-BY-SECTION ANALYSIS**

**Section 380. Reports and Statistics.**

This section derives from section 620 of S. 1482 as introduced in the 100th Congress.

Subsection (a) of this section phases out a report required by the Right to Financial Privacy Act of 1978 as duplicating information reported by administrative agencies under the same Act.

Subsection (b) of this section would transfer the reporting requirement for fees and expenses under the Equal Access to Justice Act to the Department of Justice. This provision would

ensure that the report would be done by the federal agency with the most complete data base on the subject matter.

**SECTION-BY-SECTION ANALYSIS**

**Section 381.** Would implement the recommendation of the Federal Court Study Committee Report (p. 125) that the number and frequency of unresolved intercircuit conflicts should be studied and analyzed to determine, objectively, those that are "intolerable" and yet, for whatever reason, are unlikely to be resolved by the Supreme Court.

**SECTION-BY-SECTION ANALYSIS**

**Section 382. STUDY OF CRIMINAL JUSTICE ACT PROGRAM**

(a) Study Required. -- The Judicial Conference of the United States shall appoint a special committee to conduct a comprehensive review of the 1964 Criminal Justice Act (CJA), as amended, including its implementation and administration. The review should assess the current effectiveness of the CJA program and recommend appropriate legislative, procedural, and operational changes. In addition to present and former federal defenders, the special committee should include representatives of the criminal defense bar recommended by the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, and the Criminal Justice Section of the American Bar Association. Because issues of administration, ethics, and the public trust and interest are involved participants sensitive to such perspectives should likewise be appointed.

(b) Assessment of Program. -- In conducting the study, the special committee shall assess the current effectiveness of the CJA program, including, but not limited to the following:

(1) the impact of judicial involvement in the selection and compensation of the federal public defenders and the independence of federal defender organizations, including the establishment and termination of federal defender organizations and the federal public defender and the community defender options;

(2) whether the federal defender in each jurisdiction should be selected by an independent board or commission formed within the district or districts to be served;

(3) equal employment and affirmative action procedures in the various federal defender programs;

(4) judicial involvement in the appointment and compensation of panel attorneys and experts;

(5) adequacy of compensation for legal services provided under the Criminal Justice Act;

(6) the quality of the Criminal Justice Act representation;

(7) the adequacy of administrative support for defender services programs;

(8) maximum amounts of compensation for attorneys with regard to appeals of habeas corpus proceedings;

(9) contempt, sanctions, and malpractice representation of panel attorneys;

(10) appointment of counsel in multi-defendant cases;

(11) early appointment of counsel in general, and prior to the pre-trial services interview in particular;

(12) the method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds;

(13) the provision of services and/or funds to financially eligible arrested but un-convicted persons for non-custodial transportation and subsistence expenses, including food and lodging, both prior to and during judicial proceedings.

(c) Report. -- Not later than September 30, 1992, the Judicial Conference shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives the special committee's report of the study required under subsection (a). The report shall include:

(1) any recommendations for legislation;

(2) a proposed formula for the compensation of Criminal Justice Act counsel that includes an amount to cover reasonable overhead and a reasonable hourly fee; and

(3) a discussion of any procedural or operational changes needed to effect the purposes of the Criminal Justice Act.

. This provides for a comprehensive review of the implementation of the Criminal Justice Act, as recommended by the Federal Courts Study Committee. The review would be conducted by

a special committee appointed by the Judicial Conference, and would report to the Judiciary Committees of the Senate and the House of Representatives not later than September 30, 1992. The membership of the Committee should be consistent with the recommendations of the Federal Courts Study Committee.

**SECTION-BY-SECTION ANALYSIS**

**Section 383. GOVERNMENT RATES FOR TRAVEL OF CRIMINAL JUSTICE ACT ATTORNEYS AND EXPERTS**

The Administrator of General Services, in entering into contracts providing for special rates to be charged by common carriers and hotels (or other commercial providers of lodging) for official travel and accommodation of Federal Government employees, shall provide for charging the same rates for attorneys, experts, and other persons traveling primarily in connection with carrying out responsibilities under section 3006A of title 18, United States Code.

**Section 384 SECTION-BY-SECTION ANALYSIS**

1. Background: The Office of General Counsel drafted the language in response to CSD's request that clear authority be obtained for recycling of materials and application of the proceeds to procurement of replacement property. Many courts have requested that CSD approve recycling arrangements. Lacking certain authorities, we have been unable to approve some of the proposed arrangements. Courts have expressed frustration when they have not been permitted to apply the proceeds of their

recycling efforts to procurement of replacement items, and have even abandoned recycling.

Justification: This Section, if passed, would provide economic incentive for recycling. Increased recycling would have a salutary effect on the environment by reducing energy and raw material consumption. An additional benefit would be a modest reduction of expenditures on additional supplies.

**SECTION-BY-SECTION ANALYSIS**

**Section 385.**

This bill, approved by the Judicial Conference of the United States, authorizes the minting of gold and silver commemorative coins with designs emblematic of the Bicentennial of the Bill of Rights and the role of the Federal Judiciary in interpreting the Bill of Rights during the past two centuries. The bill is patterned on recent statutes that authorized bicentennial coins commemorating the United States Constitution and the houses of Congress.

Section 1 gives the short title.

Section 2(a) authorizes the Secretary of the Treasury ("the Secretary") to mint up to one million gold five-dollar coins with physical specifications matching those of other recent commemorative gold five-dollar coins. The total mintage may comprise coins of two different designs, produced in equal quantities. The coins shall bear the customary inscriptions found on United States coins ("Liberty," "E Pluribus Unum," "In God We Trust," and "United States of America"), a designation of

value, and the year in which coins of that design were first issued. The last provision is intended to prohibit the issuance of a dated series of coins of one design.

Section 2(b) authorizes the Secretary of the Treasury to mint of up to ten million silver dollars with physical specifications matching those of other recent commemorative silver dollars. The total mintage may comprise coins of five different designs, produced in equal quantities. The coins shall bear the customary inscriptions found on United States coins ("Liberty," "E Pluribus Unum," "In God We Trust," and "United States of America"), a designation of value, and the year in which coins of that design were first issued. The last provision is intended to avoid the issuance of a dated series of any design.

The remaining sections of the bill are standard provisions adapted from other recent commemorative coin legislation.

Section 2(c) constitutes legal tender the coins authorized by this bill, as provided for United States coins and currency generally in 31 U.S.C. § 5103.

Section 2(d) defines the coins authorized by this bill as "numismatic items" within the meaning of 31 U.S.C. § 5132(a)(1). This permits the Secretary of the Treasury to reimburse amounts received from the sale of the coins to the current appropriation used to pay the cost of preparing and selling the coins

Section 3 prescribes the authority for the Secretary to acquire gold and silver bullion.

Section 4 provides that the Secretary shall consult with the Judicial Conference of the United States and the Commission of Fine Arts before selecting the designs for the coins.

Sections 5(a) and 5(b) prescribe the locations for minting the coins and authorizes the striking of both proof and uncirculated qualities of each type of coin. Section 5(c) authorizes the Secretary to start issuing the coins on the date of enactment of this bill. Section 5(d) terminates the Secretary's authority under this bill on June 30, 1992.

Section 5(e) authorizes the issuance of up to 500,000 restrikes of each denomination, design and quality of coin authorized by this bill, in addition to the mintage authorized by section 2, in the Secretary's discretion. This provision allows the Secretary to meet extraordinary public demand for the coins. Restrikes may not be issued after June 30, 1994.

Sections 6 through 9 are standard provisions that appear in several recent commemorative coin enactments. Sections 6 and 7 prescribes the terms and conditions of sale of the coins. The Secretary shall sell the coins at face value plus cost, plus a surcharge of $35 per five-dollar coin and $7 per one-dollar coin. The Secretary shall endeavor to mint and issue the coins at no net cost to the Government. Section 8 requires the Secretary to deposit an amount equal to the surcharges received on sales of the coins to the General Fund of the Treasury, for the sole purpose of reducing the national debt. Section 9 waives all provisions of law relating to procurement and public contracts,

except for equal employment opportunity laws, in carrying out this bill.

Section 10 authorizes a first-strike ceremony at the United States Supreme Court Building in Washington, D. C., on a date to be designated by the Chief Justice of the United States. This provision is adapted from similar language in other commemorative coin enactments.

**Section by Section**

**Section 398 Technical Corrections to removal provisions.**

The amendments made by this subsection are technical language changes to conform various provisions with changes made in the removal statutes by section 106 of the Judicial Improvements and Access to Justice Act (Public Law 100-702, November 19, 1988).

**SECTION-BY-SECTION ANALYSIS**

**Section 399.** Makes a number of minor technical corrections to the organization and structure of Titles 28 and 18, United States Code. These corrections rectify numerical, grammatical and typographical errors present in existing language.