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NEW TRADE ACT WILL INCREASE DUTIES OF CUSTOMS COURT

Effective January 1, 1980, the Trade Agreements Act of 1979, which implements into domestic law the trade agreements negotiated by the United States in the Tokyo Round of Multilateral Trade Negotiations, will impose several new responsibilities upon the Customs Court of the United States. President Carter described the agreements as "the most ambitious and comprehensive effort undertaken by the international community since World War II to revise the rules of international trade and to achieve a fairer, more open, world trading system."

In general, the Act will: significantly increase the number of administrative determinations subject to judicial review; greatly expand the categories of persons who will be entitled to institute suit; expedite judicial review by shortening applicable statutory time limitation; and grant authority to the Court, for the first time, to grant preliminary injunctive relief and interlocutory judicial review.

Regarding antidumping and countervailing duties the new law provides increased opportunities for judicial review of certain interlocutory and all final determinations by the Secretary of the Treasury,

See TRADE ACT p. 3

Improvements in the Administration of Justice:

AN INTERVIEW WITH ASSISTANT ATTORNEY GENERAL MAURICE ROSENBERG

Assistant Attorney General Rosenberg was last August appointed to head the Department of Justice's Office for Improvements in the Administration of Justice (OIAJ).

Professor Rosenberg has had a many-faceted career with broad experience in the legal profession. Since 1956 he has been a Professor at Columbia Law School. There is much more: lecturer (in this country and abroad); visiting professor at law schools (throughout the country); writer; and public servant.

In the following interview Assistant Attorney General Rosenberg speaks out on several matters affecting the federal courts and manifests a well above average sensitivity to problems and issues involving the federal court system.

You have been in office less than five months, but there is every indication that these have been busy months. What plans have you made for your Office? Will you generally adhere to the programs started by your predecessor in office Daniel Meador?

Yes. Generally the initiatives and ongoing projects that Dan Meador began here are carried forward in the new two-year program. We have developed in the Office a set of new projects. One of them is a serious effort to look at the question of the affordability of civil litigation to see if we can do anything useful to make civil litigation, specifically lawyers' services, more affordable to people with moderate-size claims. I believe that there is a great failure in that regard in this country and that something should be done about it. We are getting at the facts by way of several different lines of inquiry. If it develops that

See INTERVIEW p. 4

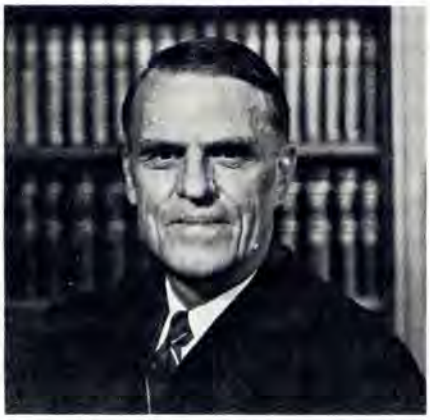
NEW CHIEF JUDGES TAKE OFFICE IN FIFTH AND EIGHTH CIRCUITS

Fifth Circuit. On December 10th James P. Coleman became Chief Judge of the Fifth Circuit, which, with 26 authorized judgeships, is the largest in the system. He succeeds Judge John R. Brown who vacated the chief judgeship upon becoming 70, as required by statute. Judge Brown will continue service in the Fifth as an active judge. Judge Brown was appointed to

See CHIEF JUDGES p. 9

ADMINISTRATIVE CONFERENCE OPPOSES BUMPERS AMENDMENT

The Administrative Conference of the United States has voted its opposition to legislation, such as the Bumpers amendment, which would alter the presumption of validity that attaches to an agency rule or regulation, and, in legal challenges, would require the government to prove a rule's validity by a preponderance of the evidence. At its semi-annual meeting held on December 13 and 14, the Conference adopted resolutions (1) opposing any legislation that would alter or reverse any presumption of validity of agency rules and (2) labeling as "unwise" any congressional judgment that judicial deference to agency expertise is never warranted.



Judge Carl McGowan, (above) of the U.S. Court of Appeals for the D.C. Circuit, is the newly appointed liaison member of the Administrative Conference of the U.S., representing the Judicial Conference of the U.S.

In related action, the Conference rejected a third proposed resolution which would have endorsed continued study of the circumstances in which and the degree to which courts accord deference to agencies. While no objection to a study *per se* was voiced by members speaking at the Conference, there was concern expressed that a call for further study might be perceived as a qualification of the Conference's other two resolutions opposing the Bumpers amendment or similar legislation.

The amendment, sponsored by Sen. Dale Bumpers (D-Ark), is part of the Federal Courts Improvement Act of 1979, S. 1477, which passed the Senate on October 30, 1979 and is presently before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. The bill would amend section 706 of the Administrative Procedure Act and proscribe judicial deference to agency expertise when a rule is under review: "There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any rule or regulation is drawn into question . . ., the court shall not uphold the validity. . . unless such validity is established by a preponderance of the evidence shown."

In this regard, the amendment differs from previous legislation introduced by Senator Bumpers. Earlier bills had called for *de novo* judicial review only of questions of law, such as an agency's interpretation of the statute it administers. Although the language of the present bill appears broad, a report prepared for the Conference noted that comments made in the Senate by Senator Bumpers and other proponents of the amendment indicate they believe that the current amendment would abolish judicial deference only to agency interpretations of law, not fact or policy. Uncertainty as to the intentions of the bill's sponsors was a matter of major concern to many of the members speaking during the Conference.

Recently, Senator Bumpers has stated in testimony before the House that he has received a number of inquiries as to the exact meaning of his amendment. Following consultation with the American Bar Association and the Business Roundtable, he reported that he has several changes to offer in the language of his amendment. First, he would change the standard of review employed by a court in reviewing questions of fact from preponderance of the evidence to substantial evidence. Second, he would make clear that, while a court may chose to defer or not defer to agency expertise on questions of agency interpretation of substantive law or on questions of procedure, no deference to questions of an agency's jurisdiction would be allowed. At this time, these changes have not been incorporated into new or existing bills.

HARVARD LAW SCHOOL SUMMER PROGRAM

At its December meeting, the FJC Board approved continuation of the experimental program by which the Center will provide financial support to a small number of judges to attend the Harvard Law School Summer Program of Instruction for Lawyers. The Program is scheduled to be held on the Harvard campus from July 14-26. Center support covers tuition, travel and subsistence, consistent with government travel regulations.

The program provides intensive instruction in such substantive legal areas as antitrust, federal jurisdiction, and administrative law. Appellate and district judges who wish to apply for Center support and have not done so should write as soon as possible to Kenneth C. Crawford, Director of the Center's Division of Continuing Education and Training.

Selection will be made by a Committee of the Center's Board.

CALENDAR from p. 10

Jan. 25 Joint meeting of Judicial Conference Committee on Ethics and Administrative Panel on Financial Disclosure and Judicial Activities; Palm Beach Shores, FL

Jan 25. Judicial Conference Committee on the Administration of the Bankruptcy System; Washington, DC

Jan 28-29 Judicial Conference Committee on Court Administration; Palm Beach Shores, FL

Jan 28-29 Judicial Conference Committee on Intercircuit Assignments; Palm Beach Shores, FL

Jan 28-30 Fiscal Workshop for Bankruptcy Clerks; Montgomery, AL

Jan 28-30 Seminar for Supervising U.S. Probation Officers; Atlanta, GA

Jan. 30 Judicial Conference Committee on the Budget; Palm Beach Shores, FL

Jan. 31-Feb. 1 Judicial Conference Committee on the Administration of the Federal Magistrate System; Palm Beach Shores, FL

Jan. 31-Feb. 1 Procurement & Contracting Workshop for Bankruptcy Clerks; Montgomery, AL

Jan. 31-Feb. 1 Workshop for District Judges (CA-8 and CA-10); Phoenix, AZ

Feb. 4-5 Judicial Conference Committee on Rules of Practice and Procedure; Washington, DC

Feb. 4-7 Introduction to COURTRAN II STARS Program; Washington, DC

Feb. 4-8 COURTRAN II Criminal Coordinator Advanced System Training; Washington, DC

Feb. 6-8 Advanced Seminar for U.S. Magistrates; Reno, NV

Feb. 9 Judicial Conference Committee on Records Disposition; New Orleans, LA

Feb. 14-15 CRIMINAL: STARS Advanced Training and Workshop; Washington, DC

TRADE ACT from p. 1

administering authority, or the United States International Trade Commission. The law also establishes the scope of the Customs Court's review in both interlocutory and final determinations. The category of persons who have standing to challenge antidumping and countervailing duty determinations is expanded to include, in addition to manufacturers, producers, or wholesalers in the United States, certified unions, and trade associations.

Separate and apart from the changes made in the antidumping and countervailing duty laws, the Act also provides increased access to the Customs Court by increasing the number of parties who will have standing in matters involving the appraised value, classification, or rate of duty on importations.

Finally, the Act gives the Customs Court exclusive jurisdiction to review determinations made by the Secretary of the Treasury concerning the "country of origin" of products covered by the Agreement on Government Procurement.

The proposed Customs Courts Act of 1979, S. 1654, which passed the Senate on December 18, will provide further procedures for implementing the judicial machinery created by the Trade Agreements Act.

Feb. 14-16 Seminar for Assistant Federal Defenders; Los Angeles, CA

Feb. 19-22 COURTRAN: Advanced Criminal Training; San Francisco, CA

Feb. 19-22 Effective Productivity for Court Personnel; San Diego, CA

Feb. 25-27 Fiscal Workshop for Bankruptcy Clerks; Amarillo, TX

Feb. 28-29 Procurement & Contracting Workshop for Bankruptcy Clerks; Amarillo, TX

NOTEWORTHY

A new Clerk of Court has been announced for the United States Court of Appeals for the Eighth Circuit: Robert St. Vrain. Mr. St. Vrain was Clerk of the Missouri Court of Appeals, Eastern District. CA-8's former clerk, Robert C. Tucker, retired last month.

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Word Processing World, a publication circulated among users and vendors of word processing equipment, this year started a program which calls for annual awards to those individuals or organizations who "demonstrate a legitimate interest" in advancing the word processing concept. The United States Court of Appeals for the Third Circuit received one of the awards "for its pioneering in setting up an electronic mail network for handling the thousands of lengthy documents that must be prepared and transmitted between participating judges in its three-state territory." Michael Greenwood of the FJC's Innovations and Systems Development Division, who assisted with the design and implementation of the program, received the award on behalf of the Circuit.

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Chief Judge Robert F. Peckham, of the Northern District of California, is writing a history of that Court. The Judge is at the fact-gathering stage now and is interested in hearing from anyone having information of historical value—on unusual cases tried in that jurisdiction, sites where the Court held hearings, or articles on the Court. The address: U.S. District Court, San Francisco, California 94102.

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Dean Jenks at ABA reminds that it is not too early to start plans for Law Day-U.S.A., which is observed each May 1st. This year's theme is "Law and Lawyers—Working for You," chosen to give the legal community the opportunity to attack the misapprehensions and lack of knowledge that keep people from participating in the justice system.

INTERVIEW from p. 1

there is indeed a serious lack in this regard, if the evidence shows that there are difficulties in finding acceptable lawyers to handle claims of a few thousand dollars — as I believe we may find — then something should be done.

Whether rich or poor or in the middle, people with moderate-size claims should be able to find lawyers to help prosecute or defend their interests.

There are several related projects in the Office that are concerned with easing the flow of civil litigation and with improving people's access to justice. First, we have in progress a large-scale study of

"Diversity jurisdiction has outlived its usefulness and should be abolished in whole or in substantial part."

civil litigation by an outside group. The Office has funded a consortium of research scholars at the Universities of Wisconsin and Southern California in an operation called the "Civil Litigation Research Project." We have granted the consortium $1,600,000, by far the largest amount of any OIAJ-funded project. This study will investigate the movement of civil cases through federal and state courts in five sites. The group will try to establish what factors influence the rate of movement and also the costs of litigation in these cases. The information the research will produce promises to throw important light on the question of affordability of civil suits.

We have many other projects that relate to this question. Some are in the research stages and others are in the development and legislative proposal stages. Among the latter are the court improvements package, the diversity bill, the arbitration bill, the Dispute Resolution Act, and so on.

Would you opt for priority in certain civil cases in the federal courts?

No. On the civil side, there are already more than 40 statutes that purport to give priority treatment to the actions that are brought to enforce rights created by those statutes. The situation reminds me of the old legend of the statute — in Kansas, I believe — providing that when two vehicles approach an intersection, both must stop and neither may proceed until the other has gone forward. We now have that situation with some 40 federal statutes. A cause of action of type A is given priority, then a claim of type B is given priority, another statute gives claim C priority, and so on. Which has priority over which? The whole thing becomes a meaningless game of leapfrogging in place.

Many of the areas of research and programs for the federal judiciary which you are studying would appear to overlap those matters which concern the Federal Judicial Center. Do you feel there are areas of duplication?

I believe that there are areas where our work reinforces theirs and vice-versa. The fact that on occasion this Office has studied the same sort of problem that the Federal Judicial Center studies doesn't mean that there is duplication. Many of these problems have so many facets that one research group will come at the matter in one way and another group in a completely different way. That probably has happened on a limited number of occasions in connection with the work of the Federal Judicial Center and this Office, and it is all to the good.

Leo Levin and the Center's staff and the people of this Office have had a fine relationship. We are in close touch and we make every effort to avoid redundant work. I believe no useless duplication has occurred.

The interest of the Federal Judicial Center is, as I understand it from what Professor Levin has told us, a rather different one from the interest that we have. In the Department of Justice, our interest stems from two circumstances. One is that we are the principal litigant in the federal courts. We in the Department have a monopoly on the criminal business before the federal courts, and we have one third or more of the civil business.

We therefore have a special interest and perspective regarding the work of the federal courts, as their Number 1 litigant. The Department also serves a kind of ministry-of-justice function. In that role we have a concern for enlarging all people's access to the courts, not just the Government's. We also have some concern for the affordability and pace of justice once the cases are in the courts.

You have been very active in many organizations that work for the improvement of judicial administration in both state and federal areas. Based on this and other personal experiences in this area, do you feel state-federal judicial relations are as good as they could be?

I believe that state-federal relations are in a much better state of repair than they were just ten or a dozen years ago when there was a good deal of irritation on the states' side because of then-new decisions of the Supreme Court that

See INTERVIEW p. 5

INTERVIEW from p. 4

placed burdens and sometimes an onus — as the state judges felt—on the state courts. Today, the situation is far more productive than the term "good relations" would indicate. As often happens when we tackle a federal problem, we look to the experience of state courts for help and guidance and for information on what might be useful and what might not be useful as solutions to the federal problem. The opportunity to learn from the states' experiences is a very valuable one. The more cooperation there can be in the joint address of common problems the better, obviously.

I believe we ought to try to create more agencies than we now have for jointly addressing the common questions of the federal and state systems. The judges of the federal and state courts tend to separate out into, for example, a National Conference of State Trial Judges and a National Conference of Federal Trial Judges. I much prefer the model of the Appellate Judges' Conference, which includes both federal and state judges. On the occasions when I have been with the Appellate Judges' Conference, I thought it very fitting that there is a forum where judges can come to discuss common problems, whether these originate in the federal or the state setting. That is the kind of organization we should stimulate and support.

Familiar as you are with the history of the Law Enforcement Assistance Administration and alternative proposals to help the courts and to reduce the rate of crime, what do you see in the future for LEAA if plans go forward to create a State Justice Institute, a National Institute of Justice, or an Office of Justice Assistance, Research, and Statistics (OJARS)? Will any one of these eventually phase out LEAA?

We ought to know the answer to that in just a few weeks. It is planned that LEAA will have a continuing role even after the creation of these other entities that you mentioned. [This legislation, S. 241, was signed into law by The President on Dec. 27, 1979.]

How is the State Justice Institute that Senator Heflin and Chief Justice Utter of Washington have both talked about, and that was apparently endorsed by the Conference of Chief Justices, different from OJARS? OJARS sounds like it would be much bigger than that embraced in the concept calling for a State Justice Institute.

As I understand it, the pending legislation calls for the reorganization of LEAA into three operating bureaus, one of which will continue to bear the name LEAA and discharge the block grant-making function. Another would be concerned with statistics, and a third would be the National Institute of Justice. The National Institute of Justice will make grants to the states.

Even if you have an OJARS?

OJARS would be the entity that would coordinate the activities of these three organizations.

Do you see Congress coming up with the vast amounts of money that would be needed for something as all-inclusive as that?

My understanding is that what will happen essentially is that LEAA's function of allocating funds on a discretionary basis will be divided between NIJ and the statistical entity called the Bureau of Justice Statistics.

Do you see any potential value of compulsory arbitration in United States District Courts? This concept has been opposed by many, particularly by Senator Howell Heflin of the Senate Judiciary Committee, who has criticized arbitration on both constitutional and policy grounds. (See *The Third Branch,* Vol. II, No. 5, May 1979.) He said that the proposed arbitration program lacks what a system of justice must have (1) a court; (2) a judge; (3) that the judge take an oath and (4) that the trier of facts take an oath. How do you respond to such criticism?

I do see value in the compulsory arbitration process and I am for it in the federal courts. The problems that Senator Howell Heflin has spoken about seem to me to fall into two categories. The first deals with the question whether the Seventh Amendment is offended by requiring that the

See INTERVIEW p. 6

ADDITIONAL *BENCH BOOK* MATERIAL DISTRIBUTED

Several new chapters of the *Bench Book for United States District Court Judges* are being distributed this month. The new material, consisting of all nine chapters of Section 4, "Useful Materials," will supplement the six chapters previously mailed out to district court judges in December. Distribution of additional sections and chapters will be made as they are completed.

The *Bench Book,* a product of the Federal Judical Center, is being prepared under the direction of a committee of three district court judges who have served on the Center's Board.

INTERVIEW from p. 5

litigants in a jury-triable case go to arbitration before they go to the jury trial. As I recall his view, it is that putting an obstacle in the way of a jury trial may infringe the Seventh Amendment. His second concern is that

"Any time a lawyer is confronted with a choice, the lawyer will tend to stay with the standard traditional process rather than opt for something different."

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even if no cost penalty is assessed against the party who wants a *de novo* trial after going to arbitration, requiring arbitration as a prerequisite *per se* penalizes the right to go to court. If a jury trial is involved, he thinks this result may invade the Seventh Amendment guarantee; and if no jury trial is involved, he thinks the arbitration is an unsound, unwise and unjust obstacle to put before the litigant. His view, as I understand it, is that no deflection of cases from their normal road toward the courtroom is permissible. He thinks, as I get it, that the mere intrusion of another proceeding before the litigants get before a judge is impermissible. In my opinion, the arbitration requirement is not constitutionally impermissible and I so wrote him before I assumed this office.

What I said then and what I believe still is that if the cost of getting the trial *de novo* before an arbitration is non-existent, that is, if after arbitration a litigant is free to go before a jury, and need not pay anything, I see no problem. It is a procedural rule that has been imposed; it's true it may require doing something that is not now required under the rule, but I take it that one of the established principles about the Seventh Amendment and the right to a jury trial in the federal courts is that as long as the substance of the jury trial is safeguarded there is no limitation on changing some of the procedures and techniques for invoking the right. I would see putting arbitration ahead of the jury trial right as merely establishing a different procedure and a different technique and not infringing the substance of the right.

Senator Heflin would allow arbitration only on a consent basis, but one of the things we find is that if you say to litigants, and particularly to their lawyers, "You may do this if you are willing to," they don't avail themselves of the opportunity.

Any time a lawyer is confronted with a choice, the lawyer will tend to stay with the standard traditional process rather than opt for something different. The lawyer is anxious to avoid any unexpected, bizarre or disastrous result on the principle of taking the known evil rather than an unknown danger.

You played an important role in the preparation of a report on the needs of the federal courts about three years ago as a consultant for the Department of Justice. Among other things, this report recommended expansion of the number of federal judges and administrative tribunals and abolition of diversity jurisdiction. The first of these recommendations has been largely implemented, but the second has not yet been acted upon. What are your views on the concept of diversity jurisdiction and the likelihood that diversity jurisdiction legislation will be passed soon?

I think that diversity jurisdiction has outlived its usefulness and should be abolished in whole or in substantial part. The Department of Justice has taken the alternative position that there should be an abolition of the in-state plaintiff diversity jurisdiction so that the plaintiff would not be able to start an action in the federal court in the same state in which he or she resides. I think that either of those proposals should be supported.

The total number of diversity cases runs over 30,000. They represent about 20% or more of the civil business of the federal courts. If they were all removed — all of them — to the state courts, they would fall into systems which in the aggregate have on the order of eight to ten million general jurisdiction cases. They would not make anything like a dent; they would be almost *de minimis*. The argument is made that they would fall heavily upon busy courts, but my impression is that studies have been made to see whether that is so, and my recollection is that they have shown that there would not be any serious overloading of already busy state courts. Thus, on the question of relative workload, the state courts are ever so much more appropriately suited to absorb these cases.

On the other question of merit, so to speak, of diversity jurisdiction, I think that the issues are very well known. It's hard to make a case for the idea that there is local prejudice against out-of-state residents of the kind that was feared when diversity jurisdiction was written into the Constitution.

See INTERVIEW p. 7

INTERVIEW from p. 6

Complex and protracted cases continue to plague the federal courts, with some cases continuing for many years. Can you suggest any remedies to speed up litigation and save both time and money for the courts and litigants?

As you know, the federal courts already have differential treatment for protracted cases. They have the Multidistrict Litigation Panel and the Manual for Complex Litigation, which provide a separate process for handling protracted cases and various procedures and special rules applicable to cases that straddle districts and that involve many litigants, many law firms and so on. That is a step in the right direction.

Another thing that could be done in the case of non-multidistrict, big or protracted cases is to differentiate the treatment which is to be expected in those cases from the treatment that ordinary size cases can expect. If serious attention is given to a differentiation in the procedures applicable to those mammoth cases, I believe we can make more progress than we have so far. So far we have been committed to the idea that all cases deserve the same sort of rules and essentially the same kind of processing. It seems to me that we must leave that commitment because it doesn't work, at least for the very large cases.

As for cutting down on costs, we are looking into suggestions here in OIAJ for ways of raising incentives and motivations that would make lawyers want to dispose of cases more quickly rather than wanting them to drag out. I think that the present method of charging by time and the devotion to the billable hour concept in litigation charging, in the cases other than contingent fee cases, has been to some degree responsible for the large stretch-out in the costs of major litigation.

My hypothesis is that each lawyer has a strong professional instinct to prepare thoroughly on the law and facts; to turn over yet another stone; to look up more law; and to search out the answer to all of the problems that occur to a lawyer while preparing a case for trial or appeal. When that normal and commendable professional instinct is wedded to a fee-charging system that rewards the lawyer for every hour or segment of an hour the lawyer spends on the case, you have a formidable combination; that is, you have a reinforcement of the professional instinct by the lawyer's economic interest.

When that occurs there is a tendency for more and more work to be done. It is impossible to gainsay the usefulness of this additional work; that is, it is incremental. The question is whether it is sufficiently incremental in time and expense. What I am proposing is that we look into the question of whether there are other basic modes for compensating lawyers than on a strict hour and fraction-of-an-hour basis. If we can come up with some ideas that are fair and palatable and effective, we may be able to do something about cutting fees in the mammoth cases down to size.

One of the problems of the present system, and this may in part answer the question about the protracted cases, is that a defendant who actually or probably owes the plaintiff a sum of money can scarcely be worse off than to pay the plaintiff that money today. If the defendant delays, the defendant will have the use of the money without paying the enormous interest rates that prevail today; and very often without paying the plaintiff anything in the way of interest. In the second place, a lot of things can happen to the plaintiff's claim between today and the time when the case comes to judgment. Thus, there is a build-up of incentives favoring delay by defendants — putting off the day of judgment by appeals, by large-scale pre-trial proceedings, or by whatever device. I think we have only to look within the system and we find motivations and incentives that are at cross-purposes with what the system is trying to achieve. The judicial system wants the cases to be disposed of in an expeditious manner, but the built-in incentives run in the other direction. What we have to do is to locate those incentives, see whether they make any sense in substantive terms, and if they don't, we must purge them from the system.

Discovery is a good example of what I was talking about. The lawyer's instinct is to prepare 110%, and the happy coincidence is that he or she is going to get paid for every red second. Certainly from the point of view of an outside observer, it often appears that the lily has been painted twice over or more by some of the discovery work. From the point of view of someone in the case, who sees the thing very differently, it may be that the lawyer's conscience is very clear as she or he goes ahead with more and more discovery. That is the difficulty: the different perspective a lawyer has on the question whether the work is necessary.

CHIEF JUSTICE BURGER'S 1979 YEAR-END REPORT RELEASED

The Chief Justice's Year-End Report for 1979, released on December 31st, starts with a thought often repeated as a reminder to the legal profession: "The purpose of any legal system and the responsibility of those that operate it is to produce the best quality of justice, with minimum delay, at the lowest possible cost for those who use it."

Chief Justice Burger called on the legal profession and the legislatures to be "energetic and imaginative in seeking new methods, practices and procedures...."

Some of the 1979 developments reported by the Chief Justice are:

• **Litigation Costs and Control.** Many litigants may be denied access to the legal system because "costs of litigation make all but large claims uneconomical to process." One encouraging effort under way is the American Bar Association's Action Commission to Reduce Court Costs and Delay, a group considering proposals to lessen abuses in pretrial discovery, make the discovery process more effective, and improve case management in the criminal justice area.

• **Judicial Workload and Productivity.** The Chief Justice referred to the recent increase of approximately 25% in the total number of federal judges, but pointed to an unfortunate lag of many months which sometimes occurs in filling vacancies. This has led to a reduction in the individual yearly caseload of District Judges for the first time since 1970. However, new case filings have increased at an average of 8% per year over the past twenty years. As for the Courts of Appeals, the 6.9% increase in the number of cases closed over last year has been offset by the increase in new filings, resulting in a 7.8% overall increase in pending cases last year. Studies of how to improve efficiency and exploration of alternatives to litigation in both the state and federal courts must continue.

• **Arbitration.** The Federal Judicial Center, in cooperation with the Department of Justice, is monitoring and evaluating a two-year program in three federal judicial districts for court-annexed arbitration of certain civil cases. Comparisons will be made with experiences in the state courts to determine whether time and costs can be substantially reduced.

• **Protracted Litigation.** In the federal courts alone, for the year ending June 30, 1979, there were 31 protracted civil jury trials averaging 35 days in length. Though relatively few in number, even one such case can disrupt the scheduling for a district. Jury duty creates a problem of time and convenience for the jurors. To meet this common problem, studies are under way by the Federal Judicial Center, the National Center for State Courts, the Conference of Chief Justices, and the Judicial Conference of the United States. In addition, the Judicial Conference of the United States at its meeting last September authorized appointment of a special panel of senior judges who can be assigned to assist when help is badly needed in a given district. The Judicial Conference action authorized a subcommittee of three District Court judges and two judges of the U.S. Courts of Appeals which, it is anticipated, will join the committee constituted by the Conference of Chief Justices in a study of this problem.

• **COURTRAN.** The use of the federal courts' computer system is being adapted to make good use of technology to advance comprehensive case-flow management of dockets. Programs include the speedy trial accounting and reporting system (STARS), the Court of Appeals index system (CAIS), and the District Court Index System.

• **Continuing Judicial Education.** The Chief Justice reported an increased interest in, expansion of and support for continuing judicial education. In the year 1979 the Federal Judicial Center sponsored a total of 131 workshops, conferences and seminars reaching some 5,000 participants, or nearly half of all federal court personnel.

• **Brookings Conferences.** These conferences provide a unique forum for representatives from the three branches of government—the House and Senate Committees on the Judiciary, representatives of the Department of Justice, and representatives of the Judicial Conference of the United States—to explore the major problems connected with the operation of the courts. [The third annual Williamsburg Conference on the Administration of Justice, under the auspices of the Brookings Institution, was held this month.]

• **Workload of the Supreme Court.** The Chief Justice referred to the need to relieve the Supreme Court from its "overwhelming burden of cases." He noted that two groups, the Study Group on the Caseload of the Supreme Court, chaired by Professor Paul Freund, and the Commission on Review of the Federal Court Appellate System, chaired by Senator Roman Hruska, had recommended creation of a new national intermediate appellate court. He called for considera-

See REPORT p. 9

WAYNE JACKSON, PROBATION CHIEF, TO RETIRE

Wayne P. Jackson, who has been Chief of the Probation Division of the Adminsitrative Office since 1972, has announced that he will retire on February 29th.

Mr. Jackson has an illustrious background of both education and experience, He earned a B.A. and an M.A. in psychology at the Univeristy of Tulsa, and since graduation his career has run parallel with continuing education.

Awards and honors have come to Chief Jackson over the years. One award which took him out of this country was a designation in 1960 by the English-Speaking Union of the United States. As their Winston Churchill Traveling Fellow, he spent three months studying probation, parole and prison practices in England, Northern Ireland, Scotland, Wales and the Channel Islands. He has represented the U.S. Probation System through attendance at a number of international conferences on corrections, and he currently sits on boards and committees of eight correctional groups.

Wayne Jackson has earned every advancement in his career through accomplishments and imaginative application of correctional principles. A look at the record shows he worked as a policeman, as a juvenile probation counselor, as a U.S Probation Officer (in Chicago), as Assistant to the Chief of the Probation Division, and finally, as Chief of this Division.

Ties with the Army Reserve have been continuous and today Mr. Jackson holds the rank of Brigadier General.

Present plans for this young retiree (50) include some part-time consulting work in Chicago and Washington.

JAMES P. COLEMAN

DONALD P. LAY

CHIEF JUDGES from p. 1

the Fifth Circuit Court of Appeals in 1955 and he became Chief Judge in 1967.

Chief Judge Coleman, 65, began his service in the Fifth Circuit August 16, 1965. He was born in Ackerman, Mississippi, and has resided there continuously since that time. He received his LL.B. in 1939 from George Washington University and in 1960 this school conferred upon him an Honorary LL.D.

Judge Coleman has served his native state in a number of positions. He was elected Governor and held that position from 1956-60. Additional public service included a stint as a Representative in the State Legislature, Attorney General of the State, Commissioner of the Supreme Court, Circuit Judge and District Attorney.

Eighth Circuit. Judge Floyd R. Gibson, who has been Chief Judge of the Eighth Circuit since August 31, 1974, elected to take Senior Judge status January 1st, and has been succeeded by Chief Judge Donald P. Lay.

Chief Judge Lay is a graduate of the University of Iowa Law School, and he received his J.D. Degree in 1951. He practiced law in Omaha for 15 years and began duty in the Eighth Circuit in 1966. He is the eleventh chief judge to have served the Circuit and only the second chief judge from Nebraska. Judge Lay was a consultant to the FJC's Advisory Committee on State-Federal Relations from 1968-70; he was a member of the Judicial Conference Committee on Trial Practice and Technique; and for two years on the Advisory Committee on Appellate Rules.

The Eighth Circuit, established in 1891, has nine authorized judgeships.

REPORT from p. 8

tion of two types of relief: (1) Congress should immediately end the mandatory jurisdiction of the Supreme Court and provide that all cases be brought by certiorari; and (2) serious study should be made of major structural changes to aid the Court's work.

The Chief Justice closed with a positive, optimistic tone: "The most pressing problems of the judicial systems are procedural. American law is basically sound. . . . The computer programs (COURTRAN) have substantially improved judicial performance. . . . Juror utilization programs have saved on costs, saved time and reduced juror hostilities over wasted dates of attendance. Collectively, these programs—and the industry and dedication of judges and staffers—account for the 36% increased output of District Courts—a record unparalleled anywhere else in government."

And a final word: "To perform their mission is what I and my colleagues are dedicated to, and we will spare no appropriate effort to this end."

PERSONNEL

NOMINATIONS

Harry T. Edwards, U.S. Circuit Judge (CA-DC), Dec. 6
Earl B. Gilliam, U.S. District Judge, S.D. CA, Dec. 7
Henry Woods, U.S. District Judge, E.D. AK, Dec. 14
Paul A. Ramirez, U.S. District Judge, E.D. CA, Dec. 14
Richard W. Arnold, U.S. Circuit Judge (CA-8), Dec. 14
Hipolito F. Garcia, U.S. District Judge, W.D. TX, Dec. 19
Clyde F. Shannon, Jr., U.S. District Judge, W.D. TX, Dec. 19

CONFIRMATIONS

Dorothy W. Nelson, U.S. Circuit Judge (CA-9), Dec. 19
Terry J. Hatter, Jr., U.S. District Judge, C.D. CA, Dec. 19
Edward D. Price, U.S. District Judge, E.D. CA, Dec. 19
Richard A. Enslen, U.S. District Judge, W.D. MI, Dec. 20
William M. Kidd, U.S. District Judge, S.D. W. VA, Dec. 20
L.T. Senter, Jr., U.S. District Judge, N.D. MS, Dec. 20

APPOINTMENTS

George J. Mitchell, U.S. District Judge, D. ME, Nov. 2
Lee West, U.S. District Judge, W.D. OK, Nov. 5
Harry Pregerson, U.S. Circuit Judge (CA-9), Nov. 6
Juan G. Burciaga, U.S. District Judge, D, NM, Nov. 9
Neal P. McCurn, U.S. District Judge, N.D. NY, Nov. 14
Thomas A. Clark, U.S. Circuit Judge (CA-5), Nov. 16
Stephanie K. Seymour, U.S. Circuit Judge, (CA-10), Nov. 16
Arthur L. Alarcon, U.S. Circuit Judge (CA-9), Nov. 20
Anne E. Thompson, U.S. District Judge, D. NJ, Nov. 20
Alan N. Bloch, U.S. District Judge, W.D. PA, Nov. 21
H. Lee Sarokin, U.S. District Judge, D. NJ, Nov. 21
Barbara B. Crabb, U.S. District Judge, W.D. WI, Nov. 26
Scott E. Reed, U.S. District Judge, E.D. KY, Nov. 27
Robert H. Hall, U.S. District Judge, N.D. GA, Nov. 27
Lucius D. Bunton, III, U.S. District Judge, W.D. TX, Nov. 29
Harry L. Hudspeth, U.S. District Judge, W.D. TX, Nov. 29
Milton L. Schwartz, U.S. District Judge, E.D. CA, Dec. 3
Dudley H. Bowen, Jr., U.S. District Judge, S.D. GA, Dec. 5
Peter H. Beer, U.S. District Judge, E.D. LA, Dec. 7

ELEVATIONS

John V. Parker, Chief Judge, M.D. LA, Nov. 27
James P. Coleman, Chief Judge (CA-5), Dec. 11
Wendell A. Miles, Chief Judge, W.D. MI, Dec. 31
Donald Lay, Chief Judge (CA-8), Jan. 1

DEATH

Murray I. Gurfein, U.S. Circuit Judge (CA-2), Dec. 16

AO COSFJC calendar

Jan. 22-23 Judicial Conference Committee on the Administration of the Bankruptcy System; Washington, DC

Jan. 22-23 COURTRAN II: Advanced Criminal Training; Detroit, MI

Jan. 22-24 Judicial Conference Committee on Ethics; Palm Beach Shores, FL

Jan. 22-25 Effective Productivity for Court Personnel; Oxford, MS

Jan. 23-25 Judicial Conference Committee to Implement the Criminal Justice Act; San Antonio, TX

Jan. 24 Judicial Conference Advisory Panel on Financial Disclosure and Judicial Activities; Palm Beach Shores, FL

Jan. 24-25 Judicial Conference Committee on the Administration of the Probation System; Palm Beach Shores, FL

Jan. 25 Judicial Conferen[illegible] Committee for the Implementation on the Admission of Attorneys to Federal Practice; Palm Beach Shores, FL

See CALENDAR p. 3

RESIGNATION

Shirley M. Hufstedler, U.S. Circuit Judge (CA-9), Dec. 6

THE THIRD BRANCH
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UPDATE ON FEDERAL JUDGES' LITIGATION

The following is a report of developments in the four pending cases involving judicial salaries and financial disclosure for federal judges.

Judicial Compensation. The first of these cases is *Will v. United States* ["Will I"] filed in the Northern District of Illinois in 1978 and now pending before the Supreme Court, No. 79-983. This class action, brought by 13 district court judges, seeks recovery of congressionally frozen pay raises for the periods October 1, 1976 through March 1, 1977 and October 1, 1977 through September 30, 1978. District Judge Stanley J. Roszkowski granted plaintiffs' motion for summary judgment in August of last year, holding that the congressional action violated the Compensation Clause of the Constitution.

This holding entitled the Government to take a direct appeal to the Supreme Court under 28 U.S.C. §1252. In its jurisdictional statement, filed December 21, 1979, the Government contended that the 1976 and 1977 statutes in question rescinded the otherwise

See LITIGATION p. 8

THREE BRANCHES OF GOVERNMENT DISCUSS COURT LEGISLATION AT BROOKINGS SEMINAR

The Brookings Institution sponsored its third annual Seminar on the Administration of Justice last month in Williamsburg, Virginia, for members of the Judiciary Committees of the Congress and key personnel in the federal courts and the Department of Justice. Each year these seminars have focused on the legislative agenda as it affects federal judicial administration, including such fundamental issues as changes in sentencing structure, as well as seemingly mundane matters such as increases in the per diem allowance for judges in travel status. The first seminar grew out of comments of Chief Justice Burger on the need for greater communication among the branches of government and was developed by Mark W. Cannon, Administrative Assistant to the Chief Justice, and Warren I. Cikins, Senior Staff Member of Brookings Advanced Study Program.

The seminars are planned by representatives of both houses of the Congress, the judicial branch, and the Justice Department.

The third seminar provided a forum for consideration of the following issues:

— **The Courts and Regulatory Reform, The Bumpers Amendment.** The seminar reviewed various pending proposals to tighten judicial review of administrative agency decisions. These were discussed, not only in light of their potential impact on the courts, but also in terms of the various and at times competing objectives of proponents of such measures.

— **Judicial Discipline and Tenure — A Progress Report.** The conferees heard a report on the operation of the Ninth Circuit's rules for handling complaints of judicial unfitness. Such rules have been adopted by each Circuit, pursuant to Judicial Conference directive, and the Congress is currently consider-

See BROOKINGS p. 3

STATE OF THE JUDICIARY: 1980

The Chief Justice delivered his State of the Judiciary report at the Midyear Meeting of the American Bar Association February 3. This year the Chief Justice reflected on the decade of the 1970s and called on the members of the legal profession to take stock and look ahead.

Highlighting both successes and problems in the field of judicial administration, the Chief Justice touched on several areas of concern to the courts and to the legal profession generally.

Greater self-discipline by the profession, he said, is a problem still a long way from solution. "Instruction in professional ethics should permeate the entire educational experience beginning with the first hour of the first day in law school. . . . The function of legal education must be more than simply producing highly-skilled legal mechanics."

The rising costs of lawyers' services was another problem identified. He noted that "There is a risk that lawyers may be 'pricing themselves out of the market.'

See JUDICIARY p. 4

EBERSOLE RETURNS TO PRIVATE INDUSTRY; NIHAN, ALLEN ASSUME NEW POSTS AT CENTER

FJC Director A. Leo Levin has announced Board approval of the appointment of Charles W. Nihan as Deputy Director of the Center. As Deputy, Mr. Nihan succeeds Joseph L. Ebersole, a member of the Center's senior staff since 1969, who resigned in January to return to private industry. Mr. Nihan is in turn succeeded by John E. Allen as Director of the Center's Division of Innovations and Systems Development.


NIHAN

Mr. Nihan has been with the Center since 1972, first as Assistant Director for Technology in the Innovations and Systems Development Division, and then as Director of that Division since 1975. In that capacity, he has worked closely with judges and other personnel in most of the courts of the federal judicial system, in connection with the design and testing of the various computer applications the Center has developed as part of its Courtran program.

Nihan, 38, holds graduate degrees in computer science and Russian studies and he earned his J.D. from Georgetown University Law Center. Prior to joining the Center, he held various management positions in the Department of Defense beginning in 1963.


ALLEN

Mr. Allen, 40, has served as manager of the Courtran project since joining the Center in 1975 —and thus is also well known to many in the federal courts—and had recently been named Deputy Director of the Innovations and Systems Development Division. He has an M.A. from American University, and is completing requirements for his doctorate. Before joining the Center, Mr. Allen served on Defense Department computer, electronic, and telecommunications projects.


EBERSOLE

Mr. Ebersole joined the Center in its infancy, and, as Professor Levin said in acknowledging his resignation, he "helped shape the institution in its formative years, and, as it grew, added immeasurably to its capacity to serve. Few people have equalled his contributions to the Center." Ebersole came to the Center from private industry, where he gained diverse experience in quality control, electronic research and development, educational research information systems, and judicial administration. He served as Director of the Innovations and Systems Development Division from 1969 to 1975, and was largely responsible for the basic design and construction of the Courtran program, most particularly its Criminal Caseflow Management System.

Mr. Ebersole has assumed the position of Director of Special Projects for Mead Data, Inc., serving in that organization's Washington, D.C. office.

THIRD BRANCH INDEX AVAILABLE

All subscribers to *The Third Branch* should have received under separate cover an index to Volume 11, covering January through December 1979. References in the index are to the title of the article and the first page on which it appeared.

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

JUSTICE WILLIAM O. DOUGLAS EULOGIZED

Mr. Justice William O. Douglas, the 79th appointee to the Supreme Court of the United States, died on January 19 at the age of 81. The Justice served on the Court for over 36 years, longer than any other justice in history.

The funeral, held at the National Presbyterian Church in Washington, was followed by burial in Arlington National Cemetery. All arrangements were planned with great detail by the Justice. In addition to requesting special musical selections, the Justice designated all those who were to speak at his funeral.

The eulogy delivered by the Chief Justice included quotes from a letter Justice Douglas sent to his colleagues at the time he announced his retirement. "It was," the Chief Justice commented, "a typical but less well known side of this uncommon man." Justice Douglas said in his letter:

"Those who start down a water course [on a canoe trip] may be strangers at the beginning, but almost invariably are close friends at the end. There were strong headwinds to overcome and there were rainy as well as sunny days. The portages were long and . . . some were very strenuous, but there was always a pleasant camp. . . . [But] inevitably there came the last campfire, the last breakfast cooked. . . . The greatest such journey I have made has been with you, my colleagues, who were strangers at the start but warm and fast friends at the end."

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

BROOKINGS from p. 1

ing several judicial discipline legislative proposals. They include the Judicial Conference proposal, which would, in effect, give legislative form to judicial discipline procedures now provided by circuit rules. Other proposals would establish—within the judicial branch—new bodies for judicial discipline, and even for removal. There was some discussion of practices in various states that allow each side in a case one peremptory challenge to the judge assigned.

— **Sentencing Reform.** The various proposals—now before the Congress as part of the Criminal Code Revision—to reduce unfair disparity in sentences imposed and in those actually served by federal offenders were discussed from the judicial perspective and also from that of the Bureau of Prisons.

— **Structure of the Courts.** The various pending legislative proposals for a U.S. Court of Appeals for the Federal Circuit and a Court of Tax Appeals were reviewed. This was followed by an examination of these proposals by the Chief Judges of the various courts that would be most directly affected by the legislation, as well as a review of proposals concerning the Customs Court by the Chief Judge of that Court.

— **The Effects of the Legal Explosion.** The Conference discussed a range of changes in the federal judicial office that have occurred over the last several decades, changes that to some have had the cumulative effect of transforming the federal judge from solo craftsman to the manager of a small, production-line oriented law office. In this context, there was also consideration of the range of problems that may in time impair the attraction of the federal bench, including judges' compensation and per diem allowances.

— **Attention to the Judicial Process: Final Judgment Rule and Appealability, and Problems of the Protracted Case—To Legislate or Not to Legislate.** The conferees heard a discussion on various possible changes in 28 U.S.C. Sec. 1292, to facilitate appellate review of various interlocutory orders, and to give statutory form to various case law exceptions to the final judgment rule. They were also briefed on the creation of federal and state judicial committees to consider the need for alternatives to jury trials in certain cases.

— **State-Federal Relations.** The conferees heard the views of the Conference of Chief Justices in support of a State Justice Institute to provide federal funds directly to state judicial improvement projects. The Conference has taken the position that the increase in federally imposed litigation in state courts has made a federal monetary contribution to state courts legitimate, if not essential.

BANKRUPTCY JUDGES AND MAGISTRATES TO RECEIVE *BENCH BOOK*

Upon authorization of the Board of the Federal Judicial Center, all full-time and part-time United States Bankruptcy Judges and United States Magistrates will be receiving the *Bench Book for United States District Court Judges.*

Mailing to the bankruptcy judges took place in late January. As explained in a memorandum from the Bankruptcy Division of the Administrative Office of the United States Courts, for ease of distribution the *Bench Book* is being furnished in its entirety, even though several sections will not have relevance to bankruptcy litigation.

Distribution to magistrates will be delayed for a short period until the necessary number of binders for the *Bench Book* can be printed. Mailing will probably begin early in March.

PROTRACTED CASES, ALTERNATIVES TO JURIES TO BE STUDIED

A special subcommittee of the Judicial Conference Court Administration Committee has recently been appointed to study possible alternatives to jury trials in protracted court cases. Reflecting a growing concern that protracted litigation is absorbing an ever-greater portion of the time and energy of federal courts, and is creating special problems for lay juries, the subcommittee is charged with the task of investigating the extent to which such litigation actually presents a problem, and whether it is having any significant impact on the federal courts, and possible solutions.

The subcommittee is chaired by Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals. Other members are: Judge John D. Butzner, Jr., Fourth Circuit Court of Appeals; Chief Judge Ray McNichols, District of Idaho; Judge Earl E. O'Connor, District of Kansas; and Judge Milton Pollack, Southern District of New York. All memberes of the subcommittee have had extensive experience with protracted cases.

Judge Rubin's subcommittee will work closely with the Committee on Juries in Protacted Civil Cases appointed by the Chairman of the Conference of [State] Chief Justices, Lawrence W. I'Anson of Virginia, and chaired by Edward F. Hennessey, Chief Justice of the Supreme Judicial Court of Massachusetts. The Conference of Chief Justices voted unanimously to undertake this study last August.

The Federal Judicial Center will provide a research staff for the subcommittee. The subcommittee study will begin with data from the Administrative Office of the United States Courts, and will expand to include interviews with jurors, lawyers, and judges who have participated in protracted

See PROTRACTED CASES p. 9

JUDICIARY from p. 1

This must be met by the profession, or it may well be dealt with by external forces." One factor contributing to these costs, he said, was the "misuse and abuse" of pretrial judicial processes. "Within reason, trial judges must take a more active role in the management of litigation by enforcing schedules and limiting free-wheeling pretrial activities." Referring to the high costs of printing records on appeal, the Chief Justice praised an experiment producing substantial savings conducted in the Fifth Circuit which eliminated the required filing of a printed trial record with a brief.

The Chief Justice commented on the substantial increase in the workload of the courts. There were 317 cases per district judge in 1970. It is expected that there will be 400 cases per judge in 1980, even with 117 additional district judges. The Chief Justice, therefore, advocated a change in the method of creating judgeships. "The time has come to find some new method of providing judges for the federal system when they are needed — not eight, nine or ten years later . . . . Congress should promptly consider authorizing the Judicial Conference to evaluate the need for additional judgeships and, subject to congressional veto, establish new judgeships as the needs require. There is a precedent for this kind of mechanism going back more than forty years with respect to the rule making power."

The Chief Justice noted the contributions made by the circuit executives in easing the effects of that increased judicial workload. He announced that funds are being sought to provide a counterpart of the circuit executive in each of the 15 largest metropolitan district courts. He said that the establishment of the Institute for Court Management in 1970 led to a "revolution" in the training of professional court administrators.

One area of court administration receiving insufficient improvement, he pointed out, is in the utilization of jurors' time. The Chief Justice charged that "We deal far too casually with the time of citizens called for jury duty."

The Chief Justice said that he could not report great progress in the area of criminal justice. He focused attention on the lack of deterrence, on "bail crime"—offenses committed by persons who are free on bail—and on the overall correctional system. "We must develop educational and vocational programs so that prisoners will leave correctional institutions, at the very least, trained in some marketable skill. We must encourage prisoners to "learn their way out of confinement.'"

The Chief Justice concluded with praise for the ABA's contribution to improvements in the administration of justice, and expressed his confidence that the courts will continue to have the Association's support in the years ahead.

Views of Five New Judges

PERSPECTIVE ON THE FEDERAL JUDICIARY

At the Seminar for Newly Appointed District Judges, held last January, well over 30 judges met at the Federal Judicial Center. They came from many districts: from Puerto Rico to Maine: from Washington to California. Not too surprisingly, they came from vastly different backgrounds.

The reactions of five judges as they came into the federal court system are incorporated in their replies to questions asked of them during recess periods.

PEREZ-GIMENEZ

Judge Juan M. Perez-Gimenez was a U.S. Magistrate at the time of his appointment to the District Court in Puerto Rico. The Judge also has private practice and public service (Assistant U.S. Attorney) on his record.

With your background and experience as an Assistant U.S. Attorney and a full-time magistrate, you obviously were well prepared for the transition to the U.S. District Court. Do you think this was a big advantage as you assumed office?

In my case, it definitely was. You might say that I came up the ladder of the U.S. Attorney's Office and then the magistrate system; and I like to consider that my appointment was mostly made because of that experience. I am not a political appointee. I was cleared through a judicial nominating commission in our district so I think my selection was based more on merit—ability which I demonstrated in these former positions.

When the U.S. Magistrate positions were created by Congress, legislative history shows that it was anticipated that for some magistrates it would be a stepping stone to the U.S. District Court. Was this one of the factors which attracted you to the position?

It definitely was. I always considered in my future plans the possibility of becoming a U.S. District Court Judge. After four and one-half years of practice as an Assistant U.S. Attorney I liked the excitement of being in court almost every day, but after a while you come to the conclusion that you practically learned everything that there is to learn there, and that you would like to move on. So when the new magistrate positions were created the time was right for me to move into that second position. I saw it as a wonderful opportunity to get bench experience which I thought was so necessary for a district judge.

With the infusion of 152 more judges in the federal system, this has brought enormous

See NEW JUDGES p. 5

NEW JUDGES from p. 4

space problems. Do you have adequate facilities for yourself, for your chambers, for your courtroom and your supporting personnel?

No. In that respect we are in a very sad situation. My chambers are now located in the extreme opposite, southern part of the third floor of our building and my court is going to be on the north side. So it means I am going to have to walk through a long hallway, in the public section, with my robe over my arm to get to my courtroom.

So, I will be walking by defendants, juries and attorneys. We have a brand new courthouse in San Juan which has not been used. It was completed in 1976 but there were so many problems with it, starting with security and so forth, that the judges have not moved in. We are still in the old courthouse. The Bankruptcy Court moved in about a year ago, but now the latest I heard is that they are going to have to remodel the whole thing to be able to accommodate seven judges. It is going to take a lot of money and time to get it ready, so right now we are going to have to stay where we are under very trying conditions.

What kinds of cases were first assigned you?

Well, the judges called me in and they each explained the procedure that they used to assign cases so I wouldn't be stuck with "old dogs." They tried to make it as fair as possible giving me complicated cases and easy cases. On criminal cases I requested that I not start taking criminal cases until the first grand jury of this year. I did not want to sit as a judge in cases that I had handled as a magistrate, either setting bonds or conducting preliminary hearings or arraignments. I know there is no problem, but it was a request that I made and they granted it. So now I'll start getting criminal cases the same as the other judges. I have approximately 586 cases. We received four new positions and now in the biannual report that has to be made for 1980 we have already requested three more.

* * *


CABRANES

Judge Jose A. Cabranes (D. CT), immediately before his induction last December, was Counsel for Yale University. Prior to that he had private practice experience and he has taught at Rutgers and Yale law schools.

Was any kind of in-court orientation offered you when you came to the court?

So far I've done whatever I can on my own. I've spent some time in other courts, sitting with other judges. Since I took my oath only last December 21st, I made a great effort to be at this seminar because I knew it was going to be of particular value to me—and it has been.

Do you think there is a definite period of time when someone with your background should come for a seminar?

I think very definitely that the earlier you get here the better. In my particular circumstance I would have felt very ill at ease without it.

What types of cases and how many were immediately assigned you?

I have about 400. We have arranged for a series of status conferences in the first weeks of February to find out what we really have.

Do you have any preference for criminal as opposed to civil work?

Civil, I think. I've done no criminal work at all, which I guess is not uncommon among new judges. Many have never done criminal work.

The space problem has been an enormous one for the Administrative Office and GSA because 152 new judges are coming into the system. Do you have adequate chambers?

Well, that is exactly what I spent the whole afternoon on. I went over to the District of Columbia Superior Court, which has the new round courtroom, because apparently GSA has adopted it as one contemporary model for new courtrooms. We are having one of those newer types of courtrooms built in Hartford, where I am going to be stationed a good deal of the time.

Are you enjoying what you are doing? It's such a different life.

I'm starting to feel the isolation that everyone speaks about. When I was at Yale as General Counsel our office was called by literally tens of different offices in the University in any one day. Our phone was always ringing. Sometimes it was a question of referring the matter to other people at the University or steering a chairman of a department or a dean in a particular direction. But now nobody is calling.

Did you also teach?

Yes. I taught at Yale Law School. I continue to offer a seminar on international law.

Is there a tendency or compulsion to teach from the bench if you have a bad lawyer before you?

I haven't had enough experience to know, but I hope not. Teachers sometimes talk too much and I suspect that's something one has to be careful about. But teaching experience is valuable for a new judge. I've always thought it wrong for some elements of the trial bar to try to preserve access to the federal judiciary exclusively to persons with similar experience. One of the criticisms made of nontrial lawyers, is, naturally enough, a lack of experience in handling trials. But there can be such a thing as too much trial experience—in the sense that it

See NEW JUDGES p. 6

NEW JUDGES from p. 5

may be harder for a person who has been a tough trial lawyer all his life to learn to exercise self-restraint. I think there really are no set rules about the sort of experience that is indispensable for either a trial judge or an appellate judge.

* * *


HALL

Judge Robert H. Hall (N.D. GA) left the Supreme Court of Georgia last November to be a trial judge in the federal system. His background includes private practice, teaching at Emory University Law School, eight years as Deputy Assistant Attorney General in his state, and thirteen years on the Georgia Court of Appeals.

You came to the Federal District Court from the Supreme Court of Georgia. Are the procedures and personnel in the federal system what you anticipated they would be?

I have been tremendously impressed with my associate judges and also with the administrative supporting personnel in the Clerk's Office. They have been extremely helpful. I have a secretary, two law clerks, a court reporter and a deputy clerk; and they are all women. One thing I might add: I'm tremendously impressed with the simply superb building we have; I am very proud of it.

What kind of in-court orientation was offered you?

The judges who went in a couple of months before I did were given about a two-day orientation. This was put on film and I was allowed to view the film. The presentation was done by one of the judges on our district court; and he spent about a half a day with me, my clerks and my secretary. Judge William O'Kelley did an excellent job.

How much of a caseload was immediately assigned you?

I think about 250-300 cases in all. About 60 of those cases were ready for some type of immediate disposition.

What kinds of cases?

A little of everything. I was surprised that there were fewer criminal cases, though. In other words, we weren't given any criminal cases that had already been filed; we took them only as they came in. For example, in the month of December I was only assigned three criminal cases.

You were on the Board of the National Center for State Courts. With this background, what do you see as the areas in which federal and state judges might cooperate to their mutual advantage?

I think having joint lectures and different training programs and things of this sort would be of great benefit. I think dialogue between the two systems has enormous potential for mutual benefits. This is even true in a state system—dialogue between the state appellate and trial judges, for example. Once people start talking about problems they start solving them.

* * *


MITCHELL

Judge George J. Mitchell, immediately before his appointment to the District Court in Maine, was United States Attorney. Over the past twenty years since he graduated from Georgetown University Law School, Judge Mitchell also gained experience in the Department of Justice, in public service in his state, and in private practice.

What initial reactions did you have as you started your work as a U.S. District Court Judge — taking up your tasks on the other side of the bench?

There aren't many differences from the active practice of the law. I have presided over a few trials already, and I work diligently to restrain myself from taking over the cases from the lawyers. Many persons who are active trial lawyers, and who then go to the bench, have a tendency to continue to be active trial lawyers when they are in fact judges. And so I have to constantly remind myself that I am no longer participating as a representative of a party but presiding as an impartial judge. I must say that I can understand why some judges have succumbed to that temptation in the past, because I do feel it myself. When I see an important point overlooked or an objection not made that should be made, my immediate reaction is to jump in.

With your vast experience in private practice and as United States Attorney, you have had a good opportunity to observe the problems of the federal courts from all angles. In your new position do you think you can make suggestions for ways to resolve some of these problems?

I practiced extensively in the state courts, both as a prosecutor and defense attorney before I became United States Attorney, and, while the system in Maine is a very good one and is improving constantly, still I think the federal system in comparison is truly excellent. There are somewhat better facilities. That is, the availability of courtrooms, the availability of the Government's resources in processing cases are generally greater than those of any individual state. Frankly, I think that with Judge Gignoux and Judge Coffin, the Chief Judge of the First Circuit, both having set a standard of excellence I will do well to meet the standard they have set. To be candid however, I do have some ideas on how I think things can be improved or changed which I hope to implement over the course of time. They are in the nature of improving docket control and things of that type.

See NEW JUDGES p. 7

NEW JUDGES from p. 6

What kinds of cases were assigned you immediately after you took your office?

I don't have a precise number. I was assigned to Bangor and simply took over the docket there. I haven't made any kind of a count but I'm sure it is in the hundreds. The cases I am handling are primarily civil and I address my attention to the oldest cases first. I think that the entire docket in Portland and Bangor has around 700-800 cases. Less than half of those are in Bangor because no federal judge has been headquartered there before.

The difficulty in going with numbers, of course, is that they can be very deceiving. In Maine, for example, over 100 of the cases are Government foreclosure cases which don't require a great deal of court time. On the other hand, a single case in which I was involved as a U.S. Attorney involved 32 defendants in a major drug conspiracy and took one and a half years to complete.

* * *

PRICE

Judge Edward Dean Price (E.D. CA) was a part-time U.S. Magistrate when he was nominated last November. The balance of his professional career has been taken up with private practice in California.

You have come to the district court with extensive experience in both private practice and public service, including several years as a part-time magistrate. Has your background, particularly as a magistrate, made your transition to the District Court easier than it might otherwise have been?

Oh, I certainly think so. Regardless of how small the participation might be from the standpoint of time, being involved in any way in the judicatory process gets you immediately thinking about the different role that you are playing as a judge or as magistrate, and it makes you very conscious of having to view your function much differently than if you were an advocate.

Did you hear a significant number of cases with the consent of the parties to the litigation which otherwise would have been tried by a United States District Judge?

Yes. Among other matters I was hearing many minor offenses out of the National Forest that lies generally to the eastern part of California. And as the National Forest's recreational areas are used more and more, the conflict of people with rules and regulations has become pronounced. All those minor offenses are triable by a U.S. District Court Judge if the parties insist, but the District Courthouse is either in Sacramento, 75 miles away, or in Fresno, 90 miles away. In my entire time, roughly 15 years, I have never had the parties insist on having their case tried by a U.S. District Judge.

What in-court orientation was available to you after you were appointed to the district court?

This seminar was the first orientation I have had, but it must be remembered I was sworn in on December 27, 1979 so basically all I've had a chance to do is to get acquainted with my colleague, Judge Crocker.

As you know, cases are pending which involve compensation for the federal judges. Do you feel you are adequately paid or was salary a consideration when the position was offered you?

Salary was a consideration to the extent that I took a look at the situation and made a determination that I could live on the then existing salary. I think that the salary has to be viewed in two ways. Salary should be adequate to compensate the person for the work that he does and reflect the importance of that work, and the salary should be sufficient so that you are certain to bring good people into the system. The federal system must constantly keep in mind that unfortunately people do have to take compensation into account when they consider their careers.

More than $1 Million Saved

FIFTH CIRCUIT ELIMINATES REQUIRED FILING OF APPENDIX

The Fifth Circuit Court of Appeals no longer requires the filing of a printed appendix with appellate briefs. According to judges and court personnel, this procedure, which went into effect May 1, 1978, has eliminated the filing of a total of an estimated 3,648,000 pages of appendix material. The savings in printing costs are put conservatively by the court at over $1 million. The Clerk of the Fifth Circuit estimates that this has meant to his office a saving of 1,520 linear feet of storage space.

Less tangible savings of time have also been realized. Attorneys no longer must designate the contents of the appendix and assemble and transmit documents to printers. The work attendant with filing two sets of briefs—one typewritten preliminary brief and one final printed brief with an appendix—has also been eliminated.

Circuit Judge Robert A. Ainsworth, Jr. has reported to the Chief Justice that the reaction of the members of the bar has been "uniformly and enthusiastically favorable." In only a few cases have attorneys filed unrequired appendixes. Given the savings of one million dollars in printing costs, Judge Ainsworth believes that the savings in attorneys' time has been at least that much or more, resulting in total savings to litigants of more than two million dollars.

In his recent address to the Midyear Meeting of the American Bar Association, the Chief Justice congratulated Judge John R. Brown, his successor as Chief Judge, James P. Coleman, and their colleagues in the Circuit for their imaginative experimentations.

LITIGATION from p. 1

applicable provisions of law which authorized the pay increases. Alternatively, the Government argued that even if judges' salaries were reduced without amending prior law, there was no violation of the Compensation Clause because of a lack of intent to undermine the independence of or otherwise discriminate against judges.

Plaintiffs filed their motion to affirm the lower court without further review, contending that the 1976 and 1977 acts were merely funding limitations which are not considered to amend or repeal existing statutes in which specific rights and duties are defined. Responding to the Government's alternative argument, plaintiffs maintained that no discriminatory intent is necessary for a finding that the Compensation Clause has been violated.

In a similar case, *Will v. United States* ["Will II"], No. 79 C 4368, federal judges have again prevailed at the district court level. This class action, filed on October 19, 1979 by the plaintiffs in *Will I* and one other judge, seeks recovery of frozen pay increases for periods beginning October 1, 1978 and October 1, 1979. On January 31, 1980, District Judge Roszkowski, "in view of" his decision in *Will I,* issued a ten page order granting plaintiffs' motions for class certification and summary judgment.

The third case concerning judicial salaries, filed November 9, 1979, is *Foley v. Carter,* pending before District Judge John Lewis Smith of the District of Columbia, No. 79-3063. This action relates to the alleged reduction of a previously effective 12.9 percent pay raise for federal judges and other personnel to 5.5 percent. The components of this raise consisted of a 5.5 percent raise due October 1, 1978 (frozen for fiscal year 1979), and an increase of 7.02 percent for fiscal year 1980 which was given to most government workers in October of last year. The compounded total would yield an increase of 12.9 percent.

The complaint alleges that this increase went into effect in early October 1979, but that on October 12, 1979 the President signed P.L. 96-86, which limited the increase to the 5.5 percent due for fiscal year 1979. This law stated that the smaller increase, if accepted, would be "in lieu of the 12.9 percent due."

Uncertain of his authority to pay the full increase and fearful of working a forfeiture of some of the raise by paying only 5.5 percent, the Director of the Administrative Office of the United States Courts, William E. Foley, brought this action to clarify the situation. Sought is a writ of mandamus against the President compelling him to declare the percentage of adjustments in the rate of pay to which judicial personnel are entitled and declaratory relief that the pay reduction of P.L. 96-86 cannot be construed to apply to judicial personnel, or, if so construed, that it is unconstitutional.

The district court judges who brought the *Will II* case have successfully intervened in this litigation, alleging that the difference in economic involvements between the intervenors (challenging pay raises for 1979 and 1980) and the plaintiff (challenging only 1980 action) raised the "possibility" of inadequate representation of their interests, thereby meeting the requirements for intervention of F.R.C.P. 24.

On February 4, the President filed an answer to the complaint responding to the allegations of the complaint, and asserting lack of subject matter jurisdiction, lack of plaintiff's standing to sue, failure to present a justiciable issue, and failure to state a claim upon which relief may be granted. On that same date, plaintiff filed a motion for summary judgment, which, with a supplement filed February 11, maintained that the action was ripe for decision and that the Government's admissions and denials indicated that the issue was solely one of law and that no questions of fact existed.

Financial Disclosure. On November 19, 1979, the Fifth Circuit upheld the constitutionality of the Ethics in Government Act of 1978, which requires the annual filing of a personal financial statement by federal judges and other Judicial Branch personnel receiving compensation equal to or exceeding that prescribed for Grade 16 of the General Schedule.*Duplantier v. United States,* No. 79-2351 (48 U.S.L.W. 2375, 5th Cir.). Under the statute, these statements are available for public inspection.

After denial of a petition for rehearing on December 12, plaintiffs—six district court judges on behalf of themselves and others similarly situated—filed a petition for writ of certiorari with the Supreme Court on January 31, 1980.

PAPER ON SENTENCING OPTIONS PUBLISHED

The February issue of Federal Rules Decisions includes an article entitled *The Sentencing Options of Federal District Judges,* by Anthony Partridge, Alan J. Chaset, and William B. Eldridge of the Federal Judicial Center's Research Division.

Based on a paper written for the benefit of district judges, the work has been published in article form because of its potential interest to practicing lawyers and others involved in the sentencing process. It goes beyond the formal language of the sentencing statutes, and considers how the judge's sentence influences the treatment an offender receives from the Bureau of Prisons and the Parole Commission.

COURT INTERPRETERS EXAMINATION SCHEDULED FOR MARCH

A written examination for proficiency in Spanish-English court interpretation will be given across the nation on March 29, as the first phase of the certification process prescribed by the Court Interpreters Act of 1978 (P.L. 95-539, Oct. 28, 1978). Those who pass will be eligible to take an oral test as phase two of the certification process. Candidates who successfully complete this second portion will then be placed on an eligibility list to be employed as interpreters in the federal courts.

As directed by the Act, the Administrative Office has established a court interpreters program to verify the bilingual proficiency and competence of interpreters to be used in civil or criminal actions brought by the United States in federal court. The Act mandates that any party or witness in such proceedings, whose primary language is not English, or who is hearing impaired, is to be provided a certified interpreter when one is available. The Administrative Office is to pay the costs of such interpreters, although a judge may direct that such expenses be apportioned among the parties or taxed as costs in a civil action.

The Administrative Office will establish standard fee schedules, and those certified interpreters who are hired full-time by the federal courts, primarily in metropolitan areas with large bilingual communities, will receive a salary of JSP 10 - JSP 11 ($18,760 to $26,794). Such employees presently receive a salary of JSP 6.

While other languages will be included in the certification process, a five-month study demonstrated that the most pressing need was for English-Spanish interpreters. In December, a conference of national and international experts in Spanish-English interpreting met in Washington to develop the written examination to measure bilingual skills. The oral examination is now being created to test a candidate's ability to do consecutive, simultaneous and summary interpreting.

While there are no formal educational requirements for taking the written examination, and while no special experience in court proceedings is necessary, the program sponsors indicate that the written test will be difficult, requiring at least a college level degree of proficiency. The oral test will examine, in simulated courtroom settings, English-Spanish and Spanish-English interpretation and sight translation.

To obtain an application form for the written English-Spanish examination, write by February 29 to:

Court Interpreters Program
Personnel Division
Administrative Office of the U.S. Courts
811 Vermont Avenue., N.W., Rm. 776
Washington, DC 20544

There is no fee for taking the examination.

PROTRACTED CASES from p. 3

trials to gather their observations and suggestions.

Finally, the subcommittee will consider whether jury trials are the best available method for resolving such cases, and whether other alternatives exist that are just, fair, and practical, and that are not inconsistent with the fundamental guarantee of the Seventh Amendment to the right to a jury trial.

After it has completed its preliminary study, the subcommittee will request advice and statements from bar groups and the public. Thus, the subcommittee will be able to incorporate existing information and opinion as well as the benefits of its own research in its final report to Judge Elmo Hunter's Committee on Court Administration.

CALENDAR from p. 10

Mar. 17-18 Workshop for District Judges (CA-4); Charlottesville, VA

Mar. 24-26 Seminar for Supervising U.S. Probation Officers; San Diego, CA

Mar. 24-28 Seminar for District Court Clerks; Lake Ozark, MO

GRADUATE PROGRAM IN JUDICIAL PROCESS ANNOUNCED

The University of Virginia at Charlottesville has announced the commencement next summer of a two-year master of laws program in the judicial process. The 1980 summer session will begin June 11.

Funded by grants from the Law Enforcement Assistance Administration and the Charles E. Culpeper Foundation, the program will be open to both trial and appellate judges—federal and state. The academic director of the program is Daniel J. Meador, former U.S. Assistant Attorney General for the Office for Improvements in the Administration of Justice, and currently Professor of Law at the University.

Participants will attend two six-week sessions held during consecutive summers at the law school. A thesis, to be commenced after the first summer course, will be required following completion of all course work.

Faculty for the program will be selected from the University of Virginia Law School and other institutions.

Financial assistance is available to cover all the expenses of a participating judge.

For information and applications, telephone Professor Meador at (804) 924-3947.

PERSONNEL

NOMINATIONS

Fred D. Gray, U.S. District Judge, M.D. AL, Jan. 10

E.B. Haltom, Jr., U.S. District Judge, N.D. AL, Jan. 10

U.W. Clemon, U.S. District Judge, N.D. AL, Jan. 10

Robert B. Propst, U.S. District Judge, N.D. AL, Jan. 10

Filemon B. Vela, U.S. District Judge, S.D. TX, Jan. 22

Truman M. Hobbs, U.S. District Judge, M.D. AL, Jan. 23

CONFIRMATIONS

Diana F. Murphy, U.S. District Judge, D. MN, Feb. 20

Robert G. Renner, U.S. District Judge, D. MN, Feb. 20

Helen J. Frye, U.S. District Judge, D. OR, Feb. 20

James A. Redden, Jr., U.S. District Judge, D. OR, Feb. 20

Owen M. Panner, U.S. District Judge, D. OR, Feb. 20

Barbara J. Rothstein, U.S. District Judge, W.D. WA, Feb. 20

Harry T. Edwards, U.S. Circuit Judge (CA-DC), Feb. 20

Henry Woods, U.S. District Judge, E.D., AR, Feb. 20

Richard W. Arnold, U.S. Circuit Judge (CA-8), Feb. 20

Gilberto Gierbolini-Ortiz, U.S. District Judge D.P.R., Feb. 20

APPOINTMENTS

William O. Bertelsman, U.S. District Judge, E.D. KY, Dec. 10

Juan M. Perez-Gimenez, U.S. District Judge, D. PR, Dec. 18

Warren J. Ferguson, U.S. Circuit Judge (CA-9), Dec. 20

David K. Winder, U.S. District Judge, D. UT, Dec. 20

Jose A. Cabranes, U.S. District Judge, D. CT, Dec. 21

Horace T. Ward, U.S. District Judge, N.D. GA, Dec. 27

Richard A. Enslen, U.S. District Judge, W.D. MI, Dec. 27

Edward D. Price, U.S District Judge, E.D. CA, Dec. 27

William M. Kidd, U.S. District Judge, S.D. W VA, Dec. 28

Harold A. Ackerman, U.S. District Judge, D. NJ, Jan. 3

James T. Giles, U.S. District Judge, E.D. PA, Jan. 3

Robert J. McNichols, U.S. District Judge, E.D. WA, Jan. 4

Terence T. Evans, U.S. District Judge, E.D. WI, Jan. 7

L.T. Senter, Jr., U.S. District Judge, N.D. MS, Jan. 18

Dorothy W. Nelson, U.S. Circuit Judge (CA-9), Feb. 1

Terry J. Hatter, Jr., U.S. District Judge, C.D. CA, Feb. 1

ELEVATIONS

Robert W. Hemphill, Chief Judge, D. SC, Nov. 30

Wilbur D. Owens, Jr., Chief Judge, M.D. GA, Jan. 1

AO and FJC Calendar

Feb. 25-27 Fiscal Workshop for Bankruptcy Clerks, Amarillo, TX

Feb. 28-29 Procurement & Contracting Workshop for Bankruptcy Clerks; Amarillo, TX

Mar. 5-6 Judicial Conference of the United States; Washington, DC

Mar. 5-7 Basic Instructional Technology Workshop; Savannah, GA

Mar. 9-12 Seminar for Newly Appointed Federal Appellate Judges; Washington, DC

Mar. 13-15 Seminar for Assistant Federal Defenders; New Orleans, LA

See CALENDAR p. 9

DEATHS

Peirson M. Hall, U.S. Distri Judge, C.D. CA, Dec. 8

William O. Douglas, Associate Justice, Supreme Court of the United States, Washington, DC, Jan. 19

Jose V. Toledo, Chief Judge, D. PR, Feb. 3

Leonard P. Walsh, U.S. District Judge, D. DC, Feb. 13

Paul R. Hays, U.S. Circuit Judge (CA-2), Feb. 13

FIRST CLASS MAIL

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March Meeting

JUDICIAL CONFERENCE DIRECTS ADOPTION OF AFFIRMATIVE ACTION PLANS

At its semiannual March meeting, the Judicial Conference of the United States directed that each federal court adopt an Affirmative Action Plan in conformance with the national policy of providing equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age, or handicap. This and other Conference actions are highlighted below.

The Conference approved a Model Affirmative Action Plan, together with accompanying grievance procedures for discrimination complaints. The Model Plan and the grievance procedures are to be distributed to all federal courts for adoption and implementation, with a requirement for the submission of an annual report regarding the implementation of affirmative action plans. An evaluation of these reports, as well as the reports themselves, will be included hereafter in the Annual Report of the Director of the Administrative Office of the United States Courts.

In a related action, the Conference also endorsed the principle that it is inappropriate for a judge to hold membership in an organization that practices invidious discrimination. The Conference referred back to a committee the drafting of definitions and standards and directed that they be reported to the next meeting of the Conference.

Magistrates. As called for by the Federal Magistrate Act of 1979 (see **The Third Branch,** October 1979, p. 1), the Judicial Conference adopted regulations establishing standards and procedures for the appointment

See JUDICIAL CONFERENCE p. 3

KING COMMITTEE: A PROGRESS REPORT

The Implementation Committee on Admission of Attorneys to Federal Practice, chaired by Judge Lawrence King of the Southern District of Florida, submitted its first progress report to the Judicial Conference at its March meeting. Created by a resolution of the Conference last September, the Committee has been charged to "oversee and monitor on a pilot basis an examination on federal practice subjects, a trial experience requirement, and a peer review procedure, in a selected number of district courts that indicate a desire to cooperate in any or all of the above programs." At that meeting, without endorsing the specific admission standards in the Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts (the Devitt Committee), the Conference endorsed the idea of pilot programs urged by the Final Report. The Conference emphasized that possible admission standards could be best assessed by evaluating a

See KING COMMITTEE p. 2

RECENT DEVELOPMENTS IN FEDERAL JUDGES' SALARY LITIGATION

This is a further update on three of the cases involving salaries for federal judges and other judicial branch personnel. For background information, see **The Third Branch** February 1980 issue, p. 1.

WILL I. This action, **Will v. United States,** No. 79-983, challenges congressionally frozen pay increases for periods in 1976 and 1977. Following the district court's granting of plaintiffs' motion for summary judgment, a direct appeal to the Supreme Court was filed pursuant to 28 U.S.C. §1252. On February 19, the Court directed the parties to brief the question of whether 28 U.S.C. §455, the Judicial Disqualification Act, affects the jurisdiction of either the U.S. Supreme Court or the District Court to hear this class action, which is filed on behalf of all Article III judges.

The question of disqualification in judicial salary litigation

See LITIGATION p. 2

DATES SET FOR NEXT SEMINAR FOR NEW DISTRICT JUDGES

FJC Director A. Leo Levin has announced that the next Seminar for Newly Appointed District Court Judges will be held next June, starting Monday, June 9 and ending midday Saturday, June 14. As in the past, the seminar will take place at the Dolley Madison House in Washington, D.C.

LITIGATION from p. 1

previously arose in **Atkins v. United States,** 556 F.2d 1028 (Ct. Clms. 1977), an ultimately unsuccessful challenge to Congress's failure to provide cost of living increases to Article III judges in the face of inflation. Uncertain of the applicability of the Disqualification Act or Canon 3C(1)(c) of the Code of Judicial Conduct, the Judges of the Court of Claims certified to the Supreme Court the question of whether disqualification was necessary. After the submission of briefs, the Supreme Court dismissed the certified question without comment or opinion. The Court of Claims therefore resolved the issue, and concluded that the rule of necessity applied, the common law doctrine that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case. Noting that their jurisdiction over this claim against the Government was exclusive, the Court held that they were "qualified, authorized and required" to decide the case.

Decision on the Supreme Court's jurisdiction to hear the **Will I** case has been postponed until a hearing on the merits.

KING COMMITTEE from p. 1

breadth of experience from different programs.

The King Committee is encouraged by the early responses of numerous district judges. Pilot districts will be selected in April. The Committee hopes that several districts will be in the active planning phase by summer. While it will take time to detail individual pilot programs, the Committee is meanwhile preparing a manual and bar examination for some of the participating districts. This important effort will provide workable plans for specific aspects of a pilot program, as well as other background information and materials.

Will II. In this class action challenging pay increases frozen in 1978 and 1979, **Will v. United States,** No. 79 C 4368 (Northern District of Illinois), the Government filed a notice of appeal to the Supreme Court on March 10.

Foley v. Carter. This is an action brought against the President by the Director of the Administrative Office of the United States Courts in which plaintiff alleges that last October Congress reduced a 12.9 percent raise for federal judges to 5.5 percent. On February 15, Department of Justice attorneys, on behalf of the President, filed a memorandum in opposition to plaintiff's motion for summary judgment, challenging in two particulars the form of relief sought. First, it is contended that a writ of mandamus against the President to formally declare the percent adjustment in rates of pay for F.Y. 1980 is unnecessary, because plaintiff by telephone or letter could have received official vertification that this adjustment was 7.02%. Additionally, it is claimed that "in a matter of days" the President will submit a report to Congress specifying the 7.02 percent figure. Second, plaintiff's request for declaratory relief against operation of the pay reduction is opposed on the grounds that Mr. Foley, who is not an Article III judge, lacks standing to raise a challenge based upon the Compensation Clause of the Constitution. Further, it is maintained that plaintiff's claim regarding his own salary should be brought against the Government in the Court of Claims rather than against the President, and that no justiciable controversy has been raised.

On February 25, plaintiff filed a motion for interlocutory relief, seeking a preliminary injunction restraining enforcement of the forfeiture provision of P.L. 96-86 which provides that acceptance by an employee of the 5.5 percent increase will be "in lieu of the 12.9 percent due." Attorneys for the President filed a memorandum in opposition to this motion, and on March 11 a hearing was held before District Judge John Lewis Smith. (Plaintiffs in **Will II,** who have intervened in this case, did not participate.) From the bench, Judge Smith denied the motion, holding that the requirements for obtaining injunctive relief set forth in **Jacksonville Port Authority v. Adams,** 556 F.2d52 (D.C. Cir. 1977), notably the required showing of irreparable injury, had not been met.

A hearing on plaintiff's motion for summary judgment was conducted March 18. After argument by all parties, including the intervenors, Judge Smith took the matter under advisement.

* * *

L.C. GOODCHILD APPOINTED CIRCUIT EXECUTIVE IN EIGHTH CIRCUIT

Chief Judge Donald P. Lay (CA-8) has announced that Lester C. Goodchild will assume the office of Circuit Executive for the Eighth Circuit on March 24th. His headquarters will be in St. Louis, Missouri. He will be replacing R. Hanson Lawton who is returning to private practice.

Mr. Goodchild presently is in charge of the Buffalo office for the New York State Commission on Judicial Conduct and prior to that service he was Chief Executive Officer for the courts in New York City. His career also includes service as Assistant Counsel to the Judicial Conference of the State of New York.

The new Circuit Executive is a 1953 graduate of the University of Buffalo Law School and he earned a degree in Business Administration at the same institution. He is a Fellow of the Institute for Court Management and has been certified by the Board of Certification for Circuit Executives.

FJC SEEKS SPEECHES, ARTICLES; ALSO CIRCUIT CONFERENCE PROGRAMS

The Federal Judicial Center's Information Services office, which provides bibliographic and other research information to federal court personnel and the public, is seeking to expand its collection of research material.

Presently, the Information Services office has a unique two thousand item collection of published and unpublished articles, seminar presentations, speeches, lectures, Administrative Office memoranda and other "fugitive" materials. Access to this collection is through ISIS (the Information Services Index System), an automated data base prepared by the I.S. staff with technical assistance provided by the Center's Innovations and Systems Development Division. Material in ISIS can be retrieved through the use of subject, author, or accession number indexes.

Although a few direct contributions are made, most new articles are found for the collection through the research of the Information Services' two librarians. As a pertinent law review article is published, or as a copy of a judge's speech is received, a bibliographic record is entered into the ISIS data base. Additionally, if a judge requests the Information Services' assistance when preparing a speech or report, the practice is to ask that judge to contribute the finished product to the collection. Clearly, however, the staff has no knowledge of many of the articles and speeches being prepared, and direct contributions are the best way to expand the material on file.

The Information Services office is now endeavoring to broaden its collection by serving as a repository for otherwise unavailable monographs and memoranda prepared by federal judges and others. FJC Board member John C. Godbold (CA-5) suggested that such a practice would have the twin advantages of providing greater service to judges doing research and of involving more judicial personnel directly in the Center's activities.

In a similar effort, the Information Services office is collecting programs and program papers from circuit judicial conferences held in past years. The Center presently possesses a number of programs but is endeavoring to make the collection as complete as possible. Program directors for the conferences have especially found these valuable in developing plans for the circuit judicial conferences; and, they have been helpful in planning bar association activities.

Contributions of articles, monographs or circuit conference materials are welcomed at the Information Services office.

For any information on material in the IS office, call Mrs. Sue Welsh, Mrs. Marsha Carey, or Mr. Eugene Edwards at (202) or (FTS) 633-6365.

JUDICIAL CONFERENCE from p.1

of magistrates. Among other qualifications for appointment to the magistrate position, a nominee must have been for at least five years a member in good standing of the bar of the highest court in the state in which he or she is to serve, must have been engaged in the active practice of law for at least five years, and must be competent to perform the duties of the office. A Merit Selection Panel, appointed by each court, will recommend those who are fully qualified, and the district court will select the magistrate from those recommended by the Panel.

The Conference also approved rules of procedure for the trial of misdemeanors before magistrates and authorized their transmission to the Supreme Court for consideration and adoption.

Judicial Workload. William E. Foley, Director of the Administrative Office, filed his annual report for the year ending December 31, 1979. This report noted that although both the courts of appeals and district courts increased their terminations, increases in the number of filings left both courts with larger pending caseloads than they had the previous year. Much of the increase in case filings during 1979 resulted from the increase of suits against students for repayment of guaranteed loans and from prisoner civil rights cases. The number of criminal cases filed in district courts continued to decline, this year by more than 10 percent, largely because of the Department of Justice policy to decline to prosecute where state courts had concurrent jurisdiction over the offense.

Legislation. The Conference expressed its opposition to S. 2045, which would provide for open meetings of the Judicial Conference, all its Committees and all meetings of Circuit Judicial Councils. The Conference expressed grave reservations, based on separation of powers principles, as to this legislation's constitutionality.

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* * *

Rep. Henry B. Gonzales (D-Tx) submitted on January 28 H. Res. 540, urging the President to order the Attorney General to offer up to $3 million as a reward for information leading to the arrest and conviction of the murderer or murderers of U.S. District Judge John Wood and those involved in the attack on Assistant U.S. Attorney James Kerr of San Antonio, Texas. It has been referred to the Committee on the Judiciary.

MINOR DISPUTES BILL ENACTED

On February 12, the President signed into law the Dispute Resolution Act, P.L. 96-190, which provides federal funding for the development and maintenance of mechanisms for the resolution of minor disputes. The bill, S.423, passed the Senate on April 9, 1979 and was then narrowly passed, with amendments, by the House on December 12 by a vote of 207-198. The Senate subsequently agreed to the House amendments.

The Act has two major provisions. First, it establishes a Department of Justice grant program whereby state and local governments and nonprofit organizations may receive funds to develop new mechanisms and strengthen existing systems for dispute resolution. The Act's major purpose is to encourage experimentation with a variety of non-judicial dispute resolution mechanisms such as conciliation, mediation, arbitration, and others, although assistance to judicial forums such as small claims courts is also provided.

Second, it creates in the Department of Justice a Dispute Resolution Center, which will serve as a clearing house for the exchange of information on dispute resolution programs, provide technical assistance, conduct research and make surveys of existing programs.

House amendments agreed to by the Senate had the primary effect of reducing the funding levels for the Act. The Dispute Resolution Center will receive $1 million rather than $3 million over five years and the grant program will have a four year budget of $10 million rather than $15 million. The House amendments also made resolution of consumer disputes a major priority of the funding and established an advisory committee to provide consultation on development and management of the program. It is anticipated that the Resolution Center will begin operation this year, but the grant program will not commence until FY 1981, and will continue through FY 1984.

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

WORK MEASUREMENT STUDY OF CLERKS' OFFICES, U.S. BANKRUPTCY COURTS

Management analysts of the Management Services Branch, Administrative Services Division of the Administrative Office of the United States Courts, are presently conducting a work measurement study of the clerks' offices. This comprehensive study was requested by the Bankruptcy Division of the Administrative Office as a result of the implementation of the Bankruptcy Reform Act of 1978, Public Law 95-598, which has had a substantial impact on the work of the bankruptcy offices.

The work measurement study will encompasss the formulation of a uniform description of work for all bankruptcy clerks' offices followed by on-site measurement at 24 representative clerks' offices. The end product of the study will be an empirically developed staffing formula which will identify the number of deputy clerk positions needed to fulfill the requirements of the Bankruptcy Reform Act of 1978. To provide assistance and guidance in this effort, an ad hoc advisory committee consisting of eight bankruptcy clerks and H. Kent Presson, the Assistant Chief of the Bankruptcy Division, has been appointed.

THE SOURCE

The Information Service of the Federal Judicial Center

Court Reform and Access to Justice: A Legislative Perspective. Robert W. Kastenmeier and Michael J. Remington. 16 Harvard Journal on Legislation 2.

Discovery Problems: Is Help on the Way? Joseph L. Ebersole. 66 ABA J. 50-56 (Jan. 1980).

Federal Court Admission Standards—a 45-Year Success Story. Adrian A. Spears. 83 FRD 235-245 (Nov. 1979).

A Guide to Federal Discovery Rules. James L. Underwood. ALI-ABA, 1979.

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Judicial Review of Environmental Administrative Actions. John D. Butzner. 4 ALI-ABA Course Materials J. 6-8+ (Oct. 1979).

A New Approach to Resolving Costly Litigation. James F. Davis. 61 J.P.O.S. 482-491 (Aug. 1979).

Procedures for Processing Complaints of Judicial Misconduct. Judicial Council of the Ninth Circuit. As amended April 12, 1979.

Scientists Are Not Prophets. Patrick E. Higgenbotham. 18 Judges' J. 16-19+ (Fall 1979).

INFORMATION SERVICES OBTAINS ADDITIONAL COMPUTER SYSTEM

To further assist users in providing bibliographic information, the Federal Judicial Center Information Services office has added another automated service to its facilities.

Lockheed **Dialog** is a bibliographic system consisting of 120 separate data bases, all of which can be accessed on one terminal. Data bases of special value in judicially related areas include the PTS Federal Index (including Congressional Record and Federal Register), Magazine Index, Public Affairs Information Service and the GPO Monthly Catalog. Also available are biology, chemistry, and other scientific indexes, as well as sociology and political science.

This system, like others available in the office, allows the staff to help federal judicial personnel to identify materials needed in a speech or article on various aspects of judicial administration. The system may be used to identify a periodical article where only the author and approximate date are known, or to determine what kinds of studies have been performed in a certain subject area. The data bases can be searched by subject, author or title, and other modifiers can be added to obtain more specific information. Upon completion of a search, both bibliographic information and an abstract of the article are displayed. Desired documents not available locally can be ordered.

The New York Times Information Bank index and ISIS, the Information Services' index to its own article collection, are also available in addition to **Dialog.**

The Information Services staff welcomes inquiries and the opportunity to perform searches for federal judicial personnel. The office may be reached by telephone at FTS 633-6365 (or 202-633-6365) or by mail at 1520 H Street, N.W., Washington, D.C. 20005.

COHAN APPOINTED CHIEF OF PROBATION DIVISION

William E. Foley, Director of the Administrative Office of the United States Courts, announced on February 25 that William A. Cohan, Jr. has been appointed Chief of the Probation Division, effective March 1, 1980. He replaces Wayne P. Jackson, who retired February 24th.

Mr. Cohan obtained his B.A. (1954) and did graduate study in social administration at Ohio State University. Mr. Cohan has been with the Administrative Office since 1963. Prior to his move to Washington he served as a United States Probation Officer in the Northern District of Ohio for eight years and in October 1963 he was named Assistant Chief of the Probation Division, which position he occupied until his recent promotion.

ABA MIDYEAR RESOLUTIONS RELATED TO THE FEDERAL COURTS

At the midyear meeting of the American Bar Association held last month, several resolutions related to the work of the federal courts were acted upon by the members of the House of Delegates. Of some significance are the following.

Approved: Resolution calling for 18 U.S.C. §3731 to be amended to provide for interlocutory appeal before or during trial from an order of the trial court in a criminal case requiring or denying the disclosure of classified information, imposing or refusing sanctions for nondisclosure of classified information or granting or refusing a protective order to prevent the disclosure of classified information, provided that provision be made for expeditious resolution of any such appeal and the provisions of Section 3731 on pretrial release be followed.

Disapproved: Pending legislation which proposes the creation of a Court of Appeals for the Federal Circuit and a U.S. Claims Court, as well as the creation of a U.S. Court of Tax Appeals.

Approved: The House of Delegates resolved to support enactment of legislation which provides that certain pleadings and proceedings in the U.S. District Court for the District of Puerto Rico may be filed and conducted in the Spanish language.

Approved: Ten recommendations for changes in the Internal Revenue Code of 1954, on such provisions as those relating to dividends-received deductions, gains or losses resulting from transfers of property to controlled corporations, and changes in provisions relating to collapsible corporations.

Approved: A resolution stating that the ABA, as a matter of principle, opposes any proposal that would permit the Government to appeal sentences merely on the grounds that they are too lenient.

Approved: A resolution calling upon the ABA to recommend to Congress the enactment of a statute permitting one peremptory challenge by each party of a federal district court judge, magistrate or bankruptcy judge in civil cases.

Approved: A resolution stating that the ABA supports legislation, such as H.R. 2583 in the 96th Congress, which would, if enacted, discontinue annuity payments to former federal employees thereafter appointed as justices or judges of the United States and making provision for resumption of such annuity payments upon resignation, retirement, or assumption of senior status as justices or judges.

aoo ofjc calendar

Mar. 26-28 Basic Instructional Technology Workshop; Salt Lake City, UT

Mar. 31 - April 2 Fiscal Workshop for Bankruptcy Clerks; Reno, NV

April/May Orientation Seminar for U.S. Magistrates; Washington, D.C. (Tentative)

Apr. 3-4 Procurement & Contracting Workshop for Bankruptcy Clerks; Reno, NV

Apr. 7-11 Seminar for District Court Clerks; Lake Ozark, MO

April 9-10 Conference of Metropolitan Chief Judges; Charleston, SC

Apr. 14-18 Effective Productivity for Court Personnel; San Antonio, TX

Apr. 18 Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts; San Antonio, TX

Apr. 21-22 Effective Productivity for Court Personnel; Savannah, GA

NEW APPOINTMENTS TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

The untimely death of Judge Murray I. Gurfein (CA-2) last December left the chairmanship of the Judicial Panel on Multidistrict Litigation vacant. The Chief Justice this month has announced that the chairmanship will be assumed by Chief Judge Andrew A. Caffrey of the District of Massachusetts, presently a member of the Panel.

Two other vacancies on the Panel will be filled by the appointment of Judge Sam C. Pointer of Alabama, and Judge Frederick A. Daugherty who sits in the Western, Eastern and Northern Districts of Oklahoma.

Apr. 24-25 Judicial Conference Committee on Civil Rules; Washington, DC

Apr. 24-25 Effective Productivity for Court Personnel; Augusta, GA

Apr. 25-26 Workshop for District Judges (CA-2); Saratoga Springs, NY

Apr. 28-30 Seminar for Bankruptcy Clerks; Pasadena, CA

Apr. 30 - May 2 Basic Instructional Technology Workshop; Providence, RI

PERSONNEL

NOMINATIONS

William A. Norris, U.S. Circuit Judge (CA-9), Feb. 27

Walter M. Heen, U.S. District Judge, D. HI, Feb. 27

Odell Horton, U.S. District Judge, W.D. TN, Feb. 27

John T. Nixon, U.S. District Judge, M.D. TN, Feb. 27

Norma H. Johnson, U.S. District Judge, D. DC, Feb. 28

ELEVATIONS

Lloyd F. MacMahon, Chief Judge, S.D. NY, Feb. 16

Herman G. Pesquera, Chief Judge, D. PR, Feb. 3

William S. Sessions, Chief Judge, W.D. TX, Feb. 18

May 1-3 Seminar for Assistant Federal Public and Community Defenders; New York, NY

May 7-9 Sentencing Institute (CA-3 and CA-6); Lexington, KY

May 19-21 Seminar for Bankruptcy Clerks; Clayton, MO

May 20-23 Effective Productivity for Court Personnel; Portland, OR

FIRST CLASS MAIL

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Court Administration and the Judicial Conference

AN INTERVIEW WITH JUDGE ELMO B. HUNTER

Judge Elmo B. Hunter has served on the federal bench in the Western District of Missouri since 1965. A graduate of the University of Missouri (A.B. 1936, J.D. 1938) with election to Phi Beta Kappa and Order of the Coif, he served on both the trial and appellate courts in his state for 13 years before moving to the federal system.

Judge Hunter has been a member of the Judicial Conference's Committee on Court Administration since 1969, and has been its chairman since 1978. He also served as chairman of its Subcommittee on Judicial Improvements from 1976 to 1978.

In the following interview, Judge Hunter explains the make-up and function of his prominent Committee and comments on some of the more pressing issues pending before it.

As Chairman of the largest standing committee of the Judicial Conference of the United States, you take the lead in guiding the efforts of 15 federal judges, and six subcommittees made up of 21 additional judges and law professors. How often do you meet and who attends the meetings?

The Committee on Court Administration meets two times a year—usually in late January and late July, about one month before the meeting of the Judicial Conference of the United States. The entire membership (15) of the Committee meets as a body. Also in attendance are three or four persons from the Administrative Office of the United States Courts, and occasionally, a few invitees who possess specialized information needed by the Committee.

What is the function of the Committee on Court Adminis-

See INTERVIEW p. 4

PLAINTIFF WINS SUMMARY JUDGMENT IN *FOLEY v. CARTER*

District Judge John Lewis Smith of Washington, D.C. held on March 24 that federal judges and certain other judicial branch personnel are entitled to a 12.9 percent raise for FY 1980. The ruling came in a suit brought by William E. Foley, the Director of the Administrative Office, against the President, *Foley* v. *Carter,* No. 79 3063. Although Judge Smith noted that a pay reduction for judges would "entail grave constitutional conflicts," he did not base his holding on constitutional grounds. Instead, Judge Smith held that a 1979 statute—reducing to 5.5 percent a 12.9 percent raise previously

See LITIGATION p. 2

NEW FJC BOARD MEMBER ELECTED

The Judicial Conference of the United States last month elected Chief Judge William S. Sessions of the Western District of Texas to a four year term as one of three district judge members of the Board of the Federal Judicial Center.

Judge Sessions was appointed to the federal bench on December 20, 1974 and he became Chief Judge in his district Feb. 18, 1980. Previously, he had served as United States Attorney for the Western District of Texas from 1971-1974 and he was Councilman for the Waco City Council in 1969. Judge Sessions attended the University of Kansas and Florida State University, and he graduated from Baylor

University, receiving his B.A. and LL.B. degrees in 1958.

Judge Sessions replaces on the Board Judge Frank J. McGarr (N.D. IL), whose four year term expired on March 28, 1980.

FINAL REPORT OF PRISONER CIVIL RIGHTS COMMITTEE RELEASED

The Federal Judicial Center's Prisoner Civil Rights Committee last month published its third and final report on *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts*. According to the Committee, the report has three purposes: (1) to evaluate the handling of prisoner condition-of-confinement cases and recommended needed changes; (2) to assist federal judges, magistrates and staff to effectively and efficiently deal with such cases, and (3) to apportion responsibility between federal and state courts with respect to matters that ought to be handled by the state judiciary.

Tentative reports of the Committee, chaired by Judge Ruggero J. Aldisert (CA-3), had been released in January 1976 and May 1977. These reports suggested procedures for the handling of condition-of-confinement cases, offered model forms to expedite their processing, and provided general commentary on the law in this field. To assist judges in implementing the Committee's recommended procedures, Committee member Ila Jeanne Sensenich (U.S. Magistrate, W.D. Pa.) was asked to expand on her prior research, and her *Compendium of the Law on Prisoners' Rights* was published by the Federal Judicial Center in April 1979.

Recommended Procedures for Handling Prisoner Civil Rights Cases has been distributed to Supreme Court Justices, Circuit and District Judges, U.S. Magistrates, clerks of federal courts, circuit executives, and federal court libraries. Additional copies are available from the Information Services Office of the Federal Judicial Center, (202) or (FTS) 633-6365.

LITIGATION from p. 1

granted—was intended by Congress to apply only to members of the executive and legislative branches, and not to the judiciary. Judge Smith granted summary judgment for Director Foley.

This was the third recent decision in cases involving federal judges in salary litigation. In two class actions brought by Article III judges in Chicago, District Judge Stanley Roszkowski earlier this year held that pay freezes for 1977, 1978, and 1979—as well as the reduction in 1980—violated the Compensation Clause of the Constitution. The first of these cases is presently pending before the Supreme Court, *Will v. United States*, No. 79-983 (*"Will I"*), and a notice of appeal to the high court has been filed in the other, *Will v. United States*, No. 79 C 4368 (*"Will II"*). The Solicitor General has not yet announced whether an appeal of Judge Smith's decision will be taken on behalf of the President.

The key statute in *Foley v. Carter* was §101 (c) of P.L. 96-86, signed into law on October 12, 1979. This provision stated that a 12.9 percent increase in pay for federal employees, which had gone into effect earlier in October 1979, would be reduced to 5.5 percent, and that this amount, if accepted by an employee, would be "in lieu of the 12.9 percent due." This provision applied to "executive employees, which includes Members of Congress."

In his eleven page opinion, Judge Smith first turned to several preliminary issues. He held that the rule of necessity required him to hear the case, notwithstanding his potential interest in the litigation. He next overruled challenges to plaintiff's standing. Since plaintiff Foley is under a statutory duty to disburse salaries to all those in the judicial branch, passage of P.L. 96-86 confronted him with the possibility of a suit against him by judges if raises were not paid and the threat of prosecution by the Government if the higher (12.9 percent) raises were paid. The dilemma, it was held, satisfied the two-part test for standing set forth in *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978), in that it alleged a sufficiently "distinct and palpable injury," which injury could be redressed by the remedial powers of the Court.

Judge Smith then analyzed the language of section 101 (c) to determine if it was intended to apply to judges. The explicit inclusion of the legislative branch in the definition of "executive employees," he said, "suggests an intentional exclusion of the judicial branch." This inference was buttressed by the fact that previous statutes had expressly mentioned the judiciary when limitations for that branch were sought. Judge Smith did note that the legislative history of P.L. 96-86 was inconclusive. The Committee report, for example, stated that federal judges *were* to be included in the reduction. Remarks by managers of the bill on the floor, however, indicated that members believed they did not and could not reduce judges' salaries.

Judge Smith concluded that this ambiguous legislative history did not compel an exception to the plain meaning rule of statutory construction, and that the plain meaning here excluded the judicial branch from the statute's provisions. Referring also to the

See LITIGATION p. 3

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WESTERN DISTRICT OF WASHINGTON ADOPTS LOCAL RULE TO EASE CIVIL BACKLOG

The judges of the Western District of Washington have recently completed their first year and a quarter under a temporary local rule designed to alleviate a "chronic and serious backlog of civil cases in the District." Originally conceived by local members of the Federal Bar Association, the rule—C.R. 39.1—imposes on designated civil cases procedures designed to encourage pretrial settlement or resolution through mediation or arbitration. This rule went into effect on January 1, 1979.

The rule mandates that within two weeks of a designation of a case as a C.R. 39.1 matter, counsel must meet at least once for settlement negotiations. If the parties are unable to agree on a settlement, they are to attempt to select a mediator from a roster of experienced attorneys who have agreed to serve, without compensation, as mediators, special masters or arbitrators. If the parties are unable to make a choice of a mediator, the Court will designate one. A confidential, unrecorded mediation conference is then to be held. Any written suggestions made by the mediator respecting changes in a party's position on settlement must be forwarded by counsel to their clients. (They are not to be made available to the Court however.)

If no settlement results from private negotiation or mediation, counsel for the plaintiff is to file a certificate attesting this fact, and the Court is to convene "as promptly as possible" a conference to consider appointment of a special master or arbitrator. With consent of the parties, a special master may be selected or appointed (if the parties cannot agree on a selection), and his powers and duties are to be as set forth in F.R.C.P. 53, except as the same may be modified or limited by agreement of the parties. Alternatively, the parties may submit the action to either binding or non-binding arbitration under a volunteer attorney selected by the parties or, if necessary, appointed by the Court. An arbitration hearing is to be conducted "as early as possible consistent with the parties' need to complete their preparation for the hearing." The arbitrator's award, which need not disclose facts or reasons in support thereof (unless otherwise required by the agreement to arbitrate), is to be filed "with reasonable promptness" following the hearing.

It is still too early in the program to statistically gauge the results attributable to the new rule, but a number of terminations in cases handled by mediators, special masters and arbitrators have been achieved. While early settlements—in particular settlements achieved without the assistance of a mediator—may not be attributable to Rule 39.1, the results to date are considered interesting and gratifying by the Court. The acid test of the rule may be the ability to resolve disputes promptly and efficiently under its provisions for special masters and arbitrators after settlement negotiations have failed.

Chief Judge Walter McGovern, commenting on this new local rule, said that "The Judges of the Western District are greatly appreciative of the many hours devoted by the lawyers of the Federal Bar Association of Washington who volunteered to serve as mediators, special masters or arbitrators. This contribution by dedicated officers of the Court has already saved many hours of court time and spared litigants significant expenses in legal fees."

Originally scheduled to terminate on December 31, 1979, the rule has been extended until the end of 1980.

LITIGATION from p. 2

potential constitutional conflicts in an alternative reading of the statute, he declared that the pay reduction did not apply to judges or those members of the judicial branch whose salaries are tied to those of judges.

In a recent development, the plaintiffs in *Will II*—who have intervened in *Foley v. Carter*—filed a motion for post-judgment relief on March 31. Sought is an order directing Mr. Foley to pay affected employees an amount equal to 12.9 percent of the salary paid to them since last October and to include in future salary payments a 12.9 percent increase. Alternatively, it is requested that the Court order plaintiff to place funds necessary to make such payments in an interest-bearing escrow account.

Plaintiff Foley has informed the Court that he will not object to or oppose the motion. Attorneys for the President have noted that the motion is not directed against the defendant, but have advised the Court of their belief that the motion is unnecessary and that, if granted, it might jeopardize operation of the judicial branch by exhausting present appropriations. Plaintiff has denied the allegations contained in defendant's response.

If implemented, the 12.9 percent raise recognized by Judge Smith will create the following salary structure for judges: The Chief Justice, $84,700; Associate Justices, $81,300; Circuit, Court of Claims and Court of Customs and Patent Appeals Judges, $65,000; District and Customs Court Judges, $61,500; Court of Claims Trial Judges, $54,800; full-time Bankruptcy Judges, $53,500; and part-time Bankruptcy Judges a maximum of $26,800.

INTERVIEW from p. 1

tration and how do its subcommittees operate?

The Committee on Court Administration is a creature of the Judicial Conference. It is designed to be a research and recommending Committee to the Judicial Conference. Under guidelines of the Judicial Conference it receives assignments of matters which the Conference wishes to be thoroughly researched and studied, with recommendations and supporting material to be reported back to the Judicial Conference.

Upon receipt of an assignment, the Chairman of the Court Administration Committee assigns the request to its appropriate subcommittee for its study, consideration and recommendation. The subcommitees meet approximately one month before the parent committee meets. There is considerable in depth preliminary research performed prior to the subcommittee meeting which is immediately made available to all members of the subcommittee. As a result of that research and its discussion at the subcommittee meeting, the subcommittee makes its recommendations to the Committee on Court Administration with the accompanying research and other pertinent material.

In turn the parent committee goes through much the same process and formulates its recommendations, together with its reasons, its research and other pertinent material in condensed form, and forwards all of it to each member of the Judicial Conference about two to three weeks before its meeting. The Chairman of the Committee on Court Administration attends the meeting of the Judicial Conference, presents the recommendations and pertinent material to the Conference which usually, after full discussion, takes action thereon.

To what extent does the Judicial Conference direct or establish the scope of your Committee's work?

The Judicial Conference establishes the scope of the Committee's work but leaves it to the Committee as to how to proceed within the designated scope.

The Court Administration Committee has a new subcommittee, chaired by Judge Alvin Rubin (CA-5), which will study possible alternatives to jury trials in protracted and complex cases. Has Judge Rubin had time to report any developments as yet?

Judge Rubin's subcommittee is hard at work on this very difficult assignment, and it has developed considerable research material for its own study. A progress report from his subcommittee will be made to the Committee on Court Administration at its July 28, 1980, meeting. A full report is not expected before the January, 1981 meeting of the Committee.

One of the subcommittees, chaired by Judge Milton Pollack (S.D.N.Y.), is on Supporting Personnel. Has this subcommittee ever considered the subject of an Affirmative Action program for the Federal Judiciary?

Yes. At its September 1979 session the Judicial Conference of the United States adopted a resolution directing the Court Administration Committee, with the assistance of the Administrative Office, to prepare a Model Affirmative Action Plan for adoption by each federal court with regard to the selection and promotion of employees, and to present the plan to the Conference for approval at its March 1979 session. As Chairman of the Court Administration Committee, assigned the matter to Judge Pollack's subcommittee. Judge Pollack's subcommittee, with the assistance of the Administrative Office, in January 1980, completed an in depth study of an appropriate affirmative action plan for the federal judiciary, including all personnel for which it is responsible. The Affirmative Action Plan in turn was approved by the Court Administration Committee at its January 28, 1980 meeting, and was submitted to the Judicial Conference at its March, 1980 meeting. The Judicial Conference approved the Affirmative Action Plan and has sent it to all of the federal courts for their immediate use. [See *The Third Branch* March 1980, p. 1]

Judge John D. Butzner of the Fourth Circuit chairs the Subcommittee on Judicial Statistics. What responsibility does that subcommittee have with regard to recommending

See INTERVIEW p. 5

1980 CIRCUIT CONFERENCES

Circuit	Dates	Location
D.C.	June 1-3	Williamsburg, VA
First	May 13-15	Portsmouth, NH
Second	May 8-10	Buck Hill Falls, PA
Third	Sept. 4-5	Wilmington, DE
Fourth	June 26-28	White Sulphur Springs, W.VA.
Fifth	May 19-21	Dallas, TX
Sixth	July 27-Aug 1	White Sulphur Springs, W.VA.
Seventh	May 11-14	French Lick, IN
Eighth	July 6-9	Colorado Springs, CO
Ninth	July 13-17	Monterey, CA
Tenth	July 30-Aug 1	Denver, CO

INTERVIEW from p. 4

new federal judgeships?

It is the continuing responsibility of that subcommittee to study requests for additional judgeships, both district and appellate, received from the various circuit councils. The results of these continuing studies, with recommendations, are in turn considered by the Committee on Court Administration, and, again, in turn by the Judicial Conference of the United States.

As you know, Senator Dennis DeConcini has introduced S. 2045, a bill which provides for open meetings of the Judicial Conference of the United States and of the judicial councils of the eleven circuits, mandates published notice of the meetings and the agenda to be taken up, requires transcripts of all that takes place, and access to those transcripts. I understand the Court Administration Committee recommended against enactment of S. 2045. What were the reasons?

First, I note that the Judicial Conference of the United States at its March, 1980 meeting overwhelmingly voted its opposition to enactment of S. 2045, and I was directed to appear before Senator DeConcini's subcommittee to report that opposition and the reasons therefor. I made that appearance on March 7, 1980.

The reasons for opposition are many. I will mention a few. The bill as presently drafted may present a serious constitutional question of separation of powers. Obviously, only the Supreme Court could resolve such a question, but certainly more effort should be made to avoid preparing any bill that has that result. The bill appears to be lifted from one that is applicable only to the executive branch of government. (There is no sunshine *statute* that applies to Congress.) As lifted, the bill is not tailored to the Judiciary and would seriously impede the ability of the Judicial Conference, its committees and subcommittees and the various circuit councils to carry out their necessary and ordinary functions and duties.

While it does not purport to apply to the judicial decision making process, it hamstrings the Judiciary's ability to carry out its housekeeping and internal management functions. For example, under the bill advance formal notice not only must be given as to every meeting of the Judicial Conference, its committees and subcommittees and of the circuit councils, but also such notice must be published in the Federal Register. No changes in meeting dates or in a guideline can be made without a full meeting of the Conference, committee, or council to vote such a change, and again to publish the results of the vote in the Federal Register. The present time-proven flexible procedures would be replaced by overly formalistic, untried, and inflexible procedures, with an accompanying crippling of the judicial entity's ability to conduct its non-decisional, housekeeping and other internal management matters. Bureaucratization, waste of time and unnecessary expense would also result. S. 2045 as a practical matter is simply unworkable as applied to the Federal Judiciary.

Is the present system of operation of the Court Administration Committee working satisfactorily?

Yes. The well-qualified judges, some 37 in number, who are members of the Committee and its subcommittees have been able to meet the requests of the Judicial Conference timely and with high quality research and recommendations.

Prison Tour. District Judges Zita Weinshienk and Jim R. Carrigan (D. Colo.) recently toured the Federal Correctional Institution at Englewood, Colorado. The Judges ate lunch in the dining room and spent an entire afternoon touring the facility. Pictured above, Judge Weinshienk, Englewood Warden John Hadden and Judge Carrigan observe a physical education class in the prison gymnasium. Right, vocational training auto mechanic instructor Ed Stursma explains to Judge Carrigan the types of inmate training available.

PERSONNEL from p. 10

Owen M. Panner, U.S. District Judge, D. OR, Mar. 24

Barbara J. Rothstein, U.S. District Judge, W.D. WA, Mar. 24

RESIGNATIONS

Charles B. Renfrew, U.S. District Judge, N.D. CA, Feb. 27

Philip W. Tone, U.S. Circuit Judge (CA-7), Apr. 30

DEATHS

J. Joseph Smith, U.S. Circuit Judge (CA-2), Feb. 16

Stanley F. Reed, Associate Justice, Supreme Court of the United States, Apr. 2

MR. JUSTICE STANLEY F. REED: 1884-1980

Retired Supreme Court Justice Stanley Forman Reed died on April 2d at the age of 95. The 69th appointee to the Court, he had at this age lived longer than any other Justice in the history of the Supreme Court.

Stanley Reed was born in Kentucky, the son of a prominent Kentucky physician. He continued to keep his ties in this state and took a special interest in his working farm at Maysville, Kentucky, where he spent most of his summers.

The Justice earned a distinguished scholastic record. After graduating from Kentucky Wesleyan College in 1902, he went on to earn a second bachelor's degree at Yale University in 1906; he studied law at both the University of Virginia and Columbia Law School; and he continued his studies at the Sorbonne in Paris. He did not seek a formal law degree, however, and elected to prepare for the legal profession as an apprentice in a law office, a custom followed by many of his contemporaries.

Early in his career he was attracted to public service. He served in the Kentucky Legislature from 1912 to 1916; he was a director of the Import-Export Bank; and he was a director of the Federal Board of Hospitalization. His career as a Government lawyer peaked when he became Solicitor General of the United States, and for the next three years in this position he argued many cases which tested the constitutionality of New Deal legislation. He was President Roosevelt's second nomination to the Supreme Court and after his appointment he served continuously on the Court until February 25, 1957, when he announced his retirement.

Justice Reed's career on the Court is recorded in legal history which covers a broad spectrum of issues related to social welfare, civil rights, the right of the federal government to exercise regulatory authority, and freedom of speech. A prolific writer, he authored 339 opinions during his 19 years on the Court; 231 opinions of the Court, 20 concurring opinions, and 88 dissenting opinions. He was a careful, scholarly draftsman who reflected in all his writings a keen grasp of the law.

Chief Justice Burger, commenting in a press release announcing Justice Reed's death, said: "His public service spanned an era in which momentous changes occurred in the social and economic structure of the country. Justice Reed wrote with clarity and firmness and his hallmark was civility at all times, even in the most controversial cases coming before the Court. He won the respect and affection of all his colleagues and the Bar. His life and career make him a model to all who must deal with the great controversies of our time."

FINANCIAL DISCLOSURE STATEMENTS DUE IN MAY

William E. Foley, Director of the Administrative Office of the U.S. Courts, has distributed reminder notices that on May 15 annual financial disclosure statements must be filed, as required by the Ethics in Government Act of 1978.

The forms to be used this year have been revised in order to be simpler than those used previously.

All reporting personnel should have received these forms, together with a letter of instruction, in March.

The disclosure statements must be filed by all federal judges, magistrates, judges of the District of Columbia, and judicial employees who earn a salary equal to or greater than G.S. 16. Those part-time bankruptcy judges and part-time magistrates and other personnel who did not serve more than 60 days during calendar year 1979 need not file. Judges on senior status who have been certified by their circuit as performing "substantial judicial service" are required to file the report.

Reporting individuals are to submit two copies of their forms to the Judicial Ethics Committee and one copy to the clerk of the court in which they serve. Employees of the Administrative Office and the Federal Judicial Center, however, need only submit two copies to the Judicial Ethics Committee.

The disclosure statements are public documents available for inspection.

Judicial Conference Action

In a related development, the Judicial Conference at its meeting last March rescinded previous Conference action which assigned to an Advisory Panel responsibility to respond to requests for advice and assistance on problems relating to financial disclosure reports. As provided in the Ethics in Government Act [28 U.S.C. §§303(a), 303(c), and 306(a)], exclusive responsibility to deal with questions from the judiciary about the Act rests with the Conference's Judicial Ethics Committee, chaired by Judge Edward A. Tamm (D.C. Cir.). Thus, the Advisory Panel will no longer handle such requests. The Panel (chaired by Chief Judge Howard T. Markey of the Court of Customs and Patent Appeals), consistent with a September 1979 Conference resolution, will continue to render advisory opinions on questions arising under various codes of conduct.

MOTIONS REPORT RELEASED BY COURT STUDIES PROJECT

Judicial Controls and the Civil Litigative Process: Motions, has recently been released by the Federal Judicial Center. This is the third publication to issue from the Center's District Court Studies Project.

The report is a study of motion management procedures and their relationship to the time required to process motions from filing to ruling. It analyzes data collected on motion activity in over 3000 civil cases in six metropolitan district courts. The study investigates the effect of both oral proceedings and the implementation of a motions-day mechanism on average ruling time. The impact of opinion-drafting practices is also taken into account.

The report contains a detailed examination of each of the time components of oral-proceedings and written-submissions procedures. This section highlights the administrative effort required at each stage in order to achieve maximum efficiency in the overall motion process. Specifically noted are delays that result from relaxed enforcement of time limits on the filing of opposition briefs and from liberal continuance practices.

The report concludes that motions-day procedures and written-submissions procedures are equally effective when monitored closely in delivering motions to a speedy ruling. However, the motions-day mechanism benefits from simplified, automatic and self-enforcing features that make it an easier and less time-consuming practice to administer.

Copies of the report may be obtained from the Information Services Office of the Federal Judicial Center, (202) or (FTS) 633-6365.

Noteworthy

A panel of federal judges in the Third Circuit, as part of an experiment, recently heard oral arguments in Philadelphia while the lawyers presenting their cases were in Pittsburgh. Through the use of the Bell Telephone Company's equipment called *Picturephone,* the judges were able to observe themselves on TV monitors while at the same time observing and questioning the lawyers in the cases. Circuit Judge Joseph F. Weis, Jr., a member of the panel trying out this new procedure, also assisted in setting up a Court of Claims experiment in 1975—sponsored by the ABA Appellate Judges' Conference. Chief Judge Collins J. Seitz, commenting on the procedure after the arguments, said that they in the Third Circuit were "interested in anything that appears to cut down costs and expedite litigation."

The cost of the use of *Picturephone* equipment for 30 minutes of argument is approximately $105, which is to be split by the appellant and the appellee. Cost of travel and subsistence being what they are today, the savings could be great. So far, however, the Bell Company only has video links between 12 cities in this country.

* * * *

Senator Howard M. Metzenbaum (D. Ohio) has introduced S. 2357 to eliminate the $10,000 jurisdictional amount required for filing controversies involving federal question issues. The Senator referred to the necessity to assure that the federal courts will be open to hear all "federal law questions, regardless of the financial amount at issue," and stated that the number of such cases which would otherwise be in the state courts would be minimal.

* * * *

Chief Judge Carl B. Rubin (S.D. Ohio) has offered a useful technique to insure compliance with F.R.Cr.P. 11 when taking a plea of guilty. The Rule provides that a defendant be advised of the mandatory minimum penalty and the maximum possible penalty provided by law.

To avoid a habeas corpus claim, Judge Rubin interprets the rule rather broadly and asks if the defendant is presently on probation from any other court or on parole from any other institution. If an affirmative answer is received, he then advises the defendant that a plea of guilty might cause either the previously imposed probation or parole to be revoked. Judge Rubin points out that the procedure only takes about thirty seconds and that it secures the record against any claim that the maximum possible penalty was not explained.

* * * *

The U.S. Penitentiary at Terre Haute, Indiana and the Federal Community Treatment Centers in Dallas and Houston, Texas and Long Beach, California last October became the first federal institutions accredited by the Commission on Accreditation for Corrections, the only nationally recognized professional accreditation program for correctional facilities and services. In February, additional accreditation was received by federal institutions in Lompoc, Ca; Memphis, Tn; Texarkana, Tx; and Allenwood, Pa; and by the Community Treatment Center in Kansas City, Mo. To receive a 3 year accreditation, an adult correctional institution is measured for compliance with 465 national standards, and a community treatment center is measured against 175 standards.

* * * *

Media Library

Listed below are audio tapes available for loan to any person employed by the judicial branch of the Government by the Media Services Unit, Federal Judicial Center. Highlighted this month are tapes of special interest to federal judges. Because of their relatively recent availability, these tapes are not listed in the *Educational Media Catalog*.

J-28 Employment Discrimination Law and Federal Civil Rights Litigation. Honorable Charles R. Richey, June 21, 1979.

J-29 Judicial Standards. Honorable Edward J. Devitt and Honorable James L. King, June 22, 1979.

J-31 An Overview of Federal Class Actions—Past, Present, and Future. Professor Arthur R. Miller, June 23, 1979.

J-309 Problems in Sentencing. Honorable Alvin B. Rubin, October 3, 1979.

J-311 Analysis of Proposed Sentencing Legislation. Honorable Gerald B. Tjoflat, October 5, 1979.

J-312 New Techniques in Charging Juries. Honorable William Bauer, October 15, 1979.

J-313 New Developments in Federal Criminal Procedure. Professor Leon Friedman, October 15, 1979.

J-314 The Freedom of Information Act. Robert L. Saloschin, Quinlan J. Shea, Jr. and Lynne Zusman, October 15, 1979.

J-316 Civil Liability Under the Securities and Exchange Commission Statutes and the Proposed Federal Securities Code. Professor Louis Loss, October 16, 1979.

Requests should be sent on appropriate letterhead to: Federal Judicial Center Media Services Unit, 1520 H Street, N.W., Washington, DC 20005. Audio tapes may be retained for two weeks. In submitting requests, please include the specific date desired for the beginning of the loan period. When returning tapes, it is important that the accompanying evaluation form be completed in order that media personnel may properly evaluate the quality of service provided.

The Federal Judicial Center last month held its first Seminar for Newly Appointed Federal Appellate Judges. Chaired by F.J.C. Board member Judge John C. Godbold (CA-5), lower left, the conference attracted 35 judges from across the nation. Chief Justice Burger, upper left, was on hand with welcoming remarks.

* * * * * *

Senator Howell T. Heflin has introduced legislation to establish a State Justice Institute to provide technical and financial assistance for improvements in the administration of justice in state courts. The bill, S.2387, is expected to reach mark-up by the Senate Judiciary's Subcommitee on Jurisprudence and Governmental Relations, chaired by Senator Heflin, this spring. Among other things, the Institute would be directed to cooperate with the Federal Judicial Center on appropriate cooperative ventures.

Law Day Observance. Law Day is scheduled for May 1 this year. This will be the twenty-third annual observance of this national event, sponsored by the ABA in cooperation with state and local bar associations.

This year's theme: law and lawyers—working for you. It is designed to give the legal community not only the opportunity to discuss the role of the law, lawyers, the courts and the justice system, but also to help dispel misunderstandings and misapprehensions about the profession.

About 40,000 events will be held throughout the country on or about May 1, including addresses, mock trials, courthouse tours, naturalization ceremonies, essay contests, and films.

A Reminder to
Newly Appointed Federal Judges

LIBRARY OF CONGRESS OFFERS SPECIAL SERVICES

Following a study two years ago on the use of the services of the Law Library of the Library of Congress, a tabulation was made as to the kinds of services requested by the judges, how quickly their requests were filled, and how many were using the Library.

The results showed that the judges had some special needs for certain material and in certain geographical locations. And, it was determined that the judges were using these services to their great benefit.

Some of these services include:

- Indexes to federal legislative histories
- Computerized data bases on current legislative materials
- Photocopying services
- Rare treatises and extensive collections of American and foreign law periodicals and primary sources in the United States
- Bibliographic searches on specific subjects not limited to legal fields
- Special reports by Library staff who have developed an expertise in foreign law and who may be available to give expert testimony
- Information as to the location of special collections.
- Materials, including U.S. Supreme Court briefs, reports and opinions of federal and state attorneys general, and administrative regulations of states and territories.

To use these services, judges or their staff should contact Marlene C. McGuirl, Chief of the American-British Law Division, Law Library, Library of Congress, Washington, D.C. 20540. Mrs. McGuirl's telephone number is (202) 287-5081.

CONVENTION FOR AUTHENTICATING FOREIGN PUBLIC DOCUMENTS RATIFIED

The General Counsel's office of the Administrative Office of United States Courts has called attention to a new international convention which affects the procedures used in admitting foreign public documents into evidence. Their report follows.

The Senate on November 28, 1979 gave its advice and consent to the ratification by the United States of the Convention abolishing the requirement of legalization for foreign public documents. Its purpose, as it was developed by the Hague Convention on Private International Law, is to eliminate in part the necessity for the long chain of authentications of documents emanating from public authority in one country for use in the courts of another country.

Under the Convention, each country designates those public officials, by their titles, who may affix a form of certification known as the "apostille". The certificate simply states that the document was signed by an individual in his official capacity and that the seal or stamp is genuine. Documents from countries which are parties to the Convention are to be recognized in the courts here so long as the apostille is affixed. (Similarly, American documents bearing the apostille are to be recognized in foreign courts.) Thus, compliance with Federal Rule of Evidence 902, which specifically requires diplomatic or consular certification of foreign public documents, will no longer be necessary.

Ratification of this Convention was approved by the Judicial Conference of the United States in September 1974. Following the recent Senate action, the U.S. is expected to deposit the instruments of ratification (accession) at the Hague shortly. The Convention will take effect six months and 60 days thereafter. At the present time, the Convention is in full effect in 29 countries and it has been signed but not yet ratified by two others.

The Convention contemplates that the apostille may be affixed either on a separate piece of paper or by being stamped on the documents. It is required that the issuing authorities maintain a register or card index recording the date and number of each certificate issued and other particulars regarding the document.

The Convention does not apply to most private papers, but covers all official documents, i.e. those produced by a unit or official of a state or the federal government, as well as any documents, including private papers, which have been notarized.

When the United States deposits the instrument of accesion at the Hague, it will designate the clerks and deputy clerks of U.S. district courts as those officers authorized to affix the apostille. Eventually, officials of our state governments will also be designated. However, because of the existence of 50 state government systems, it will be some time before the State Department has worked out the details with all of them.

* * * * * *

By a 97-0 vote the Senate on February 26, 1980 approved S. Res. 374, introduced by Senator Dennis DeConcini (D. Ariz.). S. Res. 374 calls on the American Bar Association and the Department of Justice to take all necessary measures to end discrimination against prospective federal judges who would not be qualified, by their standards, solely because of arbitrary age barriers. Current ABA guidelines, endorsed by the Department of Justice, have set out special requirements for any candidates who have reached age 60 and definitely bars all those candiates over age 64.

PERSONNEL

NOMINATIONS

John D. Holschuh, U.S. District Judge, S.D. OH, Mar. 28

Ann Aldrich, U.S. District Judge, N.D. OH, Mar. 28

George W. White, U.S. District Judge, N.D. OH, Mar. 28

Samuel J. Ervin, III, U.S. Circuit Judge (CA-4), Apr. 2

William C. Canby, Jr., U.S. Circuit Judge (CA-9), Apr. 2

Charles L. Hardy, U.S. District Judge, D. AZ, Apr. 2

Milton I. Shadur, U.S. District Judge, N.D. Il, Apr. 2

Frank J. Polozola, U.S. District Judge, M.D. LA, Apr. 2

Clyde S. Cahill, Jr., U.S. District Judge, E.D. MO, Apr. 2

CONFIRMATION

Truman M. Hobbs, U.S. District Judge, M.D. AL, April 3

APPOINTMENTS

Diana F. Murphy, U.S. District Judge, D. MN, Feb. 22

Robert G. Renner, U.S. District Judge, D. MN, Feb. 22

Harry T. Edwards, U.S. Circuit Judge (CA-DC), Feb. 27

Henry Woods, U.S. District Judge, E.D. AR, Feb. 28

Richard W. Arnold, U.S. Circuit Judge (CA-8), Mar. 7

Gilberto Gierbolini-Ortiz, U.S. District Judge, D. PR, Mar. 14

Helen J. Frye, U.S. District Judge, D. OR, Mar. 24

James A. Redden, Jr., U.S. District Judge, D. OR, Mar. 24

See PERSONNEL p. 5

a a of JC calendar

May 1-3 Seminar for Assistant Federal Public Defenders and Assistant Community Defenders; New York, NY

May 7-9 Sentencing Institute (CA-3 and CA-6); Lexington, KY

May 8-10 Second Circuit Judicial Conference; Buck Hill Falls, PA

May 11-14 Seventh Circuit Judicial Conference; French Lick, IN

May 13-15 First Circuit Judicial Conference; Portsmouth, NH

May 18-21 Fifth Circuit Judicial Conference, Dallas, TX

May 19-20 Judicial Conference Submmittee on Judicial Statistics; Bar Harbor, ME

May 19-22 Seminar for Bankruptcy Clerks, Clayton, MO

May 20-23 Effective Productivity for Court Personnel; Portland, OR

June 2-4 Advanced Seminar for Full-time U.S. Magistrates; Little Rock, AR

June 8-14 Seminar for Newly Appointed District Judges; Washington, DC

June 16-18 Advanced Instructional Technology Workshop; Oklahoma City, OK

June 26-28 Fourth Circuit Judicial Conference; White Sulphur Springs; W. VA

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METROPOLITAN CHIEF JUDGES CONVENE BIANNUAL MEETING

The Conference of Metropolitan District Chief Judges, representing the thirty trial courts with six or more authorized judgeships, held its biannual meeting on April 9th through 11th in Charleston, South Carolina.

The program prepared by the Federal Judicial Center included a discussion of the impact of attorneys' fee applications on the workload of the district courts (as detailed in a separate article on page 2) and an informative and lively presentation on the courts and their relation with the media. Chief Judge Fred M. Winner (D. Colo.) chaired a panel that included Judge Donald Fretz, Merced County Superior Court, Merced, California; Professor Everette E. Dennis, University of Minnesota School of Journalism; and Michael B. Howard, Editor, Rocky Mountain News, Denver, Colorado. Each speaker discussed his views on the topic from his own institutional perspective and then shared ideas and suggestions on shaping more productive interaction between the Fourth Estate and the Third Branch.

Further, the Conference heard status reports on two Judicial Center projects. Steven Flanders, of the Research Division, discussed the ongoing efforts in the weighted caseload area. He provided a brief historical overview on case weighting, noted the preliminary results of

See MET CHIEFS p. 2

CHANGES IN DISCOVERY, OTHER CIVIL RULES TRANSMITTED

The Chief Justice has reported to Congress amendments to the Federal Rules of Civil Procedure, which will go into effect August 1, 1980, unless Congress takes further action before then. The amendments relate principally to the area of discovery, although other minor changes are made. These proposals represent the first significant alterations in the civil rules since 1970, and reflect concern over alleged discovery abuse, and corresponding drafting and debate of possible changes extending back from at least the 1976 report of the Pound Conference Follow-Up Task Force Report. In 1977, a special ABA Section of Litigation Committee for the Study of Discovery Abuse recommended more extensive changes than those recently transmitted. In fact, in an unusual step, three members of the Supreme Court dissented from the transmittal, arguing that more extensive changes, such as proposed by the ABA Committee, were necessary.

Background. Federal procedural rules changes are considered first by rules committees of the Judicial Conference, and then by the Conference itself, which in turn may report proposals to the Supreme Court for its review and transmittal to Congress. Under the Rules Enabling Acts (28 U.S.C. 2071, et seq.), Congress has 90 days to exercise a veto power. Alternatively, Congress may take some other action, such as redrafting the rules or extending the time period for review. The Judicial Conference Standing Committee on Rules of Practice and Procedure held extensive public hearings on earlier drafts of the current proposals.

The recently submitted amendments will refine several existing practices.

Discovery Conference. New Rule 26(f) authorizes the court to call the attorneys before it for a

See CIVIL RULES p. 3

JUDGES' SALARY LITIGATION MOVES TOWARD APPELLATE REVIEW

The three federal actions contesting past reductions in judicial salaries are now, or soon will be, before the appellate courts.

Two actions which originated in the Northern District of Illinois, *Will v. United States,* No. 79-983 *("Will I"),* and *Will v. United States,* No. 79-1689 *("Will II"),* are now both pending before the Supreme Court. In *Will I,* in which District Judge Stanley Roszkowski held that pay reductions in 1976 and 1977 violated the Compensation Clause of the Constitution, the Government has received an extension until June 2nd to file its brief on the merits. The brief of the respondents, thirteen Article III judges and others similarly situated, will be due 30 days thereafter. The American Bar Association is presently preparing one of its infrequent amicus curiae briefs in support of

See LITIGATION p. 5

WORKLOAD IMPACT OF ATTORNEYS' FEE APPLICATIONS DISCUSSED

The Conference of Metropolitan District Chief Judges, meeting in Charleston, S.C. (see companion story on page 1), considered the impact on district courts' time and workload of attorneys' fee applications. The discussion leaders, Judge Alfred L. Luongo (E.D. Pa.) and Judge Richard B. Kellam (E.D.Va.), noted that the time and work consumed in fixing the fee often dwarf the burdens associated with the case in chief.

While percentage of recovery had long been the standard for assessing the fee, Judge Luongo noted that recent legislation, in particular the Civil Rights Attorneys Fees Award Act of 1976, has created new standards for determining the amount of the award. The appellate courts have provided formulae and guidelines, but determining the fee remains difficult, complex, and time-consuming and has thus had a significant impact on the workload of the trial courts.

There are difficulties in verifying the accuracy of time records, assessing the quality of the representation, and determining the necessity for certain motions or arguments. Other, even thornier, questions were raised for discussion. Fees, for example, are to be awarded only to a prevailing party, but who has "prevailed" in a consent decree? What standards should be applied where attorneys from legal services or not-for-profit organizations are less well paid than those working in private firms? In class actions where the fee is sought from the fund, should another attorney be appointed to protect the interests of the class members? Under what circumstances is an adversary hearing required or preferred for these matters?

Another set of problems relates to potential conflicts between attorneys' interests and those of their clients. Judge Kellam noted that the question of entitlement to a fee may discourage amicable resolution of relatively minor problems, especially when that fee is larger than the amount in controversy. Further, the time of settlement may be deferred while counsel builds up significant numbers of billable hours. Finally, though a number of lawyers might work profitably on the same issue or item, at some point combined effort becomes duplicative and excessive.

The discussion leaders expressed the significant concern that since much time is devoted to fee issues, the public may perceive that the courts are more interested in the pocketbooks of lawyers than the rights of litigants.

MET CHIEFS from p. 1

current efforts, and indicated the direction in which future weighting projects will be aimed. E. Allan Lind, also of the Research Division, introduced the Conference to the court-annexed arbitration project that the Center is currently evaluating in three district courts (N.D. Calif., E.D. Pa., and D. Conn.) in cooperation with the Department of Justice. He described the background of these projects, provided examples of the data being generated by them, and reported on the legislative proposals that would expand arbitration activity to each of the federal circuits.

Finally, the Conference heard from Joseph Spaniol, Deputy Director of the Administrative Office, on pending legislation and other items of interest.

The Center's Director Emeritus, Senior Judge Walter E. Hoffman (E.D. Va.) serves as the Conference chairman. Charles W. Nihan, Deputy Director of the Center, is the Conference secretary. The session was hosted by Chief Judge Robert Hemphill (D. S.C.) and the other judges of that court.

JUDICIAL FELLOWS NAMED FOR 1980-1981

The Judicial Fellows Commission recently announced that Carroll Seron, Michael J. Tonsing and John C. Yoder have been selected as Judicial Fellows for 1980-1981. The Judicial Fellows program, now in its seventh year, is designed to enable young professionals to spend a year observing and contributing to projects aimed at improving judicial administration.

Carroll Seron is a sociologist, possessing an M.A. (1974) and Ph.D. (1976) from New York University. She attended Yale as a postdoctoral fellow in 1976-77,

and performed her undergraduate work in American studies at the University of California at Santa Cruz. Ms. Seron has been teaching at the University of Texas at Dallas since 1977, and she presently has near completion a co-authored book examining the effects of court organizational dynamics on the disposition rate for federal civil

See FELLOWS p. 7

The Third Branch

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

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

CIVIL RULES from p. 1

conference on the subject of discovery. Such a conference may be held on the motion of a party after the moving attorney affirms that he or she has made a "reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion." Furthermore, parties and counsel are required to participate "in good faith" in framing a discovery plan proposed by an attorney.

Following a conference, the court is to identify tentatively the issues for discovery purposes, establish a plan and schedule for discovery, set limitations (if any) on discovery, and determine other matters, including allocation of expenses, as are necessary for the management of discovery in the case.

Pursuant to Rule 37, violations of an order entered under Rule 26(f) are subject to the imposition of sanctions listed in Rule 37(b)(2), and failure to participate in good faith in framing a discovery plan may lead to the assessment of expenses, including attorney's fees, against the responsible party or attorney.

Depositions. Pursuant to changes in Rule 30(b)(4), the parties may stipulate, rather than await a court order, to have deposition testimony recorded by other than stenographic means. Under a new subsection (7) of the Rule, the parties may also stipulate, or the court may order, that a deposition be taken by telephone. A change in Rule 32(a)(1) expands the uses to which a deposition may be put in court proceedings to include any purpose permitted by the Federal Rules of Evidence.

Other Matters. Provisions in Rule (33)(c) regulating the production of business records as answers to interrogatories have been amended so that specification of such records must be in sufficient detail to permit the questioning party to locate and identify, "as readily as can the party served," the records from which the answer may be ascertained. A new provision is added to Rule (34)(b) that a party producing documents for inspection "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request."

Several other minor changes in the rules governing the issuance and service of a summons (Rule 4), the filing of discovery papers (Rule 5), and the obtaining of a subpoena for failing to respond to a notice of deposition (Rule 45) are also made. Changes in Subsection (e)(1) of Rule 45 for the first time authorize service of a subpoena for attendance at hearing or trial at any place permitted by a statute or rule of the state where the district court is held.

Dissents. A dissenting statement was filed by Mr. Justice Powell, joined by Justices Stewart and Rhenquist. "These amendments are not inherently objectionable," it said, "But the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." Mr. Justice Powell maintained that delay and excessive expense in litigation are caused in significant part by discovery abuse under the rules, and he worried that "Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms . . . Favorable Congressional action on these amendments will create complacency and encourage inertia."

FIFTH CIRCUIT PETITIONS FOR SEPARATION

On May 7th the Judicial Council of the United States Court of Appeals for the Fifth Circuit, through a resolution of the Council, petitioned Congress to enact legislation which would divide the presently existing geographical boundaries of the Circuit into two autonomous judicial circuits.

The petition requests that the one circuit, to be called the Fifth, be made up of the states of Louisiana, Mississippi and Texas (with headquarters in New Orleans); and the other, to be designated the Eleventh, be composed of the states of Alabama, Florida and Georgia (with headquarters in Atlanta).

Pending action on this petition by Congress, and "to eliminate numerous administrative difficulties, and pursuant to the inherent and statutory authority vested in this court," two administrative units are to be established within the Fifth Circuit, designated Unit A and Unit B. Geographically, they would be divided in the same manner as outlined in the petition, with headquarters' cities also the same.

As for the handling of the cases, every case will be filed, considered and decided in the unit in which it arose and the decisions on the cases filed in each unit will ordinarily be made by panels of judges residing in the states in that unit. Made clear is the fact that all Fifth Circuit judges may serve circuitwide. Also stipulated is the fact that "there shall be only one body of law, one judicial council and one judicial conference for the circuit."

A transition committee has been appointed by the Chief Judge of the Fifth Circuit, James P. Coleman, consisting of himself and Judge Charles Clark (Miss.) Chairman, Judge John C. Godbold (Ala.), Judge Albert J. Henderson, Jr. (Ga.) and Judge Sam Johnson (Tex.), to prepare and present to the Judicial Council proposals to implement the Council's resolution.

Noteworthy

A number of recent resignations of federal judges—Charles Renfrew (N.D. Calif.), Philip Tone (CA-7), Shirley Hufstedler (CA-9), and George J. Mitchell (D. Maine)—have received much public attention. Wade H. McCree, Jr., who resigned from the Sixth Circuit to become Solicitor General of the United States, recently discussed "Defecting Judges, the Cause and Cure" in his speech accepting the Fordham-Stein Award in New York City.

The reasons for such "defections," the Solicitor General pointed out, may not necessarily be for higher pay; rather, he analyzes, judges oftentimes "hang up their scales" to accept a more interesting position or because "even the most interesting work can begin to cloy." The Solicitor General's conclusion and the suggestion for a cure to the problem: judicial sabbaticals. "I think it is incumbent upon those of us who care about the quality of justice to think of ways to persuade judges to [remain on the bench]. Academe has for a long time employed a practice to cure the blahs . . . scholars and teachers wind down when they periodically feel drained of inspiration and creativity." [A copy of Solicitor General McCree's speech is available in the FJC Information Services Office.]

* * *

A first for the Fourth: Circuit Executive Samuel W. Phillips has just released the 1979 Report of the Fourth Circuit Courts, a 62-page report on the business of this Circuit. Such a report has not previously been prepared, but plans are now to make this an annual release. The Second Circuit, which has produced annual reports in the past, recently released their 1979 version. Copies of either report are available by writing the respective Circuit Executives.

The seventh Judicial Conference of the United States Court of Customs and Patent Appeals was held April 11 in Washington, D.C. The Conference was composed of judges of the CCPA and of the Customs Court, members of the Patent and Trademark Office Boards and the International Trade Commission, officials of the Treasury Department, Justice Department and the Customs Service, and invited members of the bar. Pictured above are members of a "judicial talk show" on patent and trademark litigation which was held in conjunction with the Conference. They are (left to right) attorney C. Frederick Leydig of Chicago, Ill., Judge Frank J. McGarr (N.D. Ill.), Chief Judge Howard T. Markey (CCPA), Judge John P. Fullam (E.D.Pa.), and attorney Tom Arnold of Houston, Texas.

* * *

Senator Howell Heflin (D. Ala.) has introduced S. 2483, a bill to amend Title 28 of the United States Code to require the Chief Justice of the United States to deliver an annual address to Congress, in person or in writing, on the state of the judiciary. The bill sets forth that this report be presented "at such times as may be mutually agreed upon by the Chief Justice, the majority leader of the Senate, and the Speaker of the House of Representatives...." In any calendar year in which the Chief Justice does not appear personally, his address is to be transmitted to Congress no later than March 15th of that year. The bill has been referred to the Senate Judiciary Committee.

* * *

Chief Judge Irving Kaufman reported May 9th at the opening session of the Second Circuit's Judicial Conference that initial work of the Circuit's Five Year Planning Committee—the first established for a federal court—will soon be released. An exhaustive study of the district courts in the circuit has nearly been completed, and the details of the subcommittee reports will soon be made to the district judges. Particularly pleased by the diversity of membership in the Committee—judges, lawyers, journalists, business leaders and others are included—Chief Judge Kaufman anticipates that the final Committee report, probably to be released this fall, will be of "significant value" in improving the administrative operation of the district courts.

* * *

Judge Thomas J. Malik, of the 29th Judicial District Court in Louisiana, has sent to *The Third Branch* a copy of a letter he has directed to the Chief Justice saying he has reversed himself on a public statement made a few years ago, disagreeing with the Chief Justice's stand on the quality of advocacy in this country. Writes the Judge: "As I begin my second six-year term as a Trial Court Judge, I now extend my apologies. Having never before been exposed to a wide variety of 'trial lawyers,' I did not fully understand the dilemma the general public and trial courts are faced with. Indeed, I now feel that your estimate as to the percentage of incompetent trial lawyers was conservative."

LITIGATION from p. 1

the position of the federal judges, but the exact nature of the issues to be addressed by the ABA's submission has not yet been determined. Although the required consent of the Solicitor General for the filing of the brief has not been received, opposition to the ABA's filing is not anticipated.

The Government's jurisdictional statement was filed April 25th in *Will II*, and the respondent's motion to affirm will be filed near the end of May. In that case, Judge Roszkowski held that "in view of" his decision in *Will I* reductions of judicial salaries in 1978 and 1979 were also unconstitutional. The Government recently moved to consolidate consideration of this case with *Will I*. The respondents have objected to consolidation maintaining that resolution of *Will I* will make argument of *Will II* unnecessary.

What will presumably be the final order in the trial stage of *Foley v. Carter* was issued on April 22nd, when District Judge John Lewis Smith, Jr. denied a motion for post-judgment relief, thereby leaving intact his order granting summary judgment in favor of the plaintiff, No. 79-3063 (D. D.C.). In March, Judge Smith ruled in favor of the Director of the Administrative Office of the United States Courts that 1979 legislation reducing a previously authorized 12.9 percent pay raise for Congressmen and others to 5.5 percent did not apply to the Judicial Branch. The judgment contained no provisions for implementation, and intervenors in the case—the plaintiffs in *Will II*—subsequently moved for immediate payment of the 12.9 percent raise, or, alternatively, for the establishment of an interest bearing escrow account to hold the funds necessary to pay such an increase. Plaintiff Foley did not oppose the motion. Attorneys for the defendant, though noting that the motion was not directed against the President, maintained that the request was unnecessary and undesirable. Judge Smith's order denying the motion was not accompanied by an opinion.

The Government has indicated that an appeal will be taken to the D.C. Circuit, but no formal notice of appeal has been filed.

NEW SUPREME COURT RULES EFFECTIVE JUNE 30

The Supreme Court has adopted new rules of practice that will become effective June 30, 1980. In addition to clarifying and reorganizing existing rules, which have been in effect since July 1, 1970, the new rules contain a number of significant changes. Page limits on filed materials have been imposed, a color coding system for the covers of documents has been introduced, and filing and other fees have been raised. Some of the changes are:

Page Limits:

- Briefs on the merits-50 pages
- Jurisdictional statements, motions to dismiss or affirm, petitions for certiorari and briefs in opposition, petitions for extraordinary writs and responses thereto, and amicus curiae briefs - 30 pages
- Reply briefs to briefs on the merits - 20 pages
- Briefs opposing motions to dismiss or affirm, supplemental briefs and reply briefs to briefs in opposition to petitions for certiorari - 10 pages
- Page limitations on documents produced by standard typographic printing are slightly more than twice those set out above, which are for printed materials.

Color Code for Covers:

- Jurisdictional statements and petitions for writs of certiorari - white.
- Motions, briefs, or memoranda filed in response to jurisdictional statements or petitions for certiorari - light orange.
- Briefs on the merits for appellants or petitioners - light blue.
- Briefs on the merits for appellees or respondents - light red.
- Reply briefs - yellow.
- Intervenor or amicus curiae briefs - green.
- Documents filed by the United States - gray.
- Joint appendices and other documents - tan.

Fees:

- Admission to the bar has been raised from $25 to $100.
- Docketing fees have been increased from $100 to $200 and from $150 to $300 when oral argument is permitted.
- Filing a petition for rehearing will cost $50.
- Certificate and seal has been increased from $3 to $10.
- Photographic reproduction and certification has been increased from 50¢ to $1 per page.

Time Limits:

- All petitions for certiorari must be filed within 60 days of judgment. An extension of time of 30 days may be granted for good cause.
- Reply briefs must be filed no later than one week before oral argument.
- Any respondent to a petition for writ of certiorari, including the United States, shall have 30 days to file opposing briefs.
- Models, diagrams and exhibits of material forming part of the evidence must be submitted to the Court at least two weeks before a case is heard or submitted.
- Documents are deemed timely filed if placed in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of the Court within the time allowed for filing.

See COURT RULES p. 7

FEDERAL BUREAU OF PRISONS MARKS 50TH ANNIVERSARY

The Federal Bureau of Prisons begins the celebration of its 50th anniversary on May 23, at the Medical Center for Federal Prisoners in Springfield, Missouri. The commemoration, which is dedicated to the line staff of the Bureau, will include lectures on the history of the Bureau and will feature an historical exhibit, which on June 10-12 will be moved to Washington, D.C. for display in the Great Hall at the Department of Justice Building.

The Bureau of Prisons was created by Act of Congress on May 14, 1930, at a time when the only federally administered facilities for federal prisoners were three penitentiaries, a reformatory for young men, a reformatory for women and a jail in a converted New York City garage. Many federal prisoners were boarded in state and local prisons over which there was little federal control and even the existing federal institutions were administered by political appointees and suffered from lack of consistent management. The Bureau was created to provide to the federal corrections system centralized administration, trained personnel and a uniform philosophy of corrections.

In its fifty years, the Bureau has seen increased numbers of federal prisoners and changing theories of penology. When the Bureau was created prisons primarily provided custody, punishment and the production of goods or furnishing of services by prisoners. One of the first accomplishments of the Bureau was to focus on the needs of prisoners by establishing a classification system for offenders. Federal institutions were organized to respond to those needs and were divided into penitentiaries, reformatories, prison camps, treatment facilities for drug offenders and a hospital. Offenders were sent to the facility most appropriate to their individual circumstances and, once there, were further classified according to their needs. Probation and parole systems were extensively reorganized to serve the theory of rehabilitation as opposed to punishment.

In recent years the Bureau has attempted to improve its classification system, provide increased individual services and offer more training for its staff. Work release programs have been developed and the use of Community Treatment Centers has been increased to provide assistance to the offender reentering society. New facilities have been added with the emphasis on smaller, more specialized, more flexible, and more responsive institutions.

Today, the Bureau employs 10,790 persons, including medical, legal, scientific and other professional personnel as well as administrators and correctional officers. It administers six penitentiaries, 25 Federal Correctional Institutions, nine Community Treatment Centers, seven Federal Prison Camps, three Metropolitan Correctional Centers and the Medical Center for Federal Prisoners. Over 23,000 inmates are currently in custody in these institutions.

Amid challenges to the viability of the rehabilitation theory of penology and public confusion about the role of prisons, the Bureau is continuing to serve both the public and the offender by increasing alternatives for offenders that do not involve institutional confinement, improving present programs and facilities, expanding community involvement and reducing the economic cost of corrections to taxpayers.

In addition to highlighting the history of the Bureau, the celebration in Springfield will include, on May 23, the signing of a "Memorandum of Understanding Between the Federal Prison System and the Correctional Service of Canada." The memorandum envisions exchange of staff and information, the development of a joint Steering Committee and annual meetings. For the Washington phase of the commemoration each of the various divisions of the Bureau will present programs on its history and functions during the weeks of June 9 and June 16.

HISTORIES OF THE UNITED STATES CIRCUIT COURTS

A number of histories of United States Circuit Courts have recently been published as one of the bicentennial projects authorized by the Judicial Conference of the United States. The histories of the Sixth, Eighth and D.C. Circuits and the United States Court of Claims are currently available. In process are the histories of the Second, Third, Fourth, Fifth, Seventh, Ninth and Tenth Circuits and the Court of Customs and Patent Appeals.

Circuit histories have been distributed to libraries of the federal courts and to selected government agencies, law schools, bar associations and law journals.

The Information Services Office of the Federal Judicial Center has received copies of circuit histories as well as histories of the District Courts of the District of Columbia and Minnesota and the United States Customs Court. The Information Services Office hopes to receive copies of other histories of the circuit courts as they are published and the histories of any other district courts.

FELLOWS from p. 2
and criminal cases. Her previous publications include Court Reorganization: The Politics of Reform in Federal Bankruptcy Court (D.C. Heath and Co., 1978).

Michael Tonsing is a hearing officer for the Public Employment Relations Board in California,

handling not only adjudication but also case management and administration. A graduate of the University of San Francisco (J.D. 1975), Claremont Graduate School (M.A. 1970) and Saint Mary's College of California (B.A. 1965), Mr. Tonsing previously maintained a general law practice and is a co-founder and President of the California Administrative Law College, which develops training programs for administrative law judges, arbitrators, and advocates and promotes the effective use of alternatives to courtroom litigation. He also cofounded and instructed at an ABA accredited paralegal program and is a qualified labor arbitrator on the panel of the American Arbitration Association.

John C. Yoder comes to the Judicial Fellows program as an Associate District Judge from the Ninth Judicial District in Kansas. He is the youngest person to have held a position as a judge in a court of general jurisdiction in that state. Judge Yoder received his J.D. from the University of

Kansas in 1975 and also possesses degrees from the University of Chicago (M.B.A. 1976) and Chapman College (B.A. magna cum laude 1972). Prior to his tenure on the bench, Judge Yoder served as an assistant professor of business at Goshen College in Indiana and before then was in private practice in Chicago.

CALENDAR from p. 8

July 8-11 Effective Productivity for Court Personnel; Kansas City, MO

July 13-17 Ninth Circuit Judicial Conference; Monterey, CA

July 14-18 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Danvers, MA (tentative date)

July 28-29 Workshop for District Judges (CA-6); White Sulphur Springs, W VA

COURT RULES from p. 5

Other Changes:

- The order of contents of petitions for certiorari and briefs on the merits has been changed. These documents are now required to begin with the questions presented for review.
- Judges who are respondents to petitions for extraordinary writs *shall* advise the clerk and all parties by letter if they do not desire to respond. The existing rule states that judges *may* respond.

Chief Deputy Clerk, CA-5

FIFTH CIRCUIT POSITION OPEN

The following position vacancy and qualifications necessary for consideration has been announced in the Fifth Circuit:

Position: Chief Deputy Clerk, U.S. Court of Appeals for the Fifth Circuit.

Duties: To manage a Satellite Clerk's Office in Atlanta, Georgia.

Salary: JSP-15, $40,832

Qualifications: A minimum 10 years of progressively responsible administrative experience which provided a thorough understanding of organizational, procedural and human relations aspects in managing an organization. At least 3 of the 10 years experience must have been in a position of substantial management responsibility.

Application and resume should be sent to Gilbert F. Ganucheau, Clerk, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130.

PERSONNEL from p. 8

CONFIRMATIONS

Odell Horton, U.S. District Judge, W.D. TN, May 9

John T. Nixon, U.S. District Judge, M.D. TN, May 9

Norma H. Johnson, U.S. District Judge, D. DC, May 9

APPOINTMENTS

Jerry L. Buchmeyer, U.S. District Judge, N.D. TX, Dec. 14

Cecil F. Poole, U.S. Circuit Judge (CA-9), Mar. 31

ELEVATION

Harry E. Claiborne, Chief Judge, D. NV, May 1

DEATH

C. Stanley Blair, U.S. District Judge, D. MD, Apr. 2

AO and FJC calendar

June 1-3 District of Columbia Circuit Judicial Conference; Williamsburg, VA

June 2-4 Advanced Seminar for U.S. Magistrates; Little Rock, AR

June 8-14 Seminar for Newly Appointed District Judges; Washington, D.C.

June 9 Judicial Conference Subcommittee on Federal Jurisdiction; Washington, DC

June 9 Judicial Conference Subcommittee on Supporting Personnel; Washington, DC

June 9-11 Advanced Instructional Technology Workshop; Reno, NV

June 17-20 Judicial Conference Committee to Implement the Criminal Justice Act; Casheers, NC

June 20 Judicial Conference Committee on the Administration of the Bankruptcy System; Richmond, VA

June 26-28 Fourth Circuit Judicial Conference; White Sulphur Springs, W VA

June 30 - July 1 Judicial Conference Subcommittee on Judicial Improvements; Vail, CO.

July 6 - 9 Eighth Circuit Judicial Conference; Colorado Springs, CO

See CALENDAR p. 7

PERSONNEL

NOMINATIONS

Robert P. Aguilar, U.S. District Judge, N.D. CA, Apr. 3

James H. Michael, Jr., U.S. District Judge, W.D. VA, Apr. 9

James E. Sheffield, U.S. District Judge, E.D. VA, Apr. 9

Ruth B. Ginsburg, U.S. Circuit Judge (CA-DC), Apr. 14

Jerre S. WIlliams, U.S. Circuit Judge (CA-5), Apr. 14

Patrick F. Kelly, U.S. District Judge, D. KS, Apr. 14

W. Earl Britt, U.S. District Judge, E.D. NC, Apr. 14

Walter H. Rice, U.S. District Judge, S.D. OH, Apr. 14

S. Arthur Spiegel, U.S. District Judge, S.D. OH, Apr. 14

George R. Anderson, Jr., U.S. District Judge, D. SC, Apr. 18

Judith N. Keep, U.S. District Judge, S.D. CA, May 9

Marilyn H. Patel, U.S. District Judge, N.D. CA, May 9

Thelton E. Henderson, U.S. District Judge, N.D. CA, May 9

A. Wallace Tashima, U.S. District Judge, C.D. CA, May 9

Justin L. Quackenbush, U.S. District Judge, E.D. WA, May 9

See PERSONNEL p. 7

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APPEAL HALTS PAYMENT OF SALARY INCREASES

The District Court's summary judgment in *Foley v. Carter* has been appealed by the defendant to the Court of Appeals for the D.C. Circuit. This prevents implementation of the District Court's finding that federal judges and others are entitled to a 12.9 percent pay increase for FY 1980. In March, District Judge John Lewis Smith, Jr. ruled that a 1979 statute reducing a pay increase of 12.9 percent for Congressmen and other officials to 5.5 percent did not apply to employees of the judicial branch (see *The Third Branch,* April 1980, p. 1). Even though a minimum 5.5 percent raise was apparently provided for in the statute, no increases have been paid to judges because the statute provided that acceptance of a 5.5 increase would be "in lieu of" a

See SALARY APPEAL p. 8

AN INTERVIEW WITH REP. ROBERT McCLORY

Continuing its series of interviews with congressmen who serve on the House and Senate Judiciary Committees, The Third Branch *this month speaks with Robert McClory of Illinois, the ranking Republican on the House Judiciary Committee. [Previous congressional interviews have been conducted with Senator Edward M. Kennedy (September 1979), Congressman Robert F. Drinan (July 1979), Congressman Robert W. Kastenmeier (June 1979), Senator Howell T. Heflin (May 1979), Senator Dennis DeConcini (November 1977), and Congressman Peter W. Rodino (April 1976).]*

In addition to his Judiciary Committee duties, Mr. McClory is a member of the Permanent Select Committee on Intelligence. A graduate of Dartmouth College and the Chicago-Kent School of Law, he has served his native state of Illinois as a legislator for many years, elected as a state representative in 1950, a state senator in 1952, 1956 and 1960, and a Member of Congress in 1962 and each succeeding Congress.

Set out below are the Congressman's views on a number of issues of interest to the federal judiciary, ranging from amendments to antitrust laws to abolition of diversity jurisdiction.

Coming to the Congress with the background you have, you are a "natural" for the Judiciary Committee. But, did you have some special reason for requesting the Judiciary Committee or accepting it?

I went to the Judiciary Committee in my second term. When I was here as a new member, I wanted to be on the Foreign Affairs Committee; that was my first choice and the

See INTERVIEW p. 4

FIFTEEN DISTRICTS VOLUNTEER TO PARTICIPATE IN WORK OF FEDERAL PRACTICE COMMITTEE

The first report of the Implementation Committee on Admission of Attorneys to Federal Practice was submitted to the March 1980 meeting of the Judicial Conference. (See *The Third Branch,* March, 1980, p. 1.) The Committee was created by a Judicial Conference resolution and charged to "oversee and monitor on a pilot basis an examination on federal practice subjects, a trial experience requirement, and a peer review procedure, in a selected number of district courts that indicate a desire to cooperate [in the] programs."

Fifteen United States District Courts have now volunteered as pilot districts to try out some of the proposals contained in the Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts (the Devitt Committee).

Serving within these 15 courts are 117 active judges and a substantial number of active senior judges—approximately

See COMMITTEE p. 3

Noteworthy

LEGISLATION TO PROTECT RIGHTS OF INSTITUTIONALIZED PERSONS PASSED

The President on May 23 signed P.L. 96-247, the Civil Rights of Institutionalized Persons Act, which permits the Attorney General to file an action in equity to protect rights of persons held in state institutions. The legislation covers mental hospitals, facilities for the care of the retarded or the chronically ill or handicapped, jails, prisons, certain juvenile facilities and certain custodial care institutions. It only applies to those institutions, however, that are owned or operated by a state or political subdivision. Mere state licensing or receipt of state funds is not sufficient to bring an institution under the coverage of the Act.

Suit may be brought only for equitable relief and only when the Attorney General has reasonable cause to believe that there is a "pattern or practice" in a state institution that subjects institutionalized persons to "egregious or flagrant conditions" depriving them of rights secured under the Constitution or laws of the United States. The bill encourages consultation, negotiation and conciliation, and suit may not be filed until the Attorney General can certify that he notified state officials seven days prior to an investigation of the institution and has made a good faith attempt to conciliate. He must also certify that at least 49 days prior to suit he notified state officials of the details supporting the suit, including the conditions resulting in deprivations, supporting facts and minimum measures he believes may remedy the conditions. The Attorney General must personally sign the complaint and the certifications.

The Attorney General may also intervene in actions already commenced in which relief is

See LEGISLATION p. 8

At the recent Judicial Conference of the Fifth Circuit, Circuit Judge Carolyn D. Randall presented statistics on the median time for dispositions of three categories of cases. In cases on the summary calendar (i.e. presented without oral argument), the median time from filing the appeal to the announcement of judgment was 222 days. For cases in which oral argument was heard and which had a preference (i.e. a priority for processing and disposition under federal civil or criminal statutes), the median time was 297 days. For those cases with oral argument but without a preference, the median was 586 days.

Judge Randall noted that this is a substantial improvement over the record for the previous year. The median for orally argued cases without preferences, for example, decreased from 28 1/2 months to the current 19 1/2 months. The Fifth's backlog has also realized a significant decrease. One year ago, the backlog was 774 cases. It now stands at 374 cases. If the court continues to have no great increase in the number of appeals filed, that backlog may be reduced or eliminated during the coming year.

* * * *

The Bureau of Justice Statistics at the Department of Justice announced last month that the number of prisoners held in state and federal institutions in 1979 reached a record high for the fifth consecutive year. The total number—314,083—represents a 2.3 percent rise over 1978; however, the total for those under federal jurisdiction—26,233—is down 12 percent. Also included in the BJS statistics: there are 12,927 women in state and federal institutions, representing just four percent of the total. For the first time in almost a decade the rate of increase for women prisoners was lower than for men.

* * * *

In April, Chief Judge Robert F. Peckham chaired a founders' meeting of the Historical Society for the U.S. District Court for the Northern District of California. The members and friends of the Society met in the ceremonial courtroom of the U.S. District Court in San Francisco. The purpose for the founding of this new organization: "To preserve and make accessible the Court's earliest records; to begin an oral history project to develop additional source material for studying the Court; and, generally, to stimulate greater interest among scholars, lawyers and the public in the District Court's history."

* * * *

At the recent Judicial Conference for the Fifth Circuit, Chief Judge John V. Singleton, Jr. (S.D. Tex.) was elected to a three-year term as the District Judge Representative to the Judicial Conference of the United States. There are presently 109 District Judges in the Fifth Circuit.

* * * *

Magistrate Paul J. Komives (E.D. Mich.) has been nominated by the Chief Justice to a six-year term on the Judicial Conference Committee on the Administration of the Federal Magistrate System. Magistrate Komives is the first magistrate to serve in this capacity.

NEW SUPREME COURT RULES, A CORRECTION

In the May 1980 issue of *The Third Branch*, we noted (page 5, column 3) that under the new Supreme Court rules all petitions for certiorari must be filed within 60 days of judgment. More accurately, all petitions in criminal cases must be filed within 60 days. The time limit for petitions in civil cases, 90 days, is fixed by 28 U.S.C. §2101(c) and remains unchanged.

Media Library

Listed below are audio tapes available for loan to any person employed by the judicial branch of the Government by the Media Services Unit, Federal Judicial Center. Highlighted this month are tapes of special interest to federal magistrates. Because of their relatively recent availability, these tapes are not listed in the *Educational Media Catalog.*

M-111 The Federal Magistrates System. Peter G. McCabe, August 13, 1979.

M-112 Managing the Office of the Part-Time Magistrate. Peter G. McCabe, Duane R. Lee, Glen K. Palman, William L. Whittaker, August 13, 1979.

M-113 The Complaint and Arrest Warrant. J. Edward Harris, August 13, 1979.

M-114 The Search Warrant. Raymond T. Ferlizzi, August 13, 1979.

M-115 The Initial Appearance and Conditions of Release. Duane R. Lee, Richard W. Peterson, Richard E. Combs, Michael R. Hogan, August 14, 1979.

M-116 Removal Hearing and Preliminary Examination. Richard S. Goldsmith, August 14, 1979.

M-118 Administrative and Logistical Considerations, Michael R. Hogan, August 16, 1979.

M-119 Trial of a Minor Offense. J. Edward Harris, August 16, 1979.

M-120 Sentencing Techniques. Richard S. Goldsmith, August 16, 1979.

M-122 Conduct of a Magistrate and Conflicts of Interest. Honorable Charles Schwartz, Jr., August 17, 1979.

M-125 The New Federal Habeas Corpus. Prof. Leon Friedman, September 27, 1979.

M-126 Community Relations Service. Gilbert G. Pompa, Polly A. Kinnibrugh, Martin A. Walsh, Frank Von Perry Tyler, September 28, 1979.

Requests should be sent on appropriate letterhead to: Federal Judicial Center Media Services Unit, 1520 H Street, N.W., Washington, DC 20005. Audio tapes may be retained for two weeks. In submitting requests, please include the specific date desired for the beginning of the loan period. When returning tapes, it is important that the accompanying evaluation form be completed in order that media personnel may properly evaluate the quality of service provided.

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CHIEF JUSTICE ADDRESSES A.L.I. ON THE DEMISE OF FEDERALISM

The Chief Justice on June 10 made his eleventh address to the opening session of the American Law Institute. This year he spoke of his perception, held "in dim outline," that because of the increasing similarity of the state and federal dockets a *de facto* merger of the two systems may be taking place. Conceding that his observations might be wrong, he nonetheless cautioned that "like symptoms of illness we ignore them at our peril."

The Chief Justice referred to the ALI's 1969 report on the allocation of jurisdiction between the federal and state courts which cited the essential need to allocate judicial business in light of "basic principles of federalism." The consequences of a merger of judicial systems, the Chief Justice said, might be an "irreversible erosion" of those principles and a concomitant loss of interest by the bar in its obligation to work for the improvement of state courts.

Preferring to retain the federal courts as "tribunals of special and limited jurisdiction," the Chief Justice raised for the Institute's consideration whether the time for reappraisal of the allocation of state and federal jurisdiction, as suggested in the 1969 report, has now come. "It will do us no good in 1999," he noted, "to look back and conclude that a trend indeed began in the 1950's or 1960's to assimilate the two judicial systems, and that nearly two centuries of tested concepts of limited federal jurisdiction were abandoned without conscious intent."

COMMITTEE from p. 1

one-fourth of the federal trial judges in active service.

To further implement and to discuss the program generally, Judge J. L. King has called a meeting of the membership of his Committee and the District Chief Judges (or their designees) involved. The meeting will be held at the Center September 22-23. While the program has not been announced in detail, it will familiarize the courts with the specifics of the Devitt Committee recommendations and advise the judges what they might expect as they undertake implementation.

The 15 District Courts that will be participating in the experimental programs are:

Central Dist. Calif.
Northern Dist. Calif.
Northern Dist. Fla.
Southern Dist. Fla.
Northern Dist. Ill.
Southern Dist. Iowa
Dist. Mass.
Dist. Md.
Eastern Dist. Mich.
Western Dist. Mich.
Western Dist. Penna.
Dist. P.R.
Dist. R.I.
Eastern Dist. Tex.
Western Dist. Tex.

INTERVIEW from p. 1

Judiciary was second. Then after I observed during an entire session of Congress the operations of the different committees I found that my interest lay much more in the work of the Judiciary Committee than in the work of the Foreign Affairs Committee. I am a civil rights liberal—very enthusiatic about the whole subject of civil rights. It was an especially exciting area in 1963 and 1964 when I first came to the Congress. This was perhaps the most lively domestic political issue in the country during the 1960s. The enactment of the Voting Rights Act in 1965 as a result of the hearings and work on the Judiciary Committee confirmed my special interest in the Judiciary Committee. So I've been in the forefront of all the civil rights legislation during my tenure. I was the principal Republican proponent of the Equal Rights Amendment when we considered and recommended that in 1972. And so I have found civil rights to be my principal interest on the Committee over the long run.

I think this interest has been reflected in a lot of other types of legislation, too, besides the more obvious civil rights legislation. It is reflected in my involvement in legislation concerning the rights of institutionalized persons, administrative review, adequate judgeships, and sponsorship of the Law Enforcement Assistance Administration. All of these different things, it seems to me, relate to human rights and civil rights.

Of all the legislation current in mark-up in the Committee, that of most interest to those in the Judicial Branch is H.R. 6915—the new federal criminal code. After months of hearings and study, this bill was recently approved by Congressman Drinan's Subcommittee on Criminal Justice. What is the likelihood of action on this bill during the remainder of this session?

"I think we delayed far too long in creating additional judgeships, and in the bill that we finally passed in 1978 we created too many judgeships."

I think the chances of action are good. I am a strong supporter of passage in the House of a new federal criminal code and I am hopeful that it will be finally enacted in this Congress.

The bill, however, will be jeopardized if the liberals seek to inject exceptionally controversial departures from present law into this new code. One such contemplated departure is the subject of endangerment, which is a provision to impose criminal liability on any person who knowingly places another in a situation where there is a risk of danger, bodily harm, and the like. It is aimed particularly at manufacturers. Some of the organized labor and other liberal elements are trying to get this into the law, and that's creating a controversy which is bogging down the whole process of advancing the criminal code.

What provisions of the House bill dealing with the federal criminal code concern you most?

First, the provisions which are not in the code now; that is, parts that are not in the bill now but which might be offered and placed in the bill. Second, the area in which I have had a principal interest is that of sentencing provisions. In addition to bringing the level of sentences into closer relationship for comparable crimes, I have been supporting the establishment of a sentencing commission to establish guidelines for the federal judiciary. I am most interested in getting that into the law if we can.

A number of bills have emerged from committees other than the Judiciary Committee that tend to increase caseloads of the federal courts. Do you feel your Committee has had adequate control of such legislation? For example, are all bills containing this kind of legislation referred to your Committee? If not, do you believe that formal procedures should be adopted which would require that such legislation be channeled through the Judiciary Committee?

I feel that we do not have adequate control, and the judicial system is being given additional burdens and responsibilities as a result of action taken by other committees in which the Judiciary Committee doesn't

See INTERVIEW p. 5

INTERVIEW from p. 4

participate at all. For example, we had a subcommittee which was to deal with the whole subject of legal rights and interests in submerged lands in the inner and the outer continental shelves. That entire jurisdiction was taken away from us—we lost control of that whole subject—with the result that now the Interior Committee is primarily authorizing the establishment of rights in and to areas of the continental shelf. That, of course, results in litigation. But we don't have any say over the established procedures. That's just one example.

There are other examples where forms of litigation result from measures passed and recommended by other committees, which increase the caseload of federal courts and we haven't had input into the legislation at all. At best, every once in a while our chairman might ask for re-referral and we would then consider the impact on the judicial system.

It might also be of interest that at our committee organizational meeting for the prior Congress, we proposed that our Judiciary Committee consider the impact on the judiciary of its own legislation and report that to the House. But on a party line vote the Democrats voted our proposal down. So if we can't control our committee, how can we control others?

As ranking minority member of the House Judiciary Committee, do you feel that partisanship plays a significant role in the support or non-support of legislation referred to the Committee? Do you believe that the make-up of the Committee is such that you are able to obtain sufficient consideration of the views of the minority members?

Well, I sense a significant amount of partisanship on the Committee. The Republican members on the Committee are all there because they have selected that Committee as their principal choice; they would rather serve there than on other committees. Democratic members of the Committee, at least a number of them, are members because they accepted assignment there by the Democratic leaders. It's my perception that there is a tendency to provide a number of liberal-oriented members of the Committee to reflect a liberal point of view.

There also isn't very good attendance on the part of the Democratic members for the most part; but they religiously provide proxies to reflect the votes of the leadership. On frequent occasions the Republicans just feel completely dejected because we lose on substantive amendments to bills in which the issue is decided by absentee members whose proxies have been delivered to one or more members on the Democratic side. We have had several instances recently that have been very discouraging to the Republican side.

I think the most recent dramatic issue of that was in the *Zurcher v. Stanford Daily* legislation. [In *Zurcher,* the Supreme Court upheld the right of government to obtain a warrant for a surprise search of a newsroom for evidence of crimes committed by persons other than the newspaper or its reporters.] The Department of Justice and most of the Republicans are opposed to inclusion in the *Zurcher* bill of language which would make the bill apply to all persons—not just media personnel—who have possession of materials that might be useful in an investigation of a crime. The Subcommittee on Courts and Civil Liberties offered an amendment to so extend the coverage of the bill and Mr. [Henry J.] Hyde [R. Ill.] opposed it. The amendment would have lost on a 10 to 10 tie vote of those physically present at the meeting. But by using six proxies, the Democrats were able to adopt the amendment by a 16 to 11 vote.

Do you think the legislation should include just the news organizations and exclude other groups?

I would prefer at this time to limit the legislation to just news organizations. I am wary of limiting the investigative capability of the investigative agencies of the Department of Justice, primarily the F.B.I., without a single instance of abuse alleged in the hearing record. With respect to the media however, the instances where law enforcement must have access to media documents are relatively few and the special First Amendment considerations are high. But the same cannot be said of "all persons."

Also of concern to the judiciary are proposals, such as S. 1873 and H.R. 6330, to discipline federal judges through procedures other than impeachment. What are your views on such legislation and the possible attendant constitutional problems?

I have testified in support of H.R. 6330, which in effect provides statutory support for what is currently being done by the Judicial Conference in the establishment of circuit judicial councils to hear complaints informally and *in camera* with respect to alleged acts of misconduct, disability or senility of federal judges with no right, however, to remove the judge, since I think the subject of removal should, at least for now, remain entirely with the Judiciary Committee under the express constitutional authority with respect to impeachment.

The present method of congressionally created judgeships has been criticized, and the Chief Justice has recently proposed that the

See INTERVIEW p. 6

INTERVIEW from p. 5

Judicial Conference of the United States be empowered to create new positions subject to congressional veto. What are your views on this matter?

I don't favor that. My thorough study of the recommendations of the Judicial Conference the last time a bill was before us revealed that their own recommendations are quite political; they have in the past proved unreliable. I see no reason to substitute judicial politics for legislative politics. I think that it is a congressional responsibility to create the judgeships, although I must agree that we have not done it responsibly in recent times. I think we delayed far too long in creating additional judgeships, and in the bill that we finally passed in 1978 we created too many judgeships.

" . . . The judicial system is being given additional burdens and responsibilities as a result of action taken by other committees in which the Judiciary Committee doesn't participate at all."

This was another instance of rank partisanship. We needed additional judges long before Mr. Carter took office and yet the Democratic majority denied us the opportunity to bring that judgeship bill to the floor in the final days of the 1976 Session. As I recall, we recommended about 50 additional judgeships, which was all that we needed in 1976 and 1977. This was delayed even though I had offered an amendment which would provide that the actual appointment of judges would not occur until after the new President took office. But the bill failed for purely partisan reasons. They did not want any new judgeships if a Republican was elected. Then it came up again—with Democrats in control of the Congress and a Democrat in the White House—and after some initial attempts to be objective, the Congress agreed to a land office allocation of more judges than the Judicial Conference ever recommended and more than had been recommended in the House or in the Senate. The conferees agreed to almost all of the judges that had been recommended by the House, and to almost all that had been recommended by the Senate and agreed to nearly the maximum number which the two separate bodies had recommended. I opposed the conference report, in part, because of the conferees' refusal to look at the merits, district by district.

Did you establish a number that you would have preferred?

Yes. The House subcommittee caucused and agreed that we would be totally honest with each other and arrive at an objective number. By our agreement we deleted additional judgeships that would have served in states represented by a majority of subcommittee Members. Our objective assessment was 81. We thought that was generous, in fact. But the judicial lobbies did their work. The pressure was immense. And the dam broke, as the Chairman said, in full committee. The hunger for these "political plums" put the number over 100. And the conference increased it to 117. But, as I said, the only honest evaluation of the facts took place in subcommittee. We may someday need the 117—but not necessarily where we put them.

Don't you think they were influenced a little bit, Mr. Congressman, by the heavy caseloads and the fact that some of the judges were leaving the bench?

I don't want to say that that element was not present at all, but when we went from 81 to 117 it was almost entirely for political considerations. Also, one of the other elements that Mr. Carter campaigned for—and that I pushed for—was the merit selection of judges. That principle was abandoned in the final conference report so that we failed in our effort to get written into the law a provision requiring procedures for the merit selection of judges. We are experiencing some of the fall-out today where one or more unqualified persons are being appointed.

An important bill pending before the House Judiciary Committee is the so-called "Illinois Brick Bill", H.R. 2967, which, if enacted, would overturn a 1977 Supreme Court decision and thereby allow consumers and other indirect purchasers to sue alleged price fixers for treble damages under the Clayton Act. What is your position on this legislation?

Well, I support legislation to overrule *Illinois Brick* with certain conditions, with certain amendments. Let me point out that it has been amended substantially by the adoption of amendments that I have offered which I think are consistent with the interests of both the consumer and the defendant manufacturer. It seems to me that we should provide a remedy for the persons who are actually damaged, for to deny that remedy—which is being done under the *Illinois Brick* decision—seems to me to be quite inequitable. I'm in support of permitting claims to be filed by third parties, by the indirect purchaser, with the proviso that the claim must be established. I don't want to provide for fluid damages. That's one of my amendments the subcommittee adopted. Incidentally, the effect of *Illinois Brick* is to award fluid damages to all direct purchasers; they collect the total regardless of their injury. Somewhat maliciously, opponents decry this legislation as promoting fluid recoveries. Furthermore, I think

See INTERVIEW p. 7

INTERVIEW from p. 6

that if a suit was without merit and was undertaken to "hold up" a corporation, there should be an opportunity for the corporation to seek attorney's fees and costs from the plaintiff that wrongfully brought the action. That amendment was also adopted. Finally, there is one more amendment that is not presently in the bill but which I would want to insist upon and that is that the bill applies only to prospective violations of the antitrust laws. I do not want to provide this kind of a remedy with regard to wrongs that may have been committed in the past. So with those amendments I support the *Illinois Brick* Bill.

We had a number of federal judges and lawyers and scholars testify on the bill, and there was a lot of interest in the business community—especially on the part of big business—not to have any action taken. On the other hand, there is a substantial amount of support in the small business community for action on this legislation, and we had one witness who was a member of the Business Round Table, which is essentially big business, who testified in support of the legislation. The business community is not all in one basket as far as this issue is concerned. The small businessman is hurt by the present decision in my view. He is barred from bringing an action even though the violation has occurred and even though the damage to him has resulted.

Congress recently cleared for the President's signature H.R. 10 [see related story p. 2], which would authorize the United States to file suit to redress violations of the Constitution and statutory rights of prisoners and other persons held in state institutions. This bill is a response to recent federal court decisions which have limited the Government's standing, absent an explicit statute, to enforce fundamental Constitutional rights. Do you feel that conditions in state penal institutions necessitate this kind of legislation? Do you believe that federal intervention is the best means to improve such conditions?

I do feel that conditions in some institutions suggest the necessity for the Attorney General to intercede and to assert the Federal Government's interest in preserving the constitutional rights and interests of the confined person. Whether this procedure that we are recommending in this legislation is the best way to improve the conditions in those institutions, I'm not certain. For instance, there isn't anything in the legislation which requires the substitution of a particular change in conditions or change in construction. There are no funds that are provided for restructuring the institutions. Those things if they were included would tend to make the legislation even better, but I don't know that it's desirable for us to undertake a federal program to finance what the states should be doing themselves. The Constitution binds the states, of course. It is not this legislation that imposes the burden on the states. Rather, this legislation provides remedies when states fail to do their duty to obey the Constitution.

The bill will get at this problem by focusing public attention on it. It will rekindle state responsibility and thereby bring about substantial improvements. Maybe just the availability of this remedy will induce the states to take some action to avoid being subjected to a lawsuit, although there is, I believe, a provision in the bill to provide an informal hearing which would precede the taking of formal action by the Attorney General.

Abolition of diversity jurisdiction in the federal courts is a frequently discussed topic. There is legislation on this subject pending in each house (H.R. 2202 and S. 679). Have you taken a stand on this?

Yes. I don't think diversity of citizenship should any longer be a basis for federal court jurisdiction. It may have been justified and probably was justified at the time of the drafting of the Constitution when there was so much jealousy and uncertainty as far as states' rights and interests were concerned, but I think the necessity for it doesn't exist anymore and it just provides a basis for court shopping or judge shopping. I don't favor retention of diversity jurisdiction at all.

It should be noted that if the legislation passed, it would put quite a hole in the argument that

"I sense a significant amount of partisanship on the Committee."

we needed 117 new district judges. Also it is a shame that the American Trial Lawyers' Association and certain other bar associations have viewed this issue from a narrow perspective rather than lending their weight to support the common good. When bankers or bakers lobby for their pocketbook interests, I am not surprised. But I am disappointed when such bar associations act like just another trade association. They lose their influence by destroying their credibility when they oppose reforms as desirable as this.

1979 REPORT ON INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS RELEASED

As required by the Omnibus Crime Control and Safe Streets Act of 1968 (U.S.C. § 2510, et seq.), William E. Foley, Director of the Administrative Office, on April 28 transmitted to Congress his report on orders authorizing the interception of wire or oral communications for calendar year 1979.

The report is in both narrative and statistical form and contains (in four sections totaling over 100 pages) a summary and analysis of reports submitted by judges and prosecuting officials, and information reported in calendar year 1979 for all intercepts authorized since 1969.

Four tables in the report contain detailed information on the name of the applicant, the offense specified in the application, type of interception device and location, and the duration of the authorized intercept. The Administrative Office is not authorized to and does not receive information on the identity of parties who are subjected to the intercepts.

A sampling of some statistics reported:

- **Intercepts Authorized.** All 553 applications for orders to intercept wire or oral communications received by state and federal judges during 1979 were granted. Federal judges granted 87; state judges granted 466.
- **Length of Intercepts.** The authorized length of time for the 553 applications granted varied from one day to 180 days (including six extensions). Total number of days in operation varied from one day to 144 days.
- **Offenses.** Narcotics violations were the most serious alleged offenses, involved in 250 authorizations (45.2% of the total). In 204 authorizations (36.9%) gambling offenses were under investigation. Twenty-nine applications cited homicide and assault as the major offenses; twenty-four, racketeering.
- **Locations.** Most often reported was a "single family dwelling" which accounted for 241 (43.6%). Other locations: 152 apartments, 18 multiple dwellings, 87 business locations, 27 combination business and living quarters, 28 public pay telephones, automobiles, or social clubs.

Reports by prosecuting officials covered 85 state jurisdictions ("courts of competent jurisdiction") and the U.S. Department of Justice, and revealed th following:

- **Cost of Intercepts.** Highest reported cost for a single federal wiretap (in terms of manpower, equipment and other costs): $851,077. The most serious alleged offense listed in this intercept was for narcotics violations. For state wiretaps, highest cost for single authorization was $350,000. The offense specified here was also narcotics. The intercept was in operation 40 days and resulted in 117 arrests.

Copies of the regulations and reporting forms, as well as the federal wiretapping statute, may be obtained by writing the Director of the Administrative Office of the U.S. Courts, Washington, D.C. 20544.

LEGISLATION from p. 2

sought from "egregious or flagrant conditions." As in original suits, the Attorney General must personally certify, among other things, that he has advised state authorities of the alleged deprivations and evidence in support thereof at least 15 days prior to the intervention.

The Act provides that a party successfully opposing the Government as plaintiff or intervenor may collect reasonable attorney's fees from the Government as part of costs.

Another feature of the Act relates to exhaustion of administrative remedies in prisoner petitions under 42 U.S.C. §1983. After commencement of an action under that section, a court may continue the case for up to 90 days to require the petitioner to resort to a grievance resolution system. In order to impose such a stay the Attorney General must have certified that the system available to the petitioner is in compliance with minimum standards established by the Attorney General. The Attorney General must promulgate such standards within 180 days after the enactment of the legislation.

The Act specifically provides that actions brought under it will have no effect on the rights of private litigants.

SALARY APPEAL from p. 1

12.9 percent raise, and it was feared that payment of a adjustment would work a forfeiture of an employee's right to the higher amount.

On May 16, "in accordance with" the granting of summary judgment, Administrative Office Director William E. Foley published in the Federal Register (pp. 32355-7) a schedule of new rates of pay for affected judicial branch personnel which reflected the full 12.9 percent adjustment. Implementation of this schedule was precluded, however, when attorneys for the President filed a notice of appeal on May 20. The Administrative Office has indicated that it will refrain from paying any salary adjustments until the litigation is concluded. Sufficient funds to pay the increases for the entire fiscal year have been obligated, however, and these funds will remain available, even into the next fisca year, to implement any fir judgment authorizing the adjustments.

THE SOURCE

The Information Service of the Federal Judicial Center

Publications are primarily listed for the reader's information. Only those titles listed at the beginning of the column and in boldface are available from the FJC Information Services Office.

Appellate Overload: Prognosis, Diagnosis, and Analeptic. James D. Hopkins. A paper presented at a meeting of the Appellate Judges' Conference of the American Bar Association; Charleston, South Carolina. May 20, 1980.

The Federal Judiciary and Its Future Administration. Daniel J. Meador. 65 Va. L. Rev. 1031-1061 (1979).

Court Reform and Access to Justice: A Legislative Perspective. Robert W. Kastenmeier and Michael J. Remington. 16 Harv. J. Legis. 301 (1979).

The Federal Magistrate Act of 1979. Peter G. McCabe. 16 Harv. J. Legis. 343-401 (1979).

The Case for Diversity Jurisdiction. John P. Frank. 16 Harv. J. Legis. 403 (1979).

Judicial Implementation of Public Policy: The Courts and Legislation for the Judiciary. Cornelius M. Kerwin. 16 Harv. J. Legis. 415 (1979).

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Historical Perspectives of Modern Court Management. David J. Saari. 1980 Ct. Mgmt. J. 6-8+.

Practical Guide to the Bankruptcy Reform Act. Harvey R. Miller and Michael L. Cook. Law & Business, Inc./Harcourt Brace Jovanovich, 1980.

Trial by Jury Under the ankruptcy Reform Act of 1978. Nathan Levy, Jr. 12 Conn. L. Rev. 1-13 (1979).

CHIEF DEPUTY CLERK FOR SUPREME COURT APPOINTED

The Chief Justice this month announced that Alexander L. Stevas has been appointed as Chief Deputy Clerk for the Supreme Court, effective June 9.

Filling a vacancy that has existed for some time, Mr. Stevas comes to Supreme Court from his previous position as clerk of the District of Columbia Court of Appeals which he has held since 1970. He served as Chief Deputy Clerk of the United States Court of Appeals for the District of Columbia Circuit from 1963 to 1970 and as Assistant United States Attorney in the District of Columbia from 1952 to 1963. Since 1966, Mr. Stevas has been lecturing at George Washington University Law School on trial practice and procedure, and criminal law.

Mr. Stevas is the past president of the National Conference of Appellate Court Clerks (1978 - 1979), and in 1975 he received President Ford's Management Improvement Certificate for excellence in improving operations of the District of Columbia Court of Appeals.

PERSONNEL from p. 10

Walter H. Rice, U.S. District Judge, S.D. OH, May 21

S. Arthur Spiegel, U.S. District Judge, S.D. OH, May 21

George R. Anderson, Jr., U.S. District Judge, D. SC, May 21

E. B. Haltom, Jr., U.S. District Judge, N.D. AL, May 29

Robert B. Propst, U.S. District Judge, N.D. AL, May 29

ELEVATIONS

Charles E. Simons, Jr., Chief Judge, D. SC, May 10

Jack B. Weinstein, Chief Judge, E.D. NY, April 30

RESIGNATION

George J. Mitchell, U.S. District Judge, D. ME, May 16

NEW CIRCUIT EXECUTIVE FOR SECOND CIRCUIT

Steven Flanders, formerly of the Federal Judicial Center, has commenced service as the Circuit Executive for the Second Circuit, replacing Robert Lipscher, who became New Jersey's Administrative Director of the Courts.

Mr. Flanders started at the FJC as a research associate in the Research Division in 1972, and in 1977 he was named a project director in the division,

Flanders (left) and Goodchild

overseeing a number of projects and coauthoring several FJC reports, including *Case Management and Court Management in United States District Courts* (1977) and *the Impact of the Circuit Executive Act* (1979). He holds degrees from Indiana University (Ph.D. 1970, M.A. 1965) and Haverford College (A.B. 1963). Prior to his tenure at the Center, Mr. Flanders was for three years an associate professor of political science at the Unversity of Vermont and a systems engineer and computer operator for IBM from 1959 to 1966.

Also pictured this month is Lester Goodchild, recently appointed Circuit Executive for the Eighth Circuit (see *The Third Branch*, March 1980, p. 2), whose photograph arrived too late to accompany the announcement of his appointment.

DEATHS

Daniel J. Snyder, Jr., U.S. District Judge, W.D. PA, May 11

Warren H. Young, U.S. District Judge, D. VI, June 6

PERSONNEL

NOMINATIONS

Carmen C. Cerezo, U.S. District Judge, D. PR, May 14
Robert Boochever, U.S. Circuit Judge, CA-9, May 22
Horace W. Gilmore, U.S. District Judge, E.D. MI, May 22
Earl H. Carroll, U.S. District Judge, D. AZ, June 2
Alfred C. Marquez, U.S. District Judge, D. AZ, June 2
George Howard, Jr., U.S. District Judge, E.D. & W.D. AR, June 2
Charles P. Kocoras, U.S. District Judge, N.D. IL, June 2
John E. Spirzzo, U.S. District Judge, S.D. NY, June 2
Susan C. Getzendanner, U.S. District Judge, N.D. IL, June 4

CONFIRMATIONS

Paul A. Ramirez, U.S. District Judge, E.D. CA, May 21
John D. Holschuh, U.S. District Judge, S.D. OH, May 21
Ann Aldrich, U.S. District Judge, N.D. OH, May 21
George W. White, U.S. District Judge, N.D. OH, May 21
Samuel J. Ervin, III, U.S. Circuit Judge, CA-4, May 21
William C. Canby, Jr., U.S. Circuit Judge, CA-9, May 21
Charles L. Hardy, U.S. District Judge, D. AZ, May 21

PAT DOYLE DEAD AT 56

A sad announcement came from Chief Judge Collins J. Seitz on May 27th: William A. (Pat) Doyle, the Circuit Executive for the Third Circuit, died after an illness extended over the last several months.

Mr. Doyle was appointed as the Third Circuit's first Circuit Executive in 1972. Out of 700 applicants for certification by the first Board of Certification, only 52 were selected as eligibile, and from this list of 52 Pat Doyle was the Third Circuit's choice to take on the important work of this office.

The address for Mrs. Pat (Ellie) Doyle is:
110 Cambria Court
St. Davis, Penna. 19087

Milton I. Shadur, U.S. District Judge, N.D. IL, May 21
Frank J. Polozola, U.S. District Judge M.D. LA, May 21
Clyde S. Cahill, Jr., U.S. District Judge, E.D. MO, May 21
Patrick F. Kelly, U.S. District Judge, D. KS, May 21
W. Earl Britt, U.S. District Judge, E.D. NC, May 21

See PERSONNEL p. 9

AO COSFJC calendar

June 17-20 Judicial Conference Committee to Implement the Criminal Justice Act; Casheers, NC
June 20 Judicial Conference Committee on the Administration of the Bankruptcy System; Richmond, VA
June 26-28 Fourth Circuit Judicial Conference; White Sulphur Springs, W VA
June 30 - July 1 Judicial Conference Subcommittee on Judicial Improvements; Vail, CO
July 6-9 Eighth Circuit Judicial Conference; Colorado Springs, CO
July 8-11 Effective Productivity for Court Personnel; Kansas City, MO
July 13-17 Ninth Circuit Judicial Conference; Monterey, CA
July 21-23 Workshop for Chief Deputy Clerks of Bankrup. Courts; Danvers, MA
July 28-29 Workshop for District Judges (CA-6); White Sulpur Springs, W VA
Aug 25-27 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Salt Lake City, UT

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JUDGES' SALARY CASES CONSOLIDATED IN SUPREME COURT

On June 16, the Supreme Court granted the motion of the Solicitor General to consolidate for briefing and oral argument "Will I" and "Will II", the two cases contesting freezes in judicial salaries from 1976 through 1979 *(Will v. United States,* No. 79-983; *Will* v. *United States,* No. 79-1689). The Court also ordered that a total of one and one-half hours be allotted for oral argument, and that the question of the Court's jurisdiction will be postponed until the hearing on the merits. Only after the briefs of all parties are submitted this Summer will

See SALARY APPEAL p. 3

Legislative Update

CONGRESS ADVANCES SEVERAL BILLS OF INTEREST TO THE FEDERAL JUDICIARY

As the October 4 adjournment date for the Second Session of the 96th Congress approaches, several bills affecting the federal courts are receiving favorable attention from Congress and its committees. The legislature's heavy backlog for the remainder of the Session leaves the chances for final passage of any bill quite uncertain, but the recent progress of a number of measures is noteworthy.

Before adjourning for two weeks on July 3rd, the Senate approved a split of the Fifth Circuit and authorized elimination of the jurisdictional amount in federal question cases. The House passed a fair housing civil rights bill, cleared a bill establishing bilingual courts in the district of Puerto Rico and the House Judiciary Committee forwarded to the full House an amended version of a new federal criminal code. These and other important congressional actions are summarized below.

Bills Passed by House or Senate

Fifth Circuit Division. Within a week of the bill's introduction, the Senate on June 18th passed by a voice vote S. 2830, to divide the Fifth Circuit into two autonomous circuits. Under the bill, which would go into effect October 1, 1980, the new Fifth Circuit would be composed of the states of Louisiana, Mississippi and Texas with headquarters in New Orleans. The newly created Eleventh Circuit would consist of Alabama, Florida and Georgia and be headquartered in Atlanta.

All 24 active judges in the Fifth Circuit Court of Appeals petitioned Congress in May to enact such legislation, and the 12 Senators from the Circuit, as well as the chairman and ranking minority member of the Senate Judiciary Committee, co-sponsored the measure.

In response to this same petition, a similar bill (H.R. 7665) was introduced in the House by Congressman Rodino (D-N.J.) on June 25th. The Congressman stated, however, that he desires to make a "careful study of the

See LEGISLATION p. 4

WILFRED FEINBERG NEW CHIEF JUDGE IN SECOND CIRCUIT

In October of 1961 Wilfred Feinberg joined the federal court system through his appointment to the United States District Court for the Southern District of New York. In March of 1966 he was elevated to the U.S. Court of Appeals for the Second Circuit. Last month—a little over eighteen and a half years from the date he entered the federal court system—he assumed the office of Chief Judge in one of the oldest circuits in the system. It is also one of the largest with a total of 61 judgeship positions (50 district and 11 circuit) within the states of Connecticut, New York and Vermont.

As early as 1801 an Act of Congress (repealed the next year) established the Second Circuit as one of six, and President John Adams immediately named

See FEINBERG p. 2

STATE-FEDERAL

Arkansas. This state's State-Federal Judicial Council met last April in Little Rock under the chairmanship of Chief Justice John A. Fogleman of the Arkansas Supreme Court. Chief Judge Donald P. Lay (CA-8) addressed the meeting on "the continuing evolution of federalism; the shifting concepts of dual sovereignty and federal supremacy."

Missouri. This Council selected the University of Missouri School of Law as the site for their April meeting. Chief Justice John E. Bardgett, Supreme Court of Missouri, presided. The Missouri Council includes in their membership, in addition to state and federal judges, the Attorney General of the State (or his representative) and a law school professor who acts as reporter. Among the subjects discussed were disciplinary proceedings in both the state and federal courts; the proposed changes in the ABA canons of ethics for lawyers; the Judicial Conference study of advocacy in the federal courts; certification of questions of state law by federal courts to the Supreme Court of Missouri (and attendant problems as well as advantages in the use of this procedure); and jail conditions and what might be done to improve them. Finally, discussion centered on an old subject which Missouri has worked out to the mutual satisfaction of both court systems: conflicts in trial settings in civil cases. The next meeting is tentatively set for October 3.

New Jersey. Judge Arthur J. Simpson, Jr. of the New Jersey Superior Court, Appellate Division, in a report on the New Jersey courts for the period ending August 1979 has included materials and photographs about the federal courts in this state. This was done, Judge Simpson said, because "the federal courts . . . interrelate to a degree primarily through some common jurisdictions and through a mutual policy of maintaining communication and comity between the systems."

Oregon. This state council regularly meets at least twice a year, with good attendance and high interest. At their meeting held last April, presided over b Chief Justice Arno H. Denecke,

See STATE-FEDERAL p. 8

FEINBERG from p. 1

three circuit judges to serve. By today's standards their caseload was small. Today there are eleven judgeship positions for this Circuit (one of which has been vacant since last December). The caseload has reached staggering proportions, but the court has managed exceptionally well to stay *au courant.* In 1979, 2061 cases, the third highest number of all the circuits, were filed. Pending cases, however, totaled only 649, the third lowest of the circuits.

The new Chief of the Second brings with his leadership a distinguished background. He received his A.B. degree from Columbia College in 1940; then, after three years in the Army, he returned to Columbia. In 1946 he was awarded his LL.B. degree from the Columbia Law School, where he was editor-in-chief of the law review, and he continues his affiliation through the Law School Alumni Association.

In addition to five and a half years service on the District Court, the Judge has gained other valuable experience. He was a member of the national steering committee which developed procedures for handling the large number of antitrust cases which were filed in the 1960's after an investigation of the electrical industry and involving over 40 districts. In 1965 he wrote the opinion in one of these landmark cases, *Ohio Valley Electric Corp.* v. *General Electric Co.,* 244 F. Supp. 914. Service on the Judicial Conference committees has claimed much of his time, including membership on the Advisory Committee on Civil Rules, the Subcommittee on Supporting Personnel, and the Subcommittee on Judicial Statistics.

The subject of judicial administration generally has been a special interest of Chief Judge Feinberg. He was a member of the task force concerned with the updating of the American Bar Association Standards Relating to the Administration of Criminal Justice and he has lectured at the Federal Judicial Center on procedures at the appellate level. Currently he serves on the Center's Advisory Committee on Experimentation in the Law.

ADDITIONAL *BENCH BOOK* MATERIAL DISTRIBUTED

Several new chapters of the *Bench Book for United States District Court Judges* are being distributed this month. The new material consists of four chapters related to criminal proceedings, one chapter on civil proceedings, and a revised and expanded chapter on oaths.

Additional portions of the *Bench Book* are in various stages of production and will be distributed as they are completed.

The *Bench Book* is being compiled under the direction of a committee of the Board of the Federal Judicial Center and is circulated to district court judges, bankruptcy judges and magistrates.

"POUND CONFERENCE" PROCEEDINGS PUBLISHED

In 1976 in the chambers of the Minnesota House of Representatives in St. Paul, where seventy years earlier Roscoe Pound gave his historic address on the causes of popular dissatisfaction with the administration of justice, over 200 jurists, scholars and practicing lawyers met to confer on the reexamination and reconstitution of American civil and criminal justice. Much current interest in easing procedural abuses and finding alternatives to traditional judicial processes stems from the so-called "Pound Revisited Conference." West Publishing Company has just released *The Pound Conference: Perspectives on Justice in the Future,* which includes the full proceedings of the Conference, much of which has not been previously published, as well as assessments and commentary on the Conference.

This "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" was sponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States and was spearheaded by Chief Justice Warren E. Burger.

Papers and commentaries were presented there by, among others, the Chief Justice, then ABA President Lawrence F. Walsh, Judge A. Leon Higginbotham, Jr., Judge Griffin Bell, Attorney General Edward Levi and Judge Wade H. McCree, Jr. The volume, edited by A. Leo Levin and Russell R. Wheeler of the Federal Judicial Center, includes a foreword by former ABA Presidents William Gossett, Bernard G. Segal, and Chesterfield Smith.

The volume also includes the report of the Pound Conference Follow-Up Task Force. This Task Force was chaired by Judge Griffin Bell, and many of its recommendations, drawn from the Conference proceedings, are currently the subject of experimental implementation.

West Publishing Company has announced that all funds realized from the sale of the book will be used to further its dissemination.

SALARY APPEAL from p. 1

an argument date be set for the October 1980 Term.

Foley v. Carter. In a related matter, the defendant in *Foley v. Carter* on June 17 moved in the U.S. Court of Appeals for the District of Columbia Circuit for a stay of further briefing or other prosecution of the case until the Supreme Court decides the Will cases. *Foley v. Carter,* which is on appeal following the District Court's granting of summary judgment in favor of the plaintiff, involves challenges to an alleged reduction of judicial salaries after increases had already been put into effect in Fiscal Year 1979. The plaintiff, Director of the Administrative Office, has filed a brief in opposition to the President's motion.

Financial Disclosure. The petition for writ of certiorari in *Duplantier v. United States,* No. 79-1180, was not acted upon this Term. This suit challenges the constitutionality of the Ethics in Government Act of 1978, which requires judges and other senior Third Branch personnel to annually file a personal financial statement (see *The Third Branch,* February 1980, p. 1).

The Third Branch

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

New District Judges and Spouses Discuss Ethics. Participants in last month's Seminar for Newly Appointed District Judges and their spouses met for a morning in the Dolley Madison House to discuss judicial activities and ethics. Following an introduction by Judge William J. Campbell (seated, left), senior chairman of Center seminar programs, the meeting began with a lecture by Chief Judge Howard T. Markey (standing), of the Court of Customs and Patent Appeals. An active question and answer period followed. Among the topics discussed were avoidance of impropriety and the appearance of impropriety, relations with the press, charitable and political fund raising activities, and the Code of Judicial Conduct for United States Judges.

LEGISLATION from p. 1

issues involved." Reflecting the concerns which had led to defeat of similar measures in the past two Congresses, Congressman Rodino indicated that he wants to be sure that the division does not "create an imbalance in the make-up of the court that would prevent the continuation of civil rights advancement through our judicial system." Other bills on the same subject have also been introduced in the House.

Fair Housing. On June 12th, the House by a vote of 310 to 95 passed H.R. 5200, a bill which would revise Title VIII of the Civil Rights Act of 1968 and facilitate enforcement of fair housing laws.

Under existing law, conciliation is the only means short of federal litigation available for resolving an individual fair housing complaint. Under the bill, an aggrieved party may petition the Secretary of HUD to initiate a hearing before an administrative law judge (ALJ) for what is hoped to be a more expeditious resolution of the controversy. Limited review in the district court of an ALJ's determination is provided for. Sanctions available include an injunction against the discriminatory practice and a $10,000 civil fine (there is no provision for the payment of damages to the injured party).

Amendments passed on the floor of the House provide for the independence of the ALJ's from HUD investigators and prosecutors.

The Judicial Conference at its March 1980 meeting took no position on this bill save to recommend an amendment requiring that a person initiating an administrative hearing exhaust administrative remedies before proceeding in state or federal court.

On the Senate side, the Subcommittee on the Constitution in June forwarded a similar bill, S. 506, to the Senate Judiciary Committee.

Federal Question Jurisdictional Amount. On June 28th, the Senate passed S. 2357, which would eliminate entirely the current $10,000 jurisdictional amount for federal question cases (see *The Third Branch,* April 1980, p. 7). The Judicial Conference has long favored such action. Unlike previously introduced—and unsuccessful—measures, the bill is not part of legislation to restrict diversity jurisdiction.

In the House, this bill has been referred to the Committee on the Judiciary.

Bilingual Courts in Puerto Rico. The House on April 1st passed H.R. 5563, a bill to provide that certain judicial pleadings and proceedings in the District of Puerto Rico be conducted in Spanish.

In March of this year the Judicial Conference issued a statement to Congress explaining its position that the bill would raise "greater judicial and administrative difficulties than the flaws which it seeks to resolve." Concerns noted in the statement included constitutional problems inherent in maintaining two jury wheels; selection of only Puerto Rico from all Spanish-speaking populations to receive the opportunity of Spanish language federal jury trials; expansion of the district court's caseload; and increased expense and delay caused by the need for translation of exhibits, transcripts and opinions.

The bill is now pending before the Senate Subcommittee on Improvements in Judicial Machinery.

Graymail. The Senate on June 25th passed S. 1482, which would establish a new pretrial notice requirement for a defendant who intends to produce or cause to be produced classified information in his defense against criminal prosecution. The bill is designed to eliminate the "graymail" tactic whereby a defendant presses for the release of classified information and thereby presents the Government with a "disclose or dismiss" dilemma. Under present law there is no requirement for pretrial notification, and in preparing for trial the Government can only guess whether the defendant will attempt to disclose such information or whether such evidence will be found admissible.

Under the bill, after a defendent gives notice, the Government may request a hearing, after which the court is to determine whether and the manner in which the classified evidence may be used. For example, if found not to prejudice the defendant's right to a fair trial, the court may allow the Government to submit a statement admitting the facts which the classified information would otherwise prove. On the other hand, faced with an order that disclosure be made, the bill authorizes the Government to take an interlocutory appeal.

The Judicial Conference at its March 1980 meeting endorsed

See LEGISLATION p. 5

SECRETARIES HANDBOOK PUBLISHED

The Federal Judicial Center early this month distributed the *Handbook for Federal Judges' Secretaries.* A loose-leaf reference work for both new and seasoned secretaries, the handbook is the work of a number of individuals within the federal court system and in part is a compilation of relevant portions of other Judicial Center and Administrative Office publications. It has been mailed to all circuit, district and bankruptcy judges for further distribution as they see fit.

Problems in delivery should be brought to the attention of the Center's Continuing Education and Training Division at 202 (FTS) 633-6296.

LEGISLATION from p. 4

the bill with two procedural modifications.

A related bill in the House, H.R. 4736, has cleared both the Select Committee on Intelligence and the Subcommittee on Criminal and Constitutional Rights. Together with the recently passed Senate bill, it is now before the House Judiciary Committee.

Wiretapping. On June 9th, the Senate passed S. 1717, which amends the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510, 2518, and 2519). Specifically, the bill (1) creates procedures for judicial approval of surreptitious or covert entries to install, maintain or remove court-authorized electronic eavesdropping devices and (2) expands the availability of emergency interceptions without prior court authorization.

The first amendment codifies the existing—and Supreme Court approved—policy of the Department of Justice to notify the court when surreptitious entry becomes necessary. With regard to the second amendment, the bill broadens the statute's existing emergency coverage to include situations which involve "immediate danger of death or severe physical injury to any person."

The bill received broad support from the White House, the Department of Justice, the American Bar Association, the American Civil Liberties Union, and the FBI.

It is now pending before the House Judiciary Committee.

Antitrust. The House in June passed a number of bills designed to expedite the progress of antitrust litigation through the courts. One of these bills, H.R. 4048, would change existing law and allow a judge to award prejudgment interest if it is found that a party engaged in tactics intended to delay the litigation. This and four other antitrust reform bills have been placed under the number S. 390, a bill (similar to H.R. 4048) which passed the Senate on July 20, 1979. A conference committee to resolve differences between the reforms proposed by the two chambers has been appointed, but no date for a meeting has yet been set.

Committee Action

Criminal Code. On July 2nd, the House Judiciary Committee forwarded to the full House H.R. 6915, a bill completely revising the federal criminal code. The bill retains most of the features which distinguish it from its Senate counterpart (S. 1722). It would not, for example, abolish parole nor provide for Government appeal of sentences (see *The Third Branch,* November 1979, p. 1). However, several significant amendments were made by the House panel.

- Deleted is a provision allowing a witness to be accompanied into the grand jury room by an attorney.
- Changed is the requirement that, when imposing sentence, a court state the reasons a particular sentence is given. Instead, the court must consider all sentencing alternatives (parole, fine, imprisonment, etc.) and state the reasons for the alternative selected. Explanation of the actual sentence imposed need only be given when it exceeds published sentencing guidelines.
- When knowledge of a particular fact is an element of an offense, a provision has been added that such knowledge is established when the defendant is aware "of a high probability of the fact's existence, unless he actually believes that it does not exist."

The Committee considered, but rejected, an amendment which would have imposed the death penalty for certain crimes.

As pending, the bill is to take effect four years following passage. A recent amendment mandates that the Judicial Conference-created sentencing commission initiate work on drafting sentencing guidelines on October 1, 1981.

The Senate's criminal code reform was reported out of the Senate Judiciary Committee on January 17, but the frequent absence of the bill's chief sponsor, presidential candidate Edward Kennedy (D-Mass.), has meant that no significant action on the Senate floor has taken place.

Bills Introduced

Voir Dire. Led by Birch Bayh (D-Ind.), five Senators on June 13 introduced S. 2831, to require federal courts to permit attorneys to conduct examination of jurors, subject to reasonable limitation by the court. Under the bill, the court may also conduct its own examination if desired.

The sponsors believe that attorney participation in voir dire is more in keeping with the principles enumerated in the Sixth Amendment than the current widespread practice of court-conducted questioning.

The measure has been referred to the Senate Judiciary Committee.

NARA. Senator Donald W. Riegle, Jr. (D-Mich.) on June 6 introduced S. 2796, to repeal several provisions of the Narcotic Addict Rehabilitation Act of 1966. The affected titles created a program to provide treatment in lieu of prosecution for narcotics addicts charged with or convicted of federal crimes. Senator Riegle noted that only two addicts were committed to the program in 1977 and that in recent years no funds for it have been requested by the administration or appropriated by Congress.

The White House, which endorsed the bill, has stated that repeal of NARA would be consistent with the recent trend favoring community-based treatment centers for drug abuse.

The bill has been referred to the Senate Judiciary Committee.

U.S. Magistrate Reports

PRISONER EXCHANGE PROGRAM CONTINUES

In February, U.S. Magistrate Richard W. Peterson of Council Bluffs, Iowa acted as a verifying officer overseeing the transfer of American prisoners from Bolivian jails. With previous similar experience in Mexico, Magistrate Peterson this year flew to La Paz to conduct hearings verifying three Americans' consent to serve the remainder of their Bolivian sentences in the United States.

The Treaties. The treaties which authorized these exchanges were precipitated in mid-1975 when the State Department received a series of complaints from the families of Americans jailed in Mexico and other countries. The complaints alleged that Americans were being arrested, interrogated and imprisoned for relatively minor offenses, especially drug offenses. They also alleged that the incarcerated Americans were subject to conditions a good deal harsher than would be the case in American jails. The complaints gave rise to negotiations which culminated in treaties between the United States and Mexico and the United States and Canada.

The treaties, ratified in 1977, provided that prisoners would be permitted to return to their native country to serve the balance of the sentence as long as the offense for which imprisonment was imposed was a crime in the transferee country and six or more months of the sentence remained to be served. The treaties also provided that the transferor state retained exclusive jurisdiction over any proceedings challenging or attempting to modify or set aside the sentence originally imposed. This feature has received some criticism. See, Note: Constitutional Problems in the Execution of Foreign Penal Sentences; The Mexican-American Prisoner Transfer Treaty, 90 Harv. L. Rev. 1500 (1977). But the treaties have been upheld in *Rosado v. Civiletti,* No. 80-2001 (2nd Cir. April 23, 1980) and *Pfifer v. U.S. Bureau of Prisons,* 615 F.2d 873 (9th Cir. 1980).

Legislation implementing the treaties was passed in 1977. This legislation provided that prior to transfer the prisoner give full, complete and unqualified consent to the transfer, and that verification of this consent be given at a proceeding before a United States judge or magistrate. Among other things, the verifying officer must personally inform the offender of the conditions under which the transfer is made and determine that the prisoner understands and agrees to them.

Mexican Transfers. In December 1977, the first major exchange of American offenders held in Mexican prisons was completed, with U.S. magistrates acting as verifying officers in the transfer of approximately 250 Americans. Magistrate Peterson was one of these verifying officers, and he wrote of his experiences in the December 1979 issue of *Federal Probation,* a publication of the Administrative Office of the U.S. Courts.

On February 10, 1978 the United States and the Republic of Bolivia entered into a treaty similar to that executed with Mexico, and later that year the first transfer of American prisoners from Bolivia began. Magistrate Peterson again conducted verification hearings and recorded his experiences in a Report to the Untied States District Court for the Southern District of Iowa. Excerpts from this report follow.

Bolivian Experiences. Magistrate Peterson flew to La Paz, Bolivia on February 24, 1980. There he met American Consul James Halmo, Federal Public Defender Herbert Cooper, and U.S. Bureau of Prisons' officials George Diffenbaucher and Garnet Tarcea. First on the agenda was a tour of the La Paz prison, conducted by Governor (Warden) Rojas.

"San Pedro *Penitenciaria,* a 150 year old structure, occupies a full block in central La Paz. It is surrounded by a stone wall approximately 25 feet high; one enters through an arched doorway on its west wall. Our party received passes from the guards at the gates and then were allowed to enter a central courtyard in which 20 to 30 prisoners, including a few Americans, lounged. A wooden stairway led to a balcony where the prison offices were located. After a few minutes wait Governor Rojas invited us to his office, welcomed us with typical Latin courtesy, explained that his country was poor and could not provide the best penal conditions but that they were doing the best they could (Jim Halmo later confirmed that Rojas was a competent, conscientious public official and was recognized as an authority in the field of Latin-American penology). My limited Spanish was sufficient for me to explain to him briefly our mission (verification hearings); the Governor was interested and responsive.

"The tour of the prison lasted about an hour and a full description would be too lengthy. The following, however, are my major impressions:

"1. The prison is horribly crowded. It was built for 250 inmates and at present has over 700. The cells, rather like caves in limestone walls surrounding two or three separate courtyards *(Section Alamo, Section Pina,* etc.) are cramped and can be improved only by the inmates if they can pay the high prices demanded for lumber and other improvement supplies.

"2. Metalworking and furniture shops offer attempts at vocational training, but in a

See PRISONERS p. 7

PRISONERS from p. 6

very limited way.

"3. In the kitchen four huge iron vats are set in a floor level oven. Each was over half full with a scummy, bubbling mixture which had a greasy and slightly nauseating odor. This mixture was called *rancho* of which the inmates received two servings a day. When they arrive carrying empty tin cans, a chunk of bread is placed in each, and *rancho* poured over the top. Additional food beyond this must be purchased independently.

"4. The five or six Americans we met were young, appeared to be in good health but anxious that their court cases would be concluded soon. It was very apparent that they relied greatly on Halmo and [Vice Consul Peggy] Elliott, and have great respect for the efforts of these consulate officials to help.

"5. An infirmary in the main courtyard appears to have basic medical supplies although I am not qualified to judge fully on this. A plaque on the wall shows that the equipment and supplies were a gift of the La Paz Lions Club.

"6. Conjugal visits are allowed; in fact, one American had his wife with him at the time of our visit. (Latin culture and society are very realistic in many ways. This aspect of their conditions of penal confinement -- in most ways far substandard to ours -- is one, I believe, that American penologists should study. Its implementation would be complex and undoubtedly controversial but deserves thoughtful consideration.)"

After the tour, Magistrate Peterson, together with Consul Halmo, the American representatives and two Bolivian attorneys, went to the Hall of Justice to determine the legal situation of the prisoners. There they found that there were some technical problems with the sentences (the prison terms were reduced but the fines were increased) that needed to be cleared up prior to transfer. Legal maneuvering ensued, which took up the balance of the week and ended only hours before the participants' scheduled departure for the United States.

"Finally after the series of frustrating episodes in courts all came right by 6:00 P.M. Friday when:

"1. All required *sentencia* documents had been received and I conducted verification hearings for the three transferees on Thursday afternoon, February 28, from 5:30 to 6:30 P.M. at which all three executed consents to return.

"2. Hearing had been held at the Narcotics Clinic in La Paz on the American considered mentally incompetent to stand trial. He was so found by the [Bolivian] district judge at the hearing attended by both consulate personnel and myself and certified for return to the United States under a special provision of the treaty."

That evening at approximately 11:00 P.M. Magistrate Peterson left La Paz with the other Americans and five prisoners (the fifth was a deportee not involved in the transfer). He summarized his Bolivian experience as follows:

"1. The verification hearing procedure is now smooth and works well. In December, 1977, in Mexico, we were feeling our way to a degree. Now, thanks to more complete forms and procedural checklists, only a few problems, if any, arise.

"2. Consul James Halmo, Vice Consul Peggy Elliott and their staff of our consulate in La Paz are outstanding. Their interest in the well-being and future of the American prisoners confined there was sincere, and their efforts on their behalf remarkable. The challenges they face and overcome are unique, and they deserve high accolades as outstanding foreign service officers.

"3. In the La Paz experience, we discovered almost by chance that the presence and, if requested, participation by United States magistrates in preliminary matters leading to final correct legal posture in the foreign courts may be helpful. Such reinforcement may be psychological only, but

See PRISONERS p. 9

Courtyard at San Pedro Penitenciaria.

COURT OF CLAIMS CELEBRATES 125th ANNIVERSARY

On June 2 the United States Court of Claims assembled *en banc* to commemorate the 125th anniversary of its creation. On this rare occasion in which all seven judges and three senior judges were seated, Chief Judge Daniel M. Friedman addressed the court and spectators on the history and mission of the Court of Claims.

Chief Judge Friedman remarked that when the court was created in 1855, the only means to recover on claims against the Government was a cumbersome claims procedure in Congress. It was determined that the only satisfactory way to handle the large number of claims fairly and efficiently was to establish an independent tribunal.

The complete history of the court is traced in a recently published two-volume work by Senior Judge Wilson Cowen and Judges Philip Nichols, Jr. and Marion T. Bennett.

The philosophy and mission of the court, Chief Judge Friedman remarked, was expressed in a statement by Abraham Lincoln in his 1861 message to Congress. The statement is now inscribed in marble in the entrance hall of the court: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals."

FJC TO DISTRIBUTE ARTICLE ON DISCLOSURE OF PRESENTENCE REPORT

The Harvard Law Review has recently published an article by Stephen A. Fennell and William N. Hall entitled *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts,* 93 Harv. L. Rev. 1613 (1980). The article was written under a contract with the Federal Judicial Center though, as the article points out, neither the opinions nor conclusions contained therein necessarily represent the policy of the Center.

The report reviews both factually and legally the practice of courts and probation offices in preparing and disclosing presentence reports. It analyzes the impact of the mandatory disclosure required by Rule 32(c)(3), F.R.Cr.P., on the federal sentencing process and makes recommendations for changes.

The Federal Judicial Center is obtaining reprints of this article for distribution to probation offices. In addition it is anticipated that the article will be distributed at sentencing institutes. Any district court judge who is interested in obtaining a copy of the report may request one from the Research Division.

That Division is presently preparing a staff paper which will contain quantitative findings about disclosure practices.

STATE-FEDERAL from p. 2

number of subjects were discussed. Federal judges present reported on procedures followed when *pro se* cases are filed against the judges (and in some instances against their spouses), with great savings of time and cost to both state and federal courts. One state judge brought up for discussion a significant increase in filings in state courts of ERISA cases, some of which under the Act may be filed in either state or federal courts. There were exchanges of ideas on certification of questions from the federal court to the Oregon Supreme Court; cases coming to the federal courts on allegations of overcrowding in jails and prisons; and the relationship between judges and parole boards. Finally, the Council again went on record (as they have in the past) in support of the elimination of diversity jurisdiction in federal courts.

THE SOURCE
The Information Service of the Federal Judicial Center

Publications are primarily listed for the reader's information. Only those titles listed in boldface are available from the FJC Information Services Office.

Alternatives to Institutionalization: A Definitive Bibliography. James R. Brantley & Marjorie Kravitz. National Institute of Law Enforcement and Criminal Justice (May 1979).

The Case for Special Juries in Complex Civil Litigation. Charles W. Fornier. 89 Yale L.J. 1155-1176 (1980).

Due Process of Sentencing. Stephen J. Schulhofer. 128 U. Pa. L. Rev. 733-828 (1980).

History of the United States District Court for Northern West Virginia. U.S. District Court, Northern District of West Virginia (1977).

The Nature of the Judicial Process: Revisited. Ruggero J. Aldisert. 49 Cin. L. Rev. 1-48 (1980).

The Pound Conference; Perspectives on Justice in the Future. A. Leo Levin & Russell R. Wheeler, eds. St. Paul, West Publishing Co., 1979.

The Speedy Trial Planning Process. Kenneth Mann. 17 Harv. J. Legis. 54-97 (1980).

Suing Judges: History and Theory. Jay M. Feinman & Roy S. Cohen. 31 S.C.L. Rev. 201-292 (1980).

The Supreme Court's New Rules for the Eighties. Bennett Boskey & Eugene Gressman. 85 F.R.D. 487-519 (1980).

Survey of Discovery Sanctions. S. Mark Werner. 1979 Ariz. St. L.J. 299-337.

CENTER BOARD URGES CONTINUED EFFORT TO TAKE ADVANTAGE OF SPECIAL AIR FARE OFFERS

At its meeting on June 20, the members of the Board of the Federal Judicial Center expressed the hope that all court personnel attending Center programs continue to be alert to the savings that might be realized from taking advantage of special reduced air fare plans that the various airlines make available. Significant savings can frequently be had simply by making reservations early or by minor adjustments in travel itineraries. These offers are very difficult to track from a central location. Some are available only from regionally based airlines, and regulations from airline to airline differ dramatically.

While the Board is eager that available savings be realized from the use of such offers, it recognizes that adjustments should not be so burdensome as to impede the efficient conduct of business.

OCTOBER 1979 TERM: A STATISTICAL REVIEW

The Clerk of the Supreme Court has released the Court's final statistics from the October 1979 Term. The Court received an increase in new filings of slightly less than 100 (3985 this term over 3893 last term). In all, the Court acted upon 3889 cases this term, compared to 4017 last term. Twenty-two original cases and 948 appeals and petitions for certiorari were carried over to the October 1980 Term.

The Court continued to give plenary review in only a small percentage of the cases brought before it. Of 2509 paid cases on the docket, review was granted in only 199 (75 cases were summarily decided). Of a nearly equal number of *in forma pauperis* cases—2249—review was granted in only 32 (49 cases were summarily decided).

The number of cases in which oral argument was granted was down slightly, 156 vs. 168, but, with one exception (a case set for reargument), all cases argued and submitted were disposed of by the term's conclusion. The number of cases available for oral argument next term was virtually the same this term as last, 78 vs. 79.

The number of admissions to the Bar rose dramatically, 9391 vs 6887, perhaps reflecting an attempt to avoid the recent $75 increase in admission fee.

PERSONNEL from p. 10

Marilyn H. Patel, U.S. District Judge, N.D. CA, June 26
Thelton E. Henderson, U.S. District Judge, N.D. CA, June 26
A. Wallace Tashima, U.S. District Judge, C.D. CA, June 26
Carmen C. Cerezo, U.S. District Judge, D. PR, June 26
Earl H. Carroll, U.S. District Judge, D. AZ, June 26
Alfred C. Marquez, U.S. District Judge, D. AZ, June 26

APPOINTMENTS

Odell Horton, U.S. District Judge, W.D. TN, May 16
John T. Nixon, U.S. District Judge, M.D. TN, May 16
Frank J. Polozola, U.S. District Judge, M.D. LA, May 29
W. Earl Britt, U.S. District Judge, E.D. NC, May 30
George R. Anderson, Jr., U.S. District Judge, D. SC, June 1
Raul A. Ramirez, U.S. District Judge, E.D. CA, June 2
John D. Holschuh, U.S. District Judge, S.D. OH, June 2
Ann Aldrich, U.S. District Judge, N.D. OH, June 2
Charles L. Hardy, U.S. District Judge, D. AZ, June 2
Walter H. Rice, U.S. District Judge, S.D. OH, June 4
Patrick F. Kelly, U.S. District Judge, D. KS, June 6
Clyde S. Cahill, Jr., U.S. District Judge, E.D. MO, June 7

ELEVATIONS

Andrew W. Bogue, Chief Judge, D. SD, June 11
Wilfred Feinberg, Chief Judge, CA-2, June 24
Howard G. Munson, Chief Judge, N.D. NY, June 30

PRISONERS from p. 7

should not be overlooked as a possibility. In prison transfers the magistrate's duties under the implementing legislation are technically only verification hearings. If his attendance at other preliminary proceedings is considerd helpful by the local American diplomats, however, magistrates may make a very significant contribution to the fulfillment of the objects of the transfer treaties.

"4. The transfer treaties fulfill a great humanitarian goal: the return of citizens and nationals to their own homelands, cultures and environments. The dimension of this is measured by the contrast of the conditions existing in San Pedro Prison where we still have 15 or 16 Americans remaining, and in the American penal institutions."

In addition to the treaties with Mexico, Canada and Bolivia, the U.S. Senate has recently approved similar treaties with Panama, Peru and Turkey. Exchange of ratification with those countries is currently awaited. For related stories on prisoner exchange programs involving Bolivia, Canada and Panama, see *The Third Branch,* December 1977; April, July and December 1978; and February 1979. The complete text of Magistrate Peterson's report is reprinted in the Congressional Record, May 22, 1980, at S5790.

PERSONNEL

NOMINATIONS

Richard C. Erwin, U.S. District Judge, M.D. NC, June 11
David V. Kenyon, U.S. District Judge, C.D. CA, June 20
Consuelo B. Marshall, U.S. District Judge, C.D. CA, June 20

CONFIRMATIONS

G. Wix Unthank, U.S. District Judge, E.D. KY, June 18
Clyde F. Shannon, Jr., U.S. District Judge, W.D. TX, June 18
Filemon B. Vela, U.S. District Judge, S.D. TX, June 18
William A. Norris, U.S. Circuit Judge, CA-9, June 18
Robert P. Aguilar, U.S. District Judge, N.D. CA, June 18
Ruth B. Ginsburg, U.S. Circuit Judge, CA-DC, June 18
Jerre S. Williams, U.S. Circuit Judge, CA-5, June 18
Justin L. Quackenbush, U.S. District Judge, E.D. WA, June 18
Robert Boochever, U.S. Circuit Judge, CA-9, June 18
Horace W. Gilmore, U.S. District Judge, E.D. MI, June 18
U.W. Clemon, U.S. District Judge, N.D. AL, June 26
Judith N. Keep, U.S. District Judge, S.D. CA, June 26

See PERSONNEL p. 9

ao cosfjc calendar

July 30-Aug. 1 Tenth Circuit Judicial Conference; Denver, CO
Aug. 7 Judicial Conference Committee on Rules of Practice and Procedure; Washington, DC
Aug 8-9 Eighth Circuit Clerk's Conference; Kansas City, MO
Aug. 20-22 Seminar for Bankruptcy Judges; St. Petersburg, FL
Aug. 25-26 Judicial Conference Committee on the Budget; Carmel, CA
Aug. 25-27 Advanced Seminar for U.S. Magistrates; St. Petersburg, FL
Aug. 25-27 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Reno, NV
Aug. 25-28 Seminar for Part-Time Magistrates; St. Petersburg, FL
Sept. 4-5 Third Circuit Judicial Conference; Wilmington, DE
Sept. 8-10 Advanced Instructional Technology Workshop; Louisville, KY
Sept. 15-17 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Louisville, KY

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AUGUST, 1980

INTERVIEW WITH SOLICITOR GENERAL WADE H. McCREE, JR.

Circuit Judge Wade H. McCree
Doffed his robes to become S.G.
Though limericks are his passion,
in a more scholarly fashion,
*He speaks out for us here at Branch Three.**

As Solicitor General you decide on behalf of the United States what cases will and will not be presented to the Supreme Court for review. What procedures are followed in choosing the cases for which you will apply for writ of certiorari? Do you have any self-imposed limits on the number of cases you submit for review? To what extent does administration policy control your decisions to submit cases for review?

The procedures are rather simple, but extraordinarily useful. When the United States has lost a case in one of the Courts of Appeals and the agency or the executive department that is involved wishes Supreme Court review, its general counsel or department solicitor will send a formal request to the Justice

See INTERVIEW p. 3

**Wade H. McCree, Jr., a prolific writer of limericks, was appointed the 36th Solicitor General of the United States in 1977.*

His selection as the nation's chief appellate advocate follows a long tenure on both the federal and state benches: U.S. Court of Appeals (CA-6) from 1966 to 1977; U.S. District Court (E.D. Mich.) from 1961 to 1966; and the Circuit Court of Wayne County, Michigan from 1954 to 1961. In other areas of service, he was the United States Delegate to the Third United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Stockholm, Sweden in 1966, a member of the Board of the Federal Judicial Center from 1968 to 1973, and a member of several committees of the Judicial Conference of the United States.

He received an A.B. degree from Fisk Univeristy in 1941 and an LL.B. from Harvard in 1948. During World War II he rose to the rank of Captain in the United States Army. His career has been distinguished by the receipt of 12 LL.D's and one Litt. D.

PLAINTIFF ALLEGES THAT RECENT APPROPRIATIONS MOOT PAY LITIGATION

William E. Foley, Director of the Administrative Office, on July 25 suggested to the Court of Appeals for the D.C. Circuit that a recently enacted appropriations bill for the judicial branch has mooted the case of *Foley* v. *Carter* (Nos. 80-1548 and 80-1551) to the benefit of the plaintiff. This suit concerns section 101(c) of P.L. 96-86. Section 101(c), enacted early in FY 1980, provided that certain top federal officials would receive only a 5.5 percent salary increase while other government workers received 12.9 percent. At issue is section's 101(c)'s applicability to the judicial branch.

Plaintiff Foley was granted summary judgement by District Judge John Lewis Smith, Jr. in March (see *The Third Branch*, April 1980, page 1).

The recent motion and suggestion of mootness followed the signing by the President on July 8 of P.L. 96-304, the Supplemental Appropriations and Rescission Act of 1980. This act appropriated, *inter alia*, supplementary funds for this fiscal year for judicial salaries and expenses. Mr. Foley maintains in particular that it funded the 12.9 percent salary increase retroactively for the entire fiscal year, and thus must be viewed as repealing and superseding the earlier limitation. "To the extent that it was thought that section 101(c) would apply to the judicial branch," he contends, "Congress

See LITIGATION p. 7

SENIOR STAFF APPOINTMENTS ANNOUNCED BY ADMINISTRATIVE OFFICE DIRECTOR

William E. Foley, Director of the Administrative Office, has this month announced major appointments to senior staff positions.

Effective immediately, Edward V. Garabedian, who has been with the Administrative Office since 1947, will assume the position of Assistant Director. He will be in charge of the Financial Management Division and the Management Review Division, and will coordinate all activities of the Administrative Office relating to court reporters. His previous position was Chief of the Financial Management Division.

John E. Allen, who became Director of the Federal Judicial Center's Innovations and Systems Development Division in January of this year, is scheduled to join the Administrative Office in September as an Assistant Director. In this capacity he will supervise the activities of the Information Systems Division, the Statistical Analysis and Reports Division, and the Administrative Services Division. In commenting on this appointment, Mr. Foley said, "John Allen's experience in the development of Courtran and his excellent educational background eminently qualify him to assume a vital role in the work being done to determine how the Center-developed computer based projects will be made operational and maintained in that status by the Administrative Office. We look forward to working closely with him in the knowledge that he will make a very meaningful contribution."

James E. Macklin, Jr., formerly Assistant Director, Plans and Program Management, will assume the position of Executive Assistant Director to Mr. Foley and Deputy Director Joseph F. Spaniol, Jr. Pursuant to this change, which is effective immediately, Mr. Macklin will retain his supervision over all the program divisions, and, in addition, the Personnel Division will report directly to him, as will the two Assistant Directors. As they have in the past, the Office of the General Counsel and the Office on Legislative Affairs will continue to report directly to Mr. Macklin, Mr. Foley and Mr. Spaniol.

As to Mr. Allen, A Leo Levin, Director of the Federal Judicial Center, noted the great loss to the Center, but added that "There are benefits to the federal judicial system in John's move, which I believe strongly outweigh the loss to the Center. . . . The Center is working closer than ever with the Administrative Office, and John's appointment will go far to assure that this mutual cooperation continues."

ABA VOTES ON JUDICIAL DISCIPLINE

At its Annual Meeting in Honolulu on August 5 and 6, the American Bar Association's House of Delegates approved a resolution supporting in principle judicial discipline legislation which provides for mechanisms for removal of unfit judges. The resolution also supported in principle legislation which creates disciplinary machinery short of removal. The measure was passed by a voice vote, although a substantial minority favored the handling of complaints of judicial misconduct through existing circuit judicial councils and urged deferral of action on any legislation which would create new disciplinary procedures.

ABA PRESIDENT APPOINTS BLUE-RIBBON TASK FORCE ON JUDICIAL SALARIES

American Bar Association president Leonard S. Janofsky last month announced the formation of a blue-ribbon task force to seek improvements in salaries and benefits for federal judges. The task force will be chaired by Harold R. Tyler, Jr., a former Deputy Attorney General and district court judge (S.D. N.Y.). Also serving on the panel will be former Secretary of Defense Clark Clifford, attorney Gibson Gayle of Fulbright & Jaworski in Houston, former Secretary of Housing and Urban Development Carla A. Hills, chairman of the board and chief executive officer of du Pont Irving S. Shapiro, former U.S. Senator Joseph D.Tydings of Maryland, and Samuel L. Williams, a member of the Board of Governors of the State Bar of California.

One of the primary aims of the task force will be congressional adoption of legislation to permit the 1980 Quadrennial Commission on Executive, Legislative and Judicial Salaries to begin deliberations on July 1, rather than October 1, so as to have extra months to conduct hearings, make studies and draft reports. The Commission makes recommendations to the President on salaries for senior personnel, including judges, in all three branches of Government.

Creation of the task force is consistent with the ABA's

See ABA p. 7

The Third Branch

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

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

INTERVIEW from p. 1

Department asking us to seek certiorari. This request comes through the appropriate litigating division of the six divisions into which the Department of Justice is divided. For example, recently we considered a request from the Interior Department and the Solicitor of the Interior Department came over to talk to us about it. It initially had been sent through the Division of Land and Natural Resources. Then a recommendation will come from the appellate section of the appropriate litigating division telling us whether they agree or disagree with the request for authorization for certiorari. The United States Attorney who has handled the case and other interested agencies or departments may also submit recommendations.

When the file, which now has at least two recommendations in it—perhaps consistent, perhaps conflicting—is sent to my office it is given to one of the 13 assistants who makes a legal analysis of it, usually at some length, and makes a recommendation whether certiorari should be sought. One of the four deputies in this office, whose reviewing responsibilities roughly correspond to the areas handled by the six litigating divisions of the Department of Justice, then reviews the file and usually in a few handwritten sentences gives me his views. When the file comes to me, I do what all my predecessors have done; I personally review the entire matter beginning with the first document and the first level recommendation.

All of this is done in consultation with the affected governmental agency or executive department. By that I mean the litigating division of the Justice Department will have spoken with the office of the general counsel or solicitor of the department or agency during the course of preparing its recommendation, particularly if it disagrees with it or if it requires further information about the litigation. My assistant, by the same token, will communicate with the litigating division and the affected governmental agency in preparing the recommendation, and my Deputy might do the same. In the course of this, one of the persons from the affected governmental agency might request a conference with the Solicitor General. That's also communicated to me. So I may also have a conference with the principal legal officer of the client agency and sometimes with the head of the agency. I recall, for example, that when Joe Califano headed HEW, he used to come over and argue some of his own certiorari requests to me, and some of the other cabinet officers and agency heads have done and continue to do the same. So, procedurally that's the way the matter comes to me.

The next part of your question is whether I have any self-imposed limits on the number of cases I submit for review. Yes, but not as rigidly as the "yes" might sound. I know, for example, that the Supreme Court can only hear about 250 cases a year in plenary fashion. Last year, for example, 168 cases were argued on the merits before the Supreme Court and 67 other cases were decided on the merits without oral argument. That is a total of 235 cases, and that is the total number the Court can possibly hear because it is working right up to what appears to be the limit of its capacity. I think very few people really know how hard the Supreme Court does work. So, I have to be aware of the fact that when I am asked to seek certiorari there is a limit to the number of cases that the Supreme Court can hear. I have to ask myself, "Is this one of the 250 most important cases that the Supreme Court will be asked to hear this year?"

Last year, for example, the Supreme Court entertained 3,715 petitions for certiorari. We submitted only 68 petitions for certiorari out of that number. Some evidence of the care with which we make our selection is realized when you learn that 72% of ours were granted while only 6% of the total 3,715 petitions were granted. This means that we were very selective and very careful. This process of self-selection benefits the Government as well as the Court, because we are in a position to question closely those within the Government requesting certiorari. This enables us to ascertain the true significance of the case to Government programs or interests. So the response to this question is "yes," there are self-imposed limits—the realization of the capacity of the Supreme Court. But if we think a case should go, even if it would burden the Supreme Court, I have a duty still to send it along.

The next question seems to imply that administration policy may cause me to make affirmative decisions to seek review, and I'll address that. But I will suggest that administration policy usually works the other way. For example, an agency might lose a case in the Court of Appeals—and it would be an important case or it wouldn't have been taken to the Court of Appeals. Nevertheless, the agency might decide that it can accommodate the loss; that it can live with the precedent. I might be advised after we've considered and made an adequate legal analysis of it whether the Congress might take some action to change the law that was implicated in the Court of Appeals' review. The agency just might decide it can "live with" the decision or that it would prefer to wait for a better factual case, a case that has a more favorable factual setting for our purposes. To this extent, again, administration policy would influence this.

Regarding affirmative decisions to review, I don't recall a

See INTERVIEW p. 4

INTERVIEW from p. 3

single case during the three years I have been here in which the administration has said, "We want you to take this case to the Supreme Court." There have been cases where agency heads have been very eager and very active in impressing me with the urgency of their requests, but the persons who could *tell* me to act in a particular way are the Attorney General or the President, and in no case since I've been here has either done so.

have personal reservations about the position of the Government. How do you handle such situations?

I take it this question doesn't inquire whether I have legal reservations but whether I disagree with the policy that is implicit in it. Clearly, if I think a case is legally wrong I'm going to be reluctant to take it to the Supreme Court. But there may be policy differences, and if I had personal reservations that were so strong that I couldn't urge what was a respectable legal position of the Government, I wouldn't personally argue it because I couldn't give it my full support and enthusiasm. But I would not for that reason prevent the Government's position from being presented to the Court. Frequently I am called on to urge the Court to uphold a statute that I might not have voted for had I been a member of the Congress. But only if I found it personally offensive to the point that I couldn't give my full support to the legal authority of Congress to enact it would I take myself out of the case. That doesn't happen that often.

"...72% [our petitions for certiorari] were granted while only 6% of the total 3,715 petitions were granted.

We're certainly not insensitive to the wishes of the client agency. As a matter of fact, to the extent that we can make a distinction between policy and law, we believe that the client agency has the right to set its own policy, and my responsibility is to see that the legal analysis is proper. I would stand up against a client agency only if I thought the case didn't belong in the Supreme Court as a matter of law, if the legal position was incorrect or if the holding might be injurious to another agency. Sometimes an agency, for example, might seek an interpretation of a law that applies to many other agencies, and the interpretation that it seeks might be favorable to it in the context in which it arises, but a ruling in its favor might be harmful to or even disastrous for other agencies. For example, a pervasive statute like the Administrative Procedure Act or the Freedom of Information Act might impact on an agency in a particular way where it would want a particular interpretation urged upon the Court. But that interpretation might hurt a number of other agencies. In such a situation, of course, we have to be sensitive to the overall governmental position as well as to that of a particular agency.

There may be occasions when a decision to petition for certiorari is indicated but you

There has been some attention given recently to the possibility that relations between the Department of Justice and the federal agencies it represents are not always amicable. This has given rise to an examination of the extent to which agencies should have the authority to conduct their own litigation. What are your thoughts on this subject generally and, specifically, how would you describe the relationship between the office of the Solicitor General and the agencies it represents?

I think our relationships are good. We certainly have great respect for the principal legal officers of the several agencies whom we represent. They make it possible for us to do our work. We just couldn't do our work without their cooperation and so we seek their cooperation and try to cultivate the best possible relationship. For example, if we are going to take a case to the Supreme Court, the first draft of the brief usually emanates from the client agency. Without that, we just couldn't meet the workload that we have.

We depend on the principal legal officers of the client agencies and we have a great respect for them. Sometimes we differ with them, but that is inevitable. I mentioned earlier that one of the advantages of having the Solicitor General decide whether appeals will be taken is to give some overall unity to Government appellate litigation policy. If every agency could take its own cases, the Government would often be working at cross purposes.

The federal appellate caseload, though it has not received as much public attention as the trial court caseload, continues to rise dramatically. In fact it has risen much faster than the trial caseload. Does this rise affect the quality of the work of the appellate courts?

I think it has to. How seriously it affects it I don't know. As you well are aware, the several circuits have devised various plans to meet this challenge of the threatening caseload or the heavy caseload that's already arrived. I have some considerable concerns about some of the measures that have been taken. I think the greatest danger is presented by the possibility of the bureaucratic disposition of appeals. If supporting personnel should be permitted to participate in the decisional process, I would be very much concerned. I think the increased number of law clerks makes it imperative that the judges very carefully reserve for themselves alone the decisional process.

See INTERVIEW p. 5

INTERVIEW from p 4

In a speech you gave at the Fordham University Law School last November on the occasion of your acceptance of the "Fordham Stein Award", you suggested a unique approach to the problem of keeping experienced judges on the bench. Since then, several more judges have resigned which would seem to reinforce your stand that something should be done to keep qualified judges on the bench. Would you comment on that?

I suppose the two most conspicuous resignations since that time are the resignations of Judge Shirley Hufstedler to head the Department of Education and the resignation of Judge Philip Tone from the Seventh Circuit to return to practice. I suggested in those remarks that the federal Government should consider borrowing from the academic world the practice of a sabbatical leave. Just as academicians need a breath of fresh air after several years of hard work teaching, judges would also benefit from a change of scenery by acquiring fresh enthusiasm during a leave of absence in which they could recharge their intellectual batteries. The state of Oregon has experimented with this and its Chief Justice and others have benefitted from it. I think their experience is well worth monitoring.

I'm particularly concerned when I look at the age of some of the new judges who are coming in under the Omnibus Bill. For example, a recent addition to the court on which I sat, the Sixth Circuit, can't retire until the year 2003, and I'm not even sure that year will ever arrive! The same thing is true of a recent addition to the Court of Appeals for the District of Columbia—a very talented person, Harry Edwards, who was a professor at the University of Michigan Law School, I would guess he won't be able to retire until he is 65 and that's going to be in the year 2005. I would think over the course of that time a person with his energy and his catholicity of interests would find it very agreeable to be able to take a sabbatical leave to do something else, perhaps in the middle of the 25 years he has to serve before retirement, or maybe after seven or eight years. I think that's going to be true in the case of many judges and I think that a proposal to meet this problem is well worth a good look.

About all a judge can do now without resigning his commission is to work in the Federal Judicial Center or in the Administrative Office. There are many other things he can't do, but there are some precedents for other activity. Justice Jackson went to Nuremberg and Chief Justice Warren headed the inquiry into the Kennedy assassination. Both of these were Second Branch functions by Third Branch people. I recognize that there may be some constitutional problems to overcome. My remarks were just meant to direct the attention of the profession and the Government to the phenomenon of losing fine judges and suggesting one thing that might be done to retain them.

There have been several proposals recently, such as S. 1873, to discipline federal judges through procedures other than impeachment. What are your views on such legislation?

I sit on a standing committee of the American Bar Association that is addressing that very question. I am known on that committee as an outspoken opponent of measures to discipline federal judges through procedures other than impeachment.

I'm not satisfied that the case has been made for the seriousness of the problem. I've known a number of judges in the 23 years during which I sat on the bench. I've know only one or two instances in all that time, particularly in the federal judiciary, of a judge whose conduct might have warranted interference by someone else. One happened in our [Sixth] Circuit and we handled it in our Judicial Council without any public scandal and we were able to make a respectable resolution of the problem. The public was served by the judge's retirement, and the [the public] was not disserved by bringing the court into public ridicule by adopting a proceeding which might have encouraged challenges to every judge's capacity to sit in any case.

I think there may be some serious constitutional problems, too. I recognize that there are arguments on the other side, but you have asked me for my personal views and I would suggest that perhaps the case hasn't been made for its necessity. If the case has been made, I think we should proceed with great caution and should utilize the function of the Judicial Council and some of the ideas that have emanated from the Ninth Circuit like Chief Judge Browning's very comprehensive program to handle the problem of the difficult judge in his circuit. Other circuits have been equally thoughtful in devising programs.

"I have to ask myself, 'Is this one of the 250 most important cases that the Supreme Court will be asked to hear this year?' "

A Review:

SPECIAL COURTS OF THE UNITED STATES

On June 2, 1980, the oldest court in the nation with jurisdiction over a special subject matter, the United States Court of Claims, met *en banc* to commemorate the 125th anniversary of its creation. This court—like the Customs Court, the Court of Customs and Patent Appeals, the Tax Court and the United States Court of Military Appeals—is a special court composed of judges that sit only on that court and hear cases related to a particular subject matter; in this case, claims against the United States.

An earlier special court was unsuccessful and existed for only a short time. The Commerce Court, with jurisdiction to review decisions of the Interstate Commerce Commission, was established in 1910 and abolished in 1913 amid great controversy.

But in addition to the Court of Claims and other permanent special courts there exists today a number of other special courts. These courts hear disputes relating to particular subject matters but are composed of regular district and appellate court judges who sit on these courts in addition to the courts to which they were appointed. The most visible of these is the Temporary Emergency Court of Appeals (TECA). At present TECA deals only with energy matters. It was originally established in 1971 by the Economic Stabilization Act of 1970 (a predecessor court was abolished in 1953) to hear appeals arising from the wage and price controls instituted in 1971. Since its creation, however, the Economic Stabilization Act has been repealed except that those provisions of the Act creating TECA have been incorporated into the Emergency Petroleum Allocation Act (15 U.S.C. §751, et seq.) (EPAA) and TECA's jurisdiction is limited to cases arising under the EPAA, the Emergency Natural Gas Act of 1977 (15 U.S.C. §717, note) and the Energy Policy and Conservation Act of 1975 (Pub. L. No. 94-163, 89 Stat. 871 (1975)).

According to the 1979 Annual Report of the Administrative Office, the workload of TECA increased 45.7 percent in 1979, from 35 cases in 1978 to 51 in 1979, while disposition of cases more than doubled, from 17 in 1978 to 44 in 1979. Because the cases involve energy matters they tend to be complex and involve a great deal of money. For example, the Supreme Court on May 12, 1980 let stand a decision in *Mobil Oil Co. v. Department of Energy,* 610 F.2d 796 (TECA 1980), cert. denied, 446 U.S. ____ , that, according to the Department of Energy, permits oil refiners to raise gasoline prices to recover as much as $17 billion for lost income as a result of price ceilings that the appellate court held were not properly fixed.

The Chief Justice is empowered both to appoint individuals to the Court and to set the number of judges that sit thereon. The Court currently consists of Chief Judge Edward A. Tamm and 18 other circuit and district court judges. A panel of three judges may hear a case.

Another special court is the Rail Reorganization Court, sometimes referred to as the "Special Court". That Court was created by the Rail Reorganization Act of 1973 (45 U.S.C. §719) primarily to determine the value of properties transferred by seven principal bankrupt railroads and other transferors in the Northeast and Midwest regions. The amounts claimed by the transferors are in the billions of dollars. Proceedings to deal with those claims must, therefore, be conducted in several stages. The procedure to be followed was reported in *Matter of Valuation Proceedings, Regional Rail Reorganization Act of 1973,* 445 F. Supp. 994 (Special Court Regional Rail Reorganization Ac 1977). Judges of the Court are appointed by the Judicial Panel on Multidistrict Litigation, a special court in its own right. The Rail Reorganization Court presently consists of Presiding Judge Henry J. Friendly (CA-2), and Judges John M. Wisdom (CA-5) and Roszel C. Thomsen (D.Md.).

The United States Foreign Intelligence Surveillance Court and the United States Foreign Intelligence Surveillance Court of Review were created by the U.S. Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, et seq.). The Surveillance Court considers Justice Department requests for electronic surveillance in cases involving foreign matters. Denials of surveillance applications are considered by the Surveillance Court of Review. The composition of these courts was announced in *The Third Branch,* May 1979, p. 7. There has been one change, however. The Chief Justice on May 17, 1980 named Judge William O'Kelley (N.D. Ga.) to succeed Judge Thomas J. MacBride (E.D. Ca.) whose term on the Surveillance Court has expired.

In addition there have been in recent years a number of proposals for more special courts. The Federal Water Pollution Control Act of 1972 directed the President to study the feasibility of an Enviromental Court (Pub. L. No. 92-500, 86 Stat. 816). And, there has been a proposal to create a Science Court that would adjudicate only matters of a scientific or technical nature. There are no present plans for implementing either of these courts.

Such proposals of course are not new. In addition to the defunct Commerce Court, others have been proposed through the years. Special courts such as a Court of Indian Claims and a Court of

See COURTS p. 7

ABA from p. 2

support for federal judges in pending salary litigation. In the two consolidated cases now in the briefing stage at the Supreme Court, *Will v. United States,* Nos. 79-983 and 79-1689, the Association's Standing Committee on Judicial Selection, Tenure and Compensation will soon by filing an *amicus curiae* brief on the side of judges who are challenging the constitutionality of pay freezes for fiscal years 1976 through 1979. It will deal particularly with the issue of whether the judges must demonstrate that the pay freezes were discriminatory attacks with the designed purpose or effect of undermining judicial independence. This has been a major argument advanced by the Government. Under ABA guidelines, *amicus curiae* briefs are authorized by the Board of Governors only "sparingly", and only when they will make a significant contribution to the determination of the issue or issues involved."

For related stories on federal judges' salary litigation, see page one of the February through July, 1980 issues of *The Third Branch.*

COURTS from p. 6

Private Land Claims are discussed in Rightmore, "Special Federal Courts", 13 Ill. L. Rev. 15 (1918). For a time there was a Chickasaw Indian Court (see *Ex Parte Bakelite Corp.,* 279 U.S. 438 (1929)) and an Indian Reservation Court (see *United States* v. *Clapox,* 35 F. 575 (D. Ore. 1888)). A special labor court has been proposed as well as a trade court, a patent court, a court of tax appeals, and an administrative appellate court. It has been speculated that the reason none of these proposed courts has been adopted is the history of the unsuccessful Commerce Court (see Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction §3508 (1975).

U.S. MARSHALS SERVICE RECEIVES SUPPLEMENTAL APPROPRIATION

The Justice Department has announced that a supplemental appropriation has been enacted for the United States Marshals Service (USMS) that obviates the necessity for the severe cost cutting initiatives announced earlier.

The USMS will continue the service of private process, overtime, WAE/guard employment and out-of-district special assignments. The termination of these services, originally scheduled to begin June 25, will no longer be necessary to meet the funding emergency. The Justice Department indicates, however, that the USMS will have to maintain travel and mileage limitations and monitor all operations very closely during the remainder of this fiscal year and next year (FY 1981) as well.

A packet of materials from the Justice Department explaining the problem has been distributed by the Administrative Office to all District Court Judges, Bankruptcy Judges and Clerks of District and Bankruptcy Courts.

LITIGATION from p. 1

has now, with the concurrence of the President, reversed itself." Plaintiff seeks to have the judgment below vacated and the case remanded with direction to dismiss.

While the above motion is pending, Mr. Foley has also asked the D.C. Circuit to remand the record for the sole purpose of authorizing the district court to entertain a motion to deposit the sums appropriated to pay the 12.9 percent increase into an interest-bearing account. Judge Smith denied a similar motion last April, but plaintiff seeks to renew the request because of the change in circumstances he alleges was occasioned by the passage of P.L. 96-304.

The President's responses to these motions have not yet been filed.

THE SOURCE

The Information Service of the Federal Judicial Center

Dealing with Incompetent Counsel - The Trial Judge's Role. W. W. Schwarzer. 93 Harv. L. Rev. 633-69 (1980).

Judges of the United States. Bicentennial Committee of the Judicial Conference of the United States. GPO, 1978.

The Judicial Ten: America's Greatest Judges. Bernard Schwartz. 1979 S. Ill. U.L.J. 405-448.

Making Legal Language Understandable: a Psycholinguistic Study of Jury Instructions. Robert P. Charrow and Veda R. Charrow. 79 Colum. L. Rev. 1306-1375 (1979).

On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture. Irving Younger. 51 U. Colo. L. Rev. 341-54 (1980).

Some Problems of Discovery in an Adversary System. David L. Shapiro. 63 Minn. L. Rev. 1055-1100 (1979).

Speedy Trial Rights in Application. Gregory P.N. Joseph. XLVIII Fordham L. Rev. 611-56 (1980).

Trial by Television: Are We at the Point of No Return? George Gerbner. 63 Jud. 416-26 (1980).

PRESENTENCE REPORT— AN UPDATE

Following up on the announcement in last month's *The Third Branch,* please note that reprints of *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts,* 93 Harv. L. Rev. 1613 (1980), are now available to any interested person through the Center's Information Services Office (202/FTS-633-6365) rather than through the Research Division.

PERSONNEL

NOMINATION

Norman P. Ramsey, U.S. District Judge, D. MD, July 25.

APPOINTMENTS

Samuel J. Ervin, III, U.S. Circuit Judge, CA-4, May 30.
S. Arthur Spiegel, U.S. District Judge, S.D. OH, June 5.
E.B. Haltom, Jr., U.S. District Judge, N.D. AL, June 6.
Robert B. Propst, U.S. District Judge, N.D. AL, June 6
George W. White, U.S. District Judge, N.D. OH, June 6.
Milton I. Shadur, U.S. District Judge, N.D. IL, June 24.
Justin L. Quackenbush, U.S. District Judge, E.D. WA, June 27.
Robert P. Aguilar, U.S. District Judge, N.D. CA, June 30.
G. Wix Unthank, U.S. District Judge, E.D. KY, June 30.
Jerre S. Williams, U.S. Circuit Judge, CA-5, July 2.
William C. Canby, Jr., U.S. Circuit Judge, CA-9, July 3.
U.W. Clemon, U.S. District Judge, N.D. AL, July 3.
Norma H. Johnson, U.S. District Judge, D. DC, July 8.
Marilyn H. Patel, U.S. District Judge, N.D. CA, July 11.

DEATH

William O. Mehrtens, U.S. District Judge, S.D. FL, July 16.

ANALYSIS OF DISCOVERY PROBLEMS PUBLISHED

Discovery Problems in Civil Cases is a recently published Judicial Center report by former FJC Deputy Director Joseph L. Ebersole and Professor Barlow Burke of American University Law School.

The authors surveyed attorneys to learn of cases the attorneys thought presented particular problems, either of resistance to discovery or of over-discovery. Based on intensive case studies of 23 litigations so identified, the authors discuss a range of factors associated with discovery problems, including relationships both among parties and attorneys, characteristics of the case, rules of court and judicial procedures. The authors then recommend several steps that might be taken to ameliorate discovery problems.

Copies of the report are available by writing the Center's Information Services Office, (1520 H Street, N.W., Washington, D.C. 20005) or calling at 202-633-6365 (also FTS).

AO and FJC calendar

Aug. 20-22 Seminar for Bankruptcy Judges; St. Petersburg, FL.
Aug. 25-26 Judicial Conference Committee on the Budget; Carmel, CA.
Aug. 25-27 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Reno, NV.
August 25-27 Advanced Seminar for Full-Time Magistrates; St. Petersburg, FL.
Aug. 25-28 Seminar for Part-Time Magistrates; St. Petersburg, FL.
Sept. 4-5 Third Circuit Judicial Conference; Wilmington, DE.
Sept. 8-10 Advanced Instructional Technology Workshop; Louisville, KY.
Sept. 15-17 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Louisville, KY.
Sept. 22-23 King Committe Seminar; Washington, DC

CA-7 SEEKS LIBRARIAN

The Seventh Circuit has an opening for the position of Circuit Librarian. For application information, contact Circuit Executive Collins T. Fitzpatrick at (312) 435-5803 or FTS 387-5803.

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Legislative Update

JUDICIAL DISCIPLINE, FAIR HOUSING, AND OTHER BILLS CONSIDERED BY CONGRESS

Over the summer, Congress worked on a number of bills touching on the work of the federal courts, although it remains impossible to predict what measures will pass in the short time remaining in the 96th Congress. This Session is scheduled to adjourn on October 4, but leaders in both the House and Senate have stated that they feel Congress will have to return for a post election session in November. The report below is current as of the end of August.

Judicial Discipline. At the ABA Annual Meeting in Hawaii last month, a large amount of discussion revolved around the issue of judicial discipline, and resulted in votes by the House of Delegates favoring new statutorily authorized disciplinary procedures in lieu of reliance upon the existing mechanisms of the circuit judicial councils (see *The Third Branch,* August 1980, p. 2).

Subsequent to that meeting, Congressman Robert W. Kastenmeier (D-Wis.) introduced in the House on August 20 a new discipline bill, H.R. 7974. Similar in many respects to his previous bill (H.R. 6330), the new measure would create a three-tiered review process, starting with the chief judge of the circuit in question, followed by a committee of equal numbers of appellate and district judges who are to report to their judicial council, and culminating with the Judicial Conference. Under the bill, if a judicial council finds a complaint to have merit, that body could *inter alia:* certify a judge's disability; ask a judge to voluntarily retire; temporarily order that no new cases be assigned to a judge; or privately or publicly censor or reprimand a judge. In no case is removal of a judge authorized. If the Judicial Conference determines that consideration of impeachment may be warranted, it is to refer the matter to the House of Representatives.

The Senate last fall passed a

See LEGISLATION p. 5

PRESIDENT OPPOSES PLAINTIFF'S RECENT MOTIONS IN *FOLEY v. CARTER*

On behalf of President Carter, the Department of Justice recently filed with the D.C. Circuit its opposition to two motions filed by the plaintiff, Administrative Office Director William E. Foley, in litigation relating to a pay freeze for federal judges in FY 1980 (*Foley v. Carter,* Nos. 80-1548 and 80-1551). For a description of the original motions, see *The Third Branch,* August 1980, page 1.

The President first challenges plaintiff's suggestion that recent supplemental appropriations for

See LITIGATION p. 2

ABA HOUSE OF DELEGATES TAKES ACTION ON FEDERAL COURT ISSUES

At last month's American Bar Association Annual Meeting its House of Delegates acted upon a number of resolutions which relate to the work of the federal courts. Reported below are some of these actions.

- **Federal Judicial Discipline.** Disapproved one resolution which supported the establishment of procedures within each Circuit Judicial Council for handling complaints about federal judges and also urged that Congress defer action on additional procedures in this area until a determination could be made as to how the Circuit Councils were handling their responsibilities.

  Approved a recommendation which supports, in principle, legislation which provides for mechanisms for removal of unfit judges, and also supports, in principle, legislation such as S. 1873 (the so-called DeConcini bill) to provide machinery for judicial discipline short of removal.

- **Additional Judgeship.** Approved a recommendation which supports the request of the Judicial Conference for an additional judgeship for the U.S. Court of Appeals for the District of Columbia Circuit.

- **Judicial Compensation.** Approved a resolution urging federal and state governments to

See ABA p. 2

ABA from p. 1

adjust compensation schedules for judicial officers to provide relief from the cumulative reductions in the value of their earnings caused by inflation.

A related resolution was approved which sets up a seven-member Task Force on Federal Judicial Compensation with responsibilities exclusively in the area of federal judicial compensation. The Task Force will work toward bringing about conditions which will attract and retain on the federal bench the most qualified judges and lawyers available. The Task Force is charged with matters such as increases in judicial salaries; legislation to increase per diem allowances for judges assigned to sit in courts outside of their official headquarters; and an amendment to the Judicial Survivor's Annuity Act covering provisions for spouses and dependent children of justices and judges.

• **Federal Rules of Criminal Procedure.** Approved, with certain suggested amendments, a resolution supporting amendments to the Federal Rules of Criminal Procedure proposed by the Judicial Conference's Advisory Committee on Criminal Rules.

• **Federal Immunity of Witnesses Act.** Approved a resolution recommending that Congress amend an existing Act to permit the court to order that a defense witness be compelled to testify over a claim of privilege against self-incrimination when the court decides the order is in the public interest.

• **Grand Jury.** Approved three recommendations aimed at grand jury reform: (1) no prosecutor should call before the grand jury a person who has stated that he will invoke the privilege against self-incrimination (except in certain defined instances); (2) the grand jury should be informed as to the elements of the crimes considered by it; and (3) no witness should be found in contempt for refusing to testify before a grand jury unless he is provided an oportunity to explain his refusal to the grand jury and the grand jury thereafter recommends to the court that he be found in contempt.

Copies of these and other resolutions are available in the Federal Judicial Center Information Service Office.

INSTITUTE FOR COURT MANAGEMENT MARKS TENTH ANNIVERSARY

A special seminar was presented in Snowmass, Colorado on August 23, to commemorate the founding of the Institute for Court Management ten years ago. Dr. Carl Baar of Brock University, Ontario, Canada, and a 1970 graduate of the Institute, presented the paper at the seminar in which he reviewed and analyzed the contribution of the Institute to developments in court administration in the 1970's and assessed the prospects for the new decade.

Panelists and Dr. Baar were joined by other participants in a discussion of the changes which are anticipated within the justice system during the next decade, and the role of ICM and court administration in assisting the courts to anticipate and respond productively to those changes.

Immediately following the seminar, presentation of the Warren E. Burger Award was made by the Institute's Board of Trustees to Fannie J. Klein of the NYU School of Law and the Institute of Judicial Administration for her pioneering efforts to improve state and local court

See INSTITUTE p. 4

LITIGATION from p. 1

the judicial branch rescinded the previously imposed 5.5 percent pay cap. These appropriations, it is maintained, were only authority for Mr. Foley to hold funds necessary to pay the full 12.9 percent increase in reserve for the balance of the fiscal year in case the judgment of the district court is upheld. The President also argues that it is inconsistent for plaintiff to insist on the one hand that P.L. 96-86—the law imposing the freeze—does not apply to the judiciary, and argue on the other hand that the alleged repeal of that legislation moots the controversy.

The President also opposes the request for permission for the Director to file a motion in the district court to deposit money sufficient to pay the 12.9 percent increase into an interest-bearing account. The President denies that the circumstances now are "altogether different" than when a previous similar motion was denied by the district court, and notes Mr. Foley's recent congressional testimony that the 12.9 percent increase could be paid out of *existing* appropriations. It is also argued that F.R.C.P. 67—authorizing deposits where the relief sought includes a judgment for a sum of money—is inapplicable here because this is a suit only for declaratory relief.

Finally, the President calls to the attention of the Court of Appeals to the Supreme Court's request for briefs on the issue of judicial disqualification in the *Will* cases (litigation contesting the constitutionality of pay freezes in fiscal years 1977 through 1980). Because the high court expressed concern on this issue (despite the parties' belief that the rule of necessity applies), the President argues it would be "inappropriate" for the Circuit Court to take any action which would benefit federal judges financially before the *Will* cases are decided.

COMMUNITY SERVICE AS A CONDITION OF PROBATION: A REVIEW

From time to time, ***The Third Branch*** *carries reports on procedures and innovations that some courts have found helpful and in which others have expressed interest in learning more. The following is a review of the "community service" alternative to incarceration and probation.*

Incarceration is often considered too harsh a sentencing alternative in certain circumstances. Yet in the same circumstances, probation—requiring only that an offender obey the law and maintain steady employment—is frequently viewed by the public, and perhaps by the offender, as excessively lenient. A third alternative is to require the offender, as a condition of probation, to do uncompensated work for a public or charitable agency. This community service condition is now in use in a number of federal and state courts. Federal courts in the Eastern District of Michigan, the District of Columbia and the Western District of Tennessee were among the first to experiment with it. There has also been legislative interest. Both the Senate and House bills recodifying the federal criminal code expressly list as a discretionary condition of probation that the defendant "work in community service".

Studies of the community service sentence are few but those that do exist generally have been favorable. An LEAA study of community service prepared in 1977 asserts, for example, that "the entire court system may greatly benefit from the effect of alternative community service programs on criminal justice personnel and on the public".

Procedures. The specific programs for community service sentences vary. Basically, though, the court imposes a community service condition of probation only after full notice to the offender of the terms and consequences of the condition and after the offender has consented to the condition. If the condition is agreeable to the offender, the probationer is then, under the supervision of the probation office, placed in a participating not-for-profit public or charitable agency whose services are provided to the general public. The agencies utilized include community improvement programs, such as homes for the destitute, as well as schools, hospitals, and recreation facilities. Only after the agency agrees to the probationer and the probationer agrees to the agency is a mutually satisfactory schedule for work prepared.

The probation office must then monitor the program to assure that the probationer complies with the terms of probation. Normally the community service condition is imposed by setting a number of hours to be completed in a given time. The probation office, therefore, must follow the probationer's progress to be sure not only that the probationer is working, but that he or she is

See COMMUNITY SERVICE p. 4

Helen W. Nies was sworn in July 25 as an Associate Judge of the United States Court of Customs and Patent Appeals, the first woman to be appoined to this court. At her investiture in the courtyard of the Courts Building in Washington, Judge Nies (center) was welcomed (from left) by Judge Jack R. Miller, Chief Judge Howard T. Markey, Judge Giles S. Rich, and by Mr. Nies and their sons, daughter and daughter-in-law.

Previously a partner in the Washington firm of Howrey & Simon, Judge Nies has nearly 20 years experience in the field of intellectual property law and has served on numerous related committees and boards of bar associations and other professional organizations. In 1980 she received the Woman of the Year Award from the Women's Bar Association of the District of Columbia.

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

COMMUNITY SERVICE from p. 3

completing the requisite number of work hours.

Goals and Purposes. Because community service has not been in general use throughout the federal system nor in any single state system, no empirical analyses have been done to determine whether it actually produces the results claimed for it. However, the goals that community service is intented to serve are fairly clear.

A November 1978 study of community service as a sentencing alternative prepared for the Eastern District of Michigan by editors of the *Journal of Law Reform of the University of Michigan* identifies various aspects of the community service alternative.

The study asserted that community service, at least as envisioned by the Eastern District of Michigan, implemented the reintegrative theory of criminal causality and intervention. Community service, that is to say, focuses upon changing the individual's contacts with society, rather than attempting to change the individual directly.

The study also suggests that community service may serve a number of additional purposes commonly identified with the sentencing function.

- Rehabilitation. Community service offers the offender an opportunity to work and to learn from the job, from fellow workers, and in many instances from users of the service he is helping to provide. Such work can assist the offender in holding a paying job.
- Punishment. Community service requires the offender to work, deprives him of leisure time and generally increases the court's control over his life.
- **Deterrence.** Under traditional deterrence theories community service, since it is a more restrictive sentence than simple probation, should deter potential offenders more than the threat of simple probation.

Others have pointed to more general public benefits provided by the community service alternative. Judge Bailey Brown (CA-6), formerly of the Western District of Tennessee, where the alternative has been used for some time, suggested the following, in an article in *Federal Probation:*

- Service. The probationer can provide much needed service to public and charitable agencies. It has been pointed out that this may be especially so in cases involving skilled probationers convicted of white collar crimes.
- Public Acceptance. A service condition of probation may make probation a more acceptable sentence to the public, and foster confidence that justice has been done.
- Security. Contact with a public or charitable agency would provide the probation officer with an additional and more reliable "handle" on the probationer than does unsupervised probation.
- Cost Benefits. If the community service alternative allows some offenders who would ordinarily have been incarcerated to be placed on probation, the public will be saved the cost of incarceration.

Legal Questions. There appear to be no cases in which the authority of the court to impose community service as a condition of probation has been challenged. Thus far it has been imposed by federal courts under the general authority of the court to place an eligible defender on probation "upon such terms and conditions as the court deems best" (18 U.S.C. §3651).

Nor have there been any reported cases that have alleged constitutional or statutory limitations to uncompensated community service. In fact, a 1976 opinion letter by Carl H. Imlay, General Counsel of the Administrative Office concludes that the imposition of a special condition of work without pay would not violate the constitutional or statutory rights of the probationer, provided the condition was reasonably related to the rehabilitation of the offender and to the protection of the public and that the offender had reasonable notice of what was expected of him. If such conditions were met, the letter concludes there would be no denial of substantive or procedural due process, no involuntary servitude, and no violation of the minimum wage laws.

In addition, the letter states the opinion that neither the federal government, the judge imposing community service, nor the probation officer administering the service would be liable to the offender or a third party if the offender should negligently be injured or cause injury to a third party.

The Eastern District of Michigan study noted above also concludes that, properly imposed, a community service condition

See COMMUNITY SERVICE p. 7

INSTITUTE from p. 2

administration in the early 1950's and 1960's. The award was presented to Professor Klein by the Vice Chairman of the Institute's Board of Trustees, Horace W. Gilmore, U.S. District Court Judge in the Eastern District of Michigan. The Institute is a non-governmental, non-profit organization sponsored by the American Bar Association, American Judicature Society and the Institute of Judicial Administration. The Institute presents education and training programs in the field of court management, conducts research, renders technical assistance to courts and publishes *The Justice System Journal: A Management Review*. Earl F. Morris serves as Chairman of the Board and Harvey E. Solomon is the Executive Director.

LEGISLATION from p. 1

judicial discipline bill (S. 1873) that was subsequently incorporated into the Federal Courts Improvement Act (S. 1477) (see *The Third Branch,* Nov. 1979, p. 7). The Senate's version authorizes a complaint evaluation process in the judicial councils in which "any person" may initiate an investigation, and expressly prohibits removal of judges by any means other than impeachment. New would be the creation of a Court of Judicial Conduct and Disability, composed of five judges appointed for three year terms by the Chief Justice, to review decisions of the councils.

Fair Housing. Shortly after favorable House action (see *The Third Branch,* July 1980, p. 4), the Senate Judiciary Committee on July 30 cleared S. 506, a bill to create for the first time administrative enforcement proceedings for the resolution of individual fair housing complaints. Like the House version (H.R. 5200), the Senate bill sets forth procedures for resolution of complaints by Administrative Law Judges (ALJ's).

The two bills differ in the manner in which ALJ's would be appointed and their decisions reviewed. Under the House bill, ALJ's would be selected by the Department of Justice and appeals from their decisions would be heard in district court. The Senate version calls for selection of ALJ's by a Fair Housing Commission. Review from the administrative judges' decisions would first be made by the Commission, with further appeals taken directly to the federal Courts of Appeals.

The House bill is also pending in the Senate, but is being held at the Senate desk for introduction in case the Senate's own version runs into difficulty.

Fifth Circuit Division. On August 22 extensive hearings were held in the House Subcommittee on Courts and Civil Liberties on H.R. 7665, a bill to divide the Fifth Circuit into two autonomous circuits (see *The Third Branch,* July 1980, p. 1). Among others testifying were former Attorney General Griffin Bell (on behalf of the ABA) and a panel of Fifth Circuit judges—Chief Judge James P. Coleman, Judge Frank M. Johnson, Jr. and Judge Robert A. Ainsworth, Jr.

Pretrial Services. Both houses are considering legislation to establish pretrial services to all federal courts. Individuals working with pretrial services would provide verified information to judges for use in making pretrial release decisions and offer supervision and service to those persons released on bail. Experimental pretrial service units were originally implemented by the Speedy Trial Act in ten pilot district courts about four years ago, and the Judicial Conference has concluded that they have produced favorable enough results as to warrant their use in all other districts where a need for such service can be shown.

Although the pending legislative proposals are for the most part similar, the Senate bill (S. 2705) differs from its House counterpart (H.R. 7084) in that it also calls for the creation of a pretrial diversion program, an alternative to conventional prosecution whereby a defendant who successfully completes a pretrial program of supervision will have his or her criminal charges dismissed. Diversion programs may require medical, educational, vocational, social and psychological services; corrective and preventive counseling; residence in a halfway house; restitution to the victim; uncompensated community service; and other programs.

S. 2705 was ordered to be reported out of the Senate Judiciary Committee on July 30, and H.R. 7084 was reported out by the House Judiciary Committee on August 26.

Bankruptcy Reform Act. Lengthy technical amendments to the Bankruptcy Reform Act of 1978 were passed by the Senate last September, but pension and salary provisions added to the bill this summer by the House Judiciary Committee have stalled further progress.

Under the 1978 Act, bankruptcy judges will become subject to Presidential appointment in April 1984 for a renewable 14 year term. As amended by the House Committee, the bill (S. 658) would permit currently sitting judges who are not presidentially appointed at the end of the transitional period in 1984 to receive 80 percent of the benefits available under the judicial retirement system instead of the more modest benefits of the civil service pension system. The bill would also clarify that the salary increases given in the 1978 Act (to $50,112) were not intended to be in lieu of cost of living increases.

Proponents in the House recently moved to pass the bill under suspension of the rules, i.e. precluding any amendments. Proponents maintained that the allure of higher benefits was vital to retain experienced judges during the transition period and to recognize judges' increased responsibilities under the new Act. Opponents complained of an "unconscionable bonanza" for the judges, and expressed concern about considering such a lengthy, technical bill without amendments.

On July 28, the motion to suspend the rules failed to get the necessary two-thirds vote, 205-178. The bill remains before the entire House.

Newsroom Searches. Both chambers have been active in responding to the Supreme Court's 1978 decision of *Zurcher*

See LEGISLATION p. 6

LEGISLATION from p. 5

v. Stanford Daily, a 5 to 3 ruling which allowed the issuance of a warrant for the unannounced search of a newspaper office where neither the paper nor its reporters were themselves suspected of criminal activity.

The Senate on August 4 passed S. 1790, which would preclude federal, state and local authorities from making surprise searches of newspapers and others engaged in First Amendment activities. Searches of other "third parties" are permissible, however, and the Attorney General is to promulgate guidelines governing federal officials' conduct of such searches.

The House version, H.R. 3486, is more expansive and not only provides protection to news organizations and other like entities, but goes on to preclude *federal* officials from making unannounced searches of any other third party. State and local authorities are not so restricted, though. This bill was reported by the House Judiciary Committee to the full House on April 17.

Age of Judicial Nominees. Last April, by a vote of 97 to 0 the Senate passed S. Res. 374, a resolution condemning ABA guidelines relating to approval of judgeship nominees 60 years of age or older. On July 22, a similar measure, H. Res. 693, was approved by the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice and is pending before the Judiciary Committee. (Resolutions merely reflect the opinions of Congress, and do not have the effect of law.)

Under the ABA guidelines, individuals aged 60 to 64 must receive the top two ratings of "well qualified" or "exceptionally well qualified" and be in excellent health to be recommended for appointment. Recommendations of nominees over the age of 64 are never given, except for nominees to the Supreme Court.

State Justice Institute. The Senate on July 21 passed by a voice vote S. 2387, to create a State Justice Institute, a federally funded, private, nonprofit corporation to further the development and adoption of improved judicial administration in the state courts. Originally introduced by Senator Howell T. Heflin, former Chief Justice of the Supreme Court of Alabama, the bill directs the Institute to provide grants and to enter into cooperative agreements with state courts and nonprofit organizations—the National Center for State Courts would be an example—for the purposes, *inter alia,* of conducting research, demonstrations and special projects, providing a clearinghouse of information on state judicial systems, and encouraging and assisting in the furtherance of judicial education. As a funding vehicle, the Institute would be free of LEAA's "criminal only" restrictions.

The Senate report noted that state courts handle over 96 percent of all the cases tried in the United States, and concluded that "it is appropriate for the federal government to provide financial and technical assistance to state courts to insure that they remain strong and effective in a time when their workloads are increasing as a result of federal policies and decisions."

The measure has been referred to the House Judiciary Committee.

State of the Judiciary Speech. The Senate on August 26 approved S. 2483 by a voice vote. As passed, the bill is significantly different than the measure originally introduced (see *The Third Branch,* May 1980, p. 4). The bill now authorizes the leadership of both houses to consult with the Chief Justice and arrange for periodic addresses on the state of the judiciary before joint sessions of Congress.

A related bill, H.R. 6597, is pending before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice and the Committee on Rules. Unlike the Senate version, this bill would require an annual personal appearance by the Chief Justice.

SAMPLE ORDER DEVELOPED FOR AMENDING SENTENCES UNDER 21 U.S.C. §846

The Supreme Court in June held that a special parole term cannot be imposed upon a defendant convicted under 21 U.S.C. §846 of conspiracy to manufacture or distribute a controlled substance. The decision, *Bifulco v. United States,* 447 U.S. ____, 48 USLW 4734 (June 16, 1980), resolved a split among the Courts of Appeals as to whether a special parole term, which is not explicitedly provided for in §846, was intended by Congress to be an authorized penalty.

The Statistical Analysis and Reports Division of the Administrative Office has provided all districts with a list of all Title 21 cases sentenced since May 1, 1971, and the General Counsel's Office has issued recommended procedures for correcting sentences which are affected by the *Bifulco* decision.

The General Counsel's Office has also developed a model court order form for use in correcting such sentences:

"Order of the Court:

The court, on its own motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, orders that its sentence with respect to the conviction under 21 U.S.C. 846 imposed herein _____ 19__, be corrected by elimination of the special parole term included in the original sentence."

Questions concerning these matters may be referred to the Assistant General Counsel of the Administrative Office, Judd Kutcher (FTS: 633-6127).

COMMUNITY SERVICE from p. 3

would not violate the probationer's First or Fourth Amendment rights, does not constitute a deprivation of due process nor involuntary servitude, and does not infringe the probationer's right of privacy.

Results to Date. Although, as indicated above, no empirical studies have been conducted on the degree with which community service accomplishes all the goals envisioned for it, two districts that have used the alternative and monitored its success report that the rate of completion of the community service condition is very high.

The Eastern District of Michigan has, between 1975 and June 1980, placed 136 individuals under supervision with the special condition of community service. Of those, 57 have completed the program, 67 are actively in the program, and ten have been transferred to other districts. Only two failures were reported.

The District of the District of Columbia has between 1977 and June 1980 placed 431 persons on probation with the special condition of community service. Of those, 207 have completed the program, 156 are still active, twelve have failed to comply, and 56 cases have been closed for reasons other than completion or failure.

A 1979 District of Columbia analysis of its community service program also notes that, in general, persons placed in the program were low risk offenders who would probably not have been incarcerated, so that community service was not so much an alternative sentence but a "social restitution/punishment" sentence. It also indicated that active opiate users were very poor risks for the program.

Documents mentioned in this article as well as others on the subject are available for loan from the Information Service Office of the Federal Judicial Center. As always, *The Third Branch* would be pleased to receive any information, comments, or experiences that its readers care to share.

Noteworthy

A prisoner transfer between the United States and Panama will take place in late September. This is another in a series of transfers conducted pursuant to prisoner exchange treaties designed to return foreign prisoners to their native countries to serve the remainder of their sentences. U.S. Magistrate Joseph F. Leonard (W.D. TX) will conduct the verification hearings.

For a description of the treaties and the prisoner exchange between the United States and Bolivia, see *The Third Branch*, July 1980, p. 6.

* * * *

The Federal Court Clerks Association this year selected Kansas City, Missouri, as the site for their 52d conference. Speakers included A.O. Director William E. Foley, Chief Judge C. Clyde Atkins (S.D. Fla.), and Judge Earl E. O'Connor (D. Kan.) who discussed with the clerks and deputy clerks such matters as compliance with the Speedy Trial Act, E.E.O.C. cases and the operation of the jury system in the federal court system.

MEMBERS OF QUADRENNIAL PAY COMMISSION NAMED

In accordance with provisions of the Federal Salary Act of 1967 (2 U.S.C. §351, et seq.), appointments have been made to the Quadrennial Commission on Executive, Legislative and Judicial Salaries. This body meets every four years to make nonbinding recommendations to the President on pay levels for federal judges, congressmen and top executive branch officials. Pursuant to amendments to the Salary Act made in 1977, any pay levels subsequently recommended by the President will not become effective until both houses of Congress approve them.

Named to the panel by the President are Thomas R. Donahue, Secretary-Treasurer of the A.F.L.-C.I.O. in Washington; Martha W. Griffiths of Romeo, Michigan, a former Member of Congress and currently a partner in the law firm of Griffiths and Griffiths; and, to chair the Commission, Joseph H. McConnell of Del Ray Beach, Florida, former chairman of Communications Satellite Corp. and former president of the Reynolds Metal Co. and the National Broadcasting Company.

Selected by the Chief Justice are attorney Bernard G. Segal of the firm of Schnader, Harrison, Segal & Lewis in Philadelphia, and Otis M. Smith, vice president and general counsel of General Motors Corporation. Named by House Speaker Thomas P. O'Neill, Jr. are Richard Young, president of the international division of Polaroid Corporation in Cambridge, Massachusetts, and Sherman Hazeltine, a member of the 1976 Commission who is chairman emeritus of the First National Bank of Arizona in Phoenix.

The Vice President, in his capacity as President of the Senate, has yet to name his two selections.

Under law, the Commission is to commence operations after the beginning of the next fiscal year on October 1.

PERSONNEL

NOMINATIONS

Howard E. Sachs, U.S. Circuit Judge, CA-8, July 30
Miguel A. Gimenez-Munoz, U.S. District Judge, D. PR, July 31.
S. Gerald Arnold, U.S. District Judge, E.D. NC, Aug. 26

CONFIRMATION

Earl B. Gilliam, U.S. District Judge, S.D. CA, Aug. 19

APPOINTMENTS

Truman M. Hobbs, U.S. District Judge, M.D. AL, Apr. 14
Clyde F. Shannon, Jr., U.S. District Judge, W.D. TX, June 24
Horace W. Gilmore, U.S. District Judge, E.D. MI, June 24
Filemon B. Vela, U.S. District Judge, S.D. TX, June 25
Ruth B. Ginsburg, U.S. Circuit Judge, CA-DC, July 1
Judith N. Keep, U.S. District Judge, S.D. CA, July 9
Thelton E. Henderson, U.S. District Judge, N.D. LA, July 9
William A. Norris, U.S. Circuit Judge, CA-9, July 14
Alfred C. Marquez, U.S. District Judge, D. AZ, July 25
A. Wallace Tashima, U.S. District Judge, C.D. CA, Aug. 1
Robert Boochever, U.S. Circuit Judge, CA-9, Aug. 2

ELEVATIONS

Robert J. McNichols, Chief Judge, E.D. WA, Jan. 4
Howard G. Munson, Chief Judge, N.D., NY, July 1
Barbara B. Crabb, Chief Judge, W.D. WI, July 7

AO/FJC calendar

Sept. 15-17 Workshop for Chief Deputy Clerks of Bankruptcy Courts; Louisville, KY
Sept. 22-23 Seminar for Implementation Committee on Attorney Admission and Pilot Districts; Washington, DC
Sept. 22-24 Seminar for Defender Investigators; San Diego, CA
Sept. 24-25 Judicial Conference of the United States; Washington, DC
Sept. 25-27 Windfall Profits Excise Tax Workshop; St. Louis, MO
Sept. 29 - Oct. 1 Federal Criminal Practice Clinic for Assistant Federal Public and Community Defenders; Kansas City, MO
Oct. 8-10 Conference of Metropolitan Chief Judges; Vail, CO
Oct. 22-24 Seminar for Full-time Magistrates; New York, NY
Oct. 22-24 Seminar for Part-time Magistrates; New York, NY
Nov. 12-14 Seminar for Bankruptcy Judges; Cherry Hill, NJ
Nov. 17-19 Sentencing Institute for the Seventh and Ninth Circuits; Oakland, CA

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Will v. U.S. *set for argument*

D.C. CIRCUIT CERTIFIES *FOLEY v. CARTER* QUESTIONS TO SUPREME COURT

The Court of Appeals for the D.C. Circuit on September 19 certified to the Supreme Court two central questions in *Foley v. Carter* (Nos. 80-1548 and 80-1551).

This litigation contests the application to the judicial branch of 1979 legislation which reduced to 5.5 percent a previously enacted 12.9 percent salary increase for senior government officials, including judges. Because the statute (section 101(c) of P.L. 96-86) mandated that officials had to accept the 5.5 percent increase "in lieu of" the 12.9 percent adjustment, Administrative Office Director Foley was concerned about working a forfeiture of judges' right to the greater amount. To avoid the forfeiture, judges have not requested, and the Administrative Office has not paid, the 5.5 increase. A motion filed in the district court last April to allow immediate payment of this

See LITIGATION p. 2

JUDICIAL CONFERENCE HEARS CONGRESSIONAL REPRESENTATIVES AT FALL MEETING; RELEASES REVISED STANDARDS ON FREE PRESS — FAIR TRIAL

At the Judicial Conference's semiannual meeting in Washington last month, stress was placed on the importance of regular appearances on behalf of those Members of Congress with specific responsibility for legislation affecting the judicial branch. A representative of Congressman Peter W. Rodino, Jr., chairman of the House Judiciary Committee, read a statement to the Conference endorsing such regular visits. (The text of Congressman Rodino's remarks appears at p. 6.) The views of Senator Edward M. Kennedy, chairman of the Senate Judiciary Committee, were announced to the Conference by Stephen Breyer and Kenneth Feinberg, Chief Counsel and Special Counsel, respectively, of the Committee. As is traditional, the Attorney General, Benjamin R. Civiletti, also appeared.

Among the highlights of the Conference meeting:

Free Press and Fair Trial. The Conference promulgated revised guidelines for U.S. District Courts on the management of highly publicized cases that raise an apparent conflict between freedom of the press and the right to a fair trial. The guidelines, originally issued in 1968 and amended in 1970, were revised to reflect changes imposed in the last decade by Supreme Court decisions and other case law.

The new guidelines retain the existing standard of "reasonable likelihood" of interference with a fair trial as the test for regulation of attorney comment in federal criminal cases. In reaction to recent decisional developments, however, guideline sections restricting attorney comment in civil cases, non-jury criminal matters, and post-verdict criminal proceedings are deleted.

Added to the guidelines are provisions that (1) no court order or rule should attempt to restrain

See CONFERENCE p. 7

Legislative Update

JUDICIAL DISCIPLINE, FIFTH CIRCUIT SPLIT, OTHER BILLS CLEAR CONGRESS

Congress recessed on October 2 amid a flurry of activity on legislation affecting the federal judiciary. A few of the bills that were passed still must have differences between the House- and Senate-passed versions worked out, but some significant measures, including the judicial discipline bill and the bill dividing the Fifth Circuit, were sent to the White House for signature.

One bill, an antitrust reform measure, was signed into law by the President as P.L. 96-349 on September 15. The new act sets out numerous revisions to the antitrust laws for the purpose of expediting and reducing the cost of federal antitrust litigation. For further details, see *The Third Branch,* July 1980.

Bills Passed by Congress

The bills that have been sent to the White House for signature are as follows:

Customs Court. This measure (S. 1654) would restructure the United States Customs Court by renaming it the United States

See LEGISLATION p. 4

LITIGATION from p. 1

undisputed 5.5 percent increase pending resolution of the case was successfully opposed by the Department of Justice (see *The Third Branch,* May 1980).

The D.C. Circuit asked the high court (1) whether section 101(c) applies to the judicial branch, and (2), if it does, whether it violates the Compensation Clause of the Constitution by diminishing judges' compensation "during their continuance in office." In granting summary judgment for Director Foley last March, District Judge John Lewis Smith, Jr. held that the "plain meaning" was that the statute did *not* apply to the judiciary. He did not address the constitutional issue.

The D.C. Circuit has not heard argument in or made any rulings on any of the outstanding motions in the case, such as plaintiff's suggestion of mootness or the President's request for a stay of further briefing or prosecution of the case. (See *The Third Branch,* July, August and September 1980.)

Will Cases. In certifying its questions, the D.C. Circuit suggested that the Supreme Court's consideration would be appropriate because of the pendency in the Court of two other consolidated actions contesting judicial salary freezes from the years 1977 through 1980, *Will v. United States* (Nos. 79-983 and 79-1689). The case was set down for argument on Tuesday, October 14. Because these are consolidated matters, a total of 1½ hours has been allotted for argument. *Amicus curiae* briefs on behalf of the judges were recently submitted by the American Bar Association and the Chicago Bar Association.

SEMINAR ON ANTITRUST

The Federal Judicial Center will sponsor a seminar on antitrust law next summer for all federal district and appellate judges who wish to attend. It will be held July 27-31 on the campus of the University of Michigan Law School in Ann Arbor.

The seminar will provide a comprehensive introduction to antitrust law and its interpretation and application. Professor Phillip Areeda of the Harvard Law School will present the first three days of the seminar, focusing on substantive aspects of the antitrust laws. On Thursday and Friday morning, a panel of federal judges will deal with various aspects of antitrust case management.

A detailed syllabus with citations and a brief monograph will be distributed to augment the presentation and discussions.

Judges who are interested in attending the seminar are requested to notify the Division of Continuing Education and Training at 1520 H Street, N.W., Washington, D.C. 20005.

THE SOURCE
The Information Service of the Federal Judicial Center

The District of Columbia Courts: A Judicial Anomaly. Theodore Voorhees. 29 Catholic Univ. L. Rev. 917-937 (1980).

The Essence of Judicial Independence. Irving R. Kaufman. 80 Colum. L. Rev. 671-701 (1980).

Improvements in Appellate Procedure: Better Use of Facilities. John C. Godbold. 66 ABA J. 863-5 (1980).

Legislative History of the New Bankruptcy Code. Kenneth N. Klee. 54 Am. Bankr. L. J. 275-297 (1980).

Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit. 86 FRD 267-317 (1980).

F.J.C. APPOINTS NEW SYSTEMS HEAD

Dr. Jack R. Buchanan, currently Associate Professor at the Harvard Business School, has been selected to be Director of the Federal Judicial Center's Division of Innovations and Systems Development. Dr. Buchanan, a former Judicial Fellow, was a staff member of the Division from 1975 to 1977 and worked extensively on the development of the Center's Courtran system of automated court and case management applications. Dr. Buchanan earned his Ph.D. in computer science at Stanford and is nationally recognized for his expertise in the area of computers and court administration. He has completed numerous consulting assignments designing and installing computerized information systems for government and private industry. He is currently a member of the Center's Systems Advisory Council.

Dr. Buchanan replaces John E. Allen, who recently was appointed Assistant Director of the Administrative Office. See

The Third Branch, August 1980, p. 2. He will join the FJC in mid-October. Edwin L. Stoorza, Jr. will serve as Deputy Director of the Division.

Noteworthy

The written portion of a certification examination for individuals desiring to be certified as Spanish/English interpreters in the United States courts will be given across the country on November 22, 1980. Applications to take the examination must be received at the Administrative Office no later than 4:00 p.m., October 31, 1980. Information about making application for the examination is set forth in the Federal Register, September 25, 1980, page 63891 or may be obtained by contacting Jon A. Leeth, Personnel Division, Administrative Office of the United States Courts, Washington, D.C. 20544, 202/FTS 633-6212.

The written test is the first step toward certification as an interpreter for service in bilingual court proceedings. Applicants who successfully complete the written portion will be eligible for a subsequent oral examination. For further information about the court interpreters program, see *The Third Branch,* February 1980, p. 9.

* * * *

On September 9, 1980 a unique U.S. Court of Appeals panel was convened for oral argument in San Francisco, California. Judge Herbert Y. Choy presided and opened the session with the following statement:

"I believe that this event should not pass without comment because of its more than casual historic interest. For the first time in the Ninth Circuit and for the first time in the history of the federal judiciary we are sitting as a U.S. Court of Appeals panel composed of judges who are all of Asian descent. Judge Shiro Kashiwa, of Japanese extraction, is a visiting judge with us today from the U.S. Court of Claims. Judge Thomas Tang of our court is of Chinese descent and I am of Korean descent. We mention this to note that this type of event could only occur in a great country such as ours. We do not think this would occur even in the Orient.

"In the near future other unique Court of Appeals panels will inevitably occur in this circuit; for example, a panel in which all the judges are Black or perhaps a panel consisting of all female judges."

* * * *

The last two members of the Quadrennial Commission on Executive, Legislative and Judicial Salaries were named on September 11 by the Vice President in his capacity as President of the Senate. Acting on behalf of the majority and minority leaders of the Senate, he named Robert P. Griffin, former Senator and presently counsel to the law firm of Miller, Canfield, Paddock and Stone in Traverse City, Michigan; and Edward P. Morgan, a member of the Washington, D.C. law firm of Welch and Morgan. The other seven members of the Commission, selected by the President, the Chief Justice, and the Speaker of the House, were named earlier. They are profiled in *The Third Branch,* September 1980, p. 7.

* * * *

Federal Bureau of Prisons Director Norman A. Carlson recently gave kudos to the federal courts for their role in forcing improvements in the nation's prisons. Noting that there is no constituency lobbying on behalf of offenders, he said that "In attempting to impress the importance of our needs on funding bodies, our greatest allies have been the courts," and "the combined impact of state and federal court decisions have been the most powerful force for positive change" during the past two decades. Mr. Carlson's comments were made August 18 in San Diego before the 110th Congress of the American Correctional Association.

* * * *

The forty-third institution in the federal prison system was dedicated on September 26 at Ray Brook (Lake Placid), New York. The medium security Federal Correctional Institution will have a capacity of 500 inmates and will employ 235 security, programs and service staff. An inmate cadre is to begin occupying the facility in the latter part of October, and general commitments should start in January 1981.

SPECIAL COURTS: REVISITED

From August 16, 1979 to August 15, 1980 eight active and one senior judge from the U.S. Court of Claims undertook a total of 21 temporary assignments in six circuit courts, two district courts and the Court of Customs and Patent Appeals. During the same period, four CCPA judges assumed 17 temporary assignments in six circuits and the Court of Claims, and two Customs Court judges took on five temporary assignments in four district courts. Judges in these three special courts are Article III judges and, pursuant to 28 U.S.C. §293, can be and frequently are assigned temporary duty on other courts. See *Glidden Co. v. Zdavok,* 370 U.S. 530 (1962).

The article entitled "Special Courts of the United States" in the August 1980 issue of *The Third Branch* may have been read to imply that the judges of these courts never sit on other Article III courts. As is clear from the statistics cited above, such is far from the case, and the judges of these special courts lend invaluable assistance to their brethren sitting on other courts.

LEGISLATION from p. 1

Court of International Trade and granting it jurisdiction over all civil actions involving imports and over any statute, constitutional provision or treaty that "substantially" involves international trade. The court would have all the power of a district court, including the power to grant equitable relief, and could effect a transfer to a district court if a party wished a jury trial. The Senate passed its bill on December 18 of last year. The House cleared its similar measure on September 22, and on September 25 the Senate reported that it agreed to the amendments to S. 1654 made by the House, thus eliminating the need for a conference and readying the bill for the President's signature.

Discipline of Federal Judges. As finally passed, this bill would create a three-tiered review process to investigate complaints of judicial misconduct, but removal of a judge by means other than impeachment would not be authorized. H.R. 7944 ("the Kastenmeier bill") unanimously passed the House on September 15, and its text was immediately substituted for that of the S. 1873 ("the DeConcini bill") which was then sent back to the Senate. It should be noted that the original Senate bill created quite a different review procedure, which included the establishment of a new Court of Judicial Conduct and Disability. The Senate subsequently acceded to many of the House's changes—the proposed Court of Judicial Conduct was dropped; the addition of district judge members to Circuit Judicial Councils was accepted—when passing the bill on September 30. The House approved the Senate's work the next day and forwarded the measure to the White House for signature. The Administrative Office will be mailing copies of the Public Law when it is signed to each federal judge and magistrate.

Equal Access to Justice. This bill (S. 265) would award attorney's fees to eligible individuals, small businesses and other organizations which prevail over the United States in court or agency action or who are sued by the Government in a case that is not "substantially justified." The bill was approved by the Senate on July 31, 1979, passed by the House on October 1, and sent to the White House.

Fifth Circuit Split. A long-proposed idea, this bill (H.R. 7665) calls for division of the Fifth Circuit Court of Appeals into two autonomous circuits; the Eleventh, composed of Alabama, Florida and Georgia with headquarters in Atlanta, and the Fifth, composed of Louisiana, Mississippi, Texas and the Canal Zone with headquarters in New Orleans. It was passed by the House on September 30. Although an earlier version had been passed by the Senate last June, the Senate on October 1 passed the House bill, clearing it for the President's signature. The division would be effective on October 1, 1981.

Graymail. This bill (S. 1482) would impose a notice requirement upon any defendant who intends to use or cause to be produced classified information in defense of a federal criminal charge (for details, see *The Third Branch,* July 1980). The measure passed the House on September 22. The Senate passed the bill on June 27, and it is now ready for the President's signature.

Newsroom Searches. In reaction to the Supreme Court's decision in *Zurcher v. Stanford Daily,* this bill (S. 1790) would prohibit federal, state and local authorities from making unannounced searches of news organizations not themselves suspected of criminal conduct. As reported out of the House Judiciary Committee, the House bill additionally protected all third parties — not just news entities —from *federal* searches, but this provision was deleted in the face of opposition by the Department of Justice and others. As presented to the full House, the bill requires the Attorney General to promulgate guidelines regulating federal officials' conduct of third party searches. The amended bill was passed by the House on September 22, approved by the Senate on September 29, and sent to the White House for signature.

Bills In Conference

Bills that are still pending in Congress include:

Bankruptcy Act Amendments. This bill (S. 658) sets forth several technical amendments to the Bankruptcy Reform Act of 1978. It failed to pass the House under suspension of the rules last July primarily because of opposition to proposed retirement and pension provisions for bankruptcy judges (see *The Third Branch,* September 1980). Following that defeat, the bill was amended to provide bankruptcy judges with retirement benefits similar to those given to Article I judges in other legislation. In this form, the measure passed the House on September 22. The Senate's original version was passed last September. S. 658, as amended by the House, is now pending in the Senate. It may or may not be considered later this year.

Court of Appeals for the Federal Circuit. The House on September 15 approved the consolidation of the Court of Claims and the Court of Customs and Patent Appeals into a single court, the United States Court of Appeals for the Federal Circuit. The bill (H.R. 3806) would also create a new Article I court, called

See LEGISLATION p. 5

The Third Branch

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

LEGISLATION from p. 4

the United States Claims Court, to assume the trial jurisdiction of the current Court of Claims. A similar proposal is part of the Senate's "Federal Courts Improvement Act" (S. 1477), a far more wide-ranging measure containing many other provisions, including the original "Bumpers Amendment" (see *Third Branch,* January 1980). S. 1477 was passed by the Senate on October 30, 1979. Differences between the two versions will have to be resolved in Congress's post-election session.

Other Action

Several other bills of interest to the judiciary have been advanced although they have not yet been cleared by both chambers.

Federal Rules Amendments. The House Judiciary Committee on August 27 approved a bill (H.R. 7817) to amend certain amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence proposed by the Supreme Court. The effected rules relate to probation revocation procedures, joint representation of defendants, discovery of witness statements, and admission of plea discussions. As originally proposed, the rule changes were to be effective August 1, 1979, but Congress delayed their possible effective date until December 1, 1980. On September 9 the bill failed to get the two-thirds majority necessary to pass the House under the suspension of the rules. The rule changes will take effect on December 1 if not modified by Congress.

Pretrial Service Agencies. On August 26, the House Judiciary Committee also approved a bill (H.R. 7084) to establish pretrial service agencies to provide federal judges with assistance in setting bail and to offer supervision and service to persons released on bail. On September 16 the bill failed to get the two-thirds majority necessary to pass the House under suspension of the rules. The Senate bill (S. 2705) contains similar provisions and would additionally create a pretrial diversion program as an alternative to conventional criminal prosecution. This bill passed the Senate on September 30.

Criminal Code: Conspicuously absent from the list of bills passed are the proposed revisions of the federal criminal code, S. 1722 and H.R. 6915. Both bills were reported out of their respective judiciary committees several months ago, but no further progress has been made. The Senate bill is at the majority leader's desk and may be called up at any time, although it is likely that the Senate will first await action by the House. The House bill remains mired in the Rules Committee for a determination of the kinds of amendments that will be allowed to be offered on the floor and the amount of debate permitted. Possible inclusion of a death penalty provision is a major point of controversy.

Judicial Budget: Appropriations for the judicial branch are also stalled. Last summer, the House approved an appropriation for the judicial branch (including the Federal Judicial Center and the Administrative Office but excluding the Supreme Court) totalling approximately $615 million. An additional $8.2 million has been requested from the Senate, and the Senate Appropriations Committee approved most of that request and passed as well an amendment (not contained in the House-passed measure) authorizing continued operation of the ten experimental pretrial service agencies. The appropriation bill was not taken up on the Senate floor, however.

The judicial branch is currently operating under a continuing resolution, and is limited to spending money at the lower of the FY 1980 level or the FY 1981 appropriation approved by the House. The requested FY 1981 appropriation (including the extra funds sought from the Senate) would be approximately seven percent higher than the FY 1980 appropriation.

Congress's post-election session is scheduled to begin on November 12.

PER DIEM GOES UP

The President on September 10 signed P.L. 96-346, raising the per diem allowances payable to federal employees for travel. The per diem rate payable in lieu of actual expenses has been raised from $35 to $50.

Administrative Office Director William E. Foley has announced to judicial branch employees that the General Services Administration is expected to soon issue new regulations designating "high rate" cities for which compensation of actual expenses to a maximum of $75 (compared to the former $50) can be claimed. Pending issuance of such regulations, he said, "we will consider requests on an *ad hoc* basis for actual expenses in excess of $50 for temporary duty at a location where the cost of meals and lodging are considered exceptionally high."

The reimbursement rate for travel by private automobile is also to be increased under the new law, but Director Foley indicated that the old rate of 20 cents per mile (plus parking fees and tolls) will remain in effect pending the issuance of new GSA regulations.

TEXT OF CONGRESSMAN PETER RODINO'S MESSAGE TO THE JUDICIAL CONFERENCE

At last month's Judicial Conference, Joseph L. Nellis, General Counsel of the House Judiciary Committee, read the following message from that Committee's Chairman, Congressman Peter W. Rodino, Jr.:

"Mr. Chief Justice, Mr. Attorney General, Judges, I am grateful for this opportunity to meet with you this morning. Increased communication between the Judiciary and the Congress in the past few years has been extremely helpful. The Brookings Institution seminars in Williamsburg have repeatedly proven worthwhile. I believe regular appearances by representatives of the two Judiciary Committees before your body will prove to be of equal value.

"All of us are carrying substantially heavier burdens in the performance of our duties of office. During the past two decades increasing caseloads in the courts have directly resulted in more judicial officials, and revolutionary changes in the ways in which our courts do business. Congress has been called upon to help the Judiciary adjust to these changes, and my Committee in the House has certainly tried to respond expeditiously to your needs. We have done what has been possible under the circumstances and, I think been responsive to what is needed. Just as those of us in Congress recognize your problems, you should recognize ours. Just as your institution has been dramatically changed in the past two decades, the Congress has experienced dramatic change. We no longer do business in the House of Representatives with the same procedures we used in 1960. There are more committee units and chairpersons, staffed by ever-greater numbers of professional personnel. With new communication developments, not only is the volume of work greater, the pace at which we are called upon to perform is faster. We suffer scheduling problems due to volume. We occasionally generate confusion due to the pace. We consistently run the risk of error.

"In spite of those stresses and strains, however, I think the House Judiciary Committee's record in recent years demonstrates a remarkably low measure of error. As Chairman of that Committee, in managing routine legislative business as well as the impeachment proceedings, I have tried continuously to avoid compromising quality for quantity. I don't intend to change that emphasis in the future. If we are to continue to do what we must do well, we will increasingly need assistance from the Judiciary through this Judicial Conference and its committee system. Let me frankly tell you that I am not troubled by increased communication; I welcome it.

"Occasionally legislation which may appear routine, bills which superficially look like housekeeping matters only, in fact raise very fundamental policy questions. The House Committee cannot properly process them without your assistance. In the 95th Congress we processed the largest judgeship bill in history. Most of you contributed something to the effort. Most of you are familiar with problems we encountered in processing that judgeship bill. I think my Committee and the members of this Conference learned a great deal in the process — and I expect that education will benefit all of us when the House turns its attention to judgeship recommendations which you will be forwarding in January.

"S. 2483, which proposes a State of the Judiciary annual address to the Congress by the Chief Justice, has passed the Senate. Our Subcommittee on the Courts, chaired by Congressman Kastenmeier, has held a day of hearings on this proposal and the matter is under active consideration by the Subcommittee. We think that this proposal has merit and should be explored as a further means of assuring good communication between the Judicial and Legislative Branches of Government.

"In this 96th Congress, after more than a decade of study and debate, the House not only fashioned a bill to permit you to constructively remedy disciplinary problems within your institution which realistically do not warrant Congressional action through impeachment — we did it unanimously. The excellent work done by the members of Mr. Kastenmeier's Subcommittee on Courts, Civil Liberties and the Administration of Justice produced a bill which won the unanimous support of the whole House. We were able to do that — and do it as well as we did—only with the cooperation of representatives of this Judicial Conference. I suspect that in coming years this legislation will prove to have been one of the most important constructive contributions we have made in recent decades to strengthening the federal judicial institution. I know it was the product of cooperation and communication, not confrontation.

"In summary, those examples constitute my message to you today. The House Judiciary Committee exists in part to help you better perform your constitutional responsibilities. We really are there to help you, and we need your help in return. In the next Congress, I look forward to seeking your cooperation on several matters which will require arduous efforts by all of us.

"Thank you very much."

KING SUBCOMMITTEE ON ADVOCACY MEETS

A subcommittee of the Judicial Conference met at the Federal Judicial Center last month to review plans for the experimental implementation of recommendations of the Devitt Committee regarding admission to practice in the federal courts. The meeting, chaired by Judge James Lawrence King (S.D. FL.) (right) was attended by representatives of all district courts that have volunteered to serve as pilot districts. Also addressing the meeting was Judge A. Leon Higginbotham, Jr. (CA-3) (left).

One of the original recommendations of the Devitt Committee addressed deficiencies the Task Force found in the type and degree of trial practice training offered in law schools.

At its annual meeting last August the Council of the ABA Section of Legal Education and Admissions to the Bar declared its "intention to adopt" a formal resolution next February (following public hearings) which will make two changes in the ABA Standards for Approval of Law Schools: that law schools (1) "offer to all students at least one rigorous writing experience," and (2) "offer training in professional skills, including trial and appellate advocacy, counseling, negotiation and drafting."

If approved by the Council next February, the resolution would then go to the House of Delegates and, if approved by that body next August, the standards would be adjusted to comply with the new requirements.

SUPREME COURT COMMENCES 1980 TERM

The Justices of the Supreme Court assembled on Monday, September 29 to face the longest "Summer Conference List" in the Court's 190-year history.

On the list were 1,102 cases demanding action, including petitions for writs of certiorari, appeals from other court decisions, extraordinary writs, petitions for rehearing and motions. When the Justices returned to the bench on October 6 for the opening of the 1980 Term, an order list was issued announcing decisions with regard to most of these 1,102 matters.

The Summer Conference List represents about one-quarter of a year's caseflow, the Court having had 4,781 cases on its docket during the 1979-1980 Term. Both the Summer Conference List and the annual docket reflect the quadrupling of the Supreme Court's caseload which has occurred through the middle years of this century and especially in the past 20 years.

CONFERENCE from p. 1

representatives of the news media from publishing any information already in their possession regarding a pending criminal case, and (2) all criminal proceedings should be held in open court save for very limited circumstances and upon a proper showing of necessity as set forth in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979).

The guidelines retain prohibitions against taking photographs in, or conducting radio or television broadcasting from a court or its environs during a judicial proceeding; this year the operation of tape recorders was added to these prohibitions. New exceptions were made, however, permitting use of electronic or photographic means to present evidence or preserve a record and allowing broadcasting or photographing of investiture, ceremonial and naturalization proceedings.

Committee on the Judicial Branch. The Conference received the first report from its newly-created Committee on the Judicial Branch. The Committee has a broad mandate to devise methods to keep other branches of the federal government, the public and the news media informed about the needs and problems of the federal courts, and to encourage and promote policies to maintain a federal bench that will attract the highest quality of lawyers to serve as judges. As its immediate goal, the Committee will address the problem of the inadequacy of judges' real disposable income.

Private Clubs. The Conference postponed action with regard to guidelines for membership of judges in clubs which practice invidious discrimination. Because the American Bar Association has not been able to complete pending revisions of the Code of Judicial Conduct, the Conference gave its Advisory Committee on Codes of Conduct additional time to complete study of this matter. In the interim, the Committee was authorized to prepare a proposed addition to the commentary accompanying Canon 2(i.e. that a judge should avoid both impropriety and the appearance of impropriety in all activities).

DOJ RELEASES NEW GUIDELINES FOR USE OF MAGISTRATES

Due to the 1979 Federal Magistrates Act's clarification and expansion of magistrates' jurisdication (see *The Third Branch,* October 1979, p. 1), the Department of Justice has published a new policy statement to guide United States Attorneys and the Department's legal divisions in handling proceedings subject to that jurisdiction. These guidelines, published at 28 CFR Part 52, replace the guidelines at 28 CFR Sec. 50.11.

The new statement reiterates previous Department policy encouraging the use of magistrates to assist the district courts in resolving civil disputes and encouraging attorneys for the government to accede to referrals to magistrates in civil cases if such referrals are in the interest of the United States. The policy statement includes a list of factors to assist government attorneys in making that determination. It also sets out factors to be considered in determining whether a government attorney should consent to having an appeal from a magistrate's decision taken to the district court rather than to the court of appeals.

The guidelines also provide that in misdemeanor cases designated for trial by a magistrate, an attorney for the government may, after consultation with the appropriate Assistant Attorney General, petition for trial before a district judge.

ANNUAL REPORT SHOWS COURTS' CIVIL WORKLOAD INCREASING; CRIMINAL LOAD DECREASING

As directed by statute, Administrative Office Director William E. Foley has released his 1980 Annual Report, summarizing the state of the dockets in the U.S. Courts of Appeals, District Courts, and Bankruptcy Courts.

During the year ended June 30, 1980, filings in the U.S. Courts of Appeals increased by 14.7 percent over the previous year. The 23,200 filings were nearly 100 percent above the number filed just ten years earlier in 1970. While the rate of case dispositions also increased, the 10.3 percent rise was not sufficient to counter the increase in filings, resulting in 12.9 percent more appeals pending on June 30, 1980 than on the same date in 1979.

In the district courts, civil case filings also showed significant increases. The 168,789 case filings in 1980 were more than 9 percent above the number filed in 1979 and 93 percent above the number filed in 1970. Though civil dispositions increased by 12 percent — due in part to the increase in the number of district judges appointed under the Omnibus Judgeship Act of 1978 — the pending caseload on June 30, 1980 reached a record high 186,113. This was 4.7 percent above the pending caseload recorded in 1979 and almost double the number recorded on June 30, 1970.

Contrary to the general upward trend was the criminal caseload. The number of criminal case filings in the district courts declined for the third consecutive year, with 11.5 percent fewer filings than the previous year and 27.6 percent less than in 1970. Criminal case dispositions dropped by 12.4 percent, while the pending criminal caseload fell a modest 2.4 percent to 14,759.

The effect of the increased number of judges in the district courts was reflected in the number of trials completed. During the year, the district courts completed 6.8 percent more trials than in the preceding year. Criminal trials were down 2.4 percent overall, while civil jury trials rose 15.3 percent and civil non-jury trials increased 10.9 percent.

The Bankruptcy Reform Act, which took effect on October 1, 1979, produced a dramatic change in the caseload of U.S. Bankruptcy Courts. During the year ended June 30, 1980 there were 360,960 estates processed in bankruptcy courts. This was 59.4 percent more than in the previous year, and 41.8 percent more than in 1975, when the previous high for bankruptcy filings was recorded.

APPLICATIONS BEING RECEIVED FOR JUDICIAL FELLOWS PROGRAM

The Judicial Fellows Program for 1981-1982 is accepting applications through November 10, 1980. The program is designed to give young professionals in the formative period of their careers one year at the Supreme Court, the Federal Judicial Center or the Administrative Office of the United States Courts to observe and contribute to projects seeking to improve judicial administration.

Candidates should have one or more post-graduate degrees and at least two years of professional experience with a record of high performance. Multidisciplinary background and experience is highly desirable but not essential. Candidates should be familiar with the judicial process. Potential contributions that the applicant might make to the judiciary during his or her fellowship will weigh heavily as selection criteria.

Information about the program may be obtained from Mark W. Cannon, Administrative Assistant to the Chief Justice, Suite 4, Supreme Court of the United States, Washington, D.C. 20543. All application materials, including letters of reference, must be mailed by November 10 to ensure consideration.

CATALOG OF FJC PUBLICATIONS

The latest Federal Judicial Center *Catalog of Publications* is now available from the Center's Information Service Office. This Catalog will replace the previous Catalog, which was issued in March 1979.

The Catalog lists all publications available from the Center including the Center's seminar and workshop presentations and reports of Center research on federal court procedure and administration. These publications are arranged by subject, are annotated, and include approximately 20 items produced since the last Catalog. Some of the publications are restricted in their availability and others are available only on a loan basis. The Catalog includes some publications that have been rendered obsolete by more recent legislation or other developments, but are included for historical reference purposes.

Copies of the Catalog have been sent to federal judges and supporting personnel, as well as to a waiting list which has been developing for several months. Additional copies may be obtained by calling the Information Service Office at 202/FTS 633-6365.

PERSONNEL from p. 10

Richard C. Erwin, U.S. District Judge, M.D. NC, Sept. 29

David V. Kenyon, U.S. District Judge, C.D. CA, Sept. 29

Consuelo B. Marshall, U.S. District Judge, C.D. CA, Sept. 29

Norman P. Ramsey, U.S. District Judge, D. MD, Sept. 29

FOLLOW-UP REPORT PUBLISHED ON THIRD-CIRCUIT WORD PROCESSING AND ELECTRONIC MAIL PROJECTS

The Federal Judicial Center this month published a supplementary evaluation of a project, undertaken in cooperation with the Third Circuit Court of Appeals, to test the use of word processing, electronic mail and automatic typesetting in the preparation and dissemination of appellate court opinions.

The report, *Follow-Up Study of Word Processing and Electronic Mail in the Third Circuit Court of Appeals* (Federal Judicial Center 1980), builds upon the Center's 1979 evaluation of the court's use of word processing and electronic mail systems.

In 1978, the Center installed a particular word processing configuration in the chambers of each Third Circuit judge (sitting in six cities) and in the secretarial pool and the offices of the Clerk of the Court and Circuit Executive. Furthermore, an electronic mail capability enabled each chambers to use the word processors to transmit draft opinions and other documents instantly to one another over high-speed transmission lines connected to the Center's Courtran computer.

The 1980 report analyzes several technological enhancements made in those systems in 1979, and documents additional time and cost savings and productivity gains obtained after the court fully implemented and integrated word processing, electronic mail, and automatic typesetting.

The first study, *The Impact of Word Processing and Electronic Mail in U.S. Courts of Appeals* (Federal Judicial Center 1979), had found that after even one year of use, word processing equipment had a "striking impact" on the opinion preparation process. Evidence to support permanent installation of electronic mail services, however, was "inconclusive" due to certain technological and operational problems. The Third Circuit thus requested that the Center refine the system and continue to monitor it. Various equipment enhancements and technological modifications were made to reduce electronic mail transmission disruption and operator mistakes.

The supplementary report analyzes the results produced by these changes. Among its most significant conclusions:

- Word processing and electronic mail reduce the overall processing time for cases with written opinions by six weeks (10 percent). The first report cited a three week reduction.
- Word processing and electronic mail reduce by 40 to 50 percent the amount of time the court takes to prepare and issue *per curiam* and signed opinions.
- The electronic mail system, which now transmits 90 percent of all the court's documents, delivers 85 percent of them on the same day they are sent, guarantees receipt by the following work day, and costs less than other priority delivery services.
- The electronic mail and automatic typesetting systems permit production of published slip opinions in one day (compared to the previous average of seven days) at a 20 percent reduction in printing costs.

The follow-up report has been distributed to judges and staff in the Third Circuit and to the Chief Judges of all other circuits. In addition, copies are available from the Center's Information Service Office, phone number 202/FTS-633-6365.

PERSONNEL

NOMINATIONS

Eugene H. Nickerson, U.S. Circuit Judge, CA-2, Aug. 28

Gerald B. Lackey, U.S. District Judge, N.D. OH, Aug. 28

Peter M. Lowry, U.S. District Judge, W.D. TX, Aug. 28

David G. Roberts, U.S. District Judge, D. ME, Aug. 28

Nicholas J. Bua, U.S. Circuit Judge, CA-7, Sept. 10

Raymond L. Finch, U.S. District Judge, D. WI, Sept. 10

Myron H. Thompson, U.S. District Judge, M.D. AL, Sept. 17

Ralph W. Nimmons, Jr., U.S. District Judge, M.D. FL, Sept. 17

Israel L. Glasser, U.S. District Judge, E.D. NY, Sept. 17

Philip Weinberg, U.S. District Judge, E.D. NY, Sept. 17

NOMINATIONS WITHDRAWN

Charles B. Winberry, Jr., U.S. District Judge, E.D. NC, Aug. 26

Fred D. Gray, U.S. District Judge, M.D. AL, Sept. 17

CONFIRMATIONS

Myron H. Thompson, U.S. District Judge, M.D. AL, Sept. 26

Richard L. Williams, U.S. District Judge, E.D. VA, Sept. 29

Hipolito F. Garcia, U.S. District Judge, W.D. VA, Sept. 29

George Howard, Jr., U.S. District Judge, E.D. & W.D. AR, Sept. 29

Charles P. Kocoras, U.S. District Judge, N.D. IL, Sept. 29

Susan C. Getzendanner, U.S. District Judge, N.D. IL, Sept. 29

See PERSONNEL p. 9

CA-9 ACCEPTING APPLICATIONS FOR CIRCUIT EXECUTIVE

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

Responsibilities: The Circuit Executive of the Ninth Circuit exercises general administrative authority over staff operations. The Circuit Executive is specifically charged, by order of the Judicial Council of the circuit, with the performance of all of the functions authorized by 28 U.S.C. §332(e)(1)-(10), under the general supervision of the chief judge of the circuit.

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

To Apply: Send resume prior to November 30, 1980 to Honorable James R. Browning, Chief Judge, United States Court of Appeals for the Ninth Circuit, P.O.Box 547, San Francisco, California 94101.

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CALENDAR

Oct. 22-24 Seminar for full-time Magistrates; New York, NY

Oct. 22-24 Seminar for part-time Magistrates; New York, NY

Nov. 12-14 Seminar for Bankruptcy Judges; Cherry Hill, NJ

Nov. 17-19 Sentencing Institute for the Seventh and Ninth Circuits; Oakland, CA

Nov. 19-21 Workshop for District Judges (Fifth Circuit); Saratoga, FL

Nov. 19-21 Seminar for Federal Defender Investigators; Norfolk, VA

Dec. 1-2 Judicial Conference Subcommittee on Judicial Statistics; Palm Beach Shores, FL.

Dec. 4-6 Workshop for District Judges (Eighth and Tenth Circuits); Phoenix, AZ

Dec. 15 Judicial Conference Subcommittee on Supporting Personnel; Washington, DC

Jan. 14-16, 1981 Seminar fo Bankruptcy Judges; San Diego, CA

Jan. 21-23 Workshop for District Judges (Ninth Circuit); San Diego, CA

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

THE THIRD BRANCH
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NOVEMBER, 1980

SUMMARY JURY TRIAL INNOVATION

From time to time, The Third Branch carries reports on procedures and innovations that some courts have found helpful and in which others may be interested. Reviewed this month is a procedure being tested by one court to speed resolution of civil cases.

District Judge Thomas D. Lambros (N.D. Ohio) has recently devised a procedure he calls the "summary jury trial," in which a conventional lay jury hears an abbreviated presentation of a civil case and then renders an advisory verdict. The purpose is to facilitate pretrial termination of cases in which a significant bar to settlement arises from litigants' uncertainty of a jury's perception of liability and damages.

The summary trial jury's verdict in no way affects the parties' right to a full trial *de novo* on the merits, and is not binding, unless the parties agree prior to the proceeding that it will be so.

Judge Lambros explains that the idea came to him when juries in two personal injury cases returned verdicts of less than one-half of the defendants' settlement offers. The parties had been hopelessly apart in settlement negotiations, suggesting that attorneys and their clients may misjudge how juries will view the strengths and weaknesses of their cases. He felt that in such situations, a summary presentation of the

See SUMMARY TRIAL p. 7

PRESIDENT SIGNS BILLS OF INTEREST TO FEDERAL JUDICIARY

Shortly after being passed by Congress last month, several bills affecting the work and administration of the federal courts were signed into law by the President. Summaries appear below, and more detailed descriptions of the measures appear in the Legislative Updates of the July, September and October issues of *The Third Branch.*

Customs Courts Act [P.L. 96-417, signed October 10]. This Act creates a comprehensive system for judicial review of civil actions arising out of importations and international trade statutes by clarifying and expanding the status, jurisdiction and powers of the former United States Customs Court — now named the United States Court of International Trade (USCIT).

Being necessary to fully implement the Trade Agreements Act of 1979 (which took effect on January 1, 1980), the Customs Courts Act received expedited treatment in the 96th Congress (2d Session). It passed both houses by unanimous consent in the latter part of September and became effective on November 1, 1980, only three weeks after its enactment.

One of the primary goals of the Act was to eliminate the often uncertain division of jurisdiction over trade matters between the district and Customs Court. Accordingly, exclusive jurisdiction over such matters is vested in the USCIT and it is granted all the powers in law and equity of a district court. As originally introduced (see *The Third Branch,* October 1980), the Act called for transfer of jury trial cases to a district court, but logistical arrangements were made at the request of a House Judiciary Subcommittee so that the USCIT will itself be able to conduct jury trials throughout the country by using the facilities and jury trial mechanisms of district courts.

Edward D. Re, who has been Chief Judge of the Customs Court since March 21, 1977, is the Chief Judge of the new USCIT.

Fifth Circuit Split [P.L. 96-452, signed October 14]. Effective

See LEGISLATION p. 4

SALARY CASES SUBMITTED TO SUPREME COURT

The Supreme Court on October 14 heard one and a half hours of oral argument in *Will v. United States* (Nos. 79-983 and 79-1689), two consolidated class actions brought on behalf of Article III judges which contest pay freezes imposed by Congress in fiscal years 1977 through 1980.

Appearing for the Government was Kenneth S. Geller of the Solicitor General's Office. The federal judges were represented by Kevin M. Forde of Chicago.

JUDICIAL CONFERENCE REAFFIRMS SUPPORT FOR VOLUNTARY SURRENDER

At its September 25 and 26 meeting, following a report by Judge Gerald Bard Tjoflat (CA-5), Chairman of the Committee on the Administration of the Probation System, the Judicial Conference reaffirmed its support for the continued use of voluntary surrender of sentenced prisoners.

Voluntary surrender of sentenced prisoners began as a pilot project ten years ago in the Northern District of California. Selective Service Act violators, released on their own recognizance after sentencing, were permitted to report to the institution of incarceration at their own expense. All reported as expected.

Based on the success of this pilot project, a task force, composed of representatives from the Bureau of Prisons, the Probation Division, and the United States Marshals Service, developed suggested guidelines and procedures for systemwide utilization with expanded eligibility to include a number of offense categories other than selective service violations.

At its March 1974 session, the Judicial Conference was informed that the Probation Committee had endorsed guidelines for voluntary surrender and had asked the Administrative Office to draft a legislative proposal that would provide a penalty in the event of failure to report, since it appeared that criminal contempt was the only available sanction. The Conference later approved such a bill, which was transmitted to Congress. Both versions of the proposed revision of the criminal code now before the Congress have incorporated the penalty provision, but for now contempt of court remains the sanction for failure to report.

Two surveys on the utilization of voluntary surrender have been conducted by the Bureau of Prisons in recent years. The first described the use of voluntary surrender in the Northeast Region between June 12 and December 31, 1978. The survey found of all commitments (1,719) during this period, voluntary surrender was employed 199 times (11.6%); of the 199 participants, three failed to appear (1.5%).

A second study conducted on a nationwide basis covered all persons other than illegal aliens placed in custody during July, August, and September of 1979. This study found that of 3,104 persons committed, 623 (20.1%) voluntarily surrendered.

The Bureau of Prisons ranks prisoners by level of security risk on a scale from Level 1, representing the least risk, to Level 6, representing the greatest risk.

See CONFERENCE p. 7

FY 1981 JUDICIAL SALARIES FROZEN

A fiscal year 1981 cost-of-living increase for federal judges and other senior judicial branch personnel was suspended last month when the President signed a continuing funding resolution for the judicial branch.

On August 29, 1980, the President submitted to Congress a recommendation for a 9.1 percent increase in the salaries of government employees. Under the applicable statutes, this recommendation was to become effective at the beginning of the first applicable pay period of the new fiscal year (October 1 for the federal judges) unless vetoed by either chamber of Congress.

Prior to adjourning for its election recess, Congress had not passed an appropriation bill for the judicial branch and the President's recommendation stood unvetoed. However, on October 1, the President did sign a continuing resolution which made funds unavailable for increases in high level salaries such as judges.

Congress could conceivably authorize a pay raise when it returns in November, but for now the situation is virtually identical to that of the fall of 1976 when the President signed a bill on October 1 arresting cost of living increases for judges. At the district level in *Will I,* Judge Stanley Roszkowski ruled that the 1976 action violated the non-diminution clause of Article III of the Constitution.

FEDERAL JUDGES NAMED TO SPECIAL PROSECUTOR PANEL

Pursuant to Section 49 of the Ethics in Government Act of 1978, the Chief Justice has designated three United States Circuit Judges to constitute a special division of the U.S. Court of Appeals for the District of Columbia Circuit, effective October 26, 1980.

The judges, all of whom have just completed a two-year term on this panel, are Circuit Judge Roger Robb, Presiding Judge, (CA-DC); Senior Circuit Judge J. Edward Lumbard (CA-2); and Senior Circuit Judge Lewis R. Morgan (CA-5).

The Act provides that the Attorney General may, after investigation, request the panel to appoint a special prosecutor whenever he receives specific information that there has been a violation of any federal criminal law (other than a petty offense) whenever certain individuals are involved. Among those specifically set out in the Act are: The President and Vice President; high ranking officials in the Executive Office of the President; high ranking officials in the Department of Justice, including any Assistant Attorney General; the Director or Deputy Director of Central Intelligence; the Commissioner of Internal Revenue; and any officer of principal national campaign committee seeking the election or reelection of the President.

Noteworthy

On October 16, eleven judges of the Ninth Circuit Court of Appeals heard argument in the first limited *en banc* proceeding in the history of the federal judiciary. In a series of consolidated NLRB cases, the Ninth Circuit utilized the procedure permitted by Section 6 of the Omnibus Judgeship Act of 1978. That Section was designed to streamline the *en banc* process and reduce the administrative complexity associated with *en banc* hearings. It permits Courts of Appeals consisting of over 15 judges to adopt by local rule procedures for limited *en banc* courts.

Ninth Circuit Local Rule 25, adopted August 15, states that the *en banc* court for that circuit consists of the chief judge, or next senior active judge, and ten additional judges drawn by lot.

The Fifth Circuit, the only other court eligible to do so under the Act, has not adopted such procedures.

* * *

The Commission on Executive, Legislative and Judicial Salaries, which every four years makes recommendations to the President on salary adjustments for federal judges, legislators, and top executive branch officials, held three public hearings in October and early November. Judge Irving R. Kaufman (CA-2), Chairman of the Judicial Conference's Committee on the Judicial Branch, told the Commission that inadequate salaries are compelling federal judges to leave the bench and are demoralizing those judges who remain. "Judges must have adequate salaries," he said, *"not* because they could make more in private practice, *not* because inflation has eroded the value of their pay checks, but because without a fair wage we will, in the not too distant future, reduce the quality of the men and women who hold judicial office." He suggested also that judicial compensation should be reviewed as a "wholly different inquiry" from congressional salaries.

* * *

The Attorney General has issued new guidelines for the Government on closure of judicial proceedings. The policy now adopted is to follow a strong presumption that "judicial proceedings should be open to the public unless closure is plainly essential to the interests of justice." Also included in the guidelines is a statement that under this policy the Government "has a general overriding affirmative duty to oppose the closure of judicial proceedings ... to ensure that in practice they achieve their goal of ensuring maximum openness in judicial proceedings in which the Government appears." The guidelines appear at 28 C.F.R. §50.9.

* * *

A release from the National Institute of Justice states that, based on a study of 20,632 people arrested in the District of Columbia, certain assumptions related to drug users were not substantiated. Drug users and non-drug users arrested were equally likely to be charged with burglary, fraud/embezzlement, auto theft and arson or property destruction. There was a "slight increase" in robbery rates among men and women arrestees who used drugs, and statistics showed that they were also more likely to skip bail.

The Third Branch

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

STATE-FEDERAL JUDICIAL COUNCIL MEETINGS

Alabama. Following past practices, the Alabama State-Federal Judicial Council met in conjunction with the meeting of the Alabama State Bar.

Judge John C. Godbold (CA-5) represented the federal courts and joined Justice Hugh Maddox (Sup. Ct. Ala.) in extending a welcome to the participants.

Commenting on the discussions, Judge Godbold said: "There is continuing benefit to both state and federal courts in Alabama from this annual meeting . . . [and] a specific item can be pointed to this year. Federal judges set forth to state trial and appellate judges the desirability of the state judges making specific findings (with references to trial transcripts) concerning sufficiency of the evidence in criminal cases, which will operate to give guidance to federal judges subsequently reviewing criminal convictions in habeas corpus suits pursuant to the principles of *Jackson v. Virginia."*

Included on the agenda for discussion was Chief Justice Burger's American Law Institute address of last June on "The Future of Our Federalism." The Chief Justice there called attention to "signs" that some discern "to mean that the federal system may be on its way to a *de facto* merger with the state court system, with litigants free in most, if not all, cases to choose a federal court or a state court, depending on the condition of the dockets and depending upon what they perceive as to the quality of relief they may obtain."

California. Renewed interest in judicial council meetings in this state brought together state and federal judges in September. This group commends for consideration by other councils two ingredients which promote a successful meeting: (1) an agenda that has some real substance—matters known to be of great concern; and (2) a focus

See STATE-FEDERAL p. 6

LEGISLATION from p. 1

October 1, 1981, the Fifth Circuit Court of Appeals will be divided into two autonomous circuits. A new Eleventh Circuit will be composed of the states of Alabama, Florida and Georgia. Louisiana, Mississippi, Texas and the Canal Zone will be retained in the Fifth. This is the first division of a circuit since the Tenth Circuit was carved out of the Eighth in 1929.

Judicial assignments to the new court will be made according to the location of each circuit judge's official duty station on September 30, 1981. Senior judges of the former Fifth may elect assignment to either circuit. Seniority of judges in the new court will continue to run from the date of each judge's commission as a member of the former Fifth. Judge John C. Godbold has the longest tenure, having been appointed from the state of Alabama on August 31, 1966, and therefore is in line to become the first Chief Judge of the Eleventh Circuit.

Matters filed in the former CA-5 before the effective date of the new law shall, if they have been submitted for decision, be handled within the new Fifth Circuit. Matters not yet submitted for decision at that time will be transferred to the Eleventh or the new Fifth as is appropriate.

Equal Access to Justice [P.L. 96-481, signed October 21].

See LEGISLATION p. 5

JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT SIGNED

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 [P.L. 96-458, signed October 15] establishes nationally uniform procedures within the existing administrative structure of the federal judicial system for processing complaints concerning the conduct of federal judges and magistrates and statutorily requires significant reforms in the structure and membership of judicial councils of the circuits.

Under the Act, courts of appeals judges in active service are required to determine by majority vote how many of them will serve upon their judicial council, how many district court judges from districts within the circuit will serve upon their council, and the terms for which both will serve. The Act specifically provides that if fewer than six courts of appeals judges serve as members of the council at least two district judges shall serve, and if six or more courts of appeals judges serve, at least three district judges shall serve.

The Act authorizes "any person" to file a complaint against a judge or magistrate presenting facts allegedly evidencing "conduct prejudicial to the effective and expeditious administration of the business of the courts" or evidencing a judge's or magistrate's inability "to discharge all the duties of office by reason of mental or physical disability." All complaints will initially be reviewed by the presiding officer of the judicial council who may dismiss any complaint which (1) lacks sufficiency under the standards noted above, (2) is directly related to the merits of a judicial decision or procedural ruling, or (3) is on its face frivolous. The reviewing judge is also expressly authorized to close the complaint and conclude further proceedings if he is satisfied that "appropriate corrective action has been taken."

Any complaint not dismissed or closed by the reviewing judge must be referred to a special investigating committee consisting of an equal number of circuit and district court judges. That committee is required to file a report including the findings of its investigation and its recommendations for corrective action with the judicial council of the circuit. The council is authorized to conduct additional investigation if necessary and is required to order remedial action "to assure the effective and expeditious administration of the business of the courts." The council is specifically authorized to request retirement (with a waiver of otherwise applicable length-of-service requirements); temporarily -- for a time certain -- suspend case assignments; publicly or privately censure or reprimand; or take other action which it considers appropriate. The removal of an Article III judge from office is expressly prohibited.

The council is also expressly authorized, at its discretion, to refer any matter directly to the Judicial Conference for appropriate action, and it is specifically required to certify to the Conference any complaint which might constitute grounds for impeachment or which "in the interests of justice is not amenable to resolution by the judicial council." A matter so referred to the Conference may be handled by the entire Conference. The Act also authorizes the discretionary establishment of a standing committee of the Judicial Conference to evaluate on a certiorari basis petitions for review of a final order of a judicial council. If such a committee is established, all petitions for review must go to that committee.

Complainants, judges, and magistrates are authorized by petition to seek review of an initial determination of a reviewing judge by the circuit council and review of a final order of a council by the Judicial Conference. The Act expressly precludes any other method of judicial review "on appeal or otherwise." The Act is effective on October 1, 1981.

LEGISLATION from p. 4

Eligible individuals, small businesses and other organizations are entitled under this measure to the award of attorney's fees if they prevail over the United States in court or agency action and the Government's position is not "substantially justified." Passed as a second title to a Small Business Administration minority procurement act, the bill limits attorney's fees in most instances to $75 an hour.

Judicial Councils Reform and Judicial Conduct and Disability Act [P.L. 96-458, signed October 15]. See accompanying story, page 4.

Graymail [P.L. 96-456, signed October 15]. This law requires defendants to notify the court when they intend to produce or cause to be produced classified information as part of their defense of criminal charges. The court is to hold a hearing on the admissibility of the proposed evidence, and it may subsequently permit the information to be used, allow introduction of only a summary of the information, or bar any disclosure. The bill became effective upon being signed, but will apply only to cases initiated after enactment.

Newsroom Searches [P.L. 96-440, signed October 13.] Federal, state and local officials are precluded under this law from using warrants to conduct surprise searches of news organizatons which are not themselves suspected of criminal conduct. Instead, a subpoena must be used. As passed, the measure does not extend its protection to other third parties *(i.e.,* those not engaged in First Amendment activities), but the law does require the Attorney General to promulgate guidelines regulating federal officials' conduct of such searches. The act states that evidence otherwise admissible is not to be excluded in a proceeding because it was obtained in violation of this law, but provisions are made for civil actions by aggrieved parties against the government for such violations. The act goes into effect on January 1, 1981 for the federal government and on October 13, 1981 for state and local governments.

Other Matters. The General Counsel of the Administrative Office has asked *The Third Branch* to highlight a significant provision of the Antitrust Procedural Improvements Act of 1980 (P.L. 96-349, signed September 12). Section 4 of the Act amends the Clayton Act to permit a court to award prejudgment interest on actual damages in antitrust cases if the court finds that such an award is just in the circumstances. Interest may be awarded in antitrust actions brought by the United States, by an aggrieved private party, or by a State. This amendment is applicable only to actions commenced after September 12, 1980.

Also of interest is a law to facilitate increased enforcement by the Coast Guard of the laws relating to the importation of controlled substances (P.L. 96-350, signed September 15). Because the act "is intended to reach acts of possession, manufacturing, or distribution committed outside the territorial jurisdiction of the United States," it is anticipated that there will be an increase of drug prosecutions in the district courts at points of entry into the United States. The new act places restrictions on the possession, manufacture, distribution and importation of controlled substances, and applies to: any person on board a vessel of the United States or on board a vessel subject to the jurisdiction of the United States on the high seas; to a citizen of the United States on board any vessel; or to any person on board any vessel within the customs waters of the United States.

Lame Duck Session. Congress returns November 12 for a post-election session. Appropriation bills will undoubtedly be a major item of business, but leaders have stated it will be "open season" on all other pending bills. Among the unfinished business of particular interest to the judicial branch:

- Criminal code revision (pending on the floor of the Senate and before the Rules Committee of the House).
- Expansion of remedies for violation of fair housing civil rights laws (passed the House, cleared the Senate Judiciary Committee and is now pending before the full Senate).
- Amendments to the Bankruptcy Act of 1978 (passed by the Senate last year and by the House last month; the Senate must now review amendments made by the House).

See LEGISLATION p. 6

"HIGH-RATE" CITIES DESIGNATED

The Administrator of the General Services Administration has promulgated regulations governing per diem allowances for certain "High-Rate Geographical Areas," and raising reimbursement rates for travel by privately-owned automobile. Administrative Office Director William E. Foley provided this information to all third branch personnel in a memo dated October 2, 1980.

Pursuant to P.L. 96-346, per diem allowances payable to federal employees for travel were raised from $35 to $50 (See *The Thrid Branch,* October, 1980, p. 5.) The regulations permit actual expenses to be claimed in certain designated "high rate" cities up to a specified maximum amount. A total of 71 cities are designated and maximum allowances range up to $75 for cities such as Washington, New York and San Francisco.

In addition, the regulations now permit reimbursement for travel by privately owned automobile at the increased rate of 22½ cents per mile.

THE SOURCE
The Information Service of the Federal Judicial Center

The Art of Selecting a Jury. Robert A. Wenke. Parker & Sons, 1979.

Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act. 80 Colum. L. Rev. 560-596 (1980).

Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency. Alvin B. Rubin. 55 Notre Dame Law. 648-59 (1980).

Principles of Federal Prosecution. U.S. Department of Justice, 1980.

Problems in Federal District Court Jurisdiction. John A. Reed, Jr. 54 Fla. B.J. 598-604 (1980).

Significant Decisions of the Supreme Court, 1978-79 Term. Bruce E. Fein. American Enterprise Inst., 1980.

The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates. Larry Berkson, Susan Carbon and Alan Neff. American Judicature Society, 1980.

The Ways of a Judge: Reflections from the Federal Appellate Bench. Frank M. Coffin. Houghton Mifflin Co., 1980.

LEGISLATION from p. 5

- Creation of a Court of Appeals for the Federal Circuit (each chamber has passed a bill, but differences between the two versions remain to be resolved).
- Elimination of the jurisdictional amount for federal question cases (passed the Senate, cleared the House Judiciary Committee, and is pending before the full House).
- Establishment of a State Justice Institute (passed the Senate, now pending before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice).

STATE-FEDERAL from p. 3

on sharing information about court procedures which have been found, after testing, to be good. Judge Clifford Wallace (CA-9) reported after the meeting that although they had a lengthy agenda, the high degree of interest in the first two or three items precluded full coverage. Two subjects discussed at length: certification of unsettled state law questions to the California Supreme Court, and the effect on the state courts of the new bankruptcy law.

Minnesota. Chief Justice Robert J. Sheran addressed this state's judicial council meeting last September to review the history of developments in federal and state law over the past 20 years. He expressed his personal satisfaction in seeing our dual court systems in this country now working harmoniously for better law while at the same time functioning in sharply carved out jurisdictions. Chief Justice Sheran, now Chairman of the Conference of Chief Justices, also reported on actions of the Conference including a resolution which urges that diversity jurisdiction, presently lodged in the federal courts, be returned to the states (though there are differences among members of the Conference as to just how this should come about). (Copies of Chief Justice Sheran's speech are available in the Information Service Office of the FJC).

Oregon. A meeting of this state's council was called last month by Chief Justice Arno H. Denecke.

Old subjects with new discussions: certification of questions of state law from the federal courts to the Oregon Supreme Court; prison conditions (appeals of disciplinary proceedings, legal aid to prisoners and overcrowded jails); and diversity jurisdiction. A welcome report to the federal judges: the District Attorney in Multnomah County has agreed to file more bank robbery cases in the state courts so that they need not be prosecuted in federal court.

NOTE: State-federal judicial council meetings for which per diem and subsistence are to be claimed should be arranged with the Federal Judicial Center prior to meeting dates so that appropriate procedures may be set up.

Suggested agenda items, minutes of council meetings and papers on the formation of state-federal councils are available by writing Alice O'Donnell at the FJC, 1520 H Street, N.W., Washington, D.C. 20005.

ATTORNEYS' FEES IN CLASS ACTIONS REPORT AVAILABLE

Attorneys' Fees in Class Actions, a report to the Federal Judicial Center by Professor Arthur Miller of Harvard Law School, was published last month.

Professor Miller's report is a thorough analysis of the law governing award of attorneys' fees in class actions and of recommended procedures to avoid problems frequently encountered in this area. It includes a circuit-by-circuit review of the case law, and a discussion of abuses in fee requests. The report also includes a discussion of judges' and attorneys' attitudes toward fee computation. The author's recommendations deal in specific terms with procedures, fixed early in the litigation, designed to avoid problems when the requests for fees are submitted.

The Report is available from the Center's Information Service Office. It will expedite shipment if a self-addressed, gummed label is included with the request (a franked label is not necessary). Or, the report may be requested by calling the Office at 202/FTS 633-6365.

SUMMARY TRIAL from p. 1

issues before a jury would aid the parties in reaching settlement by suggesting how a conventional jury trial would be decided.

Mechanics. To enhance the summary trial experience, says Judge Lambros, "I try to capture as much of the reality of a regular jury trial as possible." The six member jury is selected from the same pool as any petit jury, and all proceedings are conducted in open court with the judge or magistrate wearing robes. Jurors are told they have been assembled to aid in the resolution of a case by listening to lawyers' summations of the evidence.

Each side is generally given one hour for its presentation, although the time limits are flexible and have been extended to several hours in complex matters. In most cases, however, lawyers do not use all of the hour allotted to them.

The "trial" consists of an opening statement, a summation of the evidence, a presentation of exhibits and documentary evidence, and a closing statement. Although objections to evidence are not voiced during the proceeding, litigants present all the dimensions of their cases, including facts which would impeach the credibility of their opponent's witnesses. Judge Lambros reports that there have been few evidentiary disputes, since before each summary trial he and counsel explore what evidence will be presented and how such evidence would be supported in an actual trial. Likewise, motions *in limine* are entertained and ruled upon prior to the summary presentation.

Of the 23 cases which went through a full summary trial, reports Judge Lambros, approximately 80 percent were subsequently settled.

The trial concludes with an abbreviated charge to the jury, the text of which is agreed to beforehand by the attorneys. The jury then prepares a consensus verdict or, if no consensus can be reached, presents anonymous individual juror views.

Results. The first summary jury trial was held on March 5, 1980, and some 35 cases have since been assigned to the proceeding. Judge Lambros is enthusiastic about the results. He reports that of the 23 cases which have gone through a full summary trial, approximately 80 percent were subsequently settled. A number of other assigned cases settled prior to the summary trial, typically days or even hours before the summary trial was to begin.

Judge Lambros believes that this latter statistic reveals one of the special strengths of the innovation. Lawyers appear to prepare virtually as hard for a summary jury trial as a conventional one, which, he says, "triggers the same psychological motivation for settlement without the need for blocking out court days for a full trial."

Judge Lambros also is pleased that twenty-five of the summary jury trials have been conducted by magistrates, for this both gives the magistrates more "robe time" and demonstrates to the bar the magistrates' competence to handle jury proceedings.

Originally, Judge Lambros designed the summary jury trial procedure for personal injury and FELA cases, but he now feels that it can be applied to the full range of civil cases. He has used the summary jury in complex, multiparty product liability cases, and he looks forward to its use in patent, civil rights and other complicated matters this fall.

The bases in law for the new procedure, as set forth in Judge Lambros's *Handbook and Rules of the Court for Summary Trial Proceedings,* are grounded in judges' pretrial powers under Rule 16 of the Federal Rules of Civil Procedure and the court's inherent power to control its docket. The *Handbook* is available from the Information Service Office of the Federal Judicial Center, 202/FTS 633-6365.

The Federal Judicial Center, with Judge Lambros's cooperation, is undertaking a modest effort to document and analyze the use and effect of this innovation.

CONFERENCE from p. 2

During the study, 1,762 Level 1 prisoners were committed. As would be expected, the vast majority of voluntary surrenders came from Level 1, yet only 30.5% were given the option. Of the 623 voluntary surrender designations, only seven (1.1%) failed to appear.

Both reports reflect important savings to the Government. Any risks to the public safety are far outweighed by the high rate of compliance to the terms of voluntary surrender by participants, savings to the Government, and the humanitarian benefits to offenders and their families.

Based on the report of the Probation Committee, the Conference urges district court judges to make more use of voluntary surrender after considering the factors found by the Bureau of Prisons to be appropriate criteria for security classification; namely, seriousness of the offense, length of sentence, extent of prior record, detainers, history of escape, and history of violence.

PERSONNEL

CONFIRMATIONS

James H. Michael, Jr., U.S. District Judge, W.D. VA, Sept. 29

APPOINTMENTS

Earl H. Carroll, U.S. District Judge, D. AZ, Sept. 12

Stephen R. Reinhardt, U.S. Circuit Judge, CA-9, Sept. 18

Hipolito F. Garcia, U.S. District Judge, W.D. TX, Oct. 7 (confirmation incorrectly listed last month as W.D. VA.)

Myron H. Thompson, U.S. District Judge, M.D. AL, Oct. 9

James H. Michael, Jr., U.S. District Judge, W.D. VA, Oct. 20

George Howard, Jr., U.S. District Judge, E.D. & W.D. AR, Oct. 30

Norman P. Ramsey, U.S. District Judge, D. MD, Oct. 30

Richard C. Erwin, U.S. District Judge, M.D. NC, Oct. 31

DEATH

Morell E. Sharp, U.S. District Judge, W.D. WA, Oct. 19

POSITION OPEN FOR ASSISTANT TO CIRCUIT EXECUTIVE (CA-8)

Position Description: Position in office of Circuit Executive. Assistant to the Circuit Executive will be responsible for assisting in developing and implementing programs and studies in areas of personnel, statistics, case processing, budgets, administrative services, record keeping and judicial manpower needs. Must have demonstrated ability in court administration. Degree (graduate preferred) in public or judicial administration. Salary range $22,486 to $32,048. Headquarters - St. Louis, Missouri. Equal opportunity employer.

Send resume, salary history and writing sample to Lester C. Goodchild, Circuit Executive, 524 U.S. Court and Customs House, 1114 Market Street, St. Louis, Missouri 63101.

Note to Law Clerks:

FELLOWSHIP AVAILABLE IN ITALY

A one-year fellowship with the Supreme Constitutional Court of Italy is available for an individual who is fluent in the Italian language and who is presently a law clerk to a United States Judge.

Any person interested in making application may receive information by contacting:

Glenn R. Johnson,
Personnel Officer
Administrative Office of
the United States Courts
Washington, D.C. 20544
FTS 633-6116

aoo ofjc calendar

Nov. 17-19 Sentencing Institute for the Seventh and Ninth Circuits; Oakland, CA

Nov. 17-19 Workshop for Clerks of Circuit Courts and Special Courts; Washington, DC

Nov. 19-21 Workshop for Judges of the Fifth Circuit; Sarasota, FL

Dec. 4-6 Workshop for Judges of the Eighth and Tenth Circuits; Phoenix, AZ

Dec. 10-12 Workshop for Federal Court Librarians; Philadelphia, PA

Jan. 12-15 EEO Coordinators Workshop; Salt Lake City, UT

Jan. 14-16, 1981 Seminar for Bankruptcy Judges; San Diego, CA

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

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

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

Jan. 29-31 Federal Criminal Practice Clinic for Assistant Federal Public and Community Defenders; San Diego, CA

THE THIRD BRANCH
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The Third Branch

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FOLEY URGES HIGHER JUDICIAL SALARIES

In a statement given to the Commission on Executive, Legislative and Judicial Salaries, Administrative Office Director William E. Foley recommended sharply higher salaries for federal judges, ranging from $169,500 for the Chief Justice to $107,300 for district judges. Other groups endorsed similar levels of increases.

Director Foley recommended restoration to judges of the purchasing power they possessed in 1969. Salaries were adjusted in that year as an outgrowth of extensive studies made by the first quadrennial Pay Commission. Those adjustments

See PAY COMMISSION, p. 8

DATES SET FOR NEXT SEMINAR FOR NEWLY APPOINTED DISTRICT JUDGES

FJC Director A. Leo Levin and Kenneth C. Crawford, Director of the Center's Continuing Education & Training Division, have announced that the next seminar for newly appointed District Judges will be held February 16-21.

All programs will be held at the Dolley Madison House in Washington, with the customary Open House planned for Sunday, February 15th. A "black tie" dinner honoring the new judges will be held at the Supreme Court on Tuesday, February 17th.

AN INTERVIEW WITH CHIEF JUDGE CLEMENT F. HAYNSWORTH, JR.

Clement F. Haynsworth, Jr. became a judge of the Fourth Circuit in 1957. In 1964, he became chief judge of the Fourth, with a complement of ten circuit and 44 district judgeships in five southern states. With 23 years of service and at age 68, he is the most senior chief judge of a federal Court of Appeals. His opinions have been marked with clarity and precision and he has earned the respect, admiration, and affection of the lawyers that practice before him, as well as his colleagues throughout the federal judiciary. He earned his A.B. at Furman University, and his LL.B. at Harvard Law School.

Prior to the passage of the Omnibus Judgeship Bill in 1978, you suggested that increasing the number of judgeships was not a long-term solution to the problem of judicial workload. Do you believe there is a practical limit on the size of an effectively functioning appellate court?

I do, indeed.

An appellate court should be a collegial one. Collegiality requires that each sitting judge keep in close touch with every other sitting judge and the work of each. When an opinion is written for the Fourth Circuit and circulated to the other members of a panel, copies are sent at the same time to each non-sitting judge, including our seniors. Non-sitting judges are encouraged to respond with constructive suggestions or criticism. With some frequency, the entire membership of the court is involved in a discussion of a case heard only by a panel of three. In some of them, an order for a rehearing *en banc* may be filed before any panel opinion has been filed, although in some cases a skeptical majority of the whole court may prefer to let a panel opinion come down and request a poll of the court on a suggestion of *en banc* rehearing when the almost inevitable petition for rehearing has been filed. With this method of operation, no opinion is filed without consideration of the views which may have been voiced by any judge of the court, and every judge of the court knows that he has had a full

See HAYNSWORTH, p. 4

Lame Duck Session

APPROPRIATIONS BILL, JUDICIAL NOMINATIONS DELAYED

Prior to adjourning for Thanksgiving recess, there remained pending before the post-election session of the 96th Congress only a few bills of interest to the federal judiciary. Although leaders had originally forecast a full agenda for the lame duck session, the Republican accession to control of the Senate has significantly lowered expectations for the passage of any legislation other than appropriations. The following report is current as of the end of November. Congress is scheduled to adjourn *sine die* mid-December.

Judicial Branch Appropriations. The appropriations bill for the Departments of State, Justice and Commerce and the judiciary (H.R. 7584) has traveled a long and arduous course through the 96th Congress. A House-Senate Conference recently worked out a potential resolution between the two chambers' differing views which provides the third branch with more than $631 million for fiscal year 1981, compared to the FY 1980 budget of $591 million. The House on November 21 approved the compromise, but the Senate has not yet voted on the conference report.

The 1981 figure represents nearly an even compromise between the amounts originally passed by the House ($627.7 million) and Senate ($635.8 million). The bill does contain a controversial provision, however, which forbids the Department of Justice from initiating court suits or other action to directly or indirectly compel the busing of students to achieve racial integration. The Attorney General has stated that if this provision remains in the bill presented to the President, he will recommend a veto. It should be noted that the House passed the measure by vote of 240-59, a margin sufficient to override a veto.

Judicial Nominations. One by-product of the Republican victories in the Senate has been a freeze (with one possible exception) on further consideration of pending nominations to the federal bench. Thirteen district and four circuit nominations will be left in the congressional pipeline, and President-elect Reagan will have the chance to resubmit the nominations to the new Senate when it convenes on January 3.

Jurisdictional Amount. The House on November 17 passed by a voice vote S. 2357, a bill to eliminate the $10,000 jurisdictional amount required for federal question cases. Passed by the Senate last June, the bill retains the jurisdictional amount only for cases brought pursuant to the Consumer Product Safety Act, 15 U.S.C. §2072(a). It is to go into effect immediately upon being signed, and will apply to any civil action pending on the date of enactment. S. 2357 completes reform initiated in 1976 when the $10,000 jurisdictional amount was done away with in a large class of federal question cases such as those against the United States, its agencies, officers or employees.

The bill in no way affects the continued existence of diversity jurisdiction. Although the House has twice in the past approved legislation to eliminate diversity jurisdiction in the federal courts, the Senate has yet to consider such action.

Age of Judicial Nominees. By vote of 341-19, the House on November 17 passed H. Res. 693, expressing the sense of the House with respect to age as a factor in the consideration of candidates for federal judgeships.

See LEGISLATION, p. 7

PRESIDENT MOVES FOR DISMISSAL OF *FOLEY v. CARTER*

In a motion filed November 3, the President asserted to the D.C. Circuit that the end of the fiscal year has frozen all FY 1980 funds and thereby mooted the salary litigation of *Foley v. Carter*.

The President maintained that P.L. 96-86, which in October 1979 imposed a 5.5 percent "cap" on an otherwise applicable 12.9 percent salary increase for federal judges and others, expired along with the fiscal year on September 30, 1980 and that A.O. Director Foley no longer faces potential liability for misinterpreting that statute. It was suggested further that the district court's granting of summary judgment for Mr. Foley last March no longer has any practical effect, for the judicial branch's appropriation forbids the preservation of FY 1980 funds for obligations in subsequent years.

Mr. Foley argued in a response filed November 6 that the law's restriction is upon obligating—not expending—fiscal 1980 funds beyond the end of the fiscal year. He noted that funds sufficient to pay the 12.9 percent increase were obligated in a supplemental appropriation signed in July, and he maintained that these monies will remain available to satisfy any final judgment in the case. Although he opposed the President's suggestion of mootness, Mr. Foley did remind the court of his still-outstanding suggestion of mootness on the grounds that the July supplemental appropriation repealed and superseded the earlier statutory pay freeze (see *The Third Branch*, August and September 1980).

The Third Branch

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A HOLIDAY MESSAGE FROM THE CHIEF JUSTICE

This year brought us to the threshold of a new decade that portends to be a significant one for the Judiciary and for the country.

The year 1980 brought continued and steady growth in the work of the federal courts, more complex litigation, more novel cases, and hence more problems. Congress has provided more judges to help meet the new demands. Equally important, we have more tools, better trained supporting personnel and a Judiciary better prepared for its tasks than ever before. Over this past decade Federal Judges have been disposing of their cases with traditional care but with new and innovative techniques, and with new technology. We have Circuit Executives, Clerks of Court, and other supporting personnel trained in the use of modern procedures and equipment. In addition to our own Federal Judicial Center, we have the Institute for Court Management, which continues to train some of our personnel as well as state personnel. The Institute of Judicial Administration continues in its third decade to provide programs for appellate judges. We have worked cooperatively with the Congress in resolving court-related matters. We are indebted to those leaders in Congress who have listened to the Judiciary with understanding of our problems.

Of course, there have been disappointments, but changes in the courts have always come slowly. With continued diligence and dedication on our part we have good reason to believe that the problems can be met with equal success.

We can take pride in being part of a truly great Judiciary and what judges have accomplished in the face of discouraging odds. The rewards have sometimes been few, but rewards in personal satisfaction are there. We have a Judiciary made up of dedicated, capable judges in a system which has few peers in the world. We enjoy an independence and a respect which dedicated performance has earned and will continue to merit.

As we continue with our assigned tasks into the 1980s, let me express my personal appreciation and satisfaction for what all of you have done. As your "chairman" I am proud of the performance of judges and all personnel in the system.

Mrs. Burger, and all my colleagues of the Court, join me in extending our warm greetings and all good wishes for a very Happy Holiday Season.

December 1980

Warren E. Burger

FJC RELEASES SPEEDY TRIAL ACT LEGISLATIVE HISTORY

The Federal Judicial Center has published a compilation of materials from the legislative history of Title 1 of the Speedy Trial Act of 1974, which prescribes time limits within which indictments must be filed and trials commenced in federal criminal cases. The legislative history begins with the bill introduced in 1969 by Representative Abner J. Mikva (now a judge of the Court of Appeals for the District of Columbia Circuit) and ends with the enactment of the Speedy Trial Act Amendments of 1979.

The 384-page book, prepared by Anthony Partridge of the Center's Research Division, is organized in three parts. Part 1 is a 24-page introductory essay about the genesis and development of the Act. Part 2 consists of excerpts from congressional hearing records and committee reports reproduced verbatim and arranged according to the sections of the statute to which they pertain. Part 3 includes the full text of Title 1 as it appeared in successive versions of the bill. In parts 1 and 2, the book calls attention to relationships between statutory provisions and the American Bar Association's *Standards Relating to Speedy Trial.*

Copies have been sent to district and circuit judges, full-time magistrates, and public and community defenders. A limited number of copies has been stocked by the FJC's Information Services Office to fill requests from others within the judicial branch. The Department of Justice is making copies available to federal prosecutors. The volume is available for purchase by others from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (A. Partridge, Legislative History of Title 1 of the Speedy Trial Act of 1974, GPO Stock No. 028-004-00037-1, $6.50.)

HAYNSWORTH from p. 1

opportunity to comment and to have his comments carefully considered.

The consequence of this is that there is greater consistency in decision than in a court which, because of its size, cannot function as we do. Judges who had reservations about an opinion at the time it was in circulation or who expressed disagreement with it readily accept and follow it when another case comes along, for the matter has already been debated and settled by the informal participation of all of the judges.

This method of operation posed no problems during my early years on the court, for we were a court of only three active judges, though in fact we were a court of four, for Senior Judge Soper worked almost as much as the rest of us. Keeping in close contact with the work of three other judges left each of us with an abundance of time for the preparation of his own opinions. That situation has markedly changed, however, for with the work of our seniors and visiting judges, each of us now must undertake to keep in close contact with the work of approximately eleven judges. The process is time consuming, and I am convinced that the process itself would begin to break down if the number of active circuit judges were increased substantially above our present number of ten.

With ten judges in regular active service, *en banc* hearings are difficult enough. If the number of members of an *en banc* court is enlarged, the difficulties become compounded, so it is not surprising that some are looking to devices for the *en banc* resolution of cases without the participation of all of the circuit judges in regular active service. I am very skeptical of such devices, however. When all of the judges in regular active service are participants in the *en banc* court determinations, all of the judges readily accept the majority's conclusion. I seriously doubt that this would be so if a majority of an *en banc* panel of nine judges were authorized to speak for a court of more than 20 circuit judges. Five judges of such an *en banc* panel might represent the views of a majority of all of the court's members, but there is almost an equal likelihood that they might not.

With ten judges in regular active service, I think we can maintain our collegial quality, but I believe that we are close to the outer limit of our capacity to do that.

How frequently does the Fourth Circuit decide to hear cases *en banc?* What are the policies you follow in setting a case for an *en banc* hearing?

During our 1979-80 court year, we heard seven cases *en banc.* It would surprise me if in any year there were ten or more such cases.

For approximately ten years after I became Chief Judge in 1964, I routinely set every school desegration case for *en banc* hearing. The other judges and I were all concerned that no litigant in those sometimes controversial cases should have reason to think that the result depended upon a panel's composition. Since then we have simply gone by Rule 35(a), which provides that a majority of the judges in regular active service may order a case to be heard or reheard *en banc,* when necessary to maintain uniformity of decision or where the question involved is one of exceptional importance. One may observe that in the usual case it is the precedential importance of the decision which is of moment and not the importance of the result to the parties. The standard is quite subjective, however, and we have not attempted the development of any supplementary objective criteria. With experience, however, a circuit judge develops confidence in the exercise of his judgment that one case deserves *en banc* consideration while another does not.

The Fourth Circuit has traditionally had a large number of prisoner cases. Do you have any special procedures to handle them?

Yes, the *pro se* prisoner cases are processed through the staff legal section. There, transcripts and other materials necessary to a proper adjudication of the claim are obtained. Thereafter, in some of those cases lawyers are appointed and the cases are fully briefed and argued. The great majority, however, are decided on the basis of the record as supplemented by materials, such as the transcript of a state court trial, procured by the staff law clerk. Each case is referred to a panel of three judges with a recommendation from the staff law clerk which has been reviewed by the senior staff attorney—a very capable woman who has experience as a law professor. The recommendation may be accepted, rejected or modified by the panel, but we have a firm internal rule that the panel may not decide the case unless there is unanimous agreement that full briefing and argument would not be of assistance.

The great majority of the prisoner cases result in affirmances, of course, but a very substantial number result in reversals or remands.

Internal administrative improvements within the courts are one means of improving judicial productivity, and the Fourth Circuit has been among the leaders in adopting innovations. How effective have these changes been? How do you respond to concerns that such measures may violate litigants' procedural and substantive rights under the Constitution?

The innovations have been quite effective. For a number of years after I came on the court we managed to handle a caseload of less than 80 cases for each active circuit judge per year. It required our full time and concentrated attention, but we are now quite

See HAYNSWORTH p. 5

HAYNSWORTH from p. 4

capable of handling a caseload of over 220 cases for each active circuit judge. We could never have so increased our capacity without the assistance of the staff legal section.

We in the Fourth Circuit have had little complaint about the disposition of cases without full briefing and argument. To a large extent, I think, this is attributable to the fact that we write enough so that everyone may know what we do and why we do it. If there is a written opinion in the district court we find acceptable, we may affirm on that. If not, we produce an opinion which records the facts as we understand them, reports the contentions and states the reason or reasons for our disposition of them. By this means, the prisoner and those who are providing assistance to him are completely informed. So are the Justices of the Supreme Court if a petition for a writ of certiorari is filed.

Of course, I have some concern that a losing prisoner may think that he received something less than due process, but in the great majority of cases the claims of losing prisoners may be appropriately characterized as frivolous. The prisoner-appellant whose case is reversed or remanded has no basis for complaint about the process he received.

What are the biggest changes you have seen in the federal system since you have come on the bench?

The biggest change, of course, is the expansion of the system and the revolutionary change in the kinds of cases we get. This is largely a consequence of congressional enactments during the last two decades but there have also been self-inflicted wounds by the courts.

When you refer to "self-inflicted wounds," Judge, what do you mean?

Self-inflicted wounds are principally the implication of new private rights of action from the Constitution or from statutes which provide only for criminal sanctions or administrative regulation. I understand the temptation to provide a personal remedy to one who has been wronged, though it may be sufficient from a societal point of view that the conduct of wrongdoers can be controlled by administrative sanctions or criminal prosecutions. The implication of such private rights of action, however, contributes to the increase in the workload of the judicial system. It is only in the sense that such decisions have contributed to the expansion of our jurisdiction that I refer to them as wounds.

Several years ago, you proposed the creation of a new national court to provide direct review of convictions coming from federal and state proceedings and thereby abandon our current reliance on the use of collateral proceedings to review such matters. What are your feelings about the concept now?

I still think it has merit. I believe it is wrong to require a prisoner seeking federal review of federal constitutional questions involved in a state court conviction to exhaust judicial remedies provided by the state and then to start afresh in a federal district court. The purpose of my proposal was to expand the appellate capacity so that, under the supervision of the Supreme Court, one federal national court, in deserving cases, could provide direct review of state court convictions without the intervention of lower federal courts.

There were objections to the proposal, founded primarily upon the selection and appointment of judges to staff the court. Some people feared the potential influence of the President who would have the initial appointing power, while others feared that a court of such limited jurisdiction would not be attractive to the kind of persons who should sit upon the second highest court in the land. These objections led me to the conclusion that probably the better thing would be to adopt the proposal of the Commission on Revision of the Federal Court Appellate System to create a new court which would take cases by referral from the Supreme Court. There would be variety in the referred cases, but I would hope that among them there might be enough involving direct review of state court convictions that, after experience over a period of time, the right of indirect review in the federal district courts under § 2254 might be substantially limited or abolished.

"With ten judges in regular active service, I think we can maintain our collegial quality, but I believe that we are close to the outer limit of our capacity to do that."

In many of the state-federal judicial councils they have talked about certifying questions from the federal courts. Do any of the courts in the Fourth Circuit certify questions to the Supreme Courts of the states?

Among the five states in the Fourth Circuit, only Maryland has a statute providing for such certifications. The judges of the Court of Appeals of Maryland have been very cooperative about it, having accepted certified questions both from the District Court of the District of Maryland and from the Court of Appeals. I believe that no such request has been declined, though there have

See HAYNSWORTH p. 7

Profile

COURT INTERPRETERS PROGRAM UNDERWAY

The Court Interpreters Program of the Administrative Office has received numerous inquiries about its certification program for Spanish/English interpreters. The following report has been prepared to respond to those inquiries, and to present the first results from the certification examinations. For further details about the program see The Third Branch, *February 1980, p. 9.*

The Court Interpreters Act of 1978 (P.L. 95-539) requires the use of a certified interpreter in all appropriate federal court proceedings unless no certified interpreter is available. The goal is that in all arraignments, hearings, trials, sentencings, and other proceedings, the non-English speaker be afforded the same opportunity to "hear" as if he or she were fluent in English.

To attain this goal, an interpreter must conserve the language level, tone and style of the speaker. No matter whether formal, colloquial, informal, or slang language is used, the interpreter must choose the precise equivalents in Spanish or English. He or she must understand and communicate the vocabulary and syntax of both languages.

This degree of proficiency is not normally possessed by those persons who have not studied, conducted business, read, thought or dreamed in two languages. In the United States, the common perception is that any person who speaks two languages can interpret. According to Ely Weinstein, past president of the California Court Interpreters Association and a member of the committee which designed the Administrative Office's examinations, that is like believing any person with two hands can play the piano.

The language level used in the courts is high, as is to be expected of a group of professionals, such as judges, lawyers and expert witnesses, who have had between 19 and 20 years of formal classroom education. According to a study of the level of the English language used in ordinary criminal trials, comprehension of the proceedings requires a college degree educational equivalent, and beyond that some very specific repetitive vocabulary which is peculiar to the courts alone. Civil case vocabulary is even more far-ranging, involving medical, engineering, maritime, financial and other vocabulary registers. Thus, courtroom interpreters should have essentially a college graduate level of comprehension in each language and more.

"The singularity of court vocabulary is surprising. In the transcript of a simple identification hearing, there were 18 words that never appear in the normal million words of print and 25 words found only once."

The singularity of court vocabulary is surprising. One review of the transcript of a simple hearing on identification of defendants yielded words such as "impermissably," confirmatory," "constructor," "tendentious," "cogitating," "nexus," "recognizance," "sequentially," "collateral," and "evidentiary." According to authoritative word frequency lists, such words do not appear even once in every million words of print. In the reviewed transcript, there are 18 words never found in the normal million words of print, 25 words found only once, 13 words found only twice, and 11 words found only three times.

Appreciating the difficulty of developing a valid, reliable and replicable interpreting test, the Administrative Office contracted with several professionals with expertise in Spanish/English interpretation, interpreter attitudes, and linguistics. Many of the words used in the English portion of the written examination (the first part of the testing process) were taken directly from trial transcripts. For the oral examination, three bilingual federal judges participated in the preparation of testing materials.

Because of the high level of proficiency required, full-time court interpreters are being reclassified to JSP 10-11 both to achieve comparability with

See INTERPRETERS, p. 7

COURT CHALLENGE TO INTERPRETERS PROGRAM DISMISSED

District Judge Milton Pollack (S.D.N.Y.) on December 2 dismissed a complaint challenging the procedures used for certifying federal court interpreters. The action, *Seltzer* v. *Foley,* was brought by two individuals who had previously done interpreting work in the Southern District but who failed to pass the certification examination. Alleging that the certification test was arbitrary and capricious and bore no rational relationship to the skills needed to perform court interpreting, they sought a preliminary injunction barring further operation of the court interpreters program. The suit was based upon an implied cause of action under the Fifth Amendment. A.O. Director Foley originally raised a defense of lack of personal jurisdiciton but subsequently waived that defense.

Judge Pollack consolidated the hearing on the injunction and the trial on the merits under F.R.C.P. 65 and on December 1 and 2 heard testimony from, *inter alia,* the head of the court interpreters program, three of the nationally renowned professors who helped design the examination, an independent personnel research psychologist, and a quantitative psychologist.

Following the hearing, Judge Pollack issued a judgment from the bench denying issuance of the injunction and dismissing the complaint.

INTERPRETERS from p. 6

interpreters in the executive branch and to attract qualified professionals to the courts.

Results. In March of this year, 1,371 candidates sat for the written examination. Four hundred and twelve candidates passed both language sections at the required level of proficiency, and 56 percent passed with a college graduate level of proficiency in at least one language. Formal educational levels of the candidates ranged from 8th grade through post Ph.D.; vocations ranged from the unemployed and students to teachers, embalmers and practicing interpreters.

Oral tests were given over the course of the summer to 350 candidates, of whom 121 were successful. Twenty-seven percent of these individuals are noncollege graduates, while 32 percent hold a Bachelor of Arts degree or its equivalent, and 41 percent have an M.A. degree or better. Sixty-five percent were of Spanish-speaking heritage, and 60 percent were female. Seventy-five percent had previous court interpreting experience.

As reported in the October issue of *The Third Branch,* a second Spanish/English testing cycle began with written examinations on November 22. Development of certification tests for other languages is being held in abeyance until statistics on court use are complete.

HAYNSWORTH from p. 5

not been many of them. The result there has been of great help to us. It is a frustrating experience when we are confronted with an unresolved question of state law, for the question must be decided not as we think it should be but as we think another court would decide it if the question had been presented to it.

Despite the happy experience in Maryland, such a statute has not been enacted in any of the other four states in the Circuit. There has been some indication that some members of the bars of those four states would like to see the enactment of such a statute, but there is little visible progress in that direction.

Many of the states now permit, under certain circumstances and with controlled procedures, television in the courtroom during trial. Would you have objections to the use of television in the district or appellate courts?

In the district courts I certainly would. It is said that television cameras can now be operated so unobtrusively that their presence during a trial would not be disruptive, but the participants in the trial would know that the proceedings were being taped. In almost every case some participant would be tempted to play to the television audience. To the extent that one or more participants did that, there would be distraction from the trial process.

I would have less objection to television cameras in the Court of Appeals or in the Supreme Court. For educational purposes, the Supreme Court some day might permit the taping of an argument before it, if the case were one of unusual interest and the lawyers were ones of exceptional ability. That objective might be as well served, however, by the taping of an appellate argument in a moot court setting, which has been done.

It is said that in the Fourth Circuit you and some of the other judges, at the conclusion of argument, step down from the bench and shake hands with counsel in the case. True?

We do. When I first appeared in the court as a very young lawyer, I was much impressed when Judge Parker, Judge Soper and Judge Northcutt came down from the bench and shook hands with us. I do not know when the practice began, but I do know it was in place in the late 1930's. Most lawyers regard it as a gracious custom, but as a judge, I also think it has a utilitarian quality. A judge may feel somewhat less restrained in cutting a lawyer short, knowing that, at the conclusion of the argument, he will greet the lawyer with a warm handshake and a pat on the back.

Do all the panels follow this practice?

Yes.

LEGISLATION from p. 2

Almost identical to a resolution passed 97-0 by the Senate last April, the non-binding resolution calls for an end to American Bar Association policy, endorsed by the Department of Justice, that no one 64 or over be recommended for appointment to a federal judgeship (except the Supreme Court) and that an individual between 60 and 64 receive a "well qualified" or "exceptionally well qualified" evaluation and be in excellent health to be recommended for appointment. During rather extensive floor debate, several members testified in support of the measure by making reference to the recent election of 69 year-old Ronald Reagan.

State Justice Institute. The House Subcomittee on Courts, Civil Liberties, and the Administration of Justice on November 20 cleared for full Judiciary Committee action S. 2387, the State Justice Institute Act of 1980. The bill would create a federally-funded nonprofit corporation to administer grants and provide other services aimed at improving judicial administration in state courts. It passed the Senate last July (see *The Third Branch,* September 1980).

PAY COMMISSION from p. 1

were accepted as "modest and fiscally responsible," said Mr. Foley, and, having been fixed in a period just prior to the rapid inflation of the 70's, he suggested that they provide an appropriate basis for comparison.

Mr. Foley noted that since 1969 judges' salaries have been raised only modestly. The current $54,500 salary of a district judge, for example, is only 36 percent higher than the salary paid in 1969, and an associate justice's pay has been increased only 20 percent in the same period. These and all other adjustments lag far behind the 131 percent increase in the Consumer Price Index. Raises given to judges also fall short of those received by related professionals, he pointed out. Salaries of state judges, lawyers in academia, and even federal law clerks have risen 82 to 121 percent. Recent appointees to the federal bench leaving private practice have averaged $131,122 in compensation just prior to appointment—141 percent above the salary currently paid to a district judge and 128 percent above that paid to a circuit judge.

Director Foley indicated that the pressures caused by inadequate salaries are reflected in the growing number of judicial resignations. In the 1950's there were only seven resignations from the federal bench, and in the 1960's there were only eight. In the 1970's, however, 24 judges left office, and three have resigned thus far in 1980. While there are a range of reasons for such resignations, the 1976 Pay Commission found that 73 percent of the resignees cited "inadequate compensation" as a cause for their departure. "While the number of resignations is not great," said Mr. Foley, "the resignation of judges because of salary considerations is a *new phenomenon*. This bodes ill for the future of an independent judiciary pledged to the protection of constitutional rights."

Director Foley also noted that increasing workloads have exacerbated the problem of inadequate compensation. The number of filings at the district level is up 119 percent since 1969, and the number of trials lasting 20 days or more has quadrupled. The number of appeals docketed in the circuit courts is up 126 percent. "It is a paradox, frustrating in the extreme, that federal judges today are working harder, yet living poorer."

To return federal judges to their financial position of 1969, Mr. Foley recommended at least the following salary levels: Chief Justice, $169,500; Associate Justices, $162,800; Court of Appeals Judges, $114,400; District Judges, $107,300. He advocated as well increased survivor protection, especially in a judge's early years, under the Judicial Survivors Annuity System.

Mr. Foley summarized: "A judicial position has never been and never should be a step to riches. At the same time, compensation adequate to meet living and educational expenses is necessary if the nation is to continue to attract and retain good people to serve on its courts."

Echoing Mr. Foley's recommendations were those of William Reece Smith, Jr., President of the American Bar Association. Mr. Smith noted that federal judges' current salary is worth $23,435 in 1969 dollars—a 41 percent decrease in real income. Appearing with Mr. Smith was Harold R. Tyler, Jr., a former district judge and former Deputy Attorney General, who now chairs the ABA's Special Committee on Federal Judicial Compensation. The ABA urged the Commission to recommend a minimum salary for district judges of $97,000, with upward adjustments for judges of the Courts of Appeals and Supreme Court justices.

Also appearing before the Commisison was John C. Elam, President of the American College of Trial Lawyers, and

See PAY COMMISSION p. 9

Position Available

SUPERVISORY STAFF ATTORNEY, CA-2

Position: Supervisory Staff Attorney for the United States Court of Appeals for the Second Circuit. Starting salary is expected to be $32,048 (JSP-13). The court is an affirmative action employer; members of minority groups, women and the handicapped are encouraged to apply.

Responsibilities: Supervision and management of the Circuit's four staff attorneys; assistance to the Clerk in calendar preparation; criminal appeal coordination; other matters as requested by the Clerk of Court or the Judicial Council.

Qualifications: Attorney, admitted to the bar, with one or more years of practical experience in the handling of litigation (preferably in the federal courts) and with managerial experience in judicial systems and/or the legal field. The successful candidate will possess leadership ability, superior legal skills, exceptional judgment in analyzing complex problems, the ability to work well with people, and the ability to function independently with minimal supervision.

Advancement: Prospects for advancement will be excellent. In addition to a possibility that the position may be upgraded to JSP-14, the successful applicant will be a prime candidate for the position of Chief Deputy Clerk, which is expected to be vacant in about a year.

To Apply: Send resume by January 9, 1981 to Steven Flanders, Circuit Executive, 1803 U.S. Courthouse, Foley Square, New York, New York 10007.

Noteworthy

Two Americans have recently been transferred to United States correctional facilities under the provisions of the U.S.—Peru Prisoner Transfer Treaty. Another was transferred under the provisions of a like treaty existing between the United States and Bolivia. These were two of a series of transfers coducted pursuant to several prisoner exchange treaties designed to return foreign prisoners to their native countries to serve the remainder of their sentences. U.S. Magistrate Janet Carol Ruesch (W.D. TX) conducted the verification hearings.

For a more detailed description of the treaties, see *The Third Branch,* July 1980, p. 6.

* * *

The National Institute of Justice has available for courts a pamphlet—"Citizen's Role in the Courts"—designed to answer questions of those participating in proceedings as a juror, witness, victim, plaintiff or defendant. The pamphlet explains the functionings of the judicial system, makes suggestions to witnesses, and concludes with a glossary of court-related terms. Single copies may be ordered without charge from the National Criminal Justice Reference Service—GIP Program, Box 6000, Rockville, Maryland 20850. Organizations are encouraged to reproduce all or part of the pamphlet, and camera-ready art can be provided upon request to the Director of Communications.

PAY COMMISSION from p. 8

Philip Tone, former Seventh Circuit judge and chairman of the College's Judiciary Committee. They advocated a $95,000 salary for district judges. Mr. Tone testified from personal experience that federal judges are helpless against the ravages of inflation in keeping up with the cost of living. Mr. Tone also urged that the Commission consider judicial salaries separately from congressional salaries.

The Pay Commission has concluded its public hearings and anticipates making its recommendations to the President by mid-December. President Carter will in turn give Congress his recommendations—which may differ from those of the Commission—in his January budget message (prior to the inauguration of President-elect Reagan). Congress is required within 60 days to make a recorded vote approving or disapproving the recommended adjustments. If approved by a majority of both houses the adjustments will become effective at the beginning of the first pay period 30 days thereafter, or at a later date if such was specified in the President's recommendations. The requirement for a recorded vote was a 1978 amendment to the governing statute (2 U.S.C. §§351-361). Originally, the President's recommendations were automatically to go into effect within 30 days unless in the interim other rates were enacted into law or at least one house had specifically disapproved all or part of the original recommendations.

FJC ANNUAL REPORT PUBLISHED

The 1980 Annual Report of the Federal Judicial Center was released last month. The report summarizes the activities of the Center over the past fiscal year and describes the work projected through the end of the 1980 fiscal year. The organization of the report this year differs somewhat from previous editions, which described the work of the Center in chapters devoted to each of its four divisions. The 1980 report describes the Center's work in terms of the constituent units of the federal judicial system that it serves.

The report has been distributed to all federal judges, magistrates, circuit executives, clerks, chief probation officers, chief pretrial service officers, public defenders, law school deans and libraries. Additional copies are available from the Center's Information Services Office at 202/FTS 633-6365.

Position Available

CLERK, EASTERN DISTRICT OF WISCONSIN

Position: Clerk of the United States District Court for the Eastern District of Wisconsin, Milwaukee, Wisconsin. Salary is $44,547 (JSP 15).

Responsibilities: The Clerk of Court is appointed by the Judges of the Court. This is a high level management position which functions under the direction of the Chief Judge of the Court. The Clerk of Court is responsible for managing the administrative activities of the Clerk's Office and overseeing the performance of the statutory duties of that Office.

Qualifications: Law degree from accredited law school. At least 5 years experience in either (1) the active practice of law or some law-related field or (2) a managerial or administrative position of substantial management responsibility in the private or public sector or a combination of both. A post-graduate degree in public, business or judicial administration from a college or university of recognized standing may be substituted for the required experience.

To Apply: Submit detailed application and resume (two copies) to Chief Judge John W. Reynolds, Room 471, Federal Building, 517 E. Wisconsin Ave., Milwaukee, WI 53202 no later than January 31, 1981.

fjc calendar

Dec. 10-12 Workshop for Federal Court Librarians; Philadelphia, PA

Dec. 20 Judicial Conference Committee on the Judicial Branch; Palm Beach, FL

Jan. 12-15, 1981 EEO Coordinators Workshop; Salt Lake City, UT

Jan. 14-16 Seminar for Bankruptcy Judges; San Diego, CA

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

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

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

Jan 28-30 Federal Criminal Practice Clinic for Assistant Federal Public and Community Defenders; San Diego, CA

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

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

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

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

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

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

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

PERSONNEL

NOMINATION

Stephen G. Breyer, U.S. Circuit Judge, CA-1, Nov. 13

CONFIRMATION

Stephen G. Breyer, U.S. Circuit Judge, CA-1, Dec. 9

APPOINTMENTS

Consuelo B. Marshall, U.S. District Judge, C.D. CA, Oct. 15

David V. Kenyon, U.S. District Judge, C.D. CA, Oct. 27

Richard L. Williams, U.S. District Judge, E.D. VA, Oct. 29

Charles P. Kocoras, U.S. District Judge, N.D. IL, Nov. 24

Susan C. Getzendanner, U.S. District Judge, N.D. IL, Dec. 2

ELEVATIONS

A. Andrew Hauk, Chief Judge U.S. District Court, C.D. CA, Oct. 15

Elmo B. Hunter, Chief Judge, U.S. District Court, W.D. MO, Nov. 3

DEATH

Charles J. Vogel, U.S. Circuit Judge, CA-8, Sept. 8

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